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GOVERNOR

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES

REPORT TO THE LEGISLATURE: DENIED MANDATE CLAIMS

January 1, 2004 – December 31, 2004

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TABLE OF CONTENTS

INTRODUCTION

The Commission on State Mandates (Commission) is required to report to the Legislature on January 15 of each year on the number of claims it denied during the preceding calendar year and the basis on which each of the claims was denied.[1] The following pages contain ten Statements of Decision adopted by the Commission during the period from January 1, 2004, through December 31, 2004, denying 19 test claims. As required by the California Code of Regulations, Title 2, section 1188.2, these decisions were based upon the administrative record of the claims and include findings and conclusions of the Commission.

[1] Government Code section 17601.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Business and Professions Code Section 7583.45; Education Code Sections 35021.5, 38001.5, subdivision (b), 39672, subdivision (a), 72330.2, subdivision (a), and 72330.5, subdivision (b); Penal Code Sections 830.32, 832.2, and 832.3; Statutes 1998, Chapters 745 and 746; Filed on October 3, 2001, and Amended on December 12, 2001, By San Diego Unified School District, Claimant.	No. 01-TC-05/01-TC-10 *School Safety Officer Training* 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 January 29, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 29, 2004. Arthur Palkowitz appeared on behalf of the claimant, San Diego Unified School District. Susan Geanacou and Matt Aguilera appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

In 1997, the Legislature required the Commission on Peace Officer Standards and Training (POST) to review the minimum training and selection standards for peace officers and security officers employed by school districts.[2] In November 1997, POST published its findings in accordance with the statute in a report entitled "Report to the Legislature on School Safety and Professional Standards for School Peace Officers/Security Personnel." In the report, POST stated the following:

> There is great variation between school districts concerning the level of professional standards established for their school peace officers. At the low end, many districts opt to meet only statutorily adopted standards, i.e., 96 hours of training pursuant to Penal Code sections 832 and 832.2. At the high end, 22 community college districts and 15 K-12 districts voluntarily participate in the

[2] Penal Code section 13510.6, as added by Statutes 1997, chapter 117.

full POST certification (664 hours regular basic plus continued professional training and background and psychological tests).[3]

POST also stated the following:

> Great variations also exists [sic] with respect to the professional standards of school security guards. Whether as school employees or contract personnel, security officers generally wear uniforms and serve in prevention and reporting roles. Unlike school police officers, they do not investigate nor make arrests. There are no state minimum training standards for school security officers who are employees and only nominal for those who are contract security depending upon what safety equipment is possessed.[4]

The test claim legislation was enacted in 1998 to implement the POST recommendations and to provide standardized training for school police and school security officers who are employed or on contract with a school district or community college district.[5]

Statutes 1998, Chapter 745 – School Security Officers and Reserve Officers

Statutes 1998, chapter 745 of the test claim legislation applies to school security officers and school police reserve officers. Generally, the test claim legislation requires that after July 1, 2000, every school security officer employed by a school district or community college district, who works more than 20 hours a week as a school security officer, shall complete a course of training developed by the Bureau of Security and Investigative Services (BSIS) of the Department of Consumer Affairs. School security officers employed by the district before July 1, 2000, are required to complete the training by July 1, 2002.[6]

In addition, if the school security officer is required to carry a firearm, the officer shall additionally satisfy training requirements specified in the Penal Code.[7]

School security officers are also required to submit to the district fingerprints on forms prescribed by the Department of Justice. The school district or community college district is then required to submit the fingerprints to the Department of Justice. No school security officer shall be employed or shall continue to be employed by the school district or community college district after July 1, 2000, until the fingerprints are submitted to the district and the applicant or employee has been determined not to be a person legally prohibited from employment or prohibited from possessing a firearm.[8]

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[3] Senate Floor Analysis on Senate Bill 1627, dated August 17, 1998, page 4.

[4] Senate Floor Analysis on Senate Bill 1626, dated August 17, 1998, page 5.

[5] Senate Floor Analysis on Senate Bill 1626, dated August 17, 1998; Senate Floor Analysis on Senate Bill 1627, dated August 17, 1998.

[6] Education Code sections 38001.5, 72330.5.

[7] *Ibid*.

[8] *Ibid*.

Similar training and fingerprint requirements are imposed on security guards working on the property of a school district or community college district more than 20 hours per week pursuant to a contract with a private licensed security agency.[9]

Statutes 1998, chapter 745 also requires school reserve officers to complete a course of training approved by POST. The training is required to address guidelines and procedures for reporting offenses to other law enforcement agencies that deal with violence on campus and other school related matters.[10]

Statutes 1998, Chapter 746 – School Police Officers

Statutes 1998, chapter 746 of the test claim legislation applies to school police officers. It requires every school police officer first employed by school districts and community college districts after July 1, 1999, to successfully complete the basic course of training prescribed by POST before exercising the powers of a peace officer. Officers first employed by a district after July 1, 1999, shall complete the course within two years of the date of employment. Officers first employed by a district before July 1, 1999, shall complete the course by July 1, 2002.[11]

Statutes 1998, chapter 746 also requires each police chief, or any other person in charge of a local law enforcement agency, who was appointed on or after January 1, 1999, to complete the basic course of training prescribed by POST as a condition of continued employment. The training must be completed within two years of the appointment.[12]

The test claim legislation also requires every school police officer first employed by a school district or community college district after July 1, 1999, to submit to the district fingerprints on forms prescribed by the Department of Justice. The school district or community college district is then required to submit the fingerprints to the Department of Justice. The school district or community college district is also required to determine if the employee is a person who is not prohibited from employment. If the employee is required to carry a firearm, the Department of Justice is required to determine if the employee is not prohibited from possessing a firearm.[13]

Claimant's Position

The claimant alleges that Statutes 1998, chapter 745 imposes the following reimbursable state-mandated activities on school districts and community college districts:

1. Requiring each school security officer employed by a school district or community college district after July 1, 2000 for more than 20 hours a week to complete a course of training developed by BSIS in consultation with POST.
2. The employee shall submit two copies of his or her fingerprints to BSIS, who will forward one copy to the FBI.

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[9] Business and Professions Code section 7583.45.

[10] Education Code section 35021.5; Penal Code section 832.2.

[11] Penal Code sections 830.32, 832.3.

[12] Penal Code section 832.3.

[13] Education Code sections 39672, 72330.2.

3. If a security officer is required to carry a firearm while performing his or her duties, that school officer shall satisfy the training requirements of section 832 of the Penal Code. Officers employed prior to July 1, 2000 are exempt if they have completed an equivalent course of instruction pursuant to section 832.2 of the Penal Code.

The claimant alleges that Statutes 1998, chapter 746 imposes the following reimbursable state-mandated activities on school districts and community college districts:

1. Requires each school peace officer employed by a school district or community college district after July 1, 1999 to successfully complete a course of training prescribed by POST.
2. Requires each school peace officer employed by a school district or community college district hired before July 1, 1999 be determined to be a person who is not prohibited from being an employee and, if the employee is required to carry a firearm while performing his or her duties to additionally satisfy the training requirements of section 832 of the Penal Code.
3. The employees shall submit to the district one copy of his or her fingerprints on forms prescribed by the Department of Justice.
4. Requires each police chief, or any other person in charge of a local law enforcement agency appointed after January 1, 1999 to complete the basic course of training prescribed by POST for the other peace officers. [14]

The claimant further declares that it has incurred costs for fiscal year 2001-2002 to comply with the test claim legislation as follows: $20,000 for the cost of course training and $20,000 for hourly time in attending the training course.[15]

Department of Finance Position

In response to the test claim, the Department of Finance stated that it is unable to complete an analysis due to factual errors and representations in the test claim that are not supported by documentary evidence.[16] The Department of Finance stated the following in response to the amended test claim:

?? Certain requirements imposed by Chapters 745 and 746, Statutes of 1998 impose requirements on individuals, not districts. Neither bill requires districts to train or pay for training of newly hired staff. Districts may choose to hire applicants who are already POST-certified. If districts choose to hire uncertified staff, their decision is discretionary.

[14] Claimant's Amended Test Claim.

[15] Declaration of Richard F. Roda, Detective at the Police Department for the San Diego Unified School District, dated September 25, 2001.

[16] Department of Finance letter dated November 14, 2001.

?? Chapter 746, Statutes of 1998 makes no such requirement that school peace officers who are required to carry firearms must satisfy the requirements of Penal Code Section 832.[17]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[18] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[19] "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."[20] 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.[21] 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.[22]

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.[23] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared

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[17] Department of Finance letter dated January 18, 2002.

[18] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[19] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[21] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[22] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[23] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

with the legal requirements in effect immediately before the enactment of the test claim legislation.[24] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[25]

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.[26] 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."[27]

Issue: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

As indicated above, reimbursement under article XIII B, section 6 of the California Constitution is required in the present case only if the state mandates a new program or higher level of service on school districts and community college districts. Although a school district may incur increased costs as a result of the statute, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the statute imposes a reimbursable state-mandated program. The California Supreme Court has ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency or school district, do not equate to a reimbursable state-mandated program under article XIII B, section 6.

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[28]

Claimant contends that the test claim legislation imposes a mandate on school districts and community college districts to provide the required training to their officers. The Commission disagrees. For the reasons described below, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

The test claim legislation requires school districts and community college districts that employ school police officers and school security officers, or contract with private security, to (1) ensure that new and existing officers complete the required course of training; (2) obtain fingerprint

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[24] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

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

[28] County of Los Angeles, supra, 43 Cal.3d at page 54; see also, Department of Finance v. Commission on State Mandates, supra, 30 Cal.4th at page 735.

cards from the officers and forward the cards to the Department of Justice; and (3) determine if the employee is a person who is not prohibited from employment.

But, school districts and community college districts are not required by state law to employ police officers or security officers. Unlike counties and cities that are required by the California Constitution to maintain a police force, no such requirement exists for school districts.

Article XI, Local Government, provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff, and section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

In contrast, school districts are not required by the Constitution to employ police and security officers. The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[29] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[30] the Constitution does not require school districts to operate police departments or employ school security officers as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools. However, there is no constitutional requirement to maintain safe schools through school security or a school district police department independent of the public safety services provided by the cities and counties a school district serves. [31] In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision as follows:

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][32]

Thus, at the constitutional level, cities and counties are given local law enforcement responsibilities, while the Legislature is only permitted to authorize school districts to act in any manner that is not in conflict with the Constitution.

Moreover, the Legislature does not require school districts and community college districts to employ police officers and security officers. Pursuant to Education Code section 38000:[33]

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[29] California Constitution, article IX, section 1.

[30] California Constitution, article IX, section 14.

[31] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are **safe**, secure and peaceful." (Emphasis added.)

[32] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

[33] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

> [t]he governing board of any school district may establish a security department … or a police department …[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department … [and] may employ personnel as necessary to enforce the law on or near the campus. … This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In addition, Education Code section 35021.5 states that the "governing board of a school district may establish an unpaid volunteer school police reserve officer corps to supplement a police department pursuant to section 38000."

Thus, statutory law does not require school districts and community college districts to hire police officers, security officers, or reserve officers. Therefore, forming a school district police department and employing police officers and security officers is an entirely discretionary activity on the part of all school districts.

Claimant admits that school districts are not required by state law to employ police officers and security officers.[34] Claimant argues, however, that school districts are legally compelled and, thus, mandated within the meaning of article XIII B, section 6 to provide the additional training.[35] The Commission disagrees.

In a 2003 California Supreme Court mandates decision, the Court found (affirming the holding in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777), "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."[36] The court further stated, on page 731 of the decision, that:

> [*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 program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

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[34] Claimant's comments on Draft Staff Analysis

[35] *Ibid.*

[36] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 743.

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Thus, pursuant to state law, school districts and community college districts remain free to discontinue providing their own police department and employing security officers. The statutory duties imposed by the test claim legislation that follow from such discretionary activities do not impose a reimbursable state mandate. Therefore, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concluded that Business and Professions Code section 7583.45, Education Code sections 35021.5, 38001.5, subdivision (b), 39672, subdivision (a), 72330.2, subdivision (a), 72330.5, subdivision (b), and Penal Code sections 830.32, 832.2, 832.3, as added or amended by Statutes 1998, chapters 745 and 746, do not constitute a state-mandated program and, thus, are not subject to article XIII B, section 6 of the California Constitution.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Section 148.6; Statutes 1995, Chapter 590; Statutes 1996, Chapter 586; Statutes 2000, Chapter 289; Filed on September 16, 2002, By Santa Monica Community College District, Claimant.	No. 02-TC-09 *False Reports of Police Misconduct, K-14* 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 January 29, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 29, 2004. Keith Petersen appeared on behalf of the claimant, Santa Monica Community College 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 at the hearing by a vote of 5-0.

BACKGROUND

On July 5, 2001, the Commission received a test claim filing on behalf of claimant, County of San Bernardino, entitled *False Reports of Police Misconduct* (00-TC-26). On September 16, 2002, the Commission received a test claim filing, *False Reports of Police Misconduct, K-14* (02-TC-09), on behalf of claimant Santa Monica Community College District. Both test claims allege a reimbursable state-mandated program for compliance with Penal Code section 148.6, as added by Statutes 1995, chapter 590, and amended by Statutes 1996, chapter 586, and Statutes 2000, chapter 289. Although the same statutory provisions are involved, these two test claims were not consolidated due to different threshold issues on the applicability of the California Constitution, article XIII B, section 6. As background, the complete text of Penal Code section 148.6 follows:

> (a)(1) Every person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.
>
> (2) Any law enforcement agency accepting an allegation of misconduct against a peace officer shall require the complainant to read and sign the following advisory, all in boldface type:

You have the right to make a complaint against a police officer for any improper police conduct. California law requires this agency to have a procedure to investigate citizens' complaints. You have a right to a written description of this procedure. This agency may find after investigation that there is not enough evidence to warrant action on your complaint; even if that is the case, you have the right to make the complaint and have it investigated if you believe an officer behaved improperly. Citizen complaints and any reports or findings relating to complaints must be retained by this agency for at least five years.

It is against the law to make a complaint that you know to be false. If you make a complaint against an officer knowing that it is false, you can be prosecuted on a misdemeanor charge.

I have read and understood the above statement.

_____

Complainant

(3) The advisory shall be available in multiple languages.

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

Claimant's Position

Claimant alleges that the test claim legislation requires the following reimbursable state-mandated activities:

?? establish and periodically update written policies and procedures regarding the requirement to have citizens filing complaints of peace officer misconduct to sign an advisory;

?? require each person making a complaint of peace officer misconduct to sign a prescribed advisory;

?? transcribe the advisory and make it available in multiple languages;

?? train peace officers and personnel on the district's policies and procedures for receiving complaints.

On December 29, 2003 the Commission received extensive claimant comments and case law exhibits in rebuttal to the draft staff analysis. Comments are addressed below, as appropriate.

State Agency's Position

Department of Finance, in comments received October 24, 2002, concluded that although the test claim legislation "may result in additional costs to school districts, those costs are not

reimbursable." This conclusion is based in part on the observation that the establishment of school police departments is undertaken at the discretion of the governing board of a district, thus any costs imposed on a district as a result of employing peace officers are not reimbursable.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[37] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[38] "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."[39] 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.[40] 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.[41]

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.[42] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[37] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[38] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[40] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[41] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[42] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

legislation.[43] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[44]

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.[45] 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."[46]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution for school district claimants?

As indicated above, reimbursement under article XIII B, section 6 of the California Constitution is required in the present case only if the state mandates a new program or higher level of service on school districts and community college districts. Although a school district may incur increased costs as a result of the statute, as alleged by the claimant here, increased costs alone are not determinative of the issue of whether the statute imposes a reimbursable state-mandated program. The California Supreme Court has ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency or school district, do not equate to a reimbursable state-mandated program under article XIII B, section 6.

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[47]

For the reasons described below, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

The test claim legislation provides that "[a]ny law enforcement agency accepting an allegation of misconduct against a peace officer" to require the complainant to read and sign a two-paragraph document that advises the individual of the right to make a complaint, and also describes that a misdemeanor charge may be made if a person knowingly lodges a false complaint.

But, school districts and community college districts are not required by state law to maintain a law enforcement agency or employ peace officers. Claimant asserts "a different standard [is]

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[43] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

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

[47] *County of Los Angeles, supra*, 43 Cal.3d at page 54; see also, *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 735.

being applied to school districts and community college districts than is applied to counties and cities."[48] The Commission disagrees and finds that unlike counties and cities that are required by the California Constitution to provide police protection, no such requirement exists for school districts.

Article XI, Local Government, provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff, and section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

In contrast, school districts are not required by the Constitution to employ peace officers. The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[49] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[50] the Constitution does not require school districts to operate police departments or employ peace officers as part of their essential educational function.

Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools.[51] However, there is no constitutional requirement to maintain safe schools through operating a law enforcement agency and employing peace officers independent of the public safety services provided by the cities and counties a school district serves. Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision as follows:

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][52]

Thus, at the constitutional level, cities and counties are given local law enforcement responsibilities, while the Legislature is only permitted to authorize school districts to act in any manner that is not in conflict with the Constitution.

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[48] Claimant's comments on the draft staff analysis, dated December 24, 2003, page 28.

[49] California Constitution, article IX, section 1.

[50] California Constitution, article IX, section 14.

[51] The provision is *not* applicable to community college districts.

[52] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455. (Claimant's comments on the draft staff analysis (p. 3, fn. 6) assert that this block text is not a direct quotation from *Leger*. The passage is accurately cited.)

Moreover, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[53]

> [t]he governing board of any school district may establish a security department … or a police department …[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department … [and] may employ personnel as necessary to enforce the law on or near the campus. … This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In addition, Education Code section 35021.5 states that the "governing board of a school district may establish an unpaid volunteer school police reserve officer corps to supplement a police department pursuant to section 38000."

Thus, statutory law does not require school districts and community college districts to hire police officers, security officers, or reserve officers. Therefore, forming a school district police department and employing peace officers is an entirely discretionary activity on the part of all school districts. Claimant acknowledges this point in written comments dated December 24, 2003:

> The legislature has not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this decision to local agencies who have first hand knowledge of what is necessary for their respective communities. Whether to satisfy this duty by the utilization of a school district police department or by contracting with another local agency to provide the service is a local decision based upon the historical needs of that community.[54]

Claimant's essential argument is that once a school district has decided to provide a service in a particular manner, in this case providing safe schools by operating a police department, the local determination should not be disturbed, and any mandates that then follow are reimbursable. This analysis does not comport with the case law the Commission must follow when making a mandate determination. In a 2003 California Supreme Court mandates decision, the Court found (affirming the holding in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777):

> [I]f a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation

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[53] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

[54] Claimant's comments, page 26.

> to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. [Footnote omitted.]
>
> We therefore reject claimants' assertion that merely because they participate in one or more of the various education-related funded programs here at issue, the costs they incurred in complying with program conditions have been legally compelled and hence constitute reimbursable state mandates. We instead agree with the Department of Finance, and with *City of Merced*, *supra*, 153 Cal.App.3d 777, that *the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves*.[55] [Emphasis added.]

The Court also stated, on page 731 of the decision, that:

> [*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 program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

In addition, the Court found:

> … As we explain *post*, part III.A.3.a., however, the underlying program statutes at issue in this case (with one possible exception--see *post*, pt. III.A.3.b.) make it clear that school districts retain the discretion not to participate in any given underlying program--and, as we explain *post*, footnote 22, the circumstance that the notice and agenda requirements of these elective programs were enacted *after* claimants first chose to participate in the programs does not make claimants' choice to continue to participate in those programs any less voluntary. [56]

Likewise, the claimant's local decision to provide its own police department and thus requiring itself to comply with both prior and later-enacted laws impacting the operation of law enforcement agencies does not make compliance with those laws *reimbursable* state mandates.

The decision of the California Supreme Court interpreting the issue of voluntary or compelled underlying programs is highly relevant to this test claim. However, claimant argues *Department of Finance* "was limited by the court to the facts presented."[57] The Commission disagrees and finds that the Commission is not free to disregard clear statements of the California Supreme Court on the grounds that they are dicta. In *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168–1169, the court explains why even a footnote from a California Supreme Court decision cannot be dismissed as dicta:

> The prosecution brushes aside the above language as dicta and an incorrect statement of the law. ¶ … ¶ Mr. Witkin has summarized the distinction between the holding of a case and dictum as follows: "The *ratio decidendi* is the principle

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[55] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 743.

[56] *Id.* at page 743, footnote 12.

[57] Claimant's comments, page 35.

> or rule which constitutes the ground of the decision, and it is this principle or rule which has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedent, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents. (Citations.)" (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 783, pp. 753; see also *Trope v. Katz* (1995) 11 Cal.4th 274, 287, 45 Cal.Rptr.2d 241, 902 P.2d 259.)
>
> Footnote 14 of *Izazaga* must be read in connection to the text to which it is appended. … Footnote 14 cannot reasonably be construed as being unnecessary to the *Izazaga* opinion.
>
> Thus, the ruling of respondent court violates the well-known rule articulated in *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937. The Court of Appeal, the appellate department of the superior court, and the trial courts are required to follow the "statements of law" of the California Supreme Court. These "statements of law" "... must be applied wherever the facts of a case are not fairly distinguishable from the facts of the case in which ... [the California Supreme Court has] declared the applicable principle of law." (*People v. Triggs* (1973) 8 Cal.3d 884, 106 Cal.Rptr. 408, 506 P.2d 232, 891.)
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> "*Even if properly characterized as dictum, statements of the Supreme Court should be considered persuasive.* (Citation.)" (*United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 835, 209 Cal.Rptr. 16.) Twenty years ago, Presiding Justice Otto M. Kaus gave some sage advice to trial judges and intermediate appellate court justices: *Generally speaking, follow dicta from the California Supreme Court.* (*People v. Trice* (1977) 75 Cal.App.3d 984, 987, 143 Cal.Rptr. 730.) That was good advice then and good advice now. Unfortunately, this advice was lost upon respondent court. [Emphasis added.]
>
> When the Supreme Court has conducted a thorough analysis of the issues or reflects compelling logic, its dictum should be followed. (*United Steelworkers of America v. Board of Education, supra,* 162 Cal.App.3d at p. 835, 209 Cal.Rptr. 16.) The language of footnote 14 in *Izazaga* was carefully drafted. It was not "... inadvertent, ill-considered or a matter lightly to be disregarded." (*Jaramillo v. State of California* (1978) 81 Cal.App.3d 968, 971, 146 Cal.Rptr. 823; see also *In re Brittany M.* (1993) 19 Cal.App.4th 1396, 1403, 24 Cal.Rptr.2d 57.)

In *Department of Finance*, the Court stated:

> We conclude, contrary to the Court of Appeal, that claimants are not entitled to reimbursement under the circumstances presented here. *Our conclusion is based on the following determinations*: First, *we 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 the* notice and agenda *provisions are mandatory elements of* education-related *programs in which claimants have participated, without regard to whether a claimant's participation in the underlying program is voluntary or compelled.*

> Second, we conclude that as to eight of the nine underlying funded programs here at issue, claimants have not been legally compelled to participate in those programs, and hence cannot establish a reimbursable state mandate as to those programs based upon a theory of legal compulsion.[58] [Emphasis added.]

Thus, the Court's statements regarding discretion and legal compulsion in finding a reimbursable state-mandated program cannot be dicta, because the conclusion is premised on those assessments. And, as established in *Hubbard*, even if language is properly characterized as dicta, statements of the California Supreme Court are persuasive and should be followed.

Claimant also argues that the controlling case law is the decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[59] In *Department of Finance*, the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento*.[60] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy.[61] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[62] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 9 does not require strict legal compulsion to apply.[63]

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan.[64]

The California Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain

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[58] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 731.

[59] Claimant's comments, pages 32-34.

[60] *Department of Finance, supra,* 30 Cal.4th at pages 749-751.

[61] *City of Sacramento, supra,* 50 Cal.3d at pages 57-58.

[62] *Id.* at page 71.

[63] *Ibid.*

[64] *Id.* at pages 73-76.

and severe penalties" such as "double taxation" and other "draconian" consequences. The Court stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe … penalties" such as "double … taxation" and other "draconian" consequences . . .[65]

The Commission finds that there is no evidence of "certain and severe penalties" or other "draconian" consequences here. Requiring those community college and K-12 school districts operating police departments on their campuses to either discontinue their historical practice or to absorb the costs of complying with the new Penal Code statute does not in and of itself impose the kind of "certain and severe penalties" described by the California Supreme Court. Nor does claimant provide adequate evidence that those districts that have opted to operate their own law enforcement agencies are practically compelled to continue to do so in order to provide safe schools.

Thus, pursuant to statutory law, school districts and community college districts are neither legally compelled to initially form their own police departments, nor to continue to provide their own police departments and employ peace officers. That decision is solely a local decision. Pursuant to the California Supreme Court, any statutory duties imposed by Penal Code section 148.6 that follow from such voluntary underlying activities do not impose a reimbursable state mandate. In conclusion, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution for school district peace officer employers, and school districts are not eligible claimants for the test claim statutes.

Prior Commission Decisions

Claimant also argues that the Commission has previously approved reimbursement for school peace officers, and to change now would be "arbitrary and unreasonable," citing a list of mandate claims: *Peace Officer Procedural Bill of Rights* (CSM-4499, decision adopted Nov. 30, 1999); *Threats Against Peace Officers* (CSM-96-365-02, Apr. 24, 1997); *Health Benefits for Peace Officers' Survivors* (97-TC-25, Oct. 26, 2000); *Law Enforcement Sexual Harassment Training* (97-TC-07, Sept. 28, 2000); *Photographic Record of Evidence* (98-TC-07, Oct. 26, 2000); *Law Enforcement College Jurisdiction Agreements* (98-TC-20, Apr. 26, 2001); and *Sex Offenders: Disclosure by Law Enforcement Officers* (97-TC-15, Aug. 23, 2001.)[66]

Preliminarily, the Commission only specifically referenced school districts as eligible claimants in three of the seven Statements of Decision named by claimant.[67] In the remainder, the determination that school districts were eligible claimants was made in the parameters and guidelines and was not supported by any legal analysis or conclusion in the respective Statements of Decision.

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[65] *Department of Finance, supra*, 30 Cal.4th at page 751.

[66] Claimant comments, pages 29-31.

[67] CSM-4499, CSM-96-365-02 and 98-TC-20.

Regardless, prior Commission decisions are not controlling in this case. Since 1953, the California Supreme Court has held that the failure of a quasi-judicial agency to consider prior decisions is *not* a violation of due process and does not constitute an arbitrary action by the agency. (*Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772.) In *Weiss*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue them 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, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (*Id*. at 776.)

In 1989, an Attorney General's opinion, citing the *Weiss* case, agreed that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d at 777]." (72 Ops.Cal.Atty.Gen. 173, 178, fn. 2 (1989).)

Thus, prior Commission decisions are not controlling here. Rather, the merits of each test claim must be analyzed individually. Commission decisions under article XIII B, section 6 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. (*City of San Jose, supra,* 45 Cal.App.4th at pages 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th at pages 1280-1281.) The analysis in this test claim complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs that the Commission must now follow. Claimant correctly asserts that the Commission must have a rational or compelling reason for deviating from prior decisions. Following controlling case law is such a reason. In addition, the Commission followed this same analysis in its most recent decision regarding the issue of school districts as eligible claimants for peace officer test claims.[68]

[68] The Statement of Decision on *Peace Officer Personnel Records: Unfounded Complaints and Discovery* (00-TC-24, 00-TC-25, 02-TC-07, 02-TC-08) was adopted on September 25, 2003. This decision denied reimbursement for two test claims on behalf of school district peace officer employers filed by Santa Monica Community College District.

CONCLUSION

The Commission concludes that Penal Code section 148.6, as added or amended by Statutes 1995, chapter 590, Statutes 1996, chapter 586, and Statutes 2000, chapter 289, is not subject to article XIII B, section 6 of the California Constitution in regard to this test claimant, and thus does not constitute a reimbursable state-mandated program for school districts. No legal determination is made regarding the test claim statutes as they apply to city and county peace officer employers.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 17608-17613, and 48980.3; Food and Agricultural Code Sections 13181-13188; Statutes 2000, Chapter 218; Filed on December 1, 2000, By Alum Rock Union Elementary School District, Claimant.	No. 00-TC-04 *Healthy Schools Act of 2000* 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 January 29, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 29, 2004. David Scribner appeared on behalf of the claimant, Alum Rock Union Elementary School District. Susan Geanacou and Matt Aguilera appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

This test claim addresses the Healthy Schools Act of 2000, which became effective on January 1, 2001. The test claim legislation does two things. First, the legislation codifies the Department of Pesticide Regulation's existing voluntary school integrated pest management program. It requires the Department to promote and facilitate the "voluntary adoption" of effective least toxic pest management programs, or "integrated pest management" programs, "for all school districts that voluntarily choose" to participate.[69] "Integrated pest management" is statutorily defined as a follows:

> [A] pest management strategy that focuses on long-term prevention or suppression of pest problems through a combination of techniques such as monitoring for pest presence and establishing treatment threshold levels, using nonchemical practices to make the habitat less conducive to pest development, improving sanitation, and employing mechanical and physical controls. Pesticides that pose the least possible hazard and are effective in a manner that minimizes risks to people, property, and the environment, are used only after

[69] Food and Agricultural Code section 13183.

> careful monitoring indicates they are needed according to preestablished guidelines and treatment thresholds. This definition shall apply only to integrated pest management at school facilities.[70]

Second, the test claim legislation requires school districts to provide notification, post warning signs, and maintain and make available records of pesticide use by school districts at all schoolsites used for public day care, kindergarten, elementary, or secondary school purposes. A schoolsite includes the buildings or structures, playgrounds, athletic fields, school vehicles, or any other area of school property visited or used by pupils.[71] To assist school districts in their compliance with the test claim legislation, the Department of Pesticide Regulation has posted sample notices and warnings on its website.[72]

The legislative policy of the test claim legislation is stated as follows:

> It is the policy of the state that effective least toxic pest management practices should be the preferred method of managing pests at schoolsites and that the state, in order to reduce children's exposure to toxic pesticides, shall take the necessary steps, pursuant to this article, to facilitate the adoption of effective least toxic pest management practices at schoolsites. It is the intent of the Legislature to encourage appropriate training to be provided to school personnel involved in the application of pesticide at a schoolsite.[73]

Summaries of the test claim legislation by the Department of Pesticide Regulation are found on their website at www.cdpr.ca.gov.[74]

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

- ?? Annually notifying all staff and parents or guardians of pupils enrolled at the schoolsite in writing of the name of all pesticide products expected to be applied at the school facility during the upcoming year;
- ?? Notifying registered persons at least 72 hours before the application of pesticides at the school facility;

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[70] Food and Agricultural Code section 13181.

[71] Education Code sections 17608, subdivision (e), 17611, 17612.

[72] See also, Food and Agricultural Code section 13184, subdivision (b), which expresses the legislative intent that the state, through the Department of Pesticide Regulation, shall assist school districts to ensure that compliance with Education Code section 17612 is simple and inexpensive.

[73] Food and Agricultural Code section 13182; Education Code section 17610.

[74] See also, Part 1 of the "School IPM [Integrated Pest Management] Model Program Guidebook," "Program Overview, California School IPM," "The Healthy Schools Act: What's Mandatory? What's Voluntary?," and the sample notifications and warning signs.

- ?? Notifying all staff and parents or guardians of pupils at least 72 hours before the application of any pesticides applied at the schoolsite not included in the annual notification;
- ?? Making every effort to comply with the notice requirements for emergency application of pesticides;
- ?? Posting warnings signs in the area of the schoolsite where pesticides will be applied;
- ?? Compiling and recording information on pesticides used on an annual basis;
- ?? Developing annual and 72-hour pesticide notification letters;
- ?? Developing policies and procedures for receiving and tracking registered persons;
- ?? Training of school district staff regarding the new requirements; and
- ?? Any additional activities identified as reimbursable during the Parameters and Guidelines phase.

Department of Finance's Position

In its comments of January 12, 2001, the Department of Finance states that the test claim is "generally accurate in identifying potential reimbursable state-mandated local programs." DOF specifically contends that the following requirements of the Healthy Schools Act of 2000 are likely reimbursable state-mandated costs:

- ?? Annually notifying all staff and parents of pupils of all pesticides (and other specified information) to be applied at the school site during the upcoming year;
- ?? Compiling and recording information on pesticides used annually;
- ?? Notifying registered persons at least 72 hours prior to the application of pesticides at the schoolsite;
- ?? Developing policies and procedures for receiving and tracking registered persons;
- ?? Developing annual and 72 hour pesticide notification letters;
- ?? Notifying all staff and parents at least 72 hours before applying any pesticide not included in the annual notification on the schoolsite;
- ?? Posting public notices at schoolsites applying pesticides;
- ?? Training school district staff regarding the aforementioned requirements.

The Department of Finance also contends that the voluntary adoption and implementation of integrated pest management programs by school districts are voluntary activities and, thus, are not reimbursable under article XIII B, section 6.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[75] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[76] "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."[77] 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.[78] 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.[79]

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.[80] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[75] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[76] Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727, 735.

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

[78] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[79] Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835-836.

[80] County of Los Angeles v. State *of* California (1987) 43 Cal.3d 46, 56; Lucia Mar, supra, 44 Cal.3d 830, 835.

legislation.[81] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[82]

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.[83] 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."[84]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Several code sections in the test claim legislation do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must require local agencies or school districts to perform an activity or task. If the statutory language does not mandate local agencies or school districts to perform a task, then compliance with the test claim statute is within the discretion of the local entity and a reimbursable state-mandated program does not exist.

Here, there are several code sections in the test claim legislation that are helpful in understanding the Healthy Schools Act. But, they do not impose any requirements on school districts.

For example, Education Code section 17608 and Food and Agricultural Code section 13180 simply name the article of legislation as the Healthy Schools Act of 2000. They do not mandate school districts to perform any activities.

Food and Agricultural Code sections 13183 and 13184 impose requirements on the Department of Pesticide Regulation to promote and facilitate the "voluntary" adoption of integrated pest management programs, as defined in section 13181, for school districts that voluntarily participate in the program. The Department is required to develop criteria for identifying least-hazardous pest control practices and a model program guidebook that prescribes essential program elements for a school district that has adopted an integrated pest management (IPM) program.[85] The Department is also required to establish and maintain a website as a directory of resources describing least-hazardous pest practices at schoolsites.

The plain language of Food and Agricultural Code sections 13181, 13183, and 13184 does not mandate school districts to perform any activities, including the adoption of an integrated pest

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[81] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

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

[85] See, "School IPM Model Program Guidebook."

management program. Moreover, the Department of Pesticide Regulation has interpreted the activity of adopting integrated pest management programs and effective least-toxic pest management practices by school districts under these statutes as voluntary activities.[86] The interpretation of these statutes by the Department of Pesticide Regulation, the agency charged with the administration of pest management programs, is entitled to great weight and the courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.[87] Thus, the Commission finds that Food and Agricultural Code sections 13181, 13183, and 13184 do not impose any state-mandated requirements on school districts and, thus, are not subject to article XIII B, section 6.

In addition, Food and Agricultural Code section 13185 requires the Department of Pesticide Regulation to establish training programs for school districts in order to facilitate the adoption of a model integrated pest management program and least-hazardous pest control practices. Food and Agricultural Code section 13182 and Education Code section 17610 also state the legislative intent "to encourage appropriate training to be provided to school personnel involved in the application of pesticide at a schoolsite." But, these statutes do not require school districts to receive or provide training to their employees. Moreover, since the participation in the integrated pest management program is voluntary, the corresponding training is also voluntary. In a 2003 California Supreme Court mandates decision, the court found (affirming the holding in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777), "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."[88] The court further stated, on page 731 of the decision, that:

> [*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 program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The Department of Pesticide Regulation also interprets the activity of training as a voluntary activity.[89] Thus, the activity of providing or receiving training on integrated pest management programs and least-hazardous pest control practices, pursuant to Food and Agricultural Code sections 13182 and 13185, and Education Code section 17610, is not a mandated activity and, thus, is not subject to article XIII B, section 6.

Furthermore, Food and Agricultural Code sections 13186 and 13187 require the Department of Pesticide Regulation to prepare a school pesticide use form to be used by licensed and certified pest control operators when they apply pesticides at a schoolsite. Licensed pest control operators

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[86] Department of Pesticide Regulations' website publication entitled "The Healthy Schools Act: What's Mandatory? What's Voluntary?"

[87] Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640, 647.

[88] Department of Finance v. Commission on State Mandates, supra, 30 Cal.4th at page 743.

[89] See footnote 16, *ante.*

are required to submit the form to the state on an annual basis. Food and Agricultural Code sections 13186 and 13187 do not, however, mandate school districts to perform any activities.

Finally, Food and Agricultural Code section 13188 authorizes the Department of Pesticide Regulation to adopt regulations to implement the test claim legislation. Section 13188 does not mandate school districts to perform any activities.

Accordingly, the Commission finds that Food and Agricultural Code sections 13180 through 13188, and Education Code sections 17608 and 17610 are not subject to article XIII B, section 6 of the California Constitution.

The remaining Education Code sections, which impose notice, warning, and record-keeping requirements on school districts once they decide to use a pesticide, are not mandated activities within the meaning of article XIII B, section 6

The remaining Education Code sections included in this test claim require school districts, when they decide to use a pesticide, to provide notification, post warning signs, and maintain and make available records of pesticide use at all schoolsites. (Ed. Code, §§ 17609, 17610.5, 17611, 17612, 17613, 48980.3.) The notice and warning requirements are specified below:

- Annual Notice of Pesticide Use. Education Code section 17612, subdivisions (a) and (b), and Education Code section 48980.3, require the school district to annually provide to all staff and parents or guardians of pupils enrolled at a schoolsite, as part of the annual parent notification issued at the beginning of each regular school year, a written notification of the name of all pesticide products expected to be applied at the school facility during the upcoming year. The annual notification shall identify the active ingredient or ingredients in each pesticide product. The notice shall also contain the Internet address used to access information on pesticides and pesticide use reduction developed by the Department of Pesticide Regulation. Education Code section 17612, subdivision (a)(1), also requires school districts to provide the opportunity in the annual notification for recipients to register with the school district if they wish to receive notification of individual pesticide applications at the school facility during the course of the year.

- Notice of Individual Pesticide Applications to Staff, Parents and Guardians that Register. Education Code section 17612, subdivision (a)(1), requires school districts to provide notification of individual pesticide applications, at least 72 hours before application, to persons who register with the district. The notice shall include the product name, the active ingredient or ingredients in the product, and the intended date of application.

- Notice of Pesticide Products Not Included in the Annual Notification. Education Code section 17612, subdivision (a)(2), states the "[i]f a pesticide product not included in the annual notification is subsequently intended for use at the schoolsite, the school district designee shall, consistent with this subdivision and at least 72 hours prior to application, provide written notification of its intended use." Thus, under Education Code section 17612, subdivision (a)(2), the school district is required to provide *all* parents, guardians and staff notification that a pesticide product that was not listed in the annual notification is intended to be used at the schoolsite at least 72 hours before application. Since the notice must be "consistent with this subdivision," the notice is required to contain the

product name, the active ingredient or ingredients in the product, and the date of application.

?? Notification of Pesticide Use During Emergency Conditions. Pursuant to Education Code section 17612, subdivision (c), the requirement to provide notice of pesticide use at least 72 hours before application to parents, guardians, and staff does not apply during emergency conditions. "Emergency conditions" is defined as "any circumstances in which the school district designee deems that the immediate use of a pesticide is necessary to protect the health and safety of pupils, staff, or other persons, or the schoolsite." (Ed. Code, § 17609, subd. (c).) Under such emergency conditions, the school district designee "shall make every effort to provide the required notification for an application of a pesticide." Thus, under section 17612, subdivision (c), the school district designee "shall make every effort" to provide notification that contains the product name, the active ingredient or ingredients in the product, and the date of application.

?? Posting Warning Signs. Education Code section 17612, subdivision (d), requires the school district to post a warning sign at each area of the schoolsite where pesticides will be applied. The warning sign shall prominently display the term "Warning/Pesticide Treated Area" and shall include the product name, manufacturer's name, the United States Environmental Protection Agency's product registration number, intended date and areas of application, and reason for the pesticide application. The warning sign shall be visible to all persons entering the treated area and shall be posted 24 hours prior to the application and remain posted until 72 hours after the application. In case of a pest control emergency, the warning sign shall be posted immediately upon application and shall remain posted until 72 hours after the application.

The notice and warning requirements do not apply to the following pesticide products: pesticide products deployed in the form of a self-contained bait or trap, gel or paste deployed as crack and crevice treatment[90], pesticides exempted from regulation by the United States Environmental Protection Agency pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C., § 25, subd. (b)), or to antimicrobial pesticides[91], including sanitizers and disinfectants. (Ed. Code, § 17610.5.)

In addition, the notice and warning requirements do not apply for (1) activities undertaken at a school that participates in the state program of agricultural vocation education, pursuant to Education Code section 52450 et seq. if the activities are necessary to meet the curriculum requirements prescribed in section 52454; or for (2) any agency signatory to a cooperative

[90] Education Code section 17609, subdivision (b), defines "crack and crevice treatment" as the application of small quantities of a pesticide consistent with labeling instructions in a building into openings such as those commonly found at expansion joints, between levels of construction and between equipment and floors.

[91] Education Code section 17609, subdivision (a), defines "antimicrobial" as those pesticides defined by the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C., § 136, subd. (mm).)

agreement with the State Department of Health Services pursuant to Health and Safety Code section 116180.[92] (Ed. Code, § 17613.)

The test claim legislation also requires school districts to maintain and make available to the public records of pesticide use as follows:

?? Maintain and Make Available Records of Pesticide Use. Education Code section 17611 requires each schoolsite to maintain records of all pesticide use at the schoolsite for a period of four years, and to make the information available to the public pursuant to the California Public Records Act. A schoolsite may meet the requirements of section 17611 by retaining a copy of the warning sign posted for each application required pursuant to section 17612 and recording on that copy the amount of the pesticide used.

The Public Records Act is provided in Government Code section 6250 and following. Under the Public Records Act, local agencies, which are defined to include school districts, are required to keep public records open to inspection at all times during the office hours of the school district for public inspection. In addition, the school district is required to make public records promptly available upon request by any person upon payment of fees covering the direct costs of duplication. (Gov. Code, §§ 6252, 6253.)

The requirements of Education Code section 17611 do not apply to activities undertaken at a school by participants in the state program of agricultural vocational education, pursuant to Education Code section 52450 et seq., if the activities are necessary to meet the curriculum requirements prescribed in section 52454. (Ed. Code, § 17612, subd. (f).)

These activities required by the Education Code apply only when a school district makes a local decision to use a pesticide. As more fully described below, state law does not require school districts to use pesticides.

First, the plain language of the test claim legislation does not require school districts to use pesticides. Education Code section 17610 states that the legislative intent for the test claim legislation is to promote the policy that school districts use the least toxic pest management practices in order to reduce children's exposure to toxic pesticides. Food and Agricultural Code section 13181 defines "integrated pest management" as a strategy that focuses on *non-chemical* alternatives to pest control. Thus, the plain language of the test claim legislation does not require school districts to use pesticides.

In addition, prior state law does not require school districts to use pesticides. Prior law simply requires school districts, as an operator of public property and as an employer, to provide notice

[92] Health and Safety Code section 116180 states the following: "(a) the department [Health Services] may enter into cooperative agreements with any local district or other public agency engaged in the work of controlling mosquitoes, gnats, flies, other insects, rodents, or other vectors and pests of public health importance, in areas and under terms, conditions, and specifications as the director may prescribe. (b) The agreement may provide for financial assistance on behalf of the state and for the doing of all or any portion of the necessary work by either of the contracting parties, except that in no event shall the department agree that the state's contribution shall exceed 50 percent of the total cost of any acceptable plan. (c) The agreement may provide for contributions by the local district or other public agency to the Mosquitoborne Disease Surveillance Account."

and post warnings on property treated with pesticide. (Food and Agr. Code, § 12978; Cal. Code Regs., tit. 3, §§ 6702, 6618, subd. (c).)

The legislative history of the test claim legislation further supports the conclusion that state law does not require school districts to use pesticides. The last Senate Floor Analysis for the test claim legislation, dated September 19, 2000, states that school districts are required to maintain records, provide notice, and post warnings *when* they use a pesticide. The Senate Floor Analysis includes arguments in support of the test claim legislation and states that several school districts use non-chemical methods of pest control: "Already several school districts, including Los Angeles Unified, San Francisco Unified, and Placer Hill Union, have adopted least-toxic pest management policies that avoid or minimize the use of highly toxic pesticides and instead rely on other techniques like improved sanitation, screens, caulking, inspections, and traps and bait stations."

Finally, the School IPM Guidebook published by the Department of Pesticide Regulation further supports the finding that the state does not require school districts to use pesticides. Page 41 of the Guidebook provides a list of examples of action levels of pest control. At the bottom of the page is the following statement:

> The specific action levels mentioned in this table are offered as examples only. They are not required by regulation or law. Each school using action thresholds should develop action levels of their own, suited to specific conditions at the school.

Page 49 of the Guidebook also states that a school's pest management program must always look for alternatives first and use pesticides only as a last resort. Non-pesticide treatments are listed on pages 45-50 of the Guidebook.

Thus, school districts have several options available for pest control, many of which are non-chemical and do not require the use of pesticides. The decision to use pesticides is made at the local level and is not required by the state. Once the school district elects to use a pesticide, the downstream activities of providing notice, posting warnings, and maintaining and making available records of pesticide use are then statutorily required to be performed by the school district.

However, based on the Supreme Court's recent interpretation of the meaning of "state mandate" in the *Department of Finance v. Commission on State Mandates* case[93], the Commission finds that the test claim activities, although statutorily required, do not require reimbursement under article XIII B, section 6.

In the *Department of Finance* case, the Supreme Court reviewed test claim legislation that required school site councils to post a notice and an agenda of their meetings. The court determined that school districts were not legally compelled to establish eight of the nine school site councils and, thus, school districts were not mandated by the state to comply with the notice and agenda requirements for these school site councils.[94] The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local

[93] Department of Finance, supra, 30 Cal.4th 727.

[94] *Id.* at page 731.

government entity is required or forced to do."[95] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[96]

The court also reviewed and affirmed the holding of the *City of Merced* case.[97, 98] 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 require 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. (Emphasis in original.)[99]

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.* [Emphasis added.][100]

The Supreme Court left undecided whether 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."[101]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[102] Thus, based on the Supreme Court's decision, the Commission is required to determine if the underlying program (in this case, the use of pesticides) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not

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[95] *Id.* at page 737.

[96] Ibid.

[97] *Id.* at page 743.

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

[99] Ibid.

[100] *Id.* at page 731.

[101] Ibid.

[102] *Id*. at page 743.

legally compelled by state law to apply pesticides. The decision to use a pesticide is made at the local level and is within the discretion of the school district. Further, there is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to apply pesticides.

In comments to the draft staff analysis, the claimant argues that there are times when non-chemical methods of pest control are not effective and, thus, in those situations, school districts are "practically compelled," within the meaning of the *Department of Finance* case, to apply pesticides and comply with the test claim requirements. The claimant further contends that avoidance of the test claim legislation would in fact impose substantial penalties on school districts in the form of third party lawsuits. The claimant states the following:

> Regardless, avoidance of the test claim legislation would in fact impose substantial penalties upon a school district that failed to address and remedy a pest infestation if the school district's IPM failed and the district then did not apply pesticides to avoid the "downstream" mandated activities. It is easy to envision numerous lawsuits from public and private parties if a school site let its cafeteria become overrun by cockroaches, the playground infested with fleas or hornets, or lockers teeming with ants. If a district with an IPM that failed to address these issues simply threw up its hands and said, "pesticide use is not compelled here," the district would face severe consequences from numerous public and private sources.

In support of the claimant's position, a declaration from Bob Tarczy, Supervisor of Maintenance and Operations for the San Juan Unified School District (interested party) was filed that also alleges there are times when non-chemical approaches are not enough and, in those situations, the district is "compelled" to apply pesticides.

The Commission finds that the record in this case does not support the finding that school districts are practically compelled *by the state* to apply pesticides. The Commission further finds that the claimant misreads the *Department of Finance* case.

In *Department of Finance*, the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[103] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy.[104] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[105] The state, on the other hand, contended that

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[103] *Department of Finance, supra*, 30 Cal.4th at pages 749-751.

[104] *City of Sacramento, supra*, 50 Cal.3d at pages 57-58.

[105] *Id.* at page 71.

California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 9 does not require strict legal compulsion to apply.[106]

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan.[107]

The California Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain and severe penalties" such as "double taxation" and other "draconian" consequences. The Court stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe … penalties" such as "double … taxation" and other "draconian" consequences . . .[108]

The Commission finds that there is no evidence of "certain and severe penalties" or other "draconian" consequences here. The risk of negligence damages, as alleged by claimant, falls equally on all property owners. As stated earlier in this decision, all owners of public property, including school districts, have a preexisting duty to provide notice and post warnings on property treated with pesticides. The potential and uncertain third party lawsuits raised by the claimant are not the kind of "certain and severe" consequences described by the California Supreme Court to constitute a state mandate. Thus, the Commission finds that school districts are not practically compelled by the state to apply pesticides. That decision is solely a local decision.

Therefore, the Commission finds that once the school district elects to use a pesticide, the downstream activities imposed by the Education Code to provide notice, post warnings, and to maintain and make available records of pesticide use, are also not state-mandated.

Accordingly, the Commission finds that Education Code sections 17609, 17610.5, 17611, 17612, 17613, 48980.3 are not subject to article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concludes that the test claim legislation does not impose any state-mandated duties on school districts and, thus, is not subject to article XIII B, section 6 of the California Constitution.

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[106] Ibid.

[107] *Id.* at pages 73-76.

[108] Department of Finance, supra, 30 Cal.4th at page 751.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 33126 and 33126.1; Statutes 1997, Chapter 912; Statutes 2000, Chapter 996; Filed on March 16, 2001, and Amended May 10, 2001, By Empire Union School District, Claimant and Education Code Sections 33126, 33126.1, and 41409; Statutes 2000, Chapter 996; Statutes 2001, Chapters 159 and 734; Statutes 2002, Chapter 1168; Filed on June 23, 2003, By Bakersfield City School District and Sweetwater Union High School District, Co-claimants.	No. 00-TC-09/00-TC-13; 02-TC-32 *School Accountability Report Cards II and III* 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 March 25, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this consolidated test claim during a regularly scheduled hearing on March 25, 2004. David Scribner appeared on behalf of claimant, Empire Union School District. Michael Wilkening and Lenin Del Castillo appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 4-1.

BACKGROUND

The California voters approved Proposition 98, effective November 9, 1988. The proposition amended article XVI, section 8 of the California Constitution, including adding subdivision (e), as follows:

> Any school district maintaining an elementary or secondary school shall develop and cause to be prepared an annual audit accounting for such funds and shall adopt a School Accountability Report Card for each school.

The proposition also added Education Code sections 33126 and 35256 concerning School Accountability Report Cards.

Prior Decision: *School Accountability Report Cards*

School Accountability Report Cards (97-TC-21), was a previous test claim heard and approved by the Commission. The claim, filed on December 31, 1997, by Bakersfield City School District and Sweetwater Union High School District, alleged a reimbursable state mandate for Education Code sections 33126, 35256, 35256.1, 35258, 41409, and 41409.3, as added or amended by Statutes 1989, chapter 1463; Statutes 1992, chapter 759; Statutes 1993, chapter 1031; Statutes 1994, chapter 824; and Statutes 1997, chapters 912 and 918.

The following findings were made by the Commission in the *School Accountability Report Cards* Statement of Decision, adopted April 23, 1998:

> The Commission finds the following to be state mandated activities and therefore, reimbursable under section 6, article XIII B of the California Constitution and Government Code section 17514. Reimbursement would include direct and indirect costs to compile, analyze, and report the specific information listed below in a school accountability report card.
>
> The Commission concludes that reimbursement for inclusion of the following information in the school accountability report card begins on July 1, 1996:
>
> - Salaries paid to schoolteachers, school site principals, and school district superintendents.
> - Statewide salary averages and percentages of salaries to total expenditures in the district's school accountability report card.
> - "The degree to which pupils are prepared to enter the work force."
> - "The total number of instructional minutes offered in the school year, separately stated for each grade level, as compared to the total number of the instructional minutes per year required by state law, separately stated for each grade level."
> - "The total number of minimum days, . . . , in the school year."
> - Salary information provided by the Superintendent of Public Instruction.
>
> The Commission concludes that reimbursement for inclusion of the following information in a school accountability report card begins on January 1, 1998:
>
> - Results by grade level from the assessment tool used by the school district using percentiles when available for the most recent three-year period, including pupil achievement by grade level as measured by the statewide assessment.
> - The average verbal and math Scholastic Assessment Test (SAT) scores for schools with high school seniors to the extent such scores are provided to the school and the average percentage of high school seniors taking the exam for the most recent three-year period.

- ?? The one-year dropout rate for the schoolsite over the most recent three-year period.
- ?? The distribution of class sizes at the schoolsite by grade level, the average class size, and the percentage of pupils in kindergarten and grades 1-3, inclusive, participating in the Class Size Reduction Program for the most recent three-year period.
- ?? The total number of the school's credentialed teachers, the number of teachers relying on emergency credentials, and the number of teachers working without credentials for the most recent three-year period.
- ?? Any assignment of teachers outside of their subject area of competence for the first two years of the most recent three-year period.
- ?? The annual number of schooldays dedicated to staff development for the most recent three-year period.
- ?? The suspension and expulsion rates for the most recent three-year period.

The Commission concludes that reimbursement for posting and annually updating school accountability report cards on the Internet, if a school district is connected to the Internet, begins on January 1, 1998.[109]

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[109] To the extent the test claim analysis for *School Accountability Report Cards II and III* differs from the decision in the original claim, prior Commission decisions are not controlling. The failure of a quasi-judicial agency to consider prior decisions is *not* a violation of due process and does not constitute an arbitrary action by the agency. (*Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772.) In *Weiss*, the plaintiffs brought mandamus proceedings to review the refusal of the State Board of Equalization to issue them 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, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (*Id*. at p. 776.)

Thus, the Commission is not bound by its prior decisions. Rather, the merits of a test claim must be analyzed individually. Commission decisions under article XIII B, section 6 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. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280-1281.) The analysis in this test claim complies with these principles.

The parameters and guidelines were discussed at the July 23, 1998 hearing, and the item was continued. The Commission adopted parameters and guidelines for *School Accountability Report Cards* at the August 20, 1998 hearing.

Claimants' Positions

Co-claimants Bakersfield City School District and Sweetwater Union High School District's [hereafter Sweetwater] test claim alleges new reimbursable activities are required by amendments to Education Code section 33126 by Statutes 2000, chapter 996 and Statutes 2002, chapter 1168, for calculating, determining and including new components in the School Accountability Report Card. In addition, claimant alleges Statutes 2000, chapter 996, amending Education Code section 33126.1 will result in costs of training school personnel to either use the School Accountability Report Card template developed by the California Department of Education (CDE), or for training school personnel who do not use the template regarding "standard definitions" to be used when preparing the School Accountability Report Card.

Claimant, Empire Union School District [hereafter Empire Union], made substantially similar test claim allegations regarding the amendments to Education Code sections 33126 and 33126.1 by Statutes 2000, chapter 996. Claimant also included allegations regarding "new" activities from Statutes 1997, chapter 912; that statute was part of the original *School Accountability Report Cards* test claim decision.

Claimants Empire Union and Sweetwater each filed rebuttal comments disagreeing with the draft staff analysis.

State Agency's Position

DOF's June 29, 2000 response to Empire Union's original and amended test claim allegations states "concerns regarding the activities listed by the claimant[] as reimbursable state-mandated costs," specifically that much of the information required to be included on the School Accountability Report Card is provided by the state or is already compiled by the school district. Regarding the assertion that training is required for use of the state template pursuant to Education Code section 33126.1, DOF asserts that the statute "does not require such training, and the use of the state-adopted template is voluntary." DOF's response to Sweetwater's test claim allegations, dated September 24, 2003, reiterates: "the incremental costs of including that information in an accountability report card should be minimal."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[110] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[111] "Its

[110] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

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."[112] 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.[113] 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.[114]

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.[115] 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.[116] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[117]

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.[118] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an

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[111] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[113] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[114] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[115] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[116] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[119]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Education Code Section 33126, As Amended by Statutes 1997, Chapter 912:

As a preliminary issue, Empire Union's claim includes allegations of costs for "activities associated with ensuring that all parents receive a copy of the SARC [School Accountability Report Card] and making administrators and teachers available to answer any questions regarding the SARC." These activities are identified as being imposed by the amendment of Education Code section 33126 by Statutes 1997, chapter 912. The issue of whether this legislation imposed a reimbursable state mandate was already heard and decided by the Commission in *School Accountability Report Cards*, (97-TC-21). Claimant Sweetwater, in comments dated November 15, 2003, offers the following support for Empire Union's current claim:

> After reviewing the original SARC test claim, submitted on or about December 30, 1997, the Commission's Statement of Decision, issued on or about April 23, 1998, and as a co-claimant on the original test claim, I am convinced that the issues of (1) ensuring that all parents receive a copy of the SARC and (2) making administrators and teachers available to answer any questions regarding the SARC were overlooked and not included in the original submission and therefore were neither approved or denied by the commission.

Under Government Code section 17521, "'test claim' means the first claim, including claims joined or consolidated with the first claim, filed with the commission alleging that *a particular statute* or executive order imposes costs mandated by the state." [Emphasis added.] Empire Union asserts in the amended test claim filing: "However, section 17521 does not preclude a claimant from filing a test claim alleging that a statute or executive order that was included in a prior test claim imposes activities not previously claimed." The Commission finds that claimant misapprehends the statutory meaning of Government Code section 17521.

A claimant has the opportunity upon filing a test claim to identify and allege *all* activities imposed by a particular statute or executive order.[120] Comment periods are available to all members of the public, including interested parties.[121] Comments, additional filings, and/or hearing testimony identifying other reimbursable activities are permitted during the test claim phase.[122] In addition, every Commission hearing is subject to the notice and agenda requirements of the Bagley-Keene Open Meetings Act, pursuant to Government Code section

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

[120] California Code of Regulations, title 2, section 1183, subdivision (d).

[121] California Code of Regulations, title 2, sections 1182.2, subdivision (b) and 1183.02.

[122] Government Code section 17555; California Code of Regulations, title 2, sections 1183, 1183.07 and 1187.6.

11120 et seq. Thus, the test claim proceedings provide adequate due process to the entire claimant community.

"'[D]ue process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" (*Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 91.) Despite this clear statement of the law, claimant Empire Union's comments, dated October 27, 2003, argue: "In reality, the test claim process provides adequate due process for the claimants currently represented before the Commission – a number on average, that is hardly significant to ensure all districts are informed and their interests protected." The Commission asserts that the choice of many potential claimants to not get involved in the test claim process prior to the reimbursement phase is immaterial to due process considerations. The test claim process is open and available to all parties and interested parties who seek to participate.

In *Kinlaw v. State of California*, *supra*, 54 Cal.3d at page 333, the California Supreme Court declared that the applicable Government Code sections "create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created." In this case, the claim that Education Code section 33126, as amended by Statutes 1997, chapter 912, imposed a reimbursable state mandate was already filed and heard, and the Commission adopted a final Statement of Decision on April 23, 1998. Other than the reconsideration and writ of mandate provisions of Government Code section 17559, no further issues on the merits may be raised before the Commission following the adoption of a statement of decision on a particular statute or executive order.

Therefore, Empire Union's claim for reimbursement of costs for "activities associated with ensuring that all parents receive a copy of the SARC and making administrators and teachers available to answer any questions regarding the SARC" pursuant to Education Code section 33126, as amended by Statutes 1997, chapter 912, is denied based upon the plain meaning of Government Code section 17521, and the doctrine of estoppel,[123] and is not included in the following analysis as part of the "test claim legislation."

[123] "The doctrine of collateral estoppel bars the relitigating of issues which were previously resolved in an administrative hearing by an agency acting in a judicial capacity. (*People v. Sims* (1982) 32 Cal.3d 468, 478-479.)" *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, 242.

Education Code Sections 33126, 33126.1 and 41409 As Amended By Statutes 2000, Chapter 996; Statutes 2001, Chapters 159 and 734; and Statutes 2002, Chapter 1168:

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[124] The court has held that only one of these findings is necessary.[125]

The Commission finds that providing a School Accountability Report Card imposes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. First, it constitutes a program that carries out the governmental function of providing a service to the public because it requires school districts to make a document available to the public that is designed to "promote a model statewide standard of instructional accountability and conditions for teaching and learning."[126] The courts have held that education is a peculiarly governmental function administered by local agencies as a service to the public.[127]

The test claim legislation also satisfies the second test that triggers article XIII B, section 6, because the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Accordingly, the Commission finds that providing a School Accountability Report Card constitutes a "program" and, thus, is subject to article XIII B, section 6 of the California Constitution.

However, pursuant to article XIII B, section 6, of the California Constitution, and Government Code section 17556, subdivision (f), ballot measures adopted by the voters in a statewide election do not impose reimbursable state mandates. As discussed below, to the extent that the claimed amendments to the Education Code are a restatement of what was required by the voters in enacting Proposition 98, no program, or new program or higher level of service, can be found.

Issue 2: Does the test claim legislation impose a new program or higher level of service within an existing program within the meaning of the California Constitution, article XIII B, section 6, and impose costs mandated by the state pursuant to Government Code section 17514?

Amendments to Education Code sections 33126, 33126.1, and 41409, as asserted by the claimants, are analyzed below for the imposition of a new program or higher level of service on school districts within the meaning of article XIII B, section 6.

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[124] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[125] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[126] Education Code section 33126, as added to the Education Code by Proposition 98.

[127] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d at page 172 states "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function ... administered by local agencies to provide service to the public."

Education Code Section 33126.

Section 33126 was added to the Education Code by Proposition 98, approved by the electors, effective November 9, 1988:

> In order to promote a model statewide standard of instructional accountability and conditions for teaching and learning, the Superintendent of Public Instruction shall by March 1, 1989, develop and present to the Board of Education for adoption a statewide model School Accountability Report Card.
>
> (a) The model School Accountability Report Card shall include, but is not limited to, assessment of the following school conditions:
>
> (1) Student achievement in and progress toward meeting reading, writing, arithmetic and other academic goals.
>
> (2) Progress toward reducing drop-out rates.
>
> (3) Estimated expenditures per student, and types of services funded.
>
> (4) Progress toward reducing class sizes and teaching loads.
>
> (5) Any assignment of teachers outside their subject areas of competence.
>
> (6) Quality and currency of textbooks and other instructional materials.
>
> (7) The availability of qualified personnel to provide counseling and other student support services.
>
> (8) Availability of qualified substitute teachers.
>
> (9) Safety, cleanliness, and adequacy of school facilities.
>
> (10) Adequacy of teacher evaluations and opportunities for professional improvement.
>
> (11) Classroom discipline and climate for learning.
>
> (12) Teacher and staff training, and curriculum improvement programs.
>
> (13) Quality of school instruction and leadership.
>
> (b) In developing the statewide model School Accountability Report, the Superintendent of Public Instruction shall consult with a Task Force on Instructional Improvement, to be appointed by the Superintendent, composed of practicing classroom teachers, school administrators, parents, school board members, classified employees, and educational research specialists, provided that the majority of the task force shall consist of practicing classroom teachers.

Proposition 98 also added Education Code section 35256, as follows:

> The governing board of each school district maintaining an elementary or secondary school shall by September 30, 1989, or the beginning of the school year develop and cause to be implemented for each school in the school district a School Accountability Report Card.
>
> (a) The School Accountability Report Card shall include, but is not limited to, the conditions listed in Education Code Section 33126.

(b) Not less than triennially, the governing board of each school district shall compare the content of the school district's School Accountability Report Card to the model School Accountability Report Card adopted by the State Board of Education. Variances among school districts shall be permitted where necessary to account for local needs.

(c) The Governing Board of each school district shall annually issue a School Accountability Report Card for each school in the school district, publicize such reports, and notify parents or guardians of students that a copy will be provided upon request.

Pursuant to article XIII B, section 6, of the California Constitution, and Government Code section 17556, subdivision (f), ballot measures adopted by the voters in a statewide election do not impose reimbursable state mandates. Education Code section 33126, as amended by Statutes 1993, chapter 1031, Statutes 1994, chapter 824, and Statutes 1997, chapter 912, was already heard and decided as part of the *School Accountability Report Cards* (97-TC-21) test claim. The pertinent portions of Education Code section 33126, as amended by Statutes 2000, chapter 996, effective September 30, 2000, are indicated with underline below. In addition, Statutes 2002, chapter 1168, effective September 30, 2002, amended the section by adding subdivision (b)(26).

(a) The school accountability report card shall provide data by which parents can make meaningful comparisons between public schools enabling them to make informed decisions on which school to enroll their children.

(b) The school accountability report card shall include, but is not limited to, assessment of the following school conditions:

(1)(A) Pupil achievement by grade level, as measured by the standardized testing and reporting programs pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33.

(B) Pupil achievement in and progress toward meeting reading, writing, arithmetic, and other academic goals, including results by grade level from the assessment tool used by the school district using percentiles when available for the most recent three-year period.

(C) After the state develops a statewide assessment system pursuant to Chapter 5 (commencing with Section 60600) and Chapter 6 (commencing with Section 60800) of Part 33, pupil achievement by grade level, as measured by the results of the statewide assessment.

(D) Secondary schools with high school seniors shall list both the average verbal and math Scholastic Assessment Test scores to the extent provided to the school and the percentage of seniors taking that exam for the most recent three-year period.

(2) Progress toward reducing dropout rates, including the one-year dropout rate listed in the California Basic Education Data System or any successor data system for the schoolsite over the most recent three-year period, and the graduation rate, as defined by the State Board of Education, over the most recent three-year period when available pursuant to Section 52052.

[¶]…[¶]

(6) Quality and currency of textbooks and other instructional materials, including whether textbooks and other materials meet state standards and have been adopted by the State Board of Education for kindergarten and grades 1 to 8, inclusive, and adopted by the governing boards of school districts for grades 9 to 12, inclusive, and the ratio of textbooks per pupil and the year the textbooks were adopted.

(7) The availability of qualified personnel to provide counseling and other pupil support services, including the ratio of academic counselors per pupil.

[¶]…[¶]

(17) The number of advanced placement courses offered, by subject.

(18) The Academic Performance Index, including the disaggregation of subgroups as set forth in Section 52052 and the decile rankings and a comparison of schools.

(19) Whether a school qualified for the Immediate Intervention Underperforming Schools Program pursuant to Section 52053 and whether the school applied for, and received a grant pursuant to, that program.

(20) Whether the school qualifies for the Governor's Performance Award Program.

(21) When available, the percentage of pupils, including the disaggregation of subgroups as set forth in Section 52052, completing grade 12 who successfully complete the high school exit examination, as set forth in Sections 60850 and 60851, as compared to the percentage of pupils in the district and statewide completing grade 12 who successfully complete the examination.

(22) Contact information pertaining to any organized opportunities for parental involvement.

(23) For secondary schools, the percentage of graduates who have passed course requirements for entrance to the University of California and the California State University pursuant to Section 51225.3 and the percentage of pupils enrolled in those courses, as reported by the California Basic Education Data System or any successor data system.

(24) Whether the school has a college admission test preparation course program.

(26) When available from the State Department of Education, the claiming rate of pupils who earned a Governor's scholarship award pursuant to subdivision (a) of Section 69997 for the most recent two year period. This paragraph applies only to schools that enroll pupils in grades nine, ten or eleven.[128]

Claimants allege a reimbursable state-mandated program for calculating, determining and including all amended components in the School Accountability Report Card. DOF responds that much of the information is available through the CDE website or is already accumulated by

[128] Subdivision (b)(26) was added by Statutes 2002, chapter 1168; all other indicated amendments were made by Statutes 2000, chapter 996. There is no subdivision (b)(25).

school districts for other purposes; consequently, DOF argues any additional work "should be minimal."

The claimants contend that amendments to Education Code section 33126 imposed additional activities on school districts, which constitute a higher level of service. In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at state-mandated increases in the services provided by local agencies.[129]

In 1990, the Second District Court of Appeal decided the *Long Beach Unified School District* case, which challenged a test claim filed with the Board of Control on executive orders issued by the Department of Education to alleviate racial and ethnic segregation in schools.[130] The court determined that the executive orders did not constitute a "new program" since schools had an existing constitutional obligation to alleviate racial segregation.[131] However, the court found that the executive orders constituted a "higher level of service" because the requirements imposed by the state went beyond constitutional and case law requirements. The court stated in relevant part the following:

> The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. [Citation omitted.] A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because the requirements go beyond constitutional and case law requirements. . . .While these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are required acts. These requirements constitute a higher level of service. We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "Only those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."[132]

Thus, in order for the amendments to the School Accountability Report Card legislation to impose a higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.

The California voters approved Proposition 98, effective November 9, 1988, providing a state-funding guarantee for schools. Proposition 98 amended article XVI, section 8 of the California Constitution, including adding subdivision (e), requiring all elementary and secondary school districts to develop and prepare an annual audit of such funds and a School Accountability Report Card for every school. The voters also required the state to develop a model report card and, pursuant to Education Code section 35256, required schools to periodically compare their

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[129] *County of Los Angeles, supra*, 43 Cal.3d at 56.

[130] *Long Beach Unified School District, supra*, 225 Cal.App.4th 155.

[131] *Id.* at page 173.

[132] *Ibid.*

School Accountability Report Card with the statewide model.[133] This requirement recognizes that the precise details of the model report card are subject to change as education programs change, and that schools are required to make modifications as necessary.

In comments dated October 27, 2003, Empire Union argues that the statutory amendments to the School Accountability Report Cards legislation automatically represent a higher level of service, stating: "why would the Legislature go to such lengths to specifically delineate over a dozen new pieces of information that must be in a SARC if this information was somehow already required to be reported?" However, intent to *change* the law may not always be presumed by an amendment, as suggested by the claimant. The court has recognized that changes in statutory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][134]

Thus, the Commission must determine whether the "new pieces of information" identified by the claimant are actually new, or rather a clarification of existing law previously expressed in more general terms.

Education Code section 33126, as added by Proposition 98, required that "The model School Accountability Report Card shall include, *but is not limited to,* assessment of the following school conditions: (1) Student achievement in and progress toward meeting reading, writing, arithmetic and other academic goals," and "(13) Quality of school instruction and leadership." These requirements subsume the requirements that school districts report, on "Pupil achievement by grade level, as measured by the standardized testing and reporting programs (STAR)," pursuant to subdivision (b)(1)(A); the number of advanced placement courses offered, pursuant to subdivision (b)(17); Academic Performance Index (API)[135] rankings, pursuant to subdivision (b)(18); whether the school qualifies for the Governor's Performance Award Program based upon API rankings, pursuant to subdivision (b)(20); High School Exit Exam passage rates, when available, pursuant to subdivision (b)(21); the percentage of high school graduates who passed course requirements for entrance to the University of California and the California State University, pursuant to subdivision (b)(23); whether the school offers a college admission test preparation course, pursuant to subdivision (b)(24); and the rate of pupils who earned a

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[133] Empire Union's comments dispute that the Proposition 98 funding guarantee is an available state-funding source for providing the School Accountability Report Card. On the contrary, there must be a presumed close link between the two, due to the California Constitutional single-subject rule. (Art. II, § 8, subd. (d): "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.")

[134] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[135] According to the CDE, "The purpose of the API is to measure the academic performance and growth of schools. It is a numeric index (or scale) that ranges from a low of 200 to a high of 1000. A school's score or placement on the API is an indicator of a school's performance level." March 1, 2004: < http://www.cde.ca.gov/psaa/api/apidescription.htm>.

Governor's scholarship award,[136] pursuant to subdivision (b)(26). All of these specific reporting requirements quantify student achievement and demonstrate progress towards meeting academic goals, and/or indicate the quality of school instruction.

The requirement of subdivision (b)(2) to include statewide dropout rates, as provided by the CDE, fulfills the purpose of the Proposition 98 requirement that the report card include "(2) Progress toward reducing drop-out rates." The inclusion of statewide drop-out rates to compare to the individual school's drop-out rates "promote[s] a model statewide standard of instructional accountability," as required by Proposition 98.

The new specificity of subdivision (b)(6), that the report card is to provide information on whether the textbooks used by the schools meet state or district standards and the year the textbooks were adopted is within the Proposition 98 requirement to report on the "(6) Quality and currency of textbooks and other instructional materials." The requirement to provide the ratio of textbooks per pupil is within the Proposition 98 requirements to report on the "adequacy of school facilities," the "climate for learning," as well as on the "[q]uality of school instruction."

The requirement that districts report on the "ratio of academic counselors per pupil," pursuant to subdivision (b)(7) is within the Proposition 98 requirement to report on the "(7) The availability of qualified personnel to provide counseling and other student support services."

Subdivision (b)(19) requires districts to report whether a school qualified for the Immediate Intervention/Underperforming Schools Program, "and whether the school applied for, and received a grant pursuant to, that program." Education Code section 52053 provides planning grant funds for under-performing schools, as indicated by API scores. Qualification for the Immediate Intervention/Underperforming Schools Program demonstrates that a school's API scores fall below the 50th percentile. This is within the Proposition 98 requirements to report on student achievement, the quality of student instruction, and on "(13)… curriculum improvement programs." The Commission finds that none of the above information elements required for the School Accountability Report Card impose a new program or higher level of service upon school districts.

In fact, the only alleged new element of the School Accountability Report Card that does not fall within one of the original 13 reporting categories is the requirement that the report card include "Contact information pertaining to any organized opportunities for parental involvement." (Ed. Code, § 33126, subd. (b)(22).) However, as described below, the addition of this minimal information[137] does not rise to the level of a reimbursable "higher level of service" within the meaning discerned by the courts.

In a recent appellate decision, *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193-1194, the County sought to vacate a Commission decision that denied a test claim for costs associated with a statute requiring local law enforcement officers to

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[136] Education Code section 69997 provides the Governor's Scholars Program to grant a scholarship to every public high school student demonstrating high academic achievement through the STAR program.

[137] The state model School Accountability Report Card for School Year 2000-2001 has a header: "Opportunities for Parental Involvement," followed by a box showing "Contact Person Name" and "Contact Person Phone Number."

participate in two hours of domestic violence training. The court upheld the Commission's decision that the test claim legislation did not mandate any increased costs and thus no reimbursement was required. Thus, the court concluded:

> Based upon the principles discernable from the cases discussed, we find that in the instant case, the legislation does not mandate a "higher level of service." In the case of an existing program, an increase in existing costs does not result in a reimbursement requirement. Indeed, "costs" for purposes of Constitution article XIII B, section 6, does not equal every increase in a locality's budget resulting from compliance with a new state directive. Rather, the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding.
>
> [¶]…[¶]
>
> [M]erely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.

Finally, the court concluded (*id.*, at p. 1195):

> Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement. Thus, while there may be a mandate, there are no increased costs mandated by [the test claim legislation].

Likewise here, by requiring the addition of a few lines to the existing school accountability report card, the state has not shifted from itself to schools "the burdens of state government," when "the directive can be complied with by a minimal reallocation of resources." Therefore, the Commission finds no new program or higher level of service was imposed. In addition, the state has not required the expenditure of local property tax funds in order for schools to comply with any revised directives regarding the annual issuance of the School Accountability Report Card.

Assuming, for purposes of analysis, that the claimants did meet their burden of proving a new program or higher level of service for all new information required to be included in the School Accountability Report Card, they have not met their burden of proving costs mandated by the state. The claimants have provided no evidence that the amendments alleged require the expenditure of local tax revenues, rather than the expenditure of school funding provided by the state, or funds available from other sources.[138] A CDE document entitled "2000-01 K-12

[138] Empire Union's October 27, 2003 rebuttal comments state "that all un-funded mandates have a direct impact on property tax revenue as reallocation of resources is always required." Similarly, Sweetwater's comments dated November 15, 2003, state: "The imposition of a mandate upon an entity will always create a lack of funding simply because entities do not have personnel sitting around waiting for mandates to be imposed."

Education Financial Data"[139] demonstrates that only 21.27% of public school funding comes from property tax revenues. A full 56.67% is from state sources,[140] and the remainder of the funding comes from federal and other sources, including lottery revenue. "[I]t is the expenditure of tax revenues of local governments that is the appropriate focus of section 6." (*County of Sonoma v. Commission on State Mandates*, *supra*, 84 Cal.App.4th at p. 1283, citing *County of Fresno v. State of California*, *supra*, 53 Cal.3d at p. 487.) "No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes." (*Redevelopment Agency v. Commission on State Mandate*s (1997) 55 Cal.App.4th 976, 987.)

In enacting Proposition 98, The Classroom Instructional Improvement and Accountability Act, the voters provided public schools with state funding guarantees by amending the California Constitution, article XVI, section 8, School Funding Priority, and adding section 8.5, Allocation to Schools. In exchange for this constitutional guarantee of funding, the voters also required schools to undergo an annual audit and to issue an annual School Accountability Report Card. As recently decided by the California Supreme Court, the availability of state program funds precludes a finding of a reimbursable state mandate.

> We need not, and do not, determine whether claimants have been legally compelled to participate in the Chacon-Moscone Bilingual Bicultural Education program, or to maintain a related advisory committee. Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the … program, we nevertheless conclude that under the circumstances here presented, *the costs necessarily incurred* in complying with the notice and agenda requirements under that funded program *do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary* notice and agenda related *expenses*. [Emphasis added.]

(*Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at pp. 746-747.)

Claimants have not demonstrated that the state funds received through article XVI, sections 8 and 8.5, or any other sources beyond property tax revenue, are unavailable for the claimed additional costs of issuing School Accountability Report Cards. In the absence of that showing, the Commission finds the test claim legislation did not impose costs mandated by the state.

Thus, the Commission finds that Education Code section 33126, as amended by Statutes 2000, chapter 996, and Statutes 2002, chapter 1168 does not impose a new program or higher level of service on school districts, and does not impose costs mandated by the state.

Education Code Section 33126.1.

Education Code section 33126.1 primarily gives direction to the CDE to develop a standardized template for the School Accountability Report Card, for optional use by school districts. The code section, as added by Statutes 2000, chapter 996, effective September 30, 2000; amended by

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[139] At <http://www.cde.ca.gov/fiscal/financial/FingertipFacts01.html> [as of Mar. 1, 2004.] The CDE is the department statutorily charged with receiving school district and county office of education budget, audit, apportionment, and other financial status reports, pursuant to Education Code section 42129.

[140] Approximately $31.4 billion for fiscal year 2000-2001.

Statutes 2001, chapter 159, effective January 1, 2002, and Statutes 2002, chapter 1168, effective September 30, 2002, follows, in pertinent part:

> (a) The State Department of Education shall develop and recommend for adoption by the State Board of Education a standardized template intended to simplify the process for completing the school accountability report card and make the school accountability report card more meaningful to the public.
>
> (b) The standardized template shall include fields for the insertion of data and information by the State Department of Education and by local educational agencies. When the template for a school is completed, it should enable parents and guardians to compare how local schools compare to other schools within that district as well as other schools in the state.
>
> (c) In conjunction with the development of the standardized template, the State Department of Education shall furnish standard definitions for school conditions included in the school accountability report card. The standard definitions shall comply with the following:
>
> (1) Definitions shall be consistent with the definitions already in place or under the development at the state level pursuant to existing law.
>
> (2) Definitions shall enable schools to furnish contextual or comparative information to assist the public in understanding the information in relation to the performance of other schools.
>
> (3) Definitions shall specify the data for which the State Department of Education will be responsible for providing and the data and information for which the local educational agencies will be responsible.
>
> [¶]…[¶]
>
> (g) The State Department of Education shall annually post the completed and viewable template on the Internet. The template shall be designed to allow schools or districts to download the template from the Internet. The template shall further be designed to allow local educational agencies, including individual schools, to enter data into the school accountability report card electronically, individualize the report card, and further describe the data elements. The State Department of Education shall establish model guidelines and safeguards that may be used by school districts secured access only for those school officials authorized to make modifications.
>
> (j) A school or school district that chooses not to utilize the standardized template adopted pursuant to this section shall report the data for its school accountability report card in a manner that is consistent with the definitions adopted pursuant to subdivision (c) of this section.
>
> [¶]…[¶]
>
> (l) Local educational agencies shall make these school accountability report cards available through the Internet or through paper copies.

> (m) The State Department of Education shall monitor the compliance of local educational agencies with the requirements to prepare and to distribute school accountability report cards.

Claimants allege this statute will result in costs of training school personnel to either use the School Accountability Report Card template developed by the CDE, or for training school personnel who do not use the template regarding "standard definitions" to be used when preparing the School Accountability Report Card.

The Commission finds that none of the claimed training activities are expressly required by Education Code section 33126.1.[141] In addition, the plain language of Proposition 98 requires the State to "adopt[] a statewide model School Accountability Report Card." The standardized template described by Education Code section 33126.1 meets this requirement. Further, in adopting Education Code section 35256, Proposition 98 required that "the governing board of each school district shall compare the content of the school district's School Accountability Report Card to the model School Accountability Report Card adopted by the State Board of Education," and shall "annually issue a School Accountability Report Card for each school in the school district, publicize such reports, and notify parents or guardians of students that a copy will be provided upon request."

These requirements are not substantively different from the law of Education Code section 33126.1, which was designed to "to simplify the process for completing the school accountability report card and make the school accountability report card more meaningful to the public," within the requirements of the original law adopted by the voters when passing Proposition 98. The specific new requirements of Education Code section 33126.1 are directed to the CDE, not to local school districts. Thus, the Commission finds Education Code section 33126.1 does not impose a new program or higher level of service on school districts, and does not impose costs mandated by the state.

Education Code Section 41409.

Education Code section 41409 was added by Statutes 1989, chapter 1463 and amended by Statutes 1992, chapter 759. Further amended by Statutes 2001, chapter 734 (A.B. 804), effective October 11, 2001. Sweetwater alleges a reimbursable state-mandated program as to the amendment by Statutes 2001, chapter 734. The statute requires the state Superintendent of Public Instruction to "determine the statewide average percentage of school district expenditures that are allocated to the salaries of administrative personnel, … [and] also shall determine the statewide average percentage of school district expenditures that are allocated to the salaries of teachers." Subdivision (c) provides:

> The statewide averages calculated pursuant to subdivisions (a) and (b) shall be provided annually to each school district for use in the school accountability report card.

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[141] Sweetwater's November 15, 2003 comments state: "Claimant agrees that training is not specifically referred to in the legislation, however, the California Safe School Assessment process is a reasonable example of what happens when definitions developed by others are distributed without training, and those who did not receive any training are then left to determine what the definitions are going to be."

This statute, as amended by Statutes 1992, chapter 759, was the subject of the original *School Accountability Report Cards* test claim, and was found in the Commission's April 23, 1998 Statement of Decision to impose a mandate for the inclusion of information on "salaries paid to schoolteachers, school site principals, and school district superintendents." Claimant acknowledges in the test claim filing that Education Code section 41409 was amended by Statutes 2001, chapter 734, but that it "made *non-substantive* changes." [Emphasis added.] No new activities were alleged by the claimant, therefore the Commission finds that Education Code section 41409, as amended by Statutes 2001, chapter 734, does not impose a new program or higher level of service beyond that which was recognized in the prior test claim determination, and does not impose costs mandated by the state.

CONCLUSION

The Commission concludes that Education Code sections 33126, 33126.1, and 41409, as added or amended by Statutes 2000, chapter 996, Statutes 2001, chapters 159 and 734, and Statutes 2002, Chapter 1168, do not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution, and do not impose costs mandated by the state pursuant to Government Code section 17514. In the case of the test claim for costs under Education Code section 33126, as amended by Statutes 1997, chapter 912, the Commission does not have jurisdiction to hear a new claim for reimbursable costs mandated by the state.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.1; Statutes 1999, Chapter 595, Statutes 2000, Chapter 887; Filed on June 27, 2002; By California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and County of Tehama.	No. 01-TC-19 *Cancer Presumption for Law Enforcement and Firefighters* 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 May 27, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 27, 2004. Juliana F. Gmur appeared for claimant, County of Tehama. Gina C. Dean appeared for claimant, California State Association of Counties-Excess Insurance Authority (CSAC-EIA). Jaycee Nitchke appeared for the Department of Finance. Allan P. Burdick appeared for interested party, CSAC SB 90 Group.

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

The Commission adopted the staff analysis at the hearing by a vote of 4 to 0.

BACKGROUND

This case addresses an evidentiary presumption given to certain firefighters and peace officers in workers compensation cases. Normally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.[142]

[142] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of presumptions.[143] In 1982, the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during the period of employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that
- The carcinogen is reasonably linked to the disabling cancer.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[144]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[145], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[146] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
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> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of

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[143] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

[144] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption …, the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

[145] *Zipton, supra,* 218 Cal.App.3d 980.

[146] *Id*. at page 991.

> defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[147]

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[148] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[149]

Test Claim Legislation

In 1999, the Legislature enacted the test claim statute (Stats. 1999, ch. 595), which amended Labor Code section 3212.1 to address the court's criticism of the reasonable link standard in *Zipton*.[150] The test claim statute eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

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[147] *Id.* at page 990.

[148] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

[149] *Id.* at page 1128.

[150] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

In 2000, the Legislature enacted the second test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers "primarily engaged in law enforcement activities" as defined below in Penal Code section 830.37, subdivisions (a) and (b):

> (a) Members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district, or the state, if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud.
>
> (b) Members other than members of an arson-investigating unit, regularly paid and employed in that capacity, of a fire department or fire protection agency of a county, city, city and county, district or the state, if the primary duty of these peace officers, when acting in that capacity, is the enforcement of law relating to fire prevention or fire suppression.

Prior Test Claim Decisions on Labor Code Section 3212.1

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.[151]

[151] Exhibit J to Item 5, May 27, 2004 Commission Hearing

Claimants' Position

The claimants contend that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimants assert the following:

> [The test claim legislation takes] an element that once had to be proved by the employee – that the disabling cancer is reasonably related to the carcinogen – and shifts that element so the employer must now show that the disabling cancer is not reasonably related to the carcinogen. Further, the employer is only allowed to address the reasonably-related element if the employer can establish the primary site of the cancer. The employer must establish both to make use of this defense. And this defense is now the one and only way to defeat the presumption.
>
> The net effect of this legislation is to further encourage the filing of workers' compensation claims for cancer and markedly increase the probability that the claims will be successful. Thus, the total costs of these claims, from initial prosecution to ultimate resolution are reimbursable.[152]

The claimants further argue that the "only way to rebut the presumptions [in the test claim statute] is by tracking the employee's non-work hour movements and contacts for a several month period."[153]

Position of the Department of Finance

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.[154]

On April 14, 2004, the Department of Finance filed comments on the draft staff analysis, withdrawing their original comments and agreeing that the test claim legislation does not constitute a reimbursable state-mandated program.[155]

Position of the Department of Industrial Relations

The Department of Industrial Relations contends that the test claim legislation is not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The Department asserts that the presumption in favor of safety officers does not result in a new program or higher level of service for the following reasons:

1. Local governments are not required to accept all workers' compensation claims. They have the option to rebut any claim before the Workers' Compensation Appeals Board by presenting a preponderance of evidence showing the non-existence of industrial causation.

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[152] Test Claim, page 3 (Exhibit A to Item 5, May 27, 2004 Commission Hearing).

[153] Claimants' Response to State Agency Comments, page 3 (Exhibit D to Item 5, May 27, 2004 Commission Hearing).

[154] Exhibit B to Item 5, May 27, 2004 Commission Hearing.

[155] Exhibit I to Item 5, May 27, 2004 Commission Hearing.

2. Statutes mandating a higher level of compensation to local government employees, such as workers' compensation benefits, are not "new programs" whose costs would be subject to reimbursement under article XIII B, section 6.

3. There is no shift of a financial burden from the State to local governments because local governments, by statute, have always been solely liable for providing workers' compensation benefits to their employees.[156]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[157] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[158] "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."[159] 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.[160] 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.[161]

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

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[156] Exhibit C to Item 5, May 27, 2004 Commission Hearing.

[157] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[158] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[160] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[161] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

policy, but does not apply generally to all residents and entities in the state.[162] 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.[163] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[164]

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.[165] 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."[166]

Issue 1: Does CSAC-EIA have standing as a claimant for this test claim?

The Commission finds that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim.

Government Code sections 17550 and 17551 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 17518 defines "local agencies" to mean "any city, county, special district, authority, or other political subdivision of the state." Government Code section 17520 defines "special district" to include a "joint powers agency."

CSAC-EIA is a joint powers authority established pursuant to the Joint Exercise of Powers Act ("Act") in Government Code section 6500 et seq. and is formed for insurance and risk management purposes.[167] Under the Act, school districts and local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[168] The entity provided to administer or execute the agreement (in this case CSAC-EIA) may be a firm or corporation, including a nonprofit corporation, designated in the agreement.[169] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be

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[162] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[163] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

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

[167] Letter dated February 4, 2004, by Gina C. Dean, Assistant General Manager for CSAC-EIA (Exhibit F to Item 5, May 27, 2004 Commission Hearing).

[168] Government Code section 6502.

[169] Government Code section 6506.

the same entity as its contracting parties.[170] CSAC-EIA contends that, as a joint powers agency, it is a type of local agency that can file a test claim based on the plain language of Government Code section 17520.[171]

Based on the facts of this case, the Commission disagrees.

In 1991, the California Supreme Court decided *Kinlaw v. State of California, supra*, a case that is relevant here. In *Kinlaw*, medically indigent adults and taxpayers brought an action against the state alleging that the state violated article XIII B, section 6 by enacting legislation that shifted financial responsibility for the funding of health care for medically indigent adults to the counties. The Supreme Court denied the claim, holding that the medically indigent adults and taxpayers lacked standing to prosecute the action and that the plaintiffs have no right to reimbursement under article XIII B, section 6.[172] The court stated the following:

> Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. *Plaintiffs' interest*, although pressing, *is indirect* and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind.[173] (Emphasis added.)

Like the plaintiffs in *Kinlaw*, CSAC-EIA, as a separate entity from the contracting counties, is not directly affected by the test claim legislation. The Legislature, in Labor Code section 3212.1, gave specified peace officers a presumption of industrial causation that the cancer arose out of and in the course of their employment. The counties, as employers of peace officers, argue that the presumption creates a reimbursable state-mandated program and that the increased costs are reimbursable.

But, CSAC-EIA does not employ peace officers specified in the test claim legislation.[174] Thus, while CSAC-EIA may have an interest in this claim as the insurer, its interest is indirect. As expressed in an opinion of the California Attorney General, a joint powers authority "is simply

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[170] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

[171] Claimants' response to draft staff analysis (Exhibit H to Item 5, May 27, 2004 Commission Hearing).

[172] *Kinlaw, supra*, 54 Cal.3d at pages 334-335.

[173] *Ibid.*

[174] In response to the draft staff analysis, CSAC-EIA states the following: "Indeed, CSAC-EIA is a separate entity comprised of counties to act as a mechanism to protect the counties' fisc. Although CSAC-EIA does not employ peace officers, when it comes to their workers' compensation, the buck stops at CSAC-EIA." (Exhibit H, p. 2, to Item 5, May 27, 2004 Commission Hearing.)

not a city, a county, or the state as those terms are normally used."[175] Thus, under the *Kinlaw* decision, CSAC-EIA lacks standing in this case to act as a claimant.

This conclusion is further supported by the decision of the Third District Court of Appeal in *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976. Although Government Code section 17520 expressly includes redevelopment agencies in the definition of "special districts" that are eligible to file test claims with the Commission, the court found that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any "proceeds of taxes." The court stated the following:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity."[176]

The Third District Court of Appeal affirmed the *Redevelopment Agency* decision in *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281, again finding that redevelopment agencies are not entitled to claim reimbursement for state-mandated costs because they are not required to expend "proceeds of taxes."

In the present case, CSAC-EIA is also not subject to the appropriations limitation of article XIII B and does not expend any "proceeds of taxes" within the meaning of article XIII B. According to the letter dated February 4, 2004, from CSAC-EIA, "CSAC-EIA has no authority to tax" and instead receives proceeds of taxes from its member counties in the form of premium payments.[177] Therefore, the Commission concludes CSAC-EIA is not an eligible claimant for this test claim.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

Labor Code section 3212.1, subdivision (d), as amended by the test claim legislation, states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and ***may*** be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption. (Emphasis added.)

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[175] 65 Opinions of the California Attorney General 618, 623 (1982).

[176] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986.

[177] Exhibit F to Item 5, May 27, 2004 Commission Hearing.

The test claim legislation also extends the presumption of industrial causation to peace officers "primarily engaged in law enforcement activities" as defined in Penal Code section 830.37, subdivisions (a) and (b). Finally, the legislation specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> The presumption in the applicant's favor increases the likelihood that his claim will result in money payments from his employer as well as full coverage of his medical costs. The greater the number of successful applicants, the more the employer will pay in workers' compensation benefits. Thus the new program or higher level of service is the creation of the presumption.[178]

The claimant further argues that local agencies are now required to track the employee's non-work hour movements and contacts for a several month period in order to rebut the presumption that the cancer is an industrial injury.

The express language of Labor Code section 3212.1 does not impose any state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers compensation claim and prove that the injury is non-industrial remains entirely with the local agency, as it has since Labor Code section 3212.1 was enacted in 1982.[179] The plain language of Labor Code section 3212.1 states that the "presumption is disputable and *may* be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer."

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][180]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[181] Consistent with this principle, the courts have strictly construed the meaning and effect of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

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[178] Claimants' response to draft staff analysis (Exhibit H, p. 4, to Item 5, May 27, 2004 Commission Hearing).

[179] See also, *Zipton, supra*, 218 Cal.App.3d 980, 988.

[180] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[181] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[182]

In the present case, the claimant reads requirements into Labor Code section 3212.1, which, by the plain meaning of the statute, are not there.

This conclusion is further supported by the California Supreme Court's recent decision in *Department of Finance v. Commission on State Mandates*.[183] In *Department of Finance*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[184] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[185]

The court also reviewed and affirmed the holding of the *City of Merced* case.[186, 187] 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. (Emphasis in original.)[188]

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[182] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[183] *Department of Finance, supra*, 30 Cal.4th 727.

[184] *Id.* at page 737.

[185] *Ibid.*

[186] *Id.* at page 743.

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

[188] *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.* [Emphasis added.][189]

The Supreme Court left undecided whether 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."[190]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[191] Thus, based on the Supreme Court's decision, the Commission must determine if the underlying program (in this case, the decision to rebut the presumption that the cancer is an industrial injury) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to dispute a workers compensation case. The decision to litigate such cases is made at the local level and is within the discretion of the local agency. Thus, the employer's burden to prove that the carcinogen is not reasonably linked to the cancer is also not state-mandated.

Further, there is no evidence in the law or in the record that local agencies are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that local agencies will incur increased costs in insurance premiums as a result of the test claim legislation, as alleged by claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6.

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[192]

Finally, the claimant argues that this claim is just like two prior test claim decisions approving reimbursement in cancer presumption workers compensation cases and, thus, this test claim

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[189] *Id.* at page 731.

[190] *Ibid.*

[191] *Id*. at page 743.

[192] *County of Los Angeles, supra*, 43 Cal.3d at page 54; see also, *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 735.

should likewise be approved. However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California 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.[193] In *Weiss v. State Board of Equalization*, 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, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [194]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[195] While opinions of the Attorney General are not binding, they are entitled to great weight.[196]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 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.[197] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow.

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

[194] *Id*. at page 776.

[195] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

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

[197] *City of San Jose, supra*, 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

Accordingly, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.[198]

CONCLUSION

Based on the foregoing, the Commission concludes that California State Association of Counties – Excess Insurance Authority (CSAC-EIA) does not have standing, and is not a proper claimant for this test claim. The Commission further concludes that Labor Code section 3212.1, as amended by the test claim legislation, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies.

[198] Because this conclusion is dispositive of the case, the Commission need not reach the other issues raised by the Department of Industrial Relations.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Vehicle Code Section 2407.5 Statutes 2001, Chapter 710 Filed on March 25, 2002 By City of Newport Beach, Claimant	No. 01-TC-12 *Distracted Drivers* 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 May 27, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 27, 2004. Pam Stone, Glen Everroad and Sergeant Dale Johnson appeared on behalf of claimant City of Newport Beach. Captain Scott Howland appeared on behalf of the California Highway Patrol ("CHP"). Elliott Mandell appeared on behalf of the Department of Finance ("DOF").

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

The Commission adopted the staff analysis at the hearing by a vote of 4-0.

BACKGROUND

A 1997 report published in the New England Journal of Medicine indicated that the use of cellular phones in motor vehicles posed a significant danger to the public, on par with the danger of driving while intoxicated.[199] This and other reports on the potential dangers of using a cellular phone while driving demonstrated the need for additional research to determine if and how new legislation should address this growing concern.

To this end, the test claim legislation was enacted to require that "[a]ny traffic collision report prepared by a member of the [CHP] or any other peace officer shall include information as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision."[200] The statute requires that the information

[199] Assembly Floor, Analysis of Assembly Bill No. 770 (2001-2002 Reg. Sess.) as amended September 7, 2001, page 3.

[200] Vehicle Code section 2407.5, subdivision (a).

be collected and transmitted to the CHP on or before July 1, 2002.[201] The statute was repealed, effective January 1, 2003.[202]

The purpose of the test claim legislation is data collection to "provide the necessary framework for the state to craft appropriate solutions that will enhance the safety of those persons operating motor vehicles, as well as their passengers and passengers in other vehicles."[203]

The test claim legislation requires that the information collected be transmitted to the CHP no later than July 1, 2002. The CHP is then required to submit a report to the Legislature and the Governor no later than December 31, 2002.

Claimant's Position

Claimant alleges that the test claim legislation requires the following reimbursable state-mandated activities:

- ?? Investigate at the scene of each traffic accident to determine if a qualifying distraction was present at the time of the accident.
- ?? Note on the traffic accident report any qualifying distraction determined to be present once the investigation is complete.
- ?? Review each report to obtain the information required to be reported to the CHP and put that information in the required format for transmission to the CHP.

Claimant argues that without providing traffic information data to the CHP, it cannot tabulate and analyze accident reports as required by Vehicle Code section 2408. Claimant commented on the draft staff analysis as discussed below.

At the hearing, claimant argued that there is an underlying common law constitutional obligation to enforce the law, including the Vehicle Code, which requires filing traffic collision reports. Claimant also stated that the Legislature assumed that law enforcement investigates traffic collisions and files reports or there would not be a requirement to report distraction information to the CHP. Therefore, claimant asserted that the Legislature did not think preparing traffic collision reports was purely voluntary. Claimant stated that the Commission staff cites cases regarding discretionary immunity, but that does not mean that enforcing the law is voluntary. Claimant also stated that accident reports are necessary for the CHP to compile statistical data.

State Agency Positions

DOF, in comments received April 30, 2002, concludes that Vehicle Code section 20008 requires local agencies to prepare reports of traffic collisions that involve an injury or death. Collision reports prepared by local agencies that do not involve an injury or death, however, are done so at the local agency's discretion. Therefore, DOF contends that costs related to these discretionary reports would not be reimbursable.

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[201] Vehicle Code section 2407.5, subdivision (b).

[202] See, Vehicle Code section 2407.5, subdivision (g).

[203] Assembly Floor, Analysis of Assembly Bill No. 770 (2001-2002 Reg. Sess.) as amended September 7, 2001, page 4.

The CHP, in comments received April 24, 2002, agrees with the City of Newport Beach's estimations of time required to collect distraction information at the scene of an accident, but disagrees with the City's interpretation that the test claim legislation requires (1) the information to be reported to the CHP separately from the standard monthly forwarding of vehicle accident reports or (2) additional clerical time is necessary to file the reports. Additionally, the CHP notes that the use of form CHP 555 is not required to document collisions, and that property-damage only reports need not be forwarded to the CHP at all.

At the hearing, Captain Scott Howland, a witness on behalf of the CHP, testified that before the test claim statute was enacted, the field on the form CHP 555 was coded to note cell phone use under "inattention." The witness further stated that In December 2000, the CHP requested agencies use codes rather than a description for consistency in data gathering and data output. So according to the CHP witness, when the test claim statute was enacted, no additional reports or change in reporting was required.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[204] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[205] "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."[206] 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

[204] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[205] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

task.[207] 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.[208]

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.[209] 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.[210] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[211]

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.[212] 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."[213]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The test claim statute, Vehicle Code section 2407.5, subdivision (a), provides:

> Any traffic collision report prepared by a member of the [CHP] or any other peace officer shall include information as to whether a cellular telephone or other

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[207] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id*. at p. 754.)

[208] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[209] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[210] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

[213] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma, supra*, 84 Cal.App.4th at page 1280.

driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision.

Vehicle Code section 2407.5, subdivision (b), requires that the information on whether a cellular telephone or other driver distraction or inattention be collected and transmitted to the CHP on or before July 1, 2002.

The claimant, a city, contends that the test claim statute requires local law enforcement agencies to investigate each traffic accident to determine if a distraction was present, note on the traffic accident report the distraction, and review each report to obtain the information required by the CHP and put that information in a report to transmit to the CHP.

Although the claimant did not specifically allege any reimbursable costs on behalf of counties and school districts, the test claim statute refers generally to "any other peace officer." Peace officers are defined in Penal Code section 830 et seq., to include peace officers employed by cities,[214] counties,[215] and school districts.[216] Thus, the test claim statute is analyzed below for each type of local governmental entity.

The threshold issue is whether the test claim statute mandates an activity on local government. A test claim statute may impose a reimbursable state-mandated program if it orders or commands a local governmental entity to engage in an activity or task.[217] As analyzed below, the Commission finds that the test claim legislation is subject to article XIII B, section 6 only with respect to county coroners, but not with respect to other local peace officers employed by school districts, cities, or counties.

A. Is the test claim statute subject to article XIII B, section 6 with respect to peace officers employed by school districts and community college districts?

The Commission finds that the test claim statute is not subject to article XIII B, section 6 of the California Constitution with respect to school districts because it does not impose a mandate on school districts and community college districts. School districts and community college districts are not required by state law to employ peace officers.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[218] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[219] the Constitution does not require school districts to operate police departments or employ school security officers as part of their essential educational function. Article I, section

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[214] Penal Code section 830.1

[215] *Id*.

[216] Penal Code section 830.32

[217] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 174.

[218] California Constitution, article IX, section 1.

[219] California Constitution, article IX, section 14.

28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools.

However, there is no constitutional requirement to maintain safe schools through school security or a school district police department independent of the public safety services provided by the cities and counties a school district serves.[220] In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision as follows:

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][221]

Thus, at the constitutional level, the Legislature is only permitted to authorize school districts to act in any manner that is not in conflict with the Constitution.

Moreover, the Legislature does not require school districts and community college districts to employ police officers and security officers. Pursuant to Education Code section 38000:[222]

> [t]he governing board of any school district may establish a security department … or a police department …[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department … [and] may employ personnel as necessary to enforce the law on or near the campus. … This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In *Department of Finance v. Commission on State Mandates*, the California Supreme Court found that "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

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[220] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are **safe**, secure and peaceful." (Emphasis added.)

[221] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

[222] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

and agenda requirements related to that program does not constitute a reimbursable state mandate."[223] The court further stated, on page 731 of the decision, that:

> [*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 program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Thus, pursuant to state law, school districts and community college districts remain free to discontinue providing their own police department and employing peace officers. The statutory duties imposed by the test claim legislation that follow from such discretionary activities do not impose a reimbursable state mandate.

Therefore, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution with respect to school districts because it does not impose a mandate on school districts and community college districts.

B. Is the test claim statute subject to article XIII B, section 6 with respect to peace officers employed by cities and counties?

Does the test claim statute impose a state-mandated activity on city and county peace officers?

Unlike school districts, cities and counties are required by the California Constitution to maintain a police force. Article XI, Local Government, provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff, and section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

Thus, local agency peace officers are required by the test claim statute to include information in "any traffic collision report prepared," as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision. The claimant is requesting reimbursement for preparation of a report for the CHP and investigation of the accident.

The Commission finds, however, that state law does not require local agency peace officers (except county coroners, as discussed below) to prepare traffic collision reports.[224] State law only requires local agency peace officers to receive reports from drivers.[225] The requirement to

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[223] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 743.

[224] For purposes of this analysis, "traffic accident report" is the same as "traffic collision report" or merely "report." The terms "accident" and "collision" are synonymous. California Highway Patrol, Collision Investigation Manual, February 2003, p. 2-1.

[225] If the driver of a vehicle involved in an accident resulting in property damage cannot locate the owner of the vehicle or property, Vehicle Code section 20002, subdivision (a)(2), states:

report traffic accidents remains with the driver in almost all circumstances, including accidents resulting in bodily injury and death. Vehicle Code section 20008 requires that a report be made within 24 hours when an accident involving bodily injury or death occurs. [226] However, section 20008 requires that the "driver of a vehicle … make or cause to be made a written report of the accident." It does not require local agency peace officers to do any more than receive the driver's report. Local agency peace officers are required (1) to forward the accident report to the agency that would be responsible for investigating the accident if the agency receiving the report would not be responsible for investigating it[227] and (2) to forward to the CHP before the fifth day of each month all reports received by the local law enforcement agency. [228] The first provision authorizes the agency with jurisdiction to investigate the accident, while the second merely requires local agency peace officers to forward the drivers' reports to the CHP.

In the *Department of Finance* case, the court held that the requirements imposed by a test claim statute are not state-mandated if the claimant's participation in the underlying program is voluntary. [229] In the present case, the decision to prepare a traffic collision report is left to the discretion of the local agency. Any statutory duties imposed by the test claim statute that follow from the discretionary local decision do not impose a reimbursable state mandate. [230]

Thus, with the exception of the county coroner reports described below, the Commission finds that the test claim statute does not impose a state-mandated program on local agency peace officers because they are not mandated by the state to prepare a traffic collision report.

The only state-mandated report required of local agency peace officers for traffic accidents is found in Vehicle Code section 20011, which imposes the following duty on county coroners:

> Every coroner shall on or before the tenth day of each month report in writing to the Department of the California Highway Patrol the death of any person during

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> . . . . The driver . . . shall without unnecessary delay notify the police department of the city wherein the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Vehicle Code section 20004, concerning death by traffic accident, states:

> [T]he driver… shall, without delay, report the accident to the nearest office of the Department of the California Highway Patrol or office of a duly authorized police authority and submit with the report the information required by Section 20003.

[226] Vehicle Code section 20008, subdivision (a) states:

> The driver of a vehicle… involved in any accident resulting in injuries to or death of any person shall within 24 hours after the accident make or cause to be made a written report of the accident to the Department of the California Highway Patrol or, if the accident occurred within a city, to either the Department of the California Highway Patrol or the police department of the city in which the accident occurred.

[227] *Ibid.*

[228] *Ibid.*

[229] *Department of Finance, supra*, 30 Cal.4th at page 731.

[230] *Ibid.*

> the preceding calendar month as the result of an accident involving a motor vehicle and the circumstances of the accident.

Pursuant to the rules of statutory construction, if the language of a statute is unambiguous, the plain meaning of the language controls, and looking to extrinsic sources to determine the Legislature's intent is unnecessary.[231] Coroners are statutorily defined as peace officers.[232] Thus, the express language of the test claim statute indicates that the coroner report falls within the meaning of "any traffic collision report prepared by …[a] peace officer." The fact that the content of the coroner's report must include the "circumstances of the accident" indicates that it is the type of accident report within the purview of the test claim statute.

Moreover, statutes are not read in isolation, but are interpreted so as to make sense of the entire statutory scheme.[233] Here, section 20011 is under Division 10 of the Vehicle Code, entitled Accidents and Accident Reports, the only division in the Vehicle Code devoted to those topics.[234] Because of this placement in the statutory scheme, it is evident that the Legislature intended for the test claim statute regarding "traffic collision reports" to include the coroner's report. Therefore, based on the plain meaning of section 20011, read in the context of the statutory scheme, the Commission concludes that the coroner peace officer's report required by section 20011 is a "traffic collision report" within the meaning of the test claim statute.

Accordingly, the Commission finds that the test claim statute imposes a state-mandated activity on county coroners by requiring them to include information in the section 20011 report as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision that resulted in death, and to collect and transmit such information to the CHP on or before July 1, 2002.

The Commission further finds that traffic accident investigation, an activity claimed by the City here, is a discretionary activity and is not mandated by the state. In 1976, the Fourth District Court of Appeal decided *Winkelman v. City of Sunnyvale*.[235] *Winkelman* involved a lawsuit brought by a motorist against the city, alleging negligent failure of city police to secure the identity of the opposing driver and to properly investigate the accident. The court held that the city police have no duty to investigate traffic accidents. The court stated the following:

> Appellant contends that respondent breached a duty of care owed to her. First, appellant asserts that respondent owes a duty toward those involved in auto accidents, to properly and carefully investigate such accidents. That argument is unsound. Police officers have the right, but not the duty, to investigate accidents. [Citing *McCarthy v. Frost* (1973) 33 Cal.App.3d 872.][236]

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[231] *Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1261.

[232] Penal Code section 830.35, subdivision (c).

[233] *Bonnell v. Medical Bd. of California, supra,* 31 Cal.4th 1255, 1261.

[234] The test claim statute is in Division 2, Chapter 2 of the Vehicle Code regarding the CHP, under Article 3, entitled Powers and Duties.

[235] *Winkelman v. City of Sunnyvale* (1976) 59 Cal.App,3d 509.

[236] *Id.* at page 511.

In 1983, the California Supreme Court decided *Williams v. State of California*,[237] and relied, in part, on the *Winkelman* case.[238] *Williams* involved an action against the state, alleging that the state highway patrol that arrived on the scene of a traffic accident failed to properly investigate the accident. The court determined that the plaintiff failed to state a cause of action, holding that the state highway patrol has the right, but not the duty to investigate accidents.[239]

Based on these authorities, the Commission finds that local agency peace officers are not mandated by the state to investigate traffic accidents.

Claimant's comments on the draft staff analysis. Claimant disputes the Commission's findings. The claimant raises the following authorities and makes the following arguments regarding the duty of peace officers to investigate accidents and prepare traffic accident reports.

1960 Attorney General's Opinion

First, claimant disputes the Commission's conclusion regarding a peace officer's duty to investigate accidents. Claimant quotes extensively from a 1960 Attorney General's Opinion (36 Ops. Atty. Gen. 198 (1960)) regarding the CHP's duty to administer and enforce provisions of the Vehicle Code relating to accidents. Claimant argues:

> [T]he obligation to investigate vehicular accidents resulting in injury or death is not a voluntary act, but rather is an obligation imposed by virtue of the office created. It is the obligation of police departments and sheriff departments to investigate and arrest those who have committed crimes or public offenses within their respective jurisdictions.

Claimant's discussion of a peace officer's general duty to investigate crime (upon which the Commission makes no finding) is misplaced. Claimant does not cite any state-mandated requirement to prepare accident reports. Moreover, the courts in *Winkelman* and *Williams*, discussed above, have concluded that peace officers have a right but not a duty to investigate traffic accidents.

Opinions of the Attorney General are often persuasive, but courts are not required to agree with them.[240] Thus, the Commission finds that the 1960 Attorney General's Opinion is not controlling here.

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[237] *Williams v. State of California* (1983) 34 Cal. 3d 18.

[238] *Id.* at page 24.

[239] *Ibid.*

[240] *Smith v. Andersen* (1967) 67 Cal.2d 635, 641-642. It is noteworthy that the Attorney General Opinion claimant cites was written by then-Attorney General, Stanley Mosk. Later as a justice, Mosk dissented in the *Williams* opinion regarding the duty of public law enforcement officers. (Mosk concurred with the holding of the case.) Both the *McCarthy v. Frost* (1973) 33 Cal. App. 3d 872, 874, and *Williams* (pp. 28-30) decisions distinguished or disagreed with Mosk's opinion on law enforcement's duties

People v. Kroncke

The claimant also cites a statement in *People v. Kroncke*[241] regarding the duty of the state to determine whether a person involved in an accident engaged in criminal conduct. The claimant argues, based on *Kroncke*, that local law enforcement officers have a duty to investigate and prepare a traffic collision report.

The Commission disagrees with claimant's use of *People v. Kroncke*,[242] which does not allude to any compulsion[243] to prepare a vehicle accident report. The *Kroncke* case holds that a driver's duty, as found in the Vehicle Code, to identify himself or herself as the driver involved in an accident does not violate the driver's right against self-incrimination.[244] *Kroncke* does not address the duty to prepare vehicle accident reports.

Vehicle Code Sections 2407 and 2408

In comments on the draft staff analysis, claimant cites Vehicle Code section 2407, requiring the CHP to,

> [P]repare and on request supply to police departments, coroners, sheriffs, and other suitable agencies or individuals, forms for accident reports required under this code, which reports shall call for sufficiently detailed information to disclose with reference to a traffic accident the cause, conditions then existing, and the persons and vehicles involved.

Claimant also cites Vehicle Code section 2408, requiring the CHP to "tabulate" and authorizing it to "analyze all accident reports and publish annually or at more frequent intervals statistical information based thereon as to the number and location of traffic accidents, as well as other information relating to traffic accident prevention." Claimant states that the CHP cannot fulfill its duty to tabulate and analyze the traffic data unless local peace officers provide the information required by the test claim statute to the CHP.

The Commission disagrees. Vehicle Code section 2407 requires the CHP to produce forms for local use. Neither sections 2407 nor 2408 require local peace officers to prepare accident reports. Local agencies can still comply with sections 2407 and 2408 because the CHP's tabulation duties pertain to the CHP's own reports, in addition to driver reports forwarded by local agencies pursuant to section 20008, those forwarded by coroners pursuant to section 20011, and any reports that local peace officers, in their discretion, choose to prepare and forward.

Thus, the Commission finds that the claimant's reliance on Vehicle Code sections 2407 and 2408 is misplaced.

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[241] *People v. Kroncke* (1999) 70 Cal. App.4th 1535, 1552.

[242] *Ibid.*

[243] "[I]n order for a state mandate to be found, there must be compulsion to expend revenue." *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.

[244] *People v. Kroncke, supra,* 70 Cal. App.4th 1535, 1557.

CHP's *Collision Investigation Manual*

In comments on the draft staff analysis, claimant describes and quotes extensively from the CHP's *Collision Investigation Manual*, the purpose of which is "to establish policy and uniform procedures for documenting motor vehicle collisions within the framework of SWITRS [Statewide Integrated Traffic Records System] and the Vehicle Code (VC)." (p. ii). In short, the goal of the Manual is to ensure uniform reporting to the CHP.

The CHP's *Collision Investigation Manual*, however, recognizes that filing accident reports is not required, as shown by its permissive language, e.g., "[l]ocal agencies ***should*** investigate or report, in accordance with the provisions of this manual, all collisions … within the scope of their responsibility" (p. 1-1, emphasis added); and "[a] collision ***may*** be documented as a report when one or more of the following conditions apply …." (p. 1-6, emphasis added). Therefore, the CHP Manual merely contains guidelines and cannot be construed to contain reporting requirements on local agency peace officers.

Hollman v. Warren

Claimant also argues that the draft staff analysis confuses discretion vested in an employee of the state or local entity that creates immunity under Government Code section 820.2 (tort immunity) with the issue of whether the discretion has to be exercised. Claimant provides definitions of discretion, and contends that the fact that an employee is vested with judgment in how the task is to be performed does not mean that there is discretion in whether or not to perform the task at all. Claimant cites *Hollman v. Warren,*[245] a case concerning the court's power of mandamus. Claimant argues,

> [T]he fact that officers cannot be forced to exercise their discretion regarding the enforcement of the Vehicle Code in a certain manner does not obviate the requirement that such officers enforce the Vehicle Code. Thus, the vesting of discretion in the employees does not mean that the enforcement of the Vehicle Code is voluntary and optional: it just means that the individual officers cannot be compelled to enforce it in a given manner.[246]

The Commission agrees that law enforcement has discretion in the manner of enforcing the Vehicle Code. However, reliance on *Hollman v. Warren* is misplaced because it is limited to the court's power "…to compel the performance of an act which the law specially enjoins …."[247] The law does not compel or enjoin the activity of preparing an accident report. The issue is not whether the local peace officer has power like the court's power to compel the performance of an activity. Rather, the issue is whether local peace officers have a state-imposed requirement to prepare a traffic accident report.

As discussed above, the Commission finds no legal requirement to investigate traffic accidents or prepare accident reports, except for the duty imposed on the county coroner to prepare a report in cases of death. Nor is there a state-imposed penalty imposed on peace officers for not preparing

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[245] *Hollman v. Warren* (1948) 32 Cal. 2d 351, 355.

[246] Claimant's comments on draft staff analysis submitted April 6, 2004, page 10-11.

[247] Code of Civil Procedure, section 1084.5, subdivision (a); *Hollman v. Warren, supra,* 32 Cal.2d 351, 362-363, dissenting opinion of Edmonds, J.

a traffic collision report. Local agencies that choose to discontinue preparing accident reports, by changing their local policy for example, may do so at any time. Thus, except for county coroners, it is within the local agency's discretion whether or not its peace officers prepare an accident report. A requirement that is incidental to a discretionary activity does not constitute a reimbursable state mandate.[248]

Therefore, the Commission finds that, except for county coroners, local agency peace officers are not required to prepare traffic collision reports. Accordingly, the test claim statute imposes a state-mandated activity on county coroners only by requiring them to include information in the section 20011 report as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision that resulted in death, and to collect and transmit such information to the CHP on or before July 1, 2002.

Is the mandate imposed on county coroners by the test claim statute a program within the meaning of article XIII B, section 6 of the California Constitution?

In order for the test claim statute to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[249] Only one of these findings is necessary to trigger article XIII B, section 6.[250]

The test claim statute concerns the governmental function of reporting driver distraction information to the CHP for public safety purposes. Moreover, the test claim statute imposes unique requirements on county coroner peace officers that do not apply generally to all residents or entities in the state. Therefore, the Commission finds the test claim statute constitutes a "program" within the meaning of article XIII B, section 6.

Issue 2: Does the test claim statute impose a new program or higher level of service on county coroners within the meaning of article XIII B, section 6 of the California Constitution?

To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the test claim legislation was enacted.[251]

For a six month period of time, from January 1, 2002, until on or before July 1, 2002, the test claim statute required county coroners to include information in the section 20011 report as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision that resulted in death, and to collect and transmit such information to the CHP.

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[248] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th 727, 743; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

[249] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[250] *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

[251] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

Prior law did not require coroners to include driver distraction information on traffic collision reports, or to collect and transmit such information to the CHP.

Therefore, the Commission finds that the test claim statute constitutes a new program or higher level of service for a county coroner to include on the report required pursuant to Vehicle Code section 20011 information as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of a traffic collision that resulted in death, and to collect and transmit such information to the CHP on or before July 1, 2002.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the activity listed above to impose a reimbursable, state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[252] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

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

Government Code section 17564 requires that all test claims and reimbursement claims submitted exceed $1,000 in increased costs mandated by the state. Claimant, a city, stated in the test claim that the test claim legislation results in increased costs for local law enforcement in excess of $1,000.[253] However, there is no evidence in the record to show that county coroners have incurred increased costs mandated by the state of $1,000 as a result of the test claim statute.

Thus, without evidence in the record (which may include either a declaration or sworn testimony) that county coroners have incurred increased costs as a result of the test claim statute, the Commission finds that the record does not support a finding of costs mandated by the state.[254]

CONCLUSION

The Commission concludes that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. In particular, the Commission finds the following:

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

[253] Page 4 of the test claim states that it will cost claimant approximately $4,116 "to discharge the mandate."

[254] Orange County, which includes Newport Beach, had 186 traffic fatalities in 2001, the most recent year on CHP's website. (See Exhibit G, 2001 Annual Report of Fatal and Injury Motor Vehicle Traffic Collisions. <http://www.chp.ca.gov/html/switrs2001.html> as of May 5, 2002.)

?? The test claim statute is not subject to article XIII B, section 6 of the California Constitution with respect to school districts because it does not impose a state-mandated program on school districts and community college districts.

?? The test claim statute is not subject to article XIII B, section 6 of the California Constitution with respect to local agency peace officers that are not county coroners. Because state law does not require local agency peace officers (except county coroners) to prepare traffic collision reports, local agency peace officers (except coroners) are not mandated by the state to include in any traffic collision report sent to the CHP information about the use of a cellular telephone or other distraction.

?? The test claim statute is subject to article XIII B, section 6 of the California Constitution with respect to county coroners. The test claim statute imposes a state-mandated activity on county coroners by requiring them to include in the report required by Vehicle Code section 20011 information as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of the traffic collision that resulted in death, and to collect and transmit such information to the CHP on or before July 1, 2002. In addition, the test claim statute constitutes a program within the meaning of article XIII B, section 6.

?? The test claim statute constitutes a new program or higher level of service for a county coroner to include on the report required pursuant to Vehicle Code section 20011 information as to whether a cellular telephone or other driver distraction or inattention is a known or suspected associated factor to the cause of a traffic collision that resulted in death, and to collect and transmit such information to the CHP on or before July 1, 2002.

?? Without evidence in the record (which may include either a declaration or sworn testimony) that county coroners have incurred increased costs as a result of the test claim statute, the record does not support a finding of costs mandated by the state.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 51224.5 Statutes 2000, Chapter 1024; Filed on May 25, 2001; By Sweetwater Union High School District, Claimant.	No. 00-TC-14 *Algebra Instruction* 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 29, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 29, 2004. Lawrence Hendee and Ruth Ann Duncan appeared on behalf of the claimant, Sweetwater Union High School District. Michael Wilkening appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis to deny this test claim by a vote of 5-0.

BACKGROUND

Test claim statute: In 2000, the Legislature enacted Education Code section 51224.5[255] to include algebra as part of mathematics study for grades 7 through 12, as follows:

> (a) The adopted course of study for grades 7 to 12, inclusive, shall include algebra as part of the mathematics area of study pursuant to subdivision (f) of Section 51220.[256]
>
> (b) Commencing with the 2003-04 school year and each year thereafter, at least one course, or a combination of the two courses in mathematics required to be completed pursuant to subparagraph (B) of paragraph (1) of subdivision (a) of Section 51225.3[257] by pupils while in grades 9 to 12, inclusive, prior to receiving a diploma of graduation from

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

[256] Section 51220, subdivision (f), requires the course of study for grades 7 to 12 inclusive to include, "Mathematics, including instruction designed to develop mathematical understandings, operational skills, and insight into problem-solving procedures."

[257] Section 51225.3 requires a pupil, to receive a high school diploma, to complete specified coursework, including two year-long courses in mathematics.

high school, shall meet or exceed the rigor of the content standards for Algebra I, as adopted by the State Board of Education pursuant to Section 60605.

(c) If at any time, in any of grades 7 to 12, inclusive, or in any combination of those grades, a pupil completes coursework that meets or exceeds the academic content standards for Algebra I pursuant to subdivision (b) in less than two courses, subparagraph (B) of paragraph (1) of subdivision (a) of Section 51225.3 shall be deemed to have been satisfied and the pupil shall not be required to take additional coursework in mathematics.[258]

SEC. 3. It is the intent of the Legislature that any modification to coursework required by this act shall result in neither additional classes nor in additional costs, but that any modification to coursework shall be incorporated into the requirements of paragraph (2) of subdivision (a) of Section 51225.3 of the Education Code.[259]

Claimant also pled section 51225.3, but did not plead a statute or chapter number. Section 51225.3 has been amended several times since its enactment. Since the Commission cannot determine which version of section 51225.3 the claimant pled, the Commission makes no finding on section 51225.3.

Math standards: In 1997, the State Board of Education (SBE) adopted standards for mathematics in California schools that call for algebra instruction beginning in grade 7 and continuing with Algebra I, Algebra II and Linear Algebra in grades 8 through 12. The standards were not mandatory, and many districts did not adjust course offerings to meet the recommended standards. The legislative history of the test claim statute also reveals an estimate that 30-40 percent of pupils did not take algebra.[260]

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[258] Subdivision (c) was amended by Statutes 2000, chapter 734 (§ 32) as follows:

If at any time, in any of grades 7 to 12, inclusive, or in any combination of those grades, a pupil completes coursework that meets or exceeds the academic content standards for Algebra. ~~I pursuant to subdivision (b) in less than two~~ *Those* courses *shall apply towards satisfying the requirements of* subparagraph (B) of paragraph (1) of subdivision (a) of Section 51225.3 ~~shall be deemed to have been satisfied and the pupil shall not be required to take additional coursework in mathematics.~~

Subdivision (c) was amended again by Statutes 2003, chapter 552 (§ 25) as follows:

A pupil ***who*** completes coursework * * * *in grade 7 or 8 for algebra is not exempt from the mathematics requirements for grades 9 to 12, inclusive, as specified in subdivision (b) of this section or in* subparagraph (B) of paragraph (1) of subdivision (a) of Section 51225.3.

These amendments are not before the Commission, which makes no finding on them.

[259] Section 51223, subdivision (a)(2) requires a pupil, to receive a high school diploma, to complete, "Other coursework as the governing board of the district may by rule specify."

[260] Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Senate Bill No. 1354 (1999-2000 Reg. Sess.) as amended April 26, 2000, page 3.

Related claims: The high school exit examination[261] (Stats. 1999x, ch. 1, Ed. Code, §§ 60850-60856) requires knowledge of first-year algebra content as defined by standards adopted by the SBE. The test claim statute was enacted, in part, to protect the high school exit exam from court challenges because pupils must have the opportunity to learn the subject matter tested.[262]

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant requests reimbursement for the following:

(1) developing, revising and modifying board policy and regulations regarding the implementation of activities designed to ensure that prior to graduation from high school, each student has completed at least one math course in algebra, or that the combination of the two required mathematics courses meet or exceed the rigor of content standards for Algebra I adopted by the State Board of Education;

(2) reviewing each graduating student's records to ensure that the new algebra requirement has been accomplished;

(3) assessing every student's math skill level to determine each student's ability to enter and complete an algebra course;

(4) developing remedial mathematics courses designed to bring identified students to a skill level that allows them to enter and complete an algebra course;

(5) providing remedial mathematics courses designed to bring identified students to a skill level that allows them to enter and complete an algebra course;

(6) providing remedial mathematics course tutoring programs after school, and/or during summer school and intercessions for students demonstrating difficulty in algebra;

(7) training staff members on the elements of the law and methods to implement the activities required by the law;

(8) providing algebra readiness courses during summer school and/or intercessions;

(9) acquisition of or development of mathematical instructional materials designed to bring identified students to a skill level that allows them to enter and complete an algebra course

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[261] The Commission found that the High School Exit Examination test claim, 00-TC-06, is a reimbursable state mandated program during the March 25, 2004 Commission hearing.

[262] Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Senate Bill No. 1354 (1999-2000 Reg. Sess.) as amended April 26, 2000, page 2. One of the legislative findings in the test claim statute (Stats. 2000, ch. 1024, § 1, subd. (d)) states:

> If pupils are expected to be successful on the high school exit examination, they must be given a reasonable opportunity to learn the subjects upon which they will be tested, especially because a pupil's graduation from high school is contingent upon passing the examination. This standard has been affirmed in federal case law as a threshold requirement for a high stakes examination like the high school exit examination.

(10) negotiation of cost for the purchase of materials required to implement the activities required by law.

Claimant disagreed with the draft staff analysis, claiming staff "ignored claimant's position that the claim is centered on the requirement that ALL students are the object of the Algebra graduation requirement." According to claimant, the 2000 Education Code allowed students to decide whether or not they wanted to take algebra, but the test claim statute removed that element of student choice by requiring algebra. Claimant points out that the prior standard was "two courses in mathematics" and argues that the test claim legislation redefined this standard by establishing algebra as the measurement for completing a mathematics course, thereby imposing a higher level of service.

Claimant emphasizes that the 1997 SBE mathematics standards were not mandatory, and suggests that this is because all students do not possess the same mathematical skills, desires, or goals – the same reasons that 30-40 percent of students did not take algebra before the test claim statute was enacted.

Claimant argues that staff's conclusion that the test claim legislation does not require remedial instruction is contradicted by the Senate Rules Committee analysis of Sen. Bill No. 1354 that the test claim legislation "was enacted, in part, to protect the High School Exit Exam from court challenges because pupils must have the opportunity to learn the subject matter tested." Claimant states this finding recognizes that all students have not learned the subject matter, but ignores the fact that all students do not possess the same mathematical skills, desires, and/or goals. Claimant also contends that the test claim statute imposes a higher level of service for remediation in order to determine students' mathematical needs, to raise skill levels, and to allow all students to enter and have the opportunity to complete an algebra-level course.

Claimant's other comments are in the analysis below.

State Agency's Position

In its comments on the test claim, DOF states that the test claim statute should not result in greater costs for school districts, as follows:

> [The test claim statute] expresses legislative priority in the type of mathematics courses offered, but does not require school districts to provide more mathematics courses than they currently offer. There is nothing that would prevent school districts from offering mandated Algebra-level coursework in lieu of non-mandated mathematics courses, thereby avoiding additional costs by redirecting the savings that result from terminating a non-mandated class. It is our position that it is appropriate for the Legislature to specify that expenditures being incurred by a school district on an optional program be redirected to one which the Legislature deems to be of higher priority without incurring an obligation under Section 6 of Article XIII B of the California Constitution.

DOF calls the test claim statute "a means for the Legislature to express its priorities and, in this case, the Legislature has deemed Algebra, or Algebra-level courses, to be of higher priority than other mathematics courses that are not specifically mandated." DOF argues that the test claim statute does not require districts to offer new mathematics courses beyond existing ones. Thus, to the extent that a district "continues to offer classes that are not mandated, that district would voluntarily assume costs associated with offering the new classes and those activities would not be reimbursable.

No other state agencies commented on the test claim.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[263] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[264] "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."[265] 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.[266] 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.[267]

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.[268] To determine if the program is new or imposes a higher level of service, the test claim legislation must be

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[263] Article XIII B, section 6 provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[264] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[266] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that

> [A]ctivities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.

The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id*. at p. 754.)

[267] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

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

compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[269] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[270]

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.[271] 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."[272]

This test claim presents the following issues:

- ?? Is section 51224.5 subject to article XIII B, section 6 of the California Constitution?
- ?? Does section 51224.5 impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6?

Issue 1: Is section 51224.5 subject to article XIII B, section 6 of the California Constitution?

A. Does section 51224.5 require an activity?

In order to be subject to article XIII B, section 6 of the California Constitution, the test claim legislation must require school districts to perform an activity.[273]

Remedial instruction: The test claim statute does not mandate or mention remedial instruction.

Claimant pled the activities of developing remedial math courses to bring identified pupils to a skill level for completion of algebra, and providing remedial math course tutoring programs after school, and/or during summer school and intercessions for students demonstrating difficulty in algebra. Claimant argues that all students do not possess equal mathematics skills, and in order to raise those skills, a higher level of service must be provided.

DOF did not comment on remedial instruction. Rather, DOF argued that claimant could substitute algebra for other non-mandated mathematics courses.

The Commission finds that the test claim statute does not mandate remedial instruction, so this activity is not subject to article XIII B, section 6. Remedial instruction is not mentioned in or required by the test claim statute. If the Legislature had intended that activity to be part of the algebra instruction program, that intent would be stated in either the test claim statute or

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[269] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

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

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

[272] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th at page 1280.

[273] *Long Beach Unified School Dist. v. State of California, supra,* 225 Cal.App.3d 155, 174.

legislative history.[274] In this test claim statute, however, the Legislature states the opposite intent: "modification to coursework …shall result in neither additional classes nor in additional costs, but that any modification to coursework shall be incorporated into the requirements of paragraph (2) of subdivision (a) of Section 51225.3 of the Education Code."[275]

As the California Supreme Court recently stated:

> … activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.[276]

This test claim legislation does not require remedial instruction, nor is there a threat of penalty for not providing it. Rather, remedial instruction would be undertaken at the option or discretion of the school district.

In commenting on the draft staff analysis, claimant calls this position regarding threat of penalty a "cop-out" and comments as follows.

> Further, it is a signal that (1) legislatively enacted laws are not enforceable unless they have a penalty clause, and/or (2) the legislature is merely a high level advisory group. … However, the greatest penalty of all, is the suffering child who, because they did not possess the same mathematical skills, desires and /or goals as other children, did not get his or her graduation certificate.

The Commission disagrees. Regarding enforceability, the "threat of penalty" analysis is the court's method of determining whether activities are truly discretionary. The Supreme Court used this analysis in the *Department of Finance* case cited above. As to the role of the Legislature, it is that body that determines whether an activity is mandatory or discretionary. And regarding pupils' ability to graduate, graduation prerequisites are determined by the Legislature. 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."[277]

Therefore, the Commission finds that the test claim statute does not mandate remedial instruction, and therefore it is not subject to article XIII B, section 6.

Other activities: Claimant pled other activities, namely, developing or revising board policy and regulations, reviewing each graduating student's records, assessing student's math skill level, training staff members on the law and methods to implement it, acquiring math instruction

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[274] There is a reference to remedial instruction, for example, in Education Code section 37252.2, subdivisions (e) and (f), which the Commission found to be reimbursable in the parameters and guidelines for test claim 98-TC-19, *Pupil Promotion and Retention.*

[275] Statutes 2000, chapter 1024, section 3.

[276] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal.4th at page 742.

[277] *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 1817; *County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th at page 1280.

materials to bring students to a skill level to complete algebra, and negotiation of cost for the purchase of materials required to implement the activities.

These activities are not mentioned in the test claim statute. The test claim statute does not require them, nor is there any threat of penalty for not providing them.

Thus, for the same reasons discussed under remedial instruction above, the Commission finds that the test claim statute does not mandate these other activities, and therefore they are not subject to article XIII B, section 6.

The remainder of this analysis addresses the test claim statute's algebra instruction requirement within the existing framework of two mathematics courses to graduate from high school.[278]

B. Does section 51224.5 qualify as a program under article XIII B, section 6?

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[279] Only one of these findings is necessary to trigger article XIII B, section 6.[280]

The test claim statute concerns mathematics instruction, a subset of education. "Public education is a peculiarly governmental function" administered by school districts as part of their mission to educate pupils.[281] Moreover, the test claim legislation imposes unique requirements on school districts that do not apply generally to all residents and entities of the state. Therefore, the Commission finds the test claim statute constitutes a "program" within the meaning of article XIII B, section 6.

Issue 2: Does section 51224.5 impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution?

To determine if the "program" is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[282]

Algebra instruction (Ed. Code, § 51224.5): Section 51224.5 states that "the adopted course of study for grades 7 to 12 inclusive, shall include algebra as part of the mathematics area of study" pursuant to Education Code section 51220, subdivision (f), which requires mathematics instruction.

Subdivision (b) of the test claim statute states that, starting with the 2003-04 school year,

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[278] Education Code section 51225.3, subdivision (a)(1)(B).

[279] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[280] *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

[281] *Long Beach Unified School District v. State of California, supra,* 225 Cal.App.3d 155, 172.

[282] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

> … at least one course, or a combination of the two courses in mathematics required to be completed pursuant to subparagraph (B) of paragraph (1) of subdivision (a) of Section 51225.3 by pupils while in grades 9 to 12, inclusive, prior to receiving a diploma of graduation from high school, shall meet or exceed the rigor of the content standards for Algebra I, as adopted by the State Board of Education.

Subdivision (c) states that pupils in grades 7-12 need not take a second math course if the pupil "completes coursework that meets or exceeds the academic content standards for Algebra I … in less than two courses." (This was amended by Stats. 2001, ch. 734 to indicate that the second course will go toward meeting the two-math course requirement of section 51225.3 (a)(1)(B).)

Preexisting law requires pupils to take mathematics courses as part of the adopted course of study for grades 7-12 (Ed. Code, § 51220, subd.(f)). Preexisting law also specifies course requirements for pupils to receive a high school diploma, including "two courses in mathematics." (Ed. Code, § 51225.3, subd. (a)(1)(B).) Since the 1977 Education Code, preexisting law has required school districts to "prescribe separate courses of study, including … a course of study designed to prepare prospective pupils for admission to state colleges and universities …" (Ed. Code, § 51224) to include algebra.[283]

DOF commented that the test claim statute is merely legislative expression of a priority to offer algebra instruction, which could be substituted for non-mandated math courses.

Claimant did not plead or otherwise discuss the algebra instruction requirement part of the test claim statute. Rather, the claim focuses on remedial instruction, assessment, and administrative tasks.

The Commission finds that algebra instruction is not a new program or higher level of service.

In a prior test claim, *Domestic Violence Training and Incident Reporting* (96-362-01), the Commission determined that requiring law enforcement officers to take a two-hour domestic violence course as part of an existing requirement to receive 24 hours of training every two years did not constitute a reimbursable state-mandated program. The California Court of Appeal upheld the Commission's decision in *County of Los Angeles v. Commission on State Mandates*,[284] in which the court stated:

> [L]ocal law enforcement agencies may choose from a menu of course offerings to fulfill the 24-hour requirement. … Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. … However, … the state has … directed local law enforcement agencies to reallocate their training resources … by mandating the inclusion of domestic violence training. … [T]he state is requiring certain courses to be placed within an already existing framework of training. [This] loss of "flexibility" does not rise to the level of a state mandated reimbursable program

[283] Admission requirements for the University of California and the California State University include three years of mathematics, including algebra and geometry. Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Senate Bill No. 1354 (1999-2000 Reg. Sess.) as amended April 26, 2000, page 2.

[284] *County of Los Angeles v. Commission State Mandates* (2003) 110 Cal. App. 4th 1176, 1194.

> because the loss of flexibility is incidental to the greater goal of providing domestic violence training.[285]

Like the statute at issue in *County of Los Angeles,* this test claim statute places algebra instruction within the existing statutory framework of math instruction. The preexisting requirement for school districts to provide mathematics and for pupils to take two math courses to earn a diploma did not increase or change as a result of the test claim statute. Accordingly, the Commission finds that algebra instruction is not a new program or higher level of service.

The Commission's finding is supported by the legislative intent language in the test claim statute:

> It is the intent of the Legislature that any modification to coursework required by this act shall result in neither additional classes nor in additional costs, but that any modification to coursework shall be incorporated into the requirements of paragraph (2) of subdivision (a) of Section 51225.3 of the Education Code.[286]

This is similar to the legislative intent statement "not to increase annual training costs of local government" in the statute at issue in the *County of Los Angeles* case, which statement the court used to support its position.[287]

CONCLUSION

The Commission finds that Education Code section 51224.5, as added by Statutes 2000, chapter 1024, does not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514. Therefore, the Commission denies the test claim.

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[285] *Ibid.*

[286] Statutes 2000, chapter 1024, section 3. Section 51223, subdivision (a)(2) requires a pupil, to receive a high school diploma, to complete, "Other coursework as the governing board of the district may by rule specify."

[287] *County of Los Angeles v. Commission State Mandates, supra,* 110 Cal. App. 4th 1176, 1194.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE CONSOLIDATED TEST CLAIM ON: Commission on Peace Officer Standards and Training (POST) Bulletin: 98-1; POST Administrative Manual, Procedure D-13; Filed on June 29, 2001; By County of Los Angeles, Claimant; Filed on September 13, 2002; By Santa Monica Community College District, Claimant.	No. 00-TC-19/02-TC-06 *Mandatory On-The-Job Training For Peace Officers Working Alone* 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 29, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 29, 2004. Leonard Kaye appeared on behalf of the County of Los Angeles. Leo Shaw appeared on behalf of the Santa Monica Community College District. Pamela Stone appeared on behalf of the California State Association of Counties. Georgia Johas appeared on behalf of the Department of Finance (DOF). Howell Snow and Bud Lewellen appeared on behalf of the Commission on Peace Officer Standards and Training.

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

The Commission adopted the staff analysis to deny this test claim by a vote of 5-0.

BACKGROUND

This test claim has been filed on documents issued by the Commission on Peace Officer Standards and Training (POST). POST Bulletin 98-1 and the POST Administrative Manual (PAM) procedure D-13, establish field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties. The claimants contend that the POST bulletin and manual constitute an executive order that requires reimbursement pursuant to article XIII B, section 6 of the California Constitution.

The POST bulletin, which was issued on January 9, 1998, states in pertinent part the following:

> Following a public hearing on November 6, 1997, the Commission on Peace Officer Standards and Training (POST) approved amendments to Commission Regulation 1005 and Procedure D-13 relating to establishing a mandatory POST-approved Field Training Program for peace officers assigned to general law

enforcement patrol duties. This Commission action implements one of the objectives in its strategic plan (to increase standards and competencies of officers by integrating a mandatory field training program as part of the basic training requirement). POST's regulations and procedures have incorporated most of the important elements of successful field training programs already in existence in California law enforcement agencies. Significant changes in regulation include:

- ?? All regular officers, appointed after January 1, 1999 and after completing the Regular Basic Course are required to complete a POST-approved Field Training Program (described in PAM section D-13) prior to working alone in general law enforcement patrol assignments. Trainees in a Field Training Program shall be under the direct and immediate supervision (physical presence) of a qualified field training officer.
- ?? The field training program, which shall be delivered over a minimum of 10 weeks, shall be based upon structured learning content as recommended in the *POST Field Training Program Guide* or upon a locally developed field training guide which includes the minimum POST specified topics.
- ?? Officers are exempt from this requirement: 1) while the officer's assignment remains custodial, 2) if the employing agency does not provide general law enforcement patrol services, 3) if the officer is a lateral entry officer possessing a POST Regular Basic Certificate whose previous employment included general law enforcement patrol duties, or 4) if the employing authority has obtained a waiver as provided in PAM section D-13 as described below.
- ?? A waiver provision has been established to accommodate any agency that may be unable to comply with the program's requirements due to either financial hardship or lack of availability of personnel who qualify as field training officers.
- ?? Agencies are encouraged to apply for a POST-Approved Field Training Program prior to January 1, 1999, and as soon as all POST program requirements are in place (e.g., agency policies reviewed for conformance and sufficient numbers of qualified field training officers have been selected and trained) to ensure availability of a POST-approved program for new hires after that date.
- ?? Requirements for the POST Regular Basic Certificate are not affected by the field training requirement.

Only those agencies affected by the new requirements (Police Departments, Sheriff's Departments, School/Campus Police Departments, and selected other agencies in the POST program) will receive additional documents attached to this bulletin as follows:

1. Description of the program approval process

2. Copies of the Commission Regulations which are effective January 1, 1999
3. Copy of the Application for POST-Approved Field Training Program (POST 2-229, Rev 12/97)
4. Copy of the POST Field Training Guide 1997

Effective January 1, 1999, section 1005 of the POST regulations was amended to provide for the field training program.[288] As amended, section 1005, subdivision (a)(2), stated in relevant part that "[e]very regular officer, following completion of the Regular Basic Course and before being assigned to perform general law enforcement patrol duties without direct and immediate supervision, shall complete a POST-approved Field Training Program as set forth in PAM [POST Administrative Manual] section D-13."

On July 1, 2004, further amendments to POST's regulations and administrative manual on the field training program went into effect. According to the regulatory notice issued by POST, section 1005 of the POST regulations was amended to "eliminate possible confusion with other courses in the POST Administrative Manual listed as 'Basic' courses." In addition, some of the required activities for the field training program that were originally listed in Procedure D-13 of the POST Administrative Manual were placed in section 1004 of the POST regulations.[289]

The field training activities provided in the POST Administrative Manual and in POST regulations include the following:

?? Any department that employs peace officers and/or Level I Reserve peace officers shall have a POST-approved field training program. Requests for approval of the program shall be submitted on form 2-229, signed by the department head.

?? The field training program shall be delivered over a minimum of 10 weeks and based upon the structured learning content specified in the POST Administrative Manual section D-13 and the POST Field Training Program Guide.[290]

?? The trainee shall have successfully completed the Regular Basic Course before participating in the field training program.

?? The field training program shall have a training supervisor/administrator/coordinator that has been awarded or is eligible for the award of a POST Supervisory Certificate, and meets specified POST requirements, including completion of a POST-certified Field Training Supervisor/Administrator/Coordinator Course.

?? The field training program shall have field training officers that meet specified POST requirements, including completion of a POST-certified Field Training Officer Course.

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[288] California Code of Regulations, title 11, section 1005.

[289] See exhibit I, Bates pages 481 et seq., Item 5, July 29. 2004 Commission Hearing, for POST's notice of rulemaking. In addition, on July 1, 2004, the field training program content and course curricula was updated to include specific components of leadership, ethics, and community oriented policing.

[290] The POST Field Training Program Guide, Exhibit I, Bates pages 374 et seq., Item 5, July 29, 2004 Commission Hearing.

?? A trainee assigned to general law enforcement patrol duties shall be under the direct and immediate supervision (physical presence) of a qualified field training officer. A trainee assigned to non-peace officer, specialized functions for the purpose of specialized training or orientation (i.e., complaint/dispatcher, records, jail, investigations) is not required to be in the immediate presence of a qualified field training officer.

?? Each trainee shall be evaluated daily with written summaries of performance prepared and reviewed with the trainee by the field training officer. Each trainee's progress shall be monitored by a field training administrator/supervisor by review and signing of daily evaluations and/or completing weekly written summaries of performance that are reviewed by the trainee.

?? Each field training officer shall be evaluated by the trainee and supervisor/administrator at the end of the program.[291]

Claimants' Positions

Both claimants contend that POST Bulletin 98-1 and Administrative Manual Procedure D-13 constitute a reimbursable state-mandated program. The County of Los Angeles is requesting reimbursement for the following activities:

?? One-time cost to design and develop a ten-week on-the-job training program, including course content and evaluation procedures to comply with the subject law.[292]

?? One-time cost to meet and confer with training experts on curriculum development.[293]

?? One-time cost to design training materials including, but not limited to, training videos and audio visual aids.[294]

?? One-time cost to comply with POST application process for POST approval of county field training program.[295]

?? Continuing cost for instructor time to prepare and teach ten-week training classes.[296]

This includes the following instructor and administrator training:

- 40-hour POST field training officer course in accordance with POST procedure, D-13-5;[297]

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[291] Exhibit A (Bates pp. 169-175) and Exhibit I (Bates p. 481), POST Administrative Manual, Procedure D-13, and section 1004 of the POST regulations, effective July 1, 2004. (Item 5, July 29, 2004 Commission Hearing.)

[292] Declaration of Lieutenant Bruce Fogarty, Los Angeles County Sheriff's Department, dated June 21, 2001. Staff notes that the County of Los Angeles' field training program is 28 weeks of training. (See Exhibit A, Bates p. 194, to Item 5, July 29, 2004 Commission Hearing, for the County of Los Angeles Field Training Program Manual.)

[293] *Ibid.*

[294] *Ibid.*

[295] Exhibit A, Bates pages 113-115, to Item 5, July 29, 2004 Commission Hearing.

[296] Declaration of Lt. Bruce Fogarty.

- 24-hour POST field training administrator course, POST procedure D-13-6;[298] and
- 24- hour field training officer's update, POST procedure D-13-7.[299]

?? Continuing cost for trainee time to attend the ten-week training class.[300]

?? Continuing cost to review and evaluate trainees to ensure that each phase is successfully completed.[301]

Santa Monica Community College District requests reimbursement for the following activities:

?? Develop and implement policies and procedures, with periodic updates.

?? Develop and implement tracking procedures to assure that every law enforcement officer employed by the district participates in the field training program.

?? Pay the unreimbursed costs for travel, subsistence, meals, training fees and substitute salaries of field training officers and law enforcement officers attending the training.

?? Plan, develop and implement a field training program and submit an application for approval of the field training program.

?? Apply for a waiver of the field training requirements when unable to comply due to either financial hardship or lack of availability of personnel who qualify as field training officers.[302]

Position of the Department of Finance

The Department of Finance filed comments on both test claims arguing that the test claim should be denied for the following reasons:

?? Local law enforcement agency participation in POST programs is optional. Local entities agree to participate in POST programs and comply with POST regulations by adopting a local ordinance or resolution pursuant to Penal Code sections 13522 and 13510. Therefore, any costs associated with participation in an optional program are not reimbursable state-mandated local costs.

?? Local agency participation in the training is optional because local entities can request a waiver exempting them from the training.[303]

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[297] Exhibit A, Bates pages 116 and 121, to Item 5, July 29, 2004 Commission Hearing.

[298] *Id.* at page 122.

[299] *Ibid.*

[300] Declaration of Lt. Bruce Fogarty.

[301] *Ibid.*

[302] See declaration of Eileen Miller, Chief of Police of the Santa Monica Community College District, and declaration from Greg Bass, Director of Child Welfare and Attendance, Clovis Unified School District (Exhibit B to Item 5, July 29, 2004 Commission Hearing).

[303] Exhibit C to Item 5, July 29, 2004 Commission Hearing.

Position of POST

POST filed comments on the County of Los Angeles test claim as follows:

> The Commission on Peace Officer Standards and Training did enact new regulations, effective January 1, 1999, requiring that certain peace officers complete a minimum ten-week Field Training Program. This new requirement was enacted by the Commission on POST under its authority to set standards for employment and training of peace officers employed by participating agencies. There was no statutory enactment by the Legislature compelling adoption of Field Training program regulations.
>
> Local entities, such as the County of Los Angeles, participate in the POST program on a voluntary basis. The County has passed an ordinance under the terms of which it agrees to abide by current and future employment and training standards enacted by the POST Commission.
>
> The Commission's regulations include a waiver provision for participating agencies unable to comply due to significant financial constraints.[304]

POST also filed comments on the Santa Monica Community College test claim, which further alleges that agencies choosing to participate in the POST program should budget annually for anticipated costs. POST also states that participants in the POST program are reimbursed for travel, per diem, and tuition associated with attendance at field training officer courses.[305]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[306] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[307] "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."[308] 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

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[304] Exhibit D to Item 5, July 29, 2004 Commission Hearing.

[305] *Ibid.*

[306] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[307] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

task.[309] 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.[310]

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.[311] 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.[312] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[313]

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.[314] 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."[315]

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[309] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[310] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[311] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[312] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

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

Issue I: Are the documents issued by POST, Bulletin 98-1 and POST Administrative Manual Procedure D-13, subject to article XIII B, section 6 of the California Constitution?

A. State law does not require school districts and community college districts to employ peace officers and, thus, the field training requirements do not impose a state mandate on school districts and community college districts.

Santa Monica Community College District contends that the documents issued by POST constitute executive orders that impose a mandate on school districts and community college districts to provide the required field training to their officers. The Commission disagrees. For the reasons described below, the Commission finds that the documents issued by POST are not subject to article XIII B, section 6 of the California Constitution because they do not impose a mandate on school districts and community college districts. School districts and community college districts are not required by state law to employ peace officers.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[316] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[317] the Constitution does not require school districts to operate police departments or employ school security officers as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools. However, there is no constitutional requirement to maintain safe schools through school security or a school district police department independent of the public safety services provided by the cities and counties a school district serves. [318]

In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision of the California Constitution as declaring only a general right *without* specifying any rules for its enforcement.[319] The claimant argues that the Commission should ignore the portion of the court's ruling that the safe schools provision does not specify any rules because the *Leger* case is a tort case where the plaintiff was seeking monetary damages for the alleged negligent actions of the school district. The claimant further argues that the Commission should follow the *Leger* court's statements that "all branches of government are required to comply with constitutional directives," such as providing a safe school through police services.[320]

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[316] California Constitution, article IX, section 1.

[317] California Constitution, article IX, section 14.

[318] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are *safe*, secure and peaceful." (Emphasis added.)

[319] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

[320] Exhibit K, Bates pages 598-601, to Item 5, July 29, 2004 Commission Hearing.

But, the claimant is mischaracterizing the court's holding. When interpreting the safe schools provision of the Constitution, the court was applying rules of constitutional interpretation. The court stated the following:

> The following rule has been consistently applied in California to determine whether a constitutional provision is self-executing in the sense of providing a specific method for its enforcement: " 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and *it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law*.'" [Citations omitted.] (Emphasis added.)[321]

The court further held that the safe schools provision of the Constitution is not self-executing because it does not lay down rules that are given the force of law.

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][322]

Furthermore, the court reviewed the ballot materials for the safe schools provision and found that the provision was intended to be implemented through reforms in criminal laws.[323] For example, the court noted in footnote 3 of the decision that the Legislature implemented the safe schools provision by establishing procedures in the Penal Code by which non-students can gain access to school grounds and providing punishments for violations. The Legislature also enacted the "Interagency School Safety Demonstration Act of 1985" to encourage school districts, county offices of education, and law enforcement to develop and implement interagency strategies, programs, and activities to improve school attendance and reduce the rates of school crime and vandalism.[324] But, as shown below, the Legislature has not implemented the safe schools provision by requiring school districts to employ peace officers.

Accordingly, the California Constitution does not require or mandate school districts, through the safe schools provision, to employ peace officers.

Finally, although the Legislature authorizes school districts and community college districts to employ peace officers, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[325]

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[321] *Leger v. Stockton Unified School District, supra*, 202 Cal.App.3d at page 1455.

[322] *Ibid.*

[323] *Id.* at page 1456.

[324] *Id.* at page 1456, footnote 3.

[325] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

> [t]he governing board of any school district may establish a security department … or a police department …[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department … [and] may employ personnel as necessary to enforce the law on or near the campus. … This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In 2003, the California Supreme Court decided *Department of Finance v. Commission on State Mandates* and found that "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."[326] The court further stated, on page 731 of the decision, that:

> [*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 program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Pursuant to state law, school districts and community college districts are not required by the state to have a police department and employ peace officers. That decision is a local decision.[327] Thus, the field training duties imposed by the POST documents that follow from the discretionary decision to employ peace officers do not impose a reimbursable state mandate.

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[326] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 743. (Emphasis added.)

[327] Santa Monica Community College District admits that the decision to have a police department and employ peace officers is a local decision. On page 25 of its comments to the draft staff analysis (Exhibit K, Bates p. 621, to Item 5, July 29, 2004 Commission Hearing), the claimant states the following:

> The people and the legislature has [sic] not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this decision to local agencies who [sic] have first hand knowledge of what is necessary for their respective communities. It is a local decision.

In response to the draft staff analysis, Santa Monica Community College District contends that staff has misconstrued the *Department of Finance* case. The claimant alleges that the controlling authority on the subject of legal compulsion of a state statute is *City of Sacramento v. State of California*.[328, 329] The claimant, however, is mischaracterizing the Supreme Court's holding in *Department of Finance*.

In *Department of Finance*, the school districts argued that the definition of a state mandate should not be limited to circumstances of strict legal compulsion, but, instead, should be controlled by the court's broader definition of a federal mandate in the *City of Sacramento* case.[330] In *City of Sacramento*, the court analyzed the definition of a federal mandate and determined that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan, even the federal legislation did not legally compel the participation.[331]

The Supreme Court in *Department of Finance*, however, found it "unnecessary to resolve whether [its] reasoning in *City of Sacramento* [citation omitted] applies with regard to the proper interpretation of the term 'state mandate' in section 6 of article XIII B."[332] Although the school districts argued that they had no true choice but to participate in the school site council programs, the court stated that, assuming for purposes of analysis only, the *City of Sacramento* case applies to the definition of a state mandate, the school districts did not face "certain and severe penalties" such as "double taxation" and other "draconian" consequences."[333]

Here, even assuming that the *City of Sacramento* case applies, there is no evidence in the law or in the record that school districts would face "certain and severe" penalties" such as "double taxation" or other "draconian" consequences if they don't employ peace officers.

Finally, the claimant argues that the staff analysis is arbitrary and unreasonable since it is not consistent with the Commission's prior decisions approving school district peace officer cases, such as the *Peace Officer Procedural Bill of Rights* (CSM 4499).[334] The claimant acknowledges the California Supreme Court's decision in *Weiss v. State Board of Education*, which held that the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process as long as the action is not arbitrary or unreasonable.[335] But, the claimant states that "staff has offered no compelling reason … why mandated activities of district peace officers were

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

[329] Exhibit K, Bates pages 626-630, to Item 5, July 29, 2004 Commission Hearing.

[330] *Department of Finance, supra*, 30 Cal.4th at pp. 749-751.

[331] *City of Sacramento, supra*, 50 Cal.3d at pages 73-76.

[332] *Id*. at page 751.

[333] *Id*. at pages 751-752.

[334] Exhibit K, Bates pages 623-626, to Item 5, July 29, 2004 Commission Hearing.

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

reimbursable in previous rulings and now activities of district peace officers are not reimbursable, other than what appears to be a whim or current fancy."[336]

As explained above, the compelling reason is the California Supreme Court's decision in *Department of Finance*, which affirmed the 1984 decision of *City of Merced*, and requires the Commission to determine whether the claimant's participation in the underlying program is voluntary or compelled. All of the previous Commission decisions cited by the claimant were decided before the Supreme Court issued the *Department of Finance* decision.[337]

Therefore, the POST documents are not subject to article XIII B, section 6 of the California Constitution with respect to school districts because they do not impose a mandate on school districts and community college districts.

B. State law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

Assuming for the sake of argument only that school districts are required to employ peace officers, the Commission finds that POST Bulletin 98-1 and the POST Administrative Manual Procedure D-13 do not impose a state-mandated program on either school districts or local agencies. Thus, the POST documents are not subject to article XIII B, section 6 of the California Constitution. As more fully described below, participation in POST and compliance with POST's field training program are voluntary, and not mandated by the state. Furthermore, POST's field training program is *not* part of the basic training requirement imposed by the state on all officers to obtain peace officer status, as suggested by the claimants.

Participation in POST is voluntary

As described by POST in their comments to the test claims, the ten-week field training program was enacted by POST under their authority to set standards for employment and training of peace officers employed by agencies that participate in the POST program.

POST was created in 1959 "[f]or the purpose of raising the level of competence of local law enforcement officers …" (Pen. Code, § 13510.) To accomplish this purpose, POST has the authority, pursuant to Penal Code section 13510, to adopt rules establishing minimum standards relating to the physical, mental, and moral fitness of peace officers, and to the training of peace officers. But, these rules apply only to those cities, counties, and school districts that participate in the POST program and receive state aid. Penal Code section 13510, subdivision (a), expressly states that "[t]hese rules shall apply to those cities, counties, cities and counties, and districts receiving state aid pursuant to this chapter …"[338]

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[336] Exhibit K, Bates page 626, to Item 5, July 29, 2004 Commission Hearing.

[337] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 was a case brought by the city seeking reimbursement for eminent domain statutes under the former Senate Bill 90, Revenue and Taxation Code, provisions. The claim was not brought pursuant to article XIII B, section 6 of the California Constitution.

[338] Penal Code section 13507, subdivision (e) and (f), defines "district" to include school districts and community college districts.

The state aid is provided in Penal Code section 13520, which states the following: "There is hereby created in the State Treasury a Peace Officers' Training Fund, which is hereby appropriated, without regard to fiscal years, exclusively for costs of administration and for grants to local governments and districts pursuant to this chapter."

Penal Code section 13522 further provides that any local agency or school district may apply for the state aid by filing an application with POST, accompanied by an ordinance or resolution from the governing body stating that the agency will adhere to the standards for recruitment and training established by POST. Penal Code section 13522 states the following:

> Any city, city and county, or district which desires to receive state aid pursuant to this chapter shall make application to the commission for the aid. The initial application shall be accompanied by a certified copy of an ordinance, or … a resolution, adopted by its governing body providing that while receiving any state aid pursuant to this chapter, the city, county, city and county, or district will adhere to the standards for recruitment and training established by the commission. The application shall contain any information the commission may request.

Penal Code section 13523 provides that "[i]n no event shall any allocation be made to any city, county, or district which is not adhering to the standards established by the commission as applicable to such city, county, or district."

In the *Department of Finance* case, the California Supreme Court held that the requirements imposed by a test claim statute are not state-mandated if the claimant's participation in the underlying program is voluntary.[339] As the court stated,

> [T]he core point … is that activities undertaken at the option or discretion of a local governmental entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds – even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice. [Citing *City of Merced v. State of California* (1984) 153 Cal.app.3d 777, 783.][340]

Here, participation in the underlying POST program is voluntary. The plain language of Penal Code section 13522 authorizes the governing body of local agencies and school districts to decide whether to apply for state aid through POST. If the local entity decides to file an application, the entity must adopt an ordinance or regulation agreeing to abide by POST rules and regulations as a condition of applying for state aid. Not all local agencies and school districts have applied for POST membership.[341]

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[339] *Department of Finance, supra*, 30 Cal.4th at page 731.

[340] *Department of Finance, supra*, 30 Cal.4th at page 742.

[341] See Exhibit I, Bates pages 469-480, to Item 5, July 29, 2004 Commission Hearing, for POST's list of law enforcement agencies, with several agencies, as of March 11, 2004, noted as not a POST participating agency.

In response to the draft staff analysis, the County of Los Angeles filed documents from the websites of cities that are listed by POST as non-participating agencies. These documents show that the nonparticipating cities contract their police services with agencies that do participate in the POST program.[342] But, the fact remains that there is no state statute, or other state law, that requires local agencies and school districts to participate in the POST program. The decision to participate is a local decision.

Thus, like the school districts in the *Department of Finance* case, local agencies and school districts here are free to decide whether to 1) continue to participate and receive POST funding, even though they must also incur program-related costs associated with the field training program, or 2) decline to participate in the POST program.[343] Therefore, local agencies and school districts are not mandated by the state to provide field training to their officers.

Finally, the field training program at issue in this case is not like other legislatively-mandated training programs imposed on law enforcement agencies, as asserted by the County of Los Angeles. The County argues that the Commission's analysis of this claim should be the same as its analysis and findings of state-mandated programs in *Sexual Harassment Training in the Law Enforcement Workplace* (CSM 97-TC-07, adopted September 28, 2000) and *Domestic Violence Training* (CSM 96-362-01, adopted February 26, 1998).[344] But, the test claims on the Sexual Harassment and Domestic Violence Training involved Penal Code statutes (Pen. Code, §§ 13519.7 and 13519) that required POST to develop the training courses and required local law enforcement agencies to provide the POST-developed training courses to their officers.[345] Here, the Legislature has not enacted a statute compelling POST to develop a field training course and has not compelled local agencies and school districts to provide a field training program for their officers. Thus, the same rationale does not apply. Instead, local agencies and school districts are not mandated by the state, as described above, to provide field training to their officers.

Accordingly, the Commission finds that participation in POST and compliance with POST's field training program are voluntary, and not mandated by the state.

POST's field training program is *not* part of the basic training requirement imposed by the state on all officers to obtain peace officer status

The claimants allege that the field training program for officers working alone is part of the basic training requirement imposed by the state on all officers to obtain peace officer status. Thus, the claimants argue that field training is not voluntary. The Commission disagrees.

It is true, as argued by the claimants, that officers are required to complete a basic course of training prescribed by POST before they can exercise the powers of a peace officer, and must

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[342] Exhibit J to Item 5, July 29, 2004 Commission Hearing.

[343] *Department of Finance, supra,* 30 Cal.4th at page 753.

[344] Exhibit A, County of Los Angeles test claim, Bates pages 149-151, to Item 5, July 29, 2004 Commission Hearing.

[345] The Commission ultimately denied the test claim on Domestic Violence Training because there was no evidence that the state mandated local agencies to incur increased costs mandated by the state. The Second District Court of Appeal upheld the Commission's decision. (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.)

obtain the basic certificate issued by POST within 18 months of employment in order to continue to exercise the powers of a peace officer.[346] If the officer fails to complete the POST basic training or obtain the basic certificate, the officer may exercise only non-peace officer powers; for example, the officer may not exercise the powers of arrest, serve warrants, or carry a concealed weapon without a permit.[347] The basic training and certificate is mandated by statute, and applies to all officers, whether or not their employers are POST members.[348]

But, based on the plain language of Bulletin 98-1, POST Regulations, the POST Administrative Manual, and the comments filed by POST on these test claims, the field training program is not part of the legislatively-mandated basic training requirement imposed on all officers. Field training is required only if the local agency or school district employer has elected to become a member of POST and, for those officers employed by a POST participating agency, only after the officer has completed the basic training course.

Page two of the POST Bulletin 98:1 expressly states that the "requirements for the POST regular Basic Certificate are *not* affected by the field training requirement." (Emphasis added.) Page two of the bulletin also describes those agencies affected by the new requirements as "Police Departments, Sheriff's Departments, School/Campus Police Departments, and selected other agencies *in the POST program*…" (Emphasis added.) Thus, agencies that decide not to participate in the POST program are not affected by the field training requirement.

In addition, section 1005, subdivision (a)(1), of the POST regulations, as amended in January 1999, provided that "[a]n officer as described in Penal Code section 832.2 (a) [a peace officer, first employed after January 1, 1975, that successfully completes the basic training course prescribed by POST] *is authorized to exercise peace officer powers while engaged in a field training program* …" (Emphasis added.) Section 1005, subdivision (a)(2), further provided that "[e]very regular officer, *following completion of the Regular Basic Course* and before being assigned to perform general law enforcement patrol duties without direct and immediate supervision, shall complete a POST-approved Field Training Program as set forth in PAM section D-13." (Emphasis added.)[349] Thus, unlike the statutory requirement to successfully complete the basic training course before exercising the powers of a peace officer, an officer is not required to complete the field training program before he or she has the powers of a peace officer to make arrests, serve warrants, and carry a concealed weapon. Therefore, the field training program is not part of the basic training program.

Moreover, on July 1, 2004, further amendments to POST's regulations and the POST Administrative Manual on the field training program went into effect. According to the regulatory notice issued by POST, section 1005 of the POST regulations was amended to "eliminate possible confusion with other courses in the POST Administrative Manual listed as 'Basic' courses." The plain language of section 1005, as amended, indicates that the field training program is not part of the basic training program. Section 1005, as amended, provides as follows:

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[346] Penal Code sections 832, 832.3, subdivision (a), and 832.4.

[347] 80 Opinions of the California Attorney General 293, 297 (1997).

[348] 55 Opinions of the California Attorney General 373, 375 (1972).

[349] See also, POST Administrative Manual Procedure D-13-3.

(a) Minimum Entry-Level Training Standards (Required).

(1) Basic Course Requirement: Every peace officer, except Reserve Levels II and III, those peace officers listed in Regulation 1005(a)(3) …, and 1005(a)(4) …, *shall complete the Regular Basic Course before being assigned duties which include the exercise of peace officer powers*. Requirements for the Regular Basic Course are set forth in PAM, section D-1-3.

(A) Field Training Program Requirement: Every peace officer, except Reserve Levels II and III and those officers described in sections (B)1-5(below), *following completion of the Regular Basic Course and before being assigned to perform general law enforcement uniformed patrol duties without direct and immediate supervision*, shall complete a POST-approved Field Training Program as set forth in PAM section D-13. (Emphasis added.)

The statutory authority and reference listed for section 1005 of the POST regulations includes Penal Code section 832 and 832.3, the statutes that require the successful completion of a basic course of training prescribed by POST before a person can exercise the powers of a peace officer. [350]

In addition, the activities required to be performed by POST participating agencies under the field training program that were originally listed in Procedure D-13 of the POST Administrative Manual was placed in section 1004 of the POST regulations on July 1, 2004. The statutory authority and reference for section 1004 of the POST regulations are Penal Code 13503, 13506, 13510, and 13510.5, the statutes that authorize POST to set standards for employment and training of peace officers employed by agencies that participate in POST. [351]

In addition to the plain language of the regulations and the POST Administrative Manual, the comments filed by POST on these test claims indicate that the field training program adopted by POST was meant only for POST participating agencies. POST states that the "new requirement was enacted by the Commission on POST under its authority to set standards for employment and training of peace officers *employed by participating agencies.*"[352] POST's interpretation of their regulations and Administrative Manual, is entitled to great weight and the courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [353, 354]

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[350] See exhibit I to Item 5, July 29, 2004 Commission Hearing, for POST's notice of rulemaking; California Code of Regulations, title 11, sections 1004 and 1005 (eff. 7/1/04).

[351] *Ibid.*

[352] Exhibit D to Item 5, July 29, 2004 Commission Hearing. (Emphasis added).

[353] *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10-11.

[354] In response to the draft staff analysis, Santa Monica Community College District contends that the *Yamaha* case supports the conclusion that POST's interpretation of its own regulations and rules is not entitled to deference by the Commission because POST's interpretation is a quasi-judicial interpretation of a statute. (Exhibit K, Bates pp. 634-635 to Item 5, July 29, 2004

Accordingly, POST's field training program is *not* part of the basic training requirement imposed by the state on all officers to obtain peace officer status, as suggested by the claimants. Rather, the field training program is imposed only on POST participating agencies.

CONCLUSION

The Commission concludes that POST Bulletin 98-1 and the POST Administrative Manual Procedure D-13 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

?? State law does not require school districts and community college districts to employ peace officers and, thus, POST's field training requirements do not impose a state mandate on school districts and community college districts.

?? State law does not require local agencies and school districts to participate in the POST program and, thus, the field training requirements imposed by POST on their members are not mandated by the state.

Commission Hearing.) The Commission disagrees. As indicated in the analysis, the state has *not* enacted a statute compelling POST to develop a field training course. Thus, POST was not exercising a quasi-judicial function to interpret a state statute. Rather, POST's field training course was adopted as a quasi-legislative action and, thus, under *Yamaha,* POST's interpretation of its own regulations and rules is entitled to great weight. (*Yamaha, supra,* 19 Cal.4th at pp. 10-11.)

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.1; Statutes 1982, Chapter 1568; Statutes 1984, Chapter 114; Statutes 1988, Chapter 1038; Statutes 1989, Chapter 1171; Statutes 1999, Chapter 595; Statutes 2000, Chapter 887; Statutes 1999, Chapter 595, Statutes 2000, Chapter 887; Filed on February 27, 2003; By Santa Monica Community College District, Claimant.	No. 02-TC-15 *Cancer Presumption (K-14)* 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 29, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on July 29, 2004. Leo Shaw appeared on behalf of the claimant, Santa Monica Community College District. Thomas Todd appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis to deny this test claim by a vote of 5-0.

BACKGROUND

This case addresses an evidentiary presumption given to certain firefighters and peace officers in workers compensation cases. Normally, before an employer is liable for payment of workers compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is normally on the employee to show proximate cause by a preponderance of the evidence.[355]

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of presumptions.[356] In 1982,

[355] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[356] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

the Legislature enacted Labor Code section 3212.1, which provided a limited presumption, easing the burden of proving industrial causation for specified firefighters that developed cancer during employment. In 1989, certain peace officers were also given the cancer presumption. In these cases, there was a presumption that the cancer arose out of and in the course of employment, and the employer was liable for full hospital, surgical, and medical treatment, disability indemnity, and death benefits, if the firefighter or peace officer could show that:

- He or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director; and that
- The carcinogen is reasonably linked to the disabling cancer.

Labor Code section 3212.1 further provided that the presumption of industrial causation was disputable and could be controverted by the employer by other evidence that the cancer was caused by non-industrial factors.[357]

Following the enactment of Labor Code section 3212.1, the courts struggled with the employee's burden of proving that the carcinogen was reasonably linked to the cancer. In *Zipton v. Workers' Compensation Appeals Board*[358], the survivors of a firefighter, who died at age 39 of metastatic undifferentiated epithelial cancer, were held ineligible for workers compensation benefits because the nature of the diagnosis made it impossible to reasonably link the carcinogens and the cancer. Metastatic cancer is a secondary cancer growth that migrates from the primary site of the disease to another part of the body. The primary site of the disease was unknown.[359] The court stated the following about the reasonable link requirement:

> While the legislative history reveals an intent on the part of the Legislature to ease the burden of proof of industrial causation by removing the barrier of proximate cause, in application a reasonable link requirement is no less than the logical equivalent of proximate cause. Moreover, we discern that the requirement was precipitated by a fear of financial doom [by self-insured state and local agencies], but that this fear may be unfounded.
>
> In summary, it may be that there is no purpose to be served by the reasonable link requirement. If indeed metastatic cancer, primary site unknown, is a common medical diagnosis in cancer cases, and therefore results in a pattern of defeating cancer claims of firefighters and police officers by requiring a burden of proof which is medically impossible to sustain, the Legislature may wish to reexamine the reasonable link requirement.[360]

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[357] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption …, the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

[358] *Zipton, supra,* 218 Cal.App.3d 980.

[359] *Id*. at page 991.

[360] *Id.* at page 990.

In a case after *Zipton*, the First District Court of Appeal noted that Labor Code section 3212.1 does not provide the same level of presumption enumerated in other presumption statutes. Rather, Labor Code section 3212.1 contained a "limited and disputable presumption."[361] The court also disagreed with the interpretation in *Zipton* that the reasonable link standard was the same as the proximate cause standard. The court held the following:

> We hold that more is required under section 3212.1 than the mere coincidence of exposure and cancer. But a showing of proximate cause is not required. Rather, if the evidence supports a reasonable inference that the occupational exposure contributed to the worker's cancer, then a "reasonable link" has been shown, and the disputable presumption of industrial causation may be invoked.[362]

In 1999, the Legislature amended Labor Code section 3212.1 (Stats. 1999, ch. 595) to address the court's criticism of the reasonable link standard in *Zipton*.[363] The test claim statute, as amended in 1999, eliminates the employee's burden of proving that a carcinogen is reasonably linked to the cancer before the presumption that the cancer arose out of and in the course of employment is triggered. Thus, the employee need only show that he or she was exposed, while in the service of the department or unit, to a known carcinogen as defined by the International Agency for Research on Cancer, or as defined by the director, for the presumption of industrial injury to arise.

The employer still has a right to dispute the employee's claim. But, when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer has been shifted to the employer. Labor Code section 3212.1, subdivision (d), as amended in 1999, now states the following:

> The cancer developing or manifesting itself in these cases shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by evidence that the primary site of the cancer has been established and that the carcinogen to which the member has demonstrated exposure is not reasonably linked to the disabling cancer. Unless so controverted, the appeals board is bound to find in accordance with the presumption.

The 1999 test claim statute also specifies that leukemia is included as a type of cancer for which the presumption of industrial injury can apply.

Finally, the 1999 test claim statute retroactively applies the amendments to section 3212.2 to workers compensation claims filed or pending on January 1, 1997. Labor Code section 3212.1, subdivision (e), states that "[t]he amendments to this section enacted during the 1999-2000 Regular Session shall apply to claims for benefits filed or pending on or after January 1, 1997, including, but not limited to, claims for benefits filed on or after that date that have previously been denied, or that are being appealed following denial."

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[361] *Riverview Fire Protection District v. Workers' Compensation Appeals Board* (1994) 23 Cal.App.4th 1120, 1124.

[362] *Id.* at page 1128.

[363] Assembly Floor Analysis on Assembly Bill 539, dated September 8, 1999.

In 2000, the Legislature amended the test claim statute (Stats. 2000, ch. 887) to extend the cancer presumption to peace officers in an arson-investigating unit, as defined in Penal Code section 830.37, subdivisions (a) and (b).

Prior Test Claim Decisions on Labor Code Section 3212.1

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.

On May 27, 2004, the Commission adopted a statement of decision denying a test claim on Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, Statutes 2000, chapter 887 (*Cancer Presumption for Law Enforcement and Firefighters*, CSM 01-TC-19.) The Commission found that the express language of Labor Code section 3212.1 does not impose any state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers compensation claim and prove that the injury is non-industrial remains entirely with the local agency, as it has since Labor Code section 3212.1 was enacted in 1982.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts that school districts and community college districts are eligible to receive reimbursement for the following activities:

- ?? Develop policies and procedures to handle claims by district police officers.
- ?? Pay additional costs of claims caused by the shifting of the burden of proof of the cause of the cancer from the police officer employee to the district.
- ?? Pay additional costs for insurance premiums.
- ?? Training police officer employees to take precautionary measures to prevent cancer on the job.
- ?? Review claims dating back to January 1, 1997, to determine whether the cancer arose out of or in the course of employment.
- ?? Pay previously denied claims dating back to January 1, 1997, for those claims that the district cannot meet the new burden of proof as required by Labor Code section 3212.1.

Position of the Department of Finance

The Department of Finance filed comments on June 10, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[364] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[365] "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."[366] 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.[367] 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.[368]

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.[369] 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

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[364] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[365] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[367] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[368] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836.

[369] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

claim legislation.[370] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[371]

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.[372] 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."[373]

Issue 1: Are school districts and community college districts eligible claimants for this test claim?

For the reasons provided below, the Commission finds that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Labor Code section 3212.1, subdivision (a), lists the employees that are given the cancer presumption. Labor Code section 3212.1, subdivision (a), states the following:

> This section applies to active firefighting members, whether volunteers, partly paid, or fully paid, of all of the following fire departments: (1) a fire department of a city, county, city and county, district, or other public municipal corporation or political subdivision, (2) a fire department of the University of California and the California State University, (3) the Department of Forestry and Fire Protection, and (4) county forestry or firefighting department or unit. This section also applies to peace officers, as defined in Section 830.1, subdivision (a) of Section 830.2, and subdivisions (a) and (b) of Section 830.37, of the Penal Code, who are primarily engaged in active law enforcement activities.

The claimant has not claimed any costs relating to firefighting employees. Declarations from Santa Monica Community College District and Clovis Unified School District, which were filed by the claimant with the test claim, allege costs for district police officers only.[374] In addition, the state has not expressly authorized school districts and community college districts to employ firefighters, and has not mandated that they do so. Thus, there is no evidence in the record that school districts or community college districts employ firefighters that are subject to the test claim statute.

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[370] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

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

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

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

[374] Exhibit A to Item 9, July 29, 2004 Commission Hearing.

Moreover, based on the plain language of Labor Code section 3212.1, the peace officers employed by school districts and community college districts do not receive the rebuttable cancer presumption enjoyed by peace officers employed by state and local agencies. Labor Code section 3212.1, subdivision (a), expressly provides that the cancer presumption applies to the peace officers defined in Penal Code sections 830.1, 830.2, subdivision (a), and 830.37, subdivisions (a) and (b). These code sections provide the definition for peace officers employed by counties, cities, port district police, the district attorney, the Department of Justice, the California Highway Patrol, the University of California, the California State University, the Department of Fish and Game, the Department of Parks and Recreation, and the Department of Forestry and Fire Protection, the Department of Alcoholic Beverage Control, and the Board of Directors of the California Exposition and State Fair.

Peace officers employed by school districts and community college districts are defined in Penal Code section 830.32.[375] The test claim statute does not expressly apply to peace officers defined in Penal Code section 830.32.

In response to the draft staff analysis, the claimant contends that that Penal Code section 830.32 is not relevant to the analysis. The claimant argues that Penal Code section 830.1, subdivision (a), a statute that is expressly listed in the cancer presumption test claim statute, defines a peace officer to include school district police officers since it includes in the definition of a peace officer a "police officer of a *district*, including police officers of the San Diego Unified Port District Harbor Police, authorized by statute to maintain a police department." (Emphasis added.) The claimant further argues that Penal Code section 830.32 simply expands

[375] Penal Code section 830.32 states the following:

> The following persons are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is immediate danger to person or property, or of the escape of the perpetrator of that offense, or pursuant to Section 8597 or 8598 of the Government Code. Those peace officers may carry firearms only if authorized and under terms and conditions specified by their employing agency.
>
> (a) Members of a California Community College police department appointed pursuant to Section 72330 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 72330 of the Education Code.
>
> (b) Persons employed as members of a police department of a school district pursuant to Section 38000 of the Education Code, if the primary duty of the police officer is the enforcement of the law as prescribed in Section 38000 of the Education Code.
>
> (c) Any peace officer employed by a K-12 public school district or California Community College district who has completed training as prescribed by subdivision (f) of Section 832.3 shall be designated a school police officer.

the officer's jurisdiction to make an arrest, with regard to any public offense posing an immediate danger to person or property, to any place in the state.[376]

The claimant is misreading these statutes. The word "district" in Penal Code section 830.1 is not expressly defined. However, based on the rules of statutory construction, Penal Code section 830.1 does not define a peace officer to include school district peace officers, as alleged by the claimant.

Under the rules of statutory construction, the courts are required to construe a statute in light of the entire statutory scheme. When two statutes touch upon a common subject, the two statutes must be harmonized in such a way that no part of either statute becomes surplusage. The courts must presume that the Legislature intended every word, phrase, and provision to have meaning and to perform a useful function.[377]

In the present case, both Penal Code sections 830.1 and 830.32 define *different* classes of peace officers and establish their authority. Penal Code section 830.1 was originally added by the Legislature in 1968. Had the Legislature intended to include school district peace officers in Penal Code section 830.1, then its later enactment of Penal Code section 830.32 in 1989, which specifically defines peace officers to include those officers employed by school districts and community college districts, would be "surplusage."[378] The court must presume that the Legislature intended Penal Code section 830.32 to have some effect, and that the Legislature did not indulge in an idle act.[379]

This interpretation is consistent with a 2003 Attorney General Opinion, which, in part, defined the authority for community college district police officers.[380] The opinion identifies Penal Code section 830.32 as the statute defining community college police officers as "peace officers" under the Penal Code.[381]

Furthermore, to the extent that there is any conflict between Penal Code section 830.1 and 830.32, the rules of statutory construction require that the more specific statute, Penal Code section 830.32, which defines school district police officers as peace officers, govern the more general statute, Penal Code section 830.1, which defines "district" officers as peace officers.[382]

Finally, the absence of Penal Code section 830.32 in the test claim statute is relevant. The test claim legislation was amended in 1989 to provide specified peace officers with a cancer presumption in workers compensation cases. Penal Code section 830.32 was added by the

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[376] Exhibit E to Item 9, July 29, 2004 Commission Hearing.

[377] *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.

[378] See footnote 22, ante.

[379] *Sondino v. Union Commerce Bank* (1977) 71 Cal.App.3d 391, 395.

[380] 86 Ops. Cal. Atty. Gen. 112, 113.

[381] *Ibid.*

[382] *Miller v. Superior Court* (1999) 21 Cal.4th 883, 895, where the Supreme Court held that a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.

Legislature to define school district peace officers to the definition of "peace officers" in 1989. It must be presumed that the Legislature was aware of related laws and intended to maintain a consistent body of statutes.[383] Thus, had the Legislature intended to give school district peace officers the presumption provided by the test claim statute, the Legislature would have specifically listed Penal Code section 830.32 in Labor Code section 3212.1.

Therefore, the Commission finds that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, the test claim statute is still not subject to article XIII B, section 6 because state law does not mandate school districts and community college districts to employ peace officers and firefighters.

The California Constitution, article IX, Education, establishes and permits the formation of school districts, including community college districts, and county boards of education, all for the purpose of encouraging "the promotion of intellectual, scientific, moral and agricultural improvement."[384] Although the Legislature is permitted to authorize school districts "to act in any manner which is not in conflict with the laws and purposes for which school districts are established,"[385] the Constitution does not require school districts to operate fire and police departments as part of their essential educational function. Article I, section 28, subdivision (c), of the California Constitution does require K-12 school districts to maintain safe schools. However, there is no constitutional requirement to maintain safe schools through school district fire and police departments independent of the public safety services provided by the cities and counties a school district serves.[386]

In *Leger v. Stockton Unified School District*, the court interpreted the safe schools provision of the California Constitution as declaring only a general right *without* specifying any rules for its enforcement.[387] The claimant argues that the Commission should ignore the portion of the court's ruling that the safe schools provision does not specify any rules because the *Leger* case is a tort case where the plaintiff was seeking monetary damages for the alleged negligent actions of the school district. The claimant further argues that the Commission should follow the *Leger*

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[383] *Fuentes v. Workers Compensation Appeals Board* (1976) 16 Cal.3d 1, 7.

[384] California Constitution, article IX, section 1.

[385] California Constitution, article IX, section 14.

[386] Article I, section 28, subdivision (c) of the California Constitution provides "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are *safe*, secure and peaceful." (Emphasis added.)

[387] *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455.

court's statements that "all branches of government are required to comply with constitutional directives," such as providing a safe school through police services.[388]

But, the claimant is mischaracterizing the court's holding. When interpreting the safe schools provision of the Constitution, the court was applying rules of constitutional interpretation. The court stated the following:

> The following rule has been consistently applied in California to determine whether a constitutional provision is self-executing in the sense of providing a specific method for its enforcement: " 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and *it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law*.'" [Citations omitted.] (Emphasis added.)[389]

The court further held that the safe schools provision of the Constitution is not self-executing because it does not lay down rules that are given the force of law.

> [H]owever, section 28(c) declares a general right without specifying *any* rules for its enforcement. It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred. Rather, "it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [Citation omitted.][390]

Furthermore, the court reviewed the ballot materials for the safe schools provision and found that the provision was intended to be implemented through reforms in criminal laws.[391] For example, the court noted in footnote 3 of the decision that the Legislature implemented the safe schools provision by establishing procedures in the Penal Code by which non-students can gain access to school grounds and providing punishments for violations. The Legislature also enacted the "Interagency School Safety Demonstration Act of 1985" to encourage school districts, county offices of education, and law enforcement to develop and implement interagency strategies, programs, and activities to improve school attendance and reduce the rates of school crime and vandalism.[392] But, as shown below, the Legislature has not implemented the safe schools provision by requiring school districts to employ peace officers and firefighters.

Accordingly, the California Constitution does not require or mandate school districts, through the safe schools provision, to employ peace officers and firefighters.

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[388] Exhibit E, Bates pages 175-178, to Item 9, July 29, 2004 Commission Hearing.

[389] *Leger, supra,* 202 Cal.App.3d at page 1455

[390] *Ibid.*

[391] *Id.* at page 1456.

[392] *Id.* at page 1456, footnote 3.

Finally, although the Legislature authorizes school districts and community college districts to employ peace officers, the Legislature does not require school districts and community college districts to employ peace officers. Pursuant to Education Code section 38000:[393]

> [t]he governing board of any school district may establish a security department … or a police department …[and] may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. In addition, a school district may assign a school police reserve officer who is deputized pursuant to Section 35021.5 to a schoolsite to supplement the duties of school police personnel pursuant to this section. It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

Education Code section 72330, derived from the same 1959 Education Code section, provides the law for community colleges. "The governing board of a community college district may establish a community college police department … [and] may employ personnel as necessary to enforce the law on or near the campus. … This subdivision shall not be construed to require the employment by a community college district of any additional personnel."

In 2003, the California Supreme Court decided *Department of Finance v. Commission on State Mandates* and found that "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."[394] The court further stated, on page 731 of the decision, that:

> [*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 program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.]

The decision of the California Supreme Court interpreting the state-mandate issue is relevant to this test claim. The Commission is not free to disregard clear statements of the California Supreme Court. Thus, pursuant to state law, school districts and community college districts are not required by the state to employ peace officers and firefighters. That decision is a local decision.[395] Thus, the activity of disputing a worker's compensation claim filed by a firefighter

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[393] Formerly numbered Education Code section 39670; derived from 1959 Education Code section 15831.

[394] *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 743.

[395] The claimant admits that the decision to have a police department and employ peace officers is a local decision. Exhibit E, bates pages 196-197, to Item 9, July 29, 2004, the claimant states the following:

> The people and the legislature has [sic] not directly specified how the constitutional duty to provide safe schools is to be accomplished. They left this

or peace officer employee flows from the discretionary decision to employ such officers and does not impose a reimbursable state mandate.

In response to the draft staff analysis, the claimant contends that staff has misconstrued the *Department of Finance* case. The claimant alleges that the controlling authority on the subject of legal compulsion of a state statute is *City of Sacramento v. State of California*.[396, 397] The claimant, however, is mischaracterizing the Supreme Court's holding *Department of Finance*.

In *Department of Finance*, the school districts argued that the definition of a state mandate should not be limited to circumstances of strict legal compulsion, but, instead, should be controlled by the court's broader definition of a federal mandate in the *City of Sacramento* case.[398] In *City of Sacramento*, the court analyzed the definition of a federal mandate and determined that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan, even the federal legislation did not legally compel the participation.[399]

The Supreme Court in *Department of Finance*, however, found it "unnecessary to resolve whether [its] reasoning in *City of Sacramento* [citation omitted] applies with regard to the proper interpretation of the term 'state mandate' in section 6 of article XIII B."[400] Although the school districts argued that they had no true choice but to participate in the school site council programs, the court state that, assuming for purposes of analysis only, the *City of Sacramento* case applies to the definition of a state mandate, the school districts did not face "certain and severe penalties" such as "double taxation" and other "draconian" consequences."[401]

Here, even assuming that the *City of Sacramento* case applies, there is no evidence in the law or in the record that school districts would face "certain and severe" penalties" such as "double taxation" or other "draconian" consequences if they don't employ peace officers and firefighters.

Finally, the claimant argues that the staff analysis is arbitrary and unreasonably since it is not consistent with the Commission's prior decisions approving school district peace officer cases, such as the *Peace Officer Procedural Bill of Rights* (CSM 4499).[402] The claimant acknowledges the California Supreme Court's decision in *Weiss v. State Board of Education*, which held that the failure of a quasi-judicial agency to consider prior decisions is not a violation of due process

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> decision to local agencies who [sic] have first hand knowledge of what is necessary for their respective communities. It is a local decision.

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

[397] Exhibit E, Bates pages 201-205, to Item 9, July 29, 2004 Commission Hearing.

[398] *Department of Finance, supra*, 30 Cal.4th at pp. 749-751.

[399] *City of Sacramento, supra,* 50 Cal.3d at pages 73-76.

[400] *Id*. at page 751.

[401] *Id*. at pages 751-752.

[402] Exhibit E, Bates pages 199-201, to Item 9, July 29, 2004 Commission Hearing.

as long as the action is not arbitrary or unreasonable.[403] But, claims that "staff has offered no compelling reason … why mandated activities of district peace officers were reimbursable in previous rulings and now activities of district peace officers are not reimbursable, other than what appears to be a whim or current fancy."[404]

As explained above, the compelling reason is the California Supreme Court's decision in *Department of Finance*, which affirmed the 1984 decision of *City of Merced*, and requires the Commission to determine whether the claimant's participation in the underlying program is voluntary or compelled. All of the previous Commission decisions cited by the claimant were decided before the Supreme Court issued the *Department of Finance* decision.[405]

Therefore, the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

CONCLUSION

Based on the foregoing, the Commission concludes that school districts and community college districts are not eligible claimants for this test claim because the test claim statute, Labor Code section 3212.1, does not provide a rebuttable cancer presumption to employees of a school district or community college district.

Assuming for the sake of argument only that Labor Code section 3212.1 applied to peace officers or firefighters employed by school districts and community college districts, the Commission further concludes that Labor Code section 3212.1 is not subject to article XIII B, section 6 of the California Constitution because it does not impose a mandate on school districts and community college districts.

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

[404] Exhibit E, Bates page 201, to Item 9, July 29, 2004 Commission Hearing.

[405] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 was a case brought by the city seeking reimbursement for eminent domain statutes under the former Senate Bill 90, Revenue and Taxation Code, provisions. The claim was not brought pursuant to article XIII B, section 6 of the California Constitution.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 313, 60810, 60811, 60812; Statutes 1997, Chapter 936, Statutes 1999, Chapter 78, Statutes 1999, Chapter 678, Statutes 2000, Chapter 71 Filed on June 13, 2001 By Modesto City School District, Claimant	No. 00-TC-16 *California English Language Development Test* 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 September 30, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 30, 2004. Mike Brown, representing MCS Education Services, appeared on behalf of the claimant, Modesto City School District. Susan Geanacou and Lenin Del Castillo appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

A. Test Claim Legislation

The legislative history of Assembly Bill No. 748 (Stats. 1997, ch. 936) outlined the challenge posed by English-learner pupils as follows:

Approximately 1.3 million students enrolled in California's public K-12 system are English learners (also called "limited-English-proficient," or LEP pupils). This amounts to approximately 20% of the K-12 population. English learners also make up approximately 40% of the population in the first two grades of school. Approximately 78% of English learners statewide speak Spanish as their primary language, and roughly 4% of English learners speak Vietnamese as their primary language.[406]

[406] Assembly Floor analysis, Assembly Bill No. 748 (1997-1998 Reg. Sess.) as amended September 4, 1997, page 3.

The CELDT was instituted for the following reasons:

(1) To identify pupils who are limited English proficient.

(2) To determine the level of English language proficiency of pupils who are limited English proficient.

(3) To assess the progress of limited-English-proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.[407]

Statutes 1997, chapter 936 requires the Superintendent of Public Instruction (SPI) to review existing tests that assess English-language development (of limited English proficient or L.E.P. or English-learner pupils) for specified criteria, and to report to the Legislature with recommendations. If no existing test meets the criteria, the SPI is required to explore the option of a collaborative effort with other states to develop a standardized test or series of tests and authorizes the SPI to contract with a local education agency to develop the test or series of tests or to contract to modify an existing test or series of tests (§ 60810).[408] It also requires the State Board of Education (SBE) to approve standards for English-language development for pupils whose primary language is other than English (§ 60811).

Statutes 1999, chapter 78 amended section 60810 to require the SPI and SBE to release a request for proposals for the development of the test no later than August 15, 1999, and select a contractor by September 15, 1999, for the test to be available for administration during the 2000-01 school year. It also amends section 60811 to require the SPI to develop the standards for English-language development by July 1, 1999.

Statutes 1999, chapter 678 added section 313 to require English-learner pupils be tested upon enrollment and annually until they are redesignated as English proficient. Section 60812 was also added to require the SPI to post the test results on the Internet. Finally, the bill included the statement:

It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.[409]

Statutes 2000, chapter 71 amended section 313 to clarify that the English-language assessment must be conducted at a time appointed by the SPI, and clarifies that districts are authorized to test more than once.

[407] Education Code section 60810, subdivision (d).

[408] Statutory references are to the Education Code unless otherwise indicated.

[409] Statutes 1999, chapter 678, section 4.

B. Prior and Preexisting State Law

The Chacon – Moscone Bilingual Bicultural Education Act of 1976 (§§ 52160-52178), as amended,

> [S]et forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs [sic] was to increase fluency in the English language for L.E.P. students. Secondarily, the 'programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, …' (§ 52161.)[410]

The Chacon - Moscone Act's sunset provision was enacted in 1987 (§ 62000.2, subd. (d)), but funding continued "for the intended purposes of the program." As stated in one of the sunset statutes, "The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative…." (§ 62002). The sunset statute also provided for termination of bilingual education categorical funding, as follows:

> [I]f the [SPI] determines that a school district or county superintendent of schools fails to comply with the purposes of the funds apportioned pursuant to Section 62003, the [SPI] may terminate the funding to that district or county superintendent beginning with the next succeeding fiscal year.[411]

Thus, "even after the Act's provisions became inoperative, bilingual education continued to be the norm in California public schools by virtue of the extension of funding for such programs provided in section 62002."[412] In 1987, the California Department of Education (CDE) issued a program advisory on how the sunset statutes affected bilingual education.[413] The advisory outlined the funding requirements for bilingual education, including spending funds for the general purposes of the program and identification and allocation formulas.

In 1998, the voters adopted Proposition 227 (§§ 300 – 340, not including § 313). It requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year.[414] The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique.[415] Proposition 227 also requires English-learner pupils to be transferred

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[410] *McLaughlin v. State Board of Education* (1999) 75 Cal.App. 4th 196, 203-204.

[411] Education Code section 62005.5.

[412] *McLaughlin v. State Board of Education, supra,* 75 Cal.App. 4th 196, 204.

[413] Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2, California State Department of Education, August 26, 1987.

[414] Education Code section 305.

[415] *McLaughlin v. State Board of Education, supra,* 75 Cal.App. 4th 196, 217.

to English-language mainstream classrooms once they have acquired a good working knowledge of English.[416]

The regulations implementing Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300 – 11316) cover topics such as how to determine whether the pupil is English proficient, duration of services, reclassification, monitoring, documentation, annual assessment, census, advisory committees, parental exception waivers, community-based English tutoring, and notice to parents or guardians.[417]

Statutes 1999, chapter 678, the test claim statute that added section 313, included a statement that it was supplementary to rather than amendatory of Proposition 227.[418]

C. Preexisting Federal Law

Title VI of the Civil Rights Act (42 U.S.C. § 2000d) prohibits discrimination under any program or activity receiving federal financial assistance.

The Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal educational opportunity for national origin minority students. It states, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

> The term "appropriate action" used in that provision indicates that the federal legislature did not mandate a specific program for language instruction, but rather conferred substantial latitude on state and local educational authorities in choosing their programs to meet the obligations imposed by federal law. *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F. 2d 1030, 1040.

Federal cases, however, have interpreted section 1703 (f) to require testing students' English-language skills.[419]

According to *Castaneda v. Pickard*, "…proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."[420] The *Castaneda* court also devised a three-part test to determine whether a program complies with section 1703 (f):

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[416] Education Code section 305.

[417] These were pled as part of Test Claim 03-TC-06, *California English Language Development Test II.*

[418] "The Legislature finds and declares that this act provides an assessment mechanism that is supplementary to, rather than amendatory of, the English Language In Public Schools Initiative Statute (Proposition 227, approved by the voters at the June 2, 1998, primary election)." Statutes 1999, chapter 678, section 3.

[419] *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989; and *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503.

[420] *Castaneda v. Pickard, supra*, 648 F. 2d 989, 1014.

> First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. … [S]econd … would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. … Finally … [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.[421]

In *Keyes*, the court found violations by a Denver school district of section 1703 (f) of the EEOA. The court held the school district's bilingual program was "flawed by the failure to adopt adequate tests to measure the results of what the district is doing. …The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy."[422]

In 1994, Congress enacted the Improving America's School's Act (IASA) that required an annual assessment of English proficiency." In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. NCLB requires states, by school year 2002-2003, to "provide for an annual assessment of English proficiency …of all students with limited English proficiency…." (20 U.S.C. § 6311 (b)(7)). One of the requirements of the assessment system is that it "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." (34 C.F.R. § 200.2 (b)(2) (2002).) The assessment system, like all the NCLB requirements, is merely a condition on grant funds (20 U.S.C. § 6311 (a)(1)) that is not otherwise mandatory (20 U.S.C. §§ 6575, 7371).

D. Related Test Claims

A separate test claim, 03-TC-06, *California English Language Development Test II*, pleads the other statutes[423] and regulations[424] related to the California English Language Development Test. The CELDT II claimant alleges activities such as parent notices, language census, determination of primary language, assessment of language skills, census review and correction, designation of pupils as limited English proficient, reports to CDE, and reclassification of pupils.

In March 2004, the Commission adopted its Statement of Decision on *High School Exit Examination* (HSEE), 00-TC-06 (2004). The decision includes a finding on California Code of Regulations, title 5, section 1217.5, which requires school districts to evaluate pupils to

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[421] *Id.* at pages 1009-1010.

[422] *Keyes v. School Dist. No. 1, supra*, 576 F. Supp. 1503, 1518.

[423] Education Code sections 48985 and 52164 – 52164.6. Statutes 1977, chapter 36, Statutes 1978, chapter 848, Statutes 1980, chapter 1339, Statutes 1981, chapter 219, Statutes 1994, chapter 922.

[424] California Code of Regulations, title 5, sections 11300 – 11316. Test claim 03-TC-06 also includes the title 5 regulations (§§ 11510 – 11517) for the CELDT, such as parental notification, record keeping, test security, and district and test site coordinators' duties.

determine if they possess sufficient English-language skills at the time of the HSEE to be assessed with the test. Because former Education Code section 51216 already required English-language assessments, the Commission found that section 1217.5 constitutes a reimbursable mandate only for the activity of determining whether an English-learner pupil has sufficient English-language skills to be tested.

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

A) Field testing the CELDT as required by the CDE;

B) Initial assessment of all K-12 students with a home language other than English;

C) Annual assessment of all students not classified as English proficient using the CELDT;

D) Adherence to all requirements and performance of all activities detailed in the CELDT Test Coordinator's Manual or any other manual issued by the CDE or the test publisher related to CELDT procedures and requirements;

E) Training district staff regarding the test claim activities;

F) Drafting or modifying policies and procedures to reflect the test claim activities; and

G) Any additional activities identified as reimbursable during the parameters and guidelines phase.

Claimant responds to DOF's comments (summarized below) that the CELDT is not federally mandated. Claimant contends that the following activities represent reimbursable state-mandated activities: (1) initially assess every K-12 student with a home language other than English, and (2) annually assess all students not classified as English proficient. Claimant argues that the state has gone beyond the requirements found in federal law, imposing a state mandate for the CELDT. Specifically, claimant asserts:

> While federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, these requirements does [sic] not preclude reimbursement for the activities and costs imposed upon school districts by the test claim legislation. Moreover, Title VI, and its regulations, as well as OCR, [Office of Civil Rights of the U.S. Department of Education] do not specify how states and school districts must comply with the Civil Rights Act of 1964. …

Claimant points out that before enactment of the test claim legislation, school districts had a choice as to which assessment instrument the district would use to determine students' English proficiency and subsequent placement in appropriate classes. According to OCR, assessments must include some objective measure of the student's English-language ability, but does not require a specific type of assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to

assessments, by requiring a single new test without exception. Claimant states that CELDT is not required under federal law.

According to claimant:

> Federal law only requires state and local educational agencies to ensure that all students have equal access to a state's core curriculum. This goal can be accomplished in countless ways, through numerous different assessments. California has chosen *one* assessment that *all* school districts must use, the CELDT. [Emphasis in original.] … Since federal law is silent as to how equal opportunities are to be achieved at the state and local levels, the imposition of a single program or assessment [the CELDT] … represents costs imposed upon school districts by the state. The state, not Title VI or the OCR, mandates that school districts administer the CELDT at the required intervals. For this reason, the activities imposed upon school districts by the test claim legislation are the result of state, not federal, law.

Claimant did not plead activities regarding reclassification of pupils from English learner to English proficient. Therefore, this decision makes no findings on Education Code section 313, subdivision (d), regarding reclassification procedures.[425]

Claimant did not file comments on the draft staff analysis.

State Agency Position

DOF filed comments in August 2001, stating the following regarding the activities claimant pled: First, field-testing is embedded in the testing and not separate from it. Second, federal law also requires students to be assessed for English proficiency. Districts should incur savings as the state is providing funding to the CDE to cover the costs of test development, distribution and related costs previously borne by school districts. CELDT's inclusion of reading and writing implements federal requirements. The OCR enforces Title VI of the Civil Rights Act of 1964, and has stated that assessment of non-English proficient pupils should include reading, writing, and comprehension. OCR has stated that oral language testing only is inadequate, so this is a federal and not a state mandate. Third, regarding annual assessment, OCR has stated that maintaining pupils in an alternative language program longer than necessary to achieve the program's goal could violate anti-segregation provisions of Title VI regulations. Further, the OCR has stated that exit criteria employed by the district should be based on objective standards, such as standardized test scores. Thus, schools that do not repeatedly assess their non-English speaking students in a timely manner using a standardized test may violate federal law. Thus, annual assessment is not a state mandate. Fourth, adherence to CDE or publisher manuals should be offset by the current per pupil district apportionment[426] to the extent these activities exceed the previous requirements. Fifth, as to training and policies and procedures, any marginal costs should be offset by the current CELDT per pupil district apportionment and any savings

[425] It is likely that reclassification would be analyzed in test claim 03-TC-06, *California English Language Development Test II*, as one of the activities pled pursuant to California Code of Regulations, title 5, section 11303.

[426] Although not stated by DOF, the state budget apportioned $5 per pupil for the English Language Development Test during Fiscal Years 2002-2003, and 2003-2004.

resulting from costs of test development, distribution and other related costs, which are now incurred by the State.

In August 2004, after the draft staff analysis was issued, DOF submitted comments agreeing with the analysis. No other state agency commented on the test claim.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[427] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[428] "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."[429] 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.[430] 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.[431]

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.[432] 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.[433] A "higher level of service" occurs when the new "requirements were

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[427] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[428] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

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

[431] *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.3d 830, 835 *(Lucia Mar).*

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

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

intended to provide an enhanced service to the public."[434] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[435]

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.[436] 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."[437]

Issue 1: Does the test claim legislation impose state-mandated activities on school districts within the meaning of article XIII B, section 6?

The issue is whether any of the following statutes constitute state-mandated activities that are subject to article XIII B, section 6.

A. Duties of the Superintendent of Public Instruction (§§ 60810 subds. (a) (c) & (d), 60811 & 60812)

These sections require the SPI to develop the test, create standards for English-language development, and post test results on the website. They also specify the criteria for the SPI-developed test. Because these provisions do not mandate school districts to perform an activity, sections 60810 – 60812 (except § 60810, subd. (b)) are not subject to article XIII B, section 6.

B. Initial and annual assessment (§§ 313 & 60810 subd. (b))

Subdivision (b) of section 313 requires the SPI to develop procedures for conducting English-language assessment and reclassification. Subdivisions (a) and (c) of section 313 require school districts to assess English-language proficiency for English-learner pupils, and subdivision (c) requires the CELDT to be administered to English-learner pupils upon initial enrollment and annually thereafter until the pupil is redesignated as English proficient. Subdivision (b) of section 60810 specifies the subjects to be tested, such as:

> English reading, speaking, and written skills, except that pupils in kindergarten and grade 1 shall be assessed in reading and written communication only to the extent that comparable standards and assessments in English and language arts are used for native speakers of English. (§ 60810, subd. (b)).

The Commission finds that English-language assessment provisions of section 313 and 60810, subdivision (b), do not constitute a state-mandate on two independent grounds. First, the English-language assessment requirements of Education Code sections 313 and 60810, subdivision (b), do not impose state-mandated activities because their requirements are in

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

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

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

[437] *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, 1816.

preexisting federal law, discussed below. Second, English-Language assessment is not a new program or higher level of service because it was required by prior and preexisting state law, as discussed in issue 2 below.

Preexisting Federal Law Requires English-language Assessment

If an activity is required by federal law, it does not impose state-mandated duties.[438] In *City of Sacramento v. State of California,*[439] local governments sued for subvention of costs for implementing a 1978 statute that required extending mandatory coverage under the state's unemployment insurance law to state and local governments and nonprofit corporations. The California Supreme Court held that the state statute implemented a federal mandate within the meaning of article XIII B, section 9, subdivision (b), of the California Constitution,[440] and therefore does not impose a state mandate.

Similarly, in *Hayes v. Commission on State Mandates,* the court held that the federal Education of the Handicapped Act (EHA) is a federal mandate.[441] Citing the *City of Sacramento* case, the *Hayes* court held, "state subvention is not required when the federal government imposes new costs on local governments." *Hayes* also held,

> To the extent the state implemented the act [EHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such … are state mandated and subject to subvention.[442]

Claimant argues that although federal law requires state and local educational agencies to ensure that all students have equal educational opportunities and that educational agencies must take steps to overcome language barriers that impede equal participation in a state's core curriculum, this does not preclude reimbursement. Claimant asserts that Title VI of the EEOA and its regulations do not specify how states and school districts must comply with the Civil Rights Act of 1964.

The Commission disagrees. Section 1703 (f) of the EEOA, as interpreted by the *Castaneda* and *Keyes* cases cited below, requires states and school districts to conduct English-language assessments to comply with Title VI of the EEOA.

The EEOA (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal opportunity for national origin minority and English-learner pupils. The provision at issue is, "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or

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[438] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70; *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1581.

[439] *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 70.

[440] "Article XIII B, section 9 (b), defines federally mandated appropriations as those 'required for purposes of complying with mandates of…the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly.'" *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 70.

[441] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1592.

[442] *Id.* at page 1594.

national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

In *Castaneda v. Pickard,*[443] the Fifth Circuit Court of Appeal interpreted section 1703 (f) of the EEOA in examining English-learner programs of the Raymondville, Texas Independent School District. The court devised the three-part test cited on page 5 above in determining whether the district's program complies with section 1703 (g).[444] According to *Castaneda*, "…proper testing and evaluation is essential in determining the progress of students involved in a bilingual program and ultimately, in evaluating the program itself."[445] The court also stated:

> Valid testing of students' progress in these areas is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a standardized test in their own language because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts. Although, as we acknowledged above, we do not believe these students must necessarily be continuously maintained at grade level in other areas of instruction during the period in which they are mastering English, these students cannot be permitted to incur irreparable academic deficits during this period. Only by measuring the actual progress of students in these areas during the language remediation program can it be determined that such irremediable deficiencies are not being incurred.[446]

Moreover, in *Keyes v. School Dist. No. 1,*[447] the court held a Denver school district violated section 1703 of the EEOA, in part because of the district's,

> …failure to adopt adequate tests to measure the results of what the district is doing. …The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy"[448]

Castaneda and *Keyes* affirm that a language assessment test such as the CELDT is required to comply with the EEOA, or more specifically, 20 U.S.C. section 1703 (f). The Commission finds it persuasive that *Castaneda* is relied on by CDE as authority for various English-language learner education regulations,[449] and *Keyes* and *Castaneda* were relied on in a CDE program

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[443] *Castaneda v. Pickard, supra,* 648 F. 2d 989.

[444] *Id*. at pages 1009-1010.

[445] *Id.* at page 1014; accord, *Teresa P. v. Berkeley Unified School Dist*. (1989) 724 F. Supp. 698, 715-716.

[446] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 1014.

[447] *Keyes v. School Dist. No. 1, supra,* 576 F. Supp. 1503.

[448] *Id.* at page 1518.

[449] For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

advisory[450] regarding the minimum school districts duties in light of the 1987 sunset of the bilingual education statutes.[451] CDE's interpretation of the law in this area is entitled to deference.[452]

As stated above, in *Hayes* the court ruled that to the extent the state implements federal law by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state-mandated and subject to subvention.[453] However, there is no evidence that the state implemented federal law by choosing to impose any newly required acts. The Legislature included the following statement enacted as part of Statutes 1999, chapter 678 (that added section 313).

> It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.[454]

This statement is evidence of legislative intent to comply with, but not exceed, federal requirements for assessing English-learner pupils. Specifically, it indicates that the state has not chosen to implement federal law by imposing any requirements on school districts beyond the requirements of 20 U.S.C. section 1703 (f) and the cases cited above.

Therefore, the Commission finds that sections 313 and 60810, subdivision (b), do not impose state-mandated duties on school districts within the meaning of article XIII B, section 6 because preexisting federal law requires testing.

Issue 2: Does the test claim statute impose a new program or higher level of service on school districts subject to article XIII B, section 6?

The Commission also finds, as alternative grounds for denial, that English-language assessment is not a reimbursable state mandate because it is not a new program or higher level of service.

To determine if the "program" is new or imposes a higher level of service subject to article XIII B, section 6, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[455]

In rebuttal comments, claimant argues that while assessments must include some objective measure of the student's English-language ability, they do not require a specific type of

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[450] Bill Honig, Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, pursuant to Education Code sections 62000 and 62000.2, California State Department of Education, August 26, 1987, pages 17-18.

[451] Education Code sections 62000.2 and 62002.

[452] *Yamaha v. State Board of Equalization* (1998) 19 Cal.4th 1, 6-7.

[453] *Hayes v. Commission on State Mandates, supra,* 11 Cal.App.4th 1564, 1594.

[454] Statutes 1999, chapter 678, section 4.

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

assessment that states and districts must use. Claimant argues that the test claim statutes took away any discretion that districts had under prior law related to assessments, by requiring a single new test without exception. In the test claim, claimant cited prior law as Education Code section 52164.1 and California Code of Regulations, title 5, section 4303, arguing that although language assessment was required under prior law, the CELDT is a new instrument. Claimant also argues that the CELDT requires assessing students in grade 2 in reading and writing as well as listening and speaking, whereas section 52164.1 did not require reading and writing skills to be assessed for pupils in grades 1 and 2.

The Commission does not rely on section 52164.1 or section 4303 of the title 5 regulations because of their 1987 sunset provisions.[456] As to claimant's argument regarding a school district losing the option of which assessment it may choose, that is not a reason to find a reimbursable mandate. In *County of Los Angeles v. Commission State Mandates* (2003) 110 Cal. App. 4th 1176, 1194, the court held that a loss of flexibility does not rise to the level of a state-mandated reimbursable program.

Before enactment of the test claim statute, language assessments were required on request by the pupil or parent, and were required to obtain a diploma. (Former § 51216, subds. (a) & (b), which were not part of the bilingual education act that sunset in 1987.) Also, annual testing was alluded to in section 305 (enacted as Proposition 227, effective June 1998) that states:

> [A]ll children in California public schools shall be taught English by being taught in English. In particular, this shall require that all children be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year.

It is necessary to test annually to determine the pupil's progress in the immersion program, and to determine if the pupil needs longer than one year in sheltered English immersion.

A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[457] A higher level of service also requires specific actions on the part of the school district.[458]

There is nothing in the record to indicate that the CELDT is a higher level of service than the school districts' assessments under prior law.

Moreover, before the test claim statute was enacted, the voters enacted Proposition 227 in 1998.[459] In CDE's regulations on Proposition 227, CDE interpreted the initiative to require

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[456] Education Code section 62000.2, subdivision (d). Also, section 62002 states, "The funds shall be used for the intended purposes of the program, but *all relevant statutes and regulations* adopted thereto regarding the use of the funds shall not be operative, except as specified in Section 62002.5." [Emphasis added.] Section 62002.5 concerns parent advisory committees and school site councils.

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

[458] *Long Beach, supra*, 225 Cal.App.3d 155, 173.

English-language assessments. California Code of Regulations, title 5, section 11301,[460] subdivision (a) states:

> For purposes of "a good working knowledge of English" pursuant to Education Code Section 305 and "reasonable fluency in English" pursuant to Education Code Section 306 (c), an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the California Department of Education, or any locally developed assessments.

This regulation was operative July 23, 1998, well before the January 2000 effective date of section 313 (Stats. 1999, ch. 678). Therefore, because English-language assessment required by the test claim statute is not a new program or higher level of service, the Commission finds that it is not a reimbursable state-mandated program.

CONCLUSION

The Commission finds that Education Code sections 313, 60810, 60811, and 60812, as added or amended by Statutes 1997, chapter 936, Statutes 1999, chapters 78 and 678, and Statutes 2000, chapter 71, do not constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.

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[459] Proposition 227 was effective June 3, 1998. Section 313 of the Education Code was enacted by Statutes 1999, chapter 678, effective January 1, 2000.

[460] This regulation was pled as part of Test Claim 03-TC-06, *California English Language Development Test II.*

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 39006 (now § 17215.5); Statutes 1996, Chapter 509 Filed on July 22, 1998 Amended to add: Education Code Sections 17213.1, and 17215.5 (former § 39006); Statutes 1996, Chapter 509; Statutes 1999, Chapter 1002; Statutes 2000, Chapters 135 and 443. Filed on September 18, 2001 By Brentwood Union School District, Claimant	No. 98-TC-04, amended by 01-TC-03 *Acquisition of Agricultural Land for a School Site* 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 September 30, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 30, 2004. David Scribner, representing Schools Mandate Group, appeared on behalf of the claimant, Brentwood Union School District. Susan Geanacou, Blake Johnson, and Walt Schaff appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

Test claim legislation: The amended test claim includes claims made under two separate sections of the Education Code.

Education Code section 17215.5[461] requires that prior to acquiring property for "a new schoolsite in an area designated … for agricultural use and zoned for agricultural production, the governing board of a school district shall make all of the following findings:"

[461] Former Education Code section 39006 enacted by Statutes 1996, chapter 509, was renumbered to section 17215.5 by Statutes 2000, chapter 135, between the time of the original and amended test claim filings.

?? That the district has "notified and consulted" with the local zoning agency (city and/or county) that has jurisdiction over the proposed school site; and,

?? That the final selection has been evaluated "based on all factors affecting the public interest and not limited to selection on the basis of the cost of the land," and,

?? That the district will "attempt to minimize any public health and safety issue resulting from the neighboring agricultural uses.…"

The California Farm Bureau sponsored the test claim legislation because restrictions imposed on pesticide use on agricultural land bordering schools resulted in a net loss of profitable land from the neighboring parcel. The sponsor argued that school districts locate schools in agricultural areas often, and that the intent of the legislation is not to stop siting schools in these areas, but rather to, "… require dialogue and exchange of information between the school district and the city or county when a school is proposed for an agricultural area."[462]

Education Code section 17213.1[463] requires that if a school district wishes to apply for state funds under the Leroy F. Greene School Facilities Act of 1998, it must perform a number of specified activities. The Leroy F. Greene School Facilities Act established a new state program in which the State Allocation Board would provide state per pupil funding for new school facilities construction and school facilities modernization. The act included Proposition 1A, passed by voters in November 1998, that authorized the sale of $9.2 billion in general obligation bonds for K-12 schools ($6.7 billion) and higher educational facilities ($2.5 billion.) The proposition also limited, with some exceptions, the fees school districts could levy on developers and homeowners to finance school facilities. [464] The activities required by section 17213.1 include the following:

1) Prior to acquiring the site, the school district must contract with an environmental assessor[465] (assessor) to supervise the preparation of, and sign, a Phase I environmental assessment[466] or the school district may choose to forgo a Phase I assessment and proceed directly to a preliminary endangerment assessment.[467]

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[462] Senate Committee on Education, Analysis of Assembly Bill No. 1724 (1995-96 Reg. Sess.) as amended June 12, 1996, page 2.

[463] Education Code section 17213.1 was amended by Statutes 2001, chapter 865 and Statutes 2002, chapter 935 subsequent to the amended test claim filing to make public review voluntary under subdivisions (a)(6)(A)-(a)(7).

[464]Office of the Legislative Analyst, analysis of Proposition 1A, Class Size Reduction Kindergarten-University Public Education Facilities Bond Act of 1998, pages 3-4. <http://www.lao.ca.gov/ballot/1998/1A_11_1998.htm> [as of July 19, 2004].

[465] Defined by Education Code section 17210, subdivision (b).

[466] Defined by Education Code section 17210, subdivision (g).

[467] Defined by Education Code section 17210, subdivision (h), as an "activity that is performed to determine whether current or past hazardous material management practices or waste management practices have resulted in a release or threatened release of hazardous materials, or

2) If the district chooses to complete a Phase I environmental assessment and the assessment concludes that further investigation of the site is not necessary the district must then submit the assessment to the Department of Toxic Substances Control (DTSC).
   a) If the DTSC finds the assessment sufficient, it will notify the California Department of Education (CDE) that the assessment has been approved.
   b) If the DTSC does not find the assessment sufficient, it will instruct the district on what steps need to be taken to complete the assessment.
   c) The DTSC may also conclude that a preliminary endangerment assessment is required based on the findings of the Phase I environmental assessment.
3) If the Phase I environmental assessment concludes that further investigation of the site is necessary or if the district chooses to forgo a Phase I assessment and to move directly to a preliminary endangerment assessment, the district has two options:
   a) it must either contract with an assessor to supervise the preparation of, and sign, a preliminary endangerment assessment, or,
   b) it must enter into an agreement with the DTSC to prepare this assessment (including an agreement to compensate DTSC for assessment costs).
4) The preliminary endangerment assessment shall conclude EITHER:
   a) further investigation is not required; or,
   b) that a release of hazardous materials has occurred or there is a threat of a release of hazardous materials at the site.
5) The school district must publish notice that the preliminary endangerment assessment has been submitted and shall make the assessment available for public review according to guidelines provided by subdivision (a)(6).[468]
6) The DTSC shall then either find:
   a) that no further study of the site is required; or,
   b) that the preliminary endangerment assessment is not satisfactory and further action is necessary; or,
   c) if a release of hazardous materials has been found to have occurred and the district wishes to go forward with the project the district must:
      i) prepare a financial analysis of the costs of response action required at the school site; and,
      ii) assess the benefits of the site; and,
      iii) obtain approval from the CDE for the site.

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whether naturally occurring hazardous materials are present, which pose a threat to children's health, children's learning ability, public heath or the environment."

[468] Since the filing of the amended test claim, Statutes 2001, chapter 865 amended this to make public review voluntary under section 17213.1, subdivisions (a)(6)(A)-(a)(7).

Further, section 17213.1[469], subdivision (11) states that "costs incurred by the district" may be reimbursed in accordance with section 17072.13. Section 17072.13, which is also part of the Leroy F. Greene School Facilities Act of 1998, allows for 50% of costs incurred by the district during the proposal and siting process to be reimbursed under the act. Section 17213.1 was enacted in response to Joint Legislative Audit Committee (JLAC) hearings, held in 1992, which concluded that the existing procedures for approval of school site acquisition must be "immediately reconfigure[d]… to ensure local compliance with the laws." Specifically, the bill was in response to the actions of the Los Angeles Unified School District, which a legislative committee report alleged requested state approval for at least nine schools with knowledge that the sites may have contained toxic contamination.[470]

School District Facilities: Under current California law, school facilities can be constructed with or without state financial assistance. The School Facility Program (SFP) was created in 1998 under the Leroy F. Greene School Facilities Act[471] to administer state funds for school facility construction. The SFP was created to streamline the process for receiving state bond money for public school facilities construction. The program, which involves the State Allocation Board (SAB), Office of Public School Construction (OPSC), the School Facilities Planning Division (SFPD) of the CDE and the Division of the State Architect (SA), allocates funding to local school districts from statewide general obligation bonds passed by the voters of California.

The first funding for the SFP came from Proposition 1A, approved in 1998, which provided $6.7 billion for K-12 facilities. The second funding came from Proposition 47, which included $11.4 billion for K-12 facilities. An additional $12.3 billion was added to this fund with the passage of Proposition 55 in March 2004.

A school district wishing to receive state funding submits a funding application package to the SFP. The OPSC then reviews and evaluates the package under its regulations and policies. Approval of the plans by both the SA and the SFPD are required before the SAB approves the apportionment.[472] The money is then released to the district, which is required to submit expenditure reports to the OPSC, which audits all allocations.[473]

In order to receive the required approval of the CDE, the school district must follow the appropriate guidelines under California Code of Regulations, title 5, division 1, chapter 13,

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

[470] Conference Report on Senate Bill No. 162 (1999-2000 Reg. Sess.) as amended July 12, 1999, page 4.

[471] This statute (Stats. 1998, ch. 407), among others, is the subject of test claim 02-TC-30, *School Facilities Funding Requirements.*

[472] The New Construction Program provides 50% state funds for public school projects while the Modernization Program provides 60% state funds.

[473] See School Facility Program Guidebook. <http://www.documents.dgs.ca.gov/OPSC/ PDF-Handbooks/SFP_GdBk.pdf> [as of July 19, 2004]. This document is also part of test claim 02-TC-30, *School Facilities Funding Requirements.*

subchapter 1.[474] These regulations include guidelines on site selection,[475] design of education facilities[476] and procedures for plan approval.[477]

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code 17514. In the original claim, claimant alleges that the test claim legislation requires school districts to engage in the following reimbursable state-mandated activities:

1. Develop and adopt policies and procedures in accordance with Education Code section 39006 (now § 17215.5) for the acquisition of real property for a school site.
2. Train school district personnel regarding the requirements of acquiring real property designated as agricultural land.
3. Evaluate the property based on all factors affecting the public interest, not limited to selection based on the cost of the land.
4. Prior to the commencement of purchasing property for any school site:
    a. research city and/or county general plans to determine if the desired parcel of land is designated in either document for agricultural use; and,
    b. research city and/or county zoning requirements to determine if the desired parcel of land is zoned for agricultural production.
5. If the land sought to be purchased by the school district is designated in a city, county, or city and county general plan for agricultural use and zoned for agricultural production:
    a. notify the city, county, or city and county within which the prospective school site is located; and,
    b. consult with the city, county or city and county within which the prospective school site is located.
6. Prepare a report for the governing board that will allow the governing board to make the following findings:
    a. the school district has notified and consulted with the city, county, or city and county within which the prospective school site is to be located; and,

[474] See School Site Selection and Approval Guide. <http://www.cde.ca.gov/ls/fa/sf/schoolsiteguide.asp> [as of July 19, 2004].

[475] California Code of Regulations, title 5, section 14010.

[476] California Code of Regulations, title 5, section 14030.

[477] California Code of Regulations, title 5, sections 14011 and 14012.

b. the final site selection has been evaluated by the governing board of the school district based on all factors affecting the public interest and not limited to selection on the basis of the cost of the land; and,

c. the school district will attempt to minimize any public health and safety issues resulting from the neighboring agricultural uses that may affect the pupils and employees at the school site.

7. Conduct a meeting of the governing board to make the findings required by Education Code section 39006 (now § 17215.5).

8. Prepare and draft a board resolution with the following findings:

a. the school district has notified and consulted with the city, county, or city and county within which the prospective school site is to be located; and,

b. the final site selection has been evaluated by the governing board of the school district based on all factors affecting the public interest and not limited to selection on the basis of the cost of the land; and,

c. the school district will attempt to minimize any public health and safety issues resulting from the neighboring agricultural uses that may affect the pupils and employees at the school site.[478]

In the amended test claim, claimant states that based on the Department of Finance (DOF) letter filed on January 26, 1999,[479] the claimant now believes that the following activities "were part of prior law and therefore removes them from [the] amended test claim filing:" (3) evaluating the property based on all factors, (4) researching city and/or county zoning requirements and current use, and (5) notifying the city and/or county within which the site is located.[480] Further, claimant amended the test claim to add new alleged state-mandated activities, as follows:

1) contract with an environmental assessor to supervise the preparation of and sign a Phase I environmental assessment of the proposed school site unless the governing board decides to proceed directly to a preliminary endangerment assessment (§ 17213.1, subd. (a)); or,

2) if the governing board of the school district decides to proceed directly to a preliminary endangerment assessment, the school district shall contract with an environmental assessor to supervise the preparation of and sign a preliminary endangerment assessment of the proposed school site and enter into an agreement

[478] Original test claim (98-TC-04), pages 13-14.

[479] In a letter dated January 26, 1999, the DOF advised that activities [1] and [2] were reimbursable mandates, that activities [3], [4] and [5] were activities already required by state law and therefore not reimbursable mandates and that activities [6], [7] and [8] where not required by section 17215.5 and therefore also not reimbursable mandates.

[480] Amended test claim (01-TC-03), page 7.

with the DTSC to oversee the preparation of the preliminary endangerment assessment (§ 17213.1, subd. (a)(4)).[481]

Claimant commented on the draft staff analysis as follows. Under the Education Code, a school district must house and educate all students that establish residency in the district in a manner that does not risk the health or safety of its students. Claimant argues that the activities related to section 17515.5 are reimbursable if all discretion is removed from the district for siting and building a new school. Claimant states that school districts that are grossly overpopulated or facing an influx of students due to new development in the districts' boundaries have no choice but to build new school sites to house and educate pupils. Under circumstances of gross overcrowding in the district, claimant argues, the decision to build a new school site is practically compelled. Those districts that face overcrowding and have no choice but to seek out agricultural land for building a school site, according to claimant, are mandated to comply with section 17515.5 because there is no discretion afforded the district. Thus, claimant requests Commission staff to amend the analysis to include a limited exception to reimburse only those districts that can establish they are practically compelled to build a new school site due to overpopulation or expected additional development and growth within the district *and* that the only available option is to acquire agricultural land.

Claimant does not dispute the draft staff analysis conclusions regarding section 17213.1.

State Agency Position

In its January 1999 comments on the original test claim statute (§ 39006, now § 17215.5), DOF states that the alleged state-mandated activities of developing policies and procedures and training staff both appeared to be state-mandated activities of minimal cost. DOF states that the alleged state-mandated activities of evaluating the site on all factors and determining if the site is zoned for agriculture are already incorporated into state law under Education Code section 17212. And the requirement that the district notifies and consults with a city and/or county is also incorporated into state law under Education Code section 17213, subdivision (b). DOF states that since all three are previously required activities they are not new programs or higher levels of service. DOF also states that the alleged state-mandated activities of preparing a report, holding a meeting, and, passing a resolution, were not required by Education Code section 17215.5. DOF states that section 17215.5 only requires the governing board to make a finding; it does not require staff to prepare a report, conduct a specific meeting or prepare and pass a resolution.[482]

In its December 2002 comments on the amended test claim statutes (§§ 17215.5 & 17213.1), DOF reiterates its prior statements on policy development and training, stating that both appear to be state-mandated activities that impose minimal cost. DOF argues that the newly alleged state-mandated activities, such as contracting for a Phase I environmental assessment, and contracting for a preliminary endangerment assessment are not state-mandated. DOF points out that the entire section 17213.1 begins with "As a condition of receiving funding pursuant to

[481] Amended test claim (01-TC-03) page 16. A different numbering scheme is assigned to these activities on pages 9-10 of the amended test claim, but here the numbering scheme on pages 6-7 is used.

[482] DOF comments on test claim 98-TC-04, dated January 26, 1999, pages 1-3.

Chapter 12.5…"[483] Therefore, DOF argues that section 17213.1 sets out the requirements for an optional funding source and does not constitute state-mandated activities.

However, DOF reverses its position on the alleged state-mandated activities of preparing a report and a resolution, arguing that although they are not specifically required by the section 17215.5, these activities are "reasonable and consistent with the intent of the statute."[484] DOF states that, in accordance with its previous comments, holding a meeting is not specifically required by section 17215.5 and the board could make the required finding at "a regularly scheduled board meeting."[485]

Finally, DOF points out that, "[t]he appropriate period in the State Mandates process for identifying reimbursable activities is the Test Claim phase … [i]t is inappropriate to transform the Parameters and Guidelines phase … into a venue for Claimants to seek reimbursement for activities they failed to identify in their test claims."[486]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[487] recognizes the state constitutional restriction on the powers of local government to tax and spend.[488] "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."[489] A test claim statute or executive order may impose a reimbursable state program if it orders or commands a local agency or school district to engage in an activity or task.[490] In

[483] Education Code section 17213.1.

[484] DOF comments on test claim 01-TC-03, dated December 5, 2001, page 3.

[485] DOF comments on test claim 01-TC-03, dated December 5, 2001, page 2.

[486] DOF comments on test claim 01-TC-03, dated December 5, 2001, page 3.

[487] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subjection of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders of regulations initially implementing legislation enacted prior to January 1, 1975."

[488] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727, 735.

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

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

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.[491]

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.[492] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirement in effect immediately before the enactment of the test claim legislation.[493] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[494] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[495]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[496] 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."[497]

Issue: Do the test claim statutes impose a state-mandated activity on school districts within the meaning of article XIII B, section 6?

The courts have held that article XIII B, section 6 was not intended to entitle local agencies and school districts to reimbursement for all costs resulting from legislative enactments, but only those costs "mandated" by a new program or higher level of service imposed upon them by the

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[491] *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.3d 830, 835 *(Lucia Mar).*

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

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

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

[495] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 187; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

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

[497] *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.

state.[498] Thus, the issue is whether the test claim statutes impose a state-mandated activity on school districts.

Education Code section 17215.5: This section requires the governing board of a school district to make three findings if the board wishes to acquire and build a new school on land zoned for agricultural use. The section states that before acquiring land zoned for agricultural use the governing board of a school district must find:

1) that the school district has notified and consulted with the city and/or county within which the site is located; and,
2) that the final site selection has been evaluated by the school governing board based on factors other than costs; and,
3) that the school district will attempt to minimize any public health issue resulting from neighboring agricultural uses.

The Commission finds that this section is not subject to article XIII B, section 6 because the decisions to construct a new school as well as where to site it are discretionary decisions made by the local governing board of a school district. Section 17215.5 does not require the acquisition of any land for a school, nor does it specify the type of land to be acquired (including land zoned for agricultural use.)

Although California law does express the intent of the Legislature that public education shall be a priority in the state and provided by the state,[499] there are no statutes or regulations requiring a school district or county board of education to construct school facilities. School districts are given the power by state law to lease [500]or purchase[501] land for school facilities, to construct school facilities[502] and to establish additional schools in the district.[503] However, in all of these statutes permissive language is used when describing the role of the governing board of the school district. In sections 17244 and 17245 the board "…is authorized…" and section 17342 states that the, "governing board of any school, whenever in its judgment it is desirable to do so, may establish additional schools in the district."

California courts have also found that the construction of school facilities within a school district is a discretionary decision of the school district. In *People v. Oken,* the court found that, "[w]here, when or how, if at all, a school district constructs school buildings is a matter within

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[498] *Lucia Mar., supra,* 44 Cal.3d 830, 835; *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 1816.

[499] Education Code sections 16001, 16701 and 17001.

[500] Education Code section 17244.

[501] Education Code sections 17340 and 35162.

[502] Education Code sections 17245 and 17340.

[503] Education Code section 17342.

the sole competency of its governing board to determine."[504] This was reiterated in a state Attorney General opinion in 1988.[505]

> With the conventional construction of school facilties, the question of "where, when or how, if at all, a school district shall construct a school building is a matter within the sole competency of its governing board to determine ." (*People v. Oken* (1958) 159 Cal.App.2d 456, 460.) The same is essentially true with the construction of a school facility under the Leroy F. Greene State School Building Lease-Purchase Law.[506]

This language indicates that all aspects of new school facilities, including when they are constructed and if they are constructed at all, is a decision left to local school boards.

In other cases the courts have also held that the power to site a school belongs to the local school district and not the state. In *Town of Atherton v. Superior Court of San Mateo,* the court found that "[u]nder the statutes … the state has expressly granted the power of location to its agencies, the school districts."[507] In *City of Santa Clara v. Santa Clara Unified School District*, the court found that "the selection of a school site by a school district involves an exercise of legislative and discretionary action and may not be challenged as to its wisdom, expediency or reasonableness…."[508]

Additionally, there are no statutes that direct school districts where to place schools. Former Education Code sections 37000 through 37008 did relate to the specific location of schools, but were repealed by Statutes 1989, chapter 1256. Currently, the only section that pertains to state agency involvement in school site selection is section 17521. However, section 17521 only requires that the CDE create standards for use by school districts in the selection of school sites and allows school districts to request advice on the acquisition of a proposed site.

Therefore, based both on statutes and case law, the decision to acquire land on which to site a school and the decision as to which land to acquire are both decisions that are made at the discretion of the school district. If a district's decision is discretionary, no state-mandated costs will be found.

In *City of Merced v. State of California,*[509] the court determined that the city's decision to exercise eminent domain was discretionary. The court found that no state reimbursement was required for loss of goodwill to businesses over which eminent domain was exercised, the court reasoned as follows:

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[504] *People v. Oken* (1958) 159 Cal. App.2d 456, 460.

[505] "Although Attorney General opinions are not binding, they are entitled to great weight." *Freedom Newspapers, Inc. v. Orange County Employees Retirement* (1993) 6 Cal.4th 829, 832.

[506] 71 Opinions Attorney General of California 332, 339 (1988).

[507] *Town of Atherton v. Superior Court of San Mateo* (1958) 159 Cal.App.2d 417, 428.

[508] *City of Santa Clara v. Santa Clara Unified School District* (1971) 22 Cal.App.3d 152, 161, footnote 4.

[509] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

> We agree that the Legislature intended for payment of goodwill to be discretionary. The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county rather than a mandate of the state. *The fundamental concept is that the city or county is not required to exercise eminent domain.*[510] [Emphasis added.]

In *Kern High School District,*[511] the California Supreme Court found that costs associated with notices and agendas required by state law were not entitled to reimbursement if the requirements for notice and agendas were part of a program in which the school district had chosen to participate. In that case, the California Supreme Court affirmed the reasoning of the *City of Merced* case as follows:

> [T]he core point articulated by the court in *City of Merced* is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds – even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.[512]

The Supreme Court left undecided whether 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."[513] As explained below, there is no evidence in the record that school districts are "practically compelled" to acquire agricultural land to build schools. The test claim statute does not impose a penalty for noncompliance.

Although the Supreme Court declined to extend the *City of Merced* holding in a recent case,[514] its core point stands: there is no state mandate where a local government or school district freely undertakes activities at its option. The Commission is not free to disregard the clear statement of the California Supreme Court interpreting mandates law. Thus, pursuant to state law, school districts remain free to site new schools where they choose. The statutory duties imposed by section 17215.5 flow from the decision to site a school on land zoned for agricultural use. Based on the *Kern High School Dist.* case, since this decision is a local discretionary activity, any requirements imposed by the state on the local decision do not constitute a reimbursable state mandate.

Claimant argues that the Commission should find a limited exception to reimburse those districts that can establish they are practically compelled to build a new school site due to overpopulation or expected additional development and growth within the district and that the only available option is to acquire agricultural land.

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[510] *Ibid.*

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

[512] *Id.* at page 742.

[513] *Ibid.*

[514] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878. The Court reached its decision on alternative grounds not involving the *City of Merced* rationale.

The Commission disagrees because claimant does not submit any evidence as to the existence of this situation. The Commission must base its findings on substantial evidence in the record.[515]

> …[S]ubstantial evidence has been defined in two ways: first, as evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion. [The finding must be supported by] …all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence."[516]

Moreover, the Commission's regulations require that all factual evidence be supported by either a signed declaration and/or sworn testimony.[517]

Since claimant has not submitted evidence describing a situation where a school district meets the hypothetical criteria claimant suggests, the record does not support a finding of a state-mandated program. Therefore, the Commission finds that section 17215.5 does not impose a state-mandated activity on school districts within the meaning of article XIII B, section 6.

Education Code section 17213.1: This section, enacted in 1999, lays out the additional requirements[518] that school districts must satisfy in order to receive funding from the Leroy F. Greene School Facilities Act of 1998.[519] It requires school districts to contract for a Phase I environmental assessment or if necessary a preliminary endangerment assessment if the school district wishes to request state funding for the facility. These requirements specifically address the study of new school sites for natural, previous or potential releases of hazardous or toxic substances.

When construing a statute, the Commission, like a court, must ascertain the intent of the Legislature so as to effectuate the purpose of the law.

> In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose [citation]. At the same time, we do not consider statutory language in isolation [citation]. Instead, we examine the entire substance of the

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[515] *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515; Government Code section 17559, subdivision (b).

[516] *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.

[517] California Code of Regulations, title 2, sections 1183.03, subdivision (b)(1) and 1187.5, subdivision (b).

[518] Basic requirements for school siting can be found in California Code of Regulations, title 5, sections 14001-14012 and Education Code section 17251.

[519] Section 17072.13 provides that a school district may request up to 50% of the cost of implementing this section if it chooses to request funding from the State Funding Program (SFP). If a school district qualifies as eligible for financial hardship under section 17075.10 or if the site meets the environmental hardship criteria in section 17072.13, subdivision (c)(1), then up to 100% of this cost can be requested from the SFP.

> statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts [citation]. Moreover, we read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness [citations].[520]

Section 17213.1's first sentence states, "As a condition of receiving state funding.…" The plain meaning of this section is that the requirements in section 17213.1 only apply to school districts that decide to request funding through the Leroy F. Greene School Facilities Act of 1998. Thus, the district's decision to seek funds under this act is discretionary and not mandatory. DOF alleges that approximately 58% of districts do not apply for funding under the 1998 Leroy Greene Act.[521]

As stated above, if a district's decision is discretionary, no state-mandated costs will be found.[522]

Therefore, the requirements imposed on the conditional funding from the Leroy F. Greene School Facilities Act of 1998 are not state-mandated activities, so section 17213.1 is not a reimbursable mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission finds that the test claim statutes, Education Code sections 17215.5 and 17213.1, do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. This conclusion is based on the following findings:

1) For Education Code section 17215.5, the specified findings the school district must make if the proposed school site is on land zoned for agricultural use is not state-mandated because the decision to build a school, as well as where to locate it, including the acquisition of agricultural land for a school, is a discretionary decision left to local school districts by state law.

2) For Education Code section 17213.1, the procedures a school district must follow when it seeks state funding pursuant to the Leroy Greene School Facilities Act of 1998 (commencing with Ed. Code, § 17070.10) are not state-mandated because the school district is not required to request state funding under section 17213.1.

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[520] *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1043.

[521] DOF comments on test claim 01-TC-03, dated December 5, 2001, page 2.

[522] *Kern High School District, supra,* 30 Cal.4th 727, 742; *City of Merced v. State of California, supra,* 153 Cal.App.3d 777, 783.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3213.2; Statutes 2001, Chapter 834; Filed on June 28, 2002, By California State Association of Counties – Excess Insurance Authority (CSAC-EIA) and County of Tehama, Claimants	No. 01-TC-25 *Lower Back Injury Presumption for Law Enforcement* 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 December 9, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this consolidated test claim during a regularly scheduled hearing on December 9, 2004. Julianna Gmur appeared on behalf of the claimants, CSAC-EIA and County of Tehama. Gina C. Dean appeared on behalf of CSAC-EIA. Susan Geanacou and Jaci Thomson appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

This test claim addresses an evidentiary presumption given to specified state and local peace officers in workers' compensation cases. Normally, before an employer is liable for payment of workers' compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is usually on the employee to show proximate cause by a preponderance of the evidence.[523]

[523] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

The Legislature eased the burden of proving industrial causation for certain public employees, primarily fire and safety personnel, by establishing a series of presumptions.[524] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption . . . , the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

In 2001, the Legislature passed Senate Bill 424, adding section 3213.2 to the Labor Code. For the first time, certain local agency and state peace officers with at least five years of full-time service, and who were "required to wear a duty belt as a condition of employment," were granted a rebuttable presumption that "lower back impairment so developing or manifesting itself in the peace officer shall be presumed to arise out of and in the course of employment." The presumption extends for a maximum of five years beyond the last date worked, depending on the number of years of service. Under the statute, the employer may offer evidence disputing the presumption.

Claimants' Position

The claimants, CSAC-EIA and the County of Tehama, contend that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, as follows:

> This Chapter creates a new injury heretofore not compensable and provides a presumption that shifts the burden of proof to the employer.
>
> The effect of a presumption is that the employee does not have to demonstrate that the injury arose out of or in the course of his or her employment. The first effect of a presumption is to encourage the filing of workers' compensation claims because otherwise it would be often difficult, if not impossible, to demonstrate that a particular injury arose out of or in the course of one's employment. The presumption not only works in favor of the employee, but works to the detriment of the employer who must now prove that the injury did not arise out of and in the course of the employee's employment, which is difficult.
>
> The net effect of this legislation is to cause an increase in workers' compensation claims for lower back injury and decrease the possibility that any defenses can be raised by the employer to defeat the claims. Thus, the total costs of these claims, from initial presentation to ultimate resolution are reimbursable.

In comments on the draft staff analysis, dated November 5, 2004, the claimants argue that CSAC-EIA is a proper test claimant. In addition, the claimants contend: 1) Labor Code section 3213.2 "sets forth a clear mandate;" 2) staff fails to apply statutory construction rules "to the plain language of the statute;" and 3) staff fails to properly apply the recent California Supreme Court decision, *San Diego Unified School District v. Commission on State Mandates*.

[524] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

Position of the Department of Finance

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.

On November 4, 2004, the Department of Finance filed comments withdrawing any previous conclusions supporting the test claim allegations, and agreeing with the draft staff analysis that CSAC-EIA does not have claimant standing, and the test claim "legislation does not mandate a new program or higher level of service on local agencies." They also state: "A complete estimate of mandated costs was not identified during the deliberation of the test claim legislation."

Position of the Department of Industrial Relations

In comments received August 8, 2002, the Department of Industrial Relations contends that the test claim legislation is not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The Department asserts that the presumption in favor of safety officers does not result in a new program or higher level of service for the following reasons:

- Local governments are not required to accept all workers' compensation claims. They have the option to rebut any claim before the Workers' Compensation Appeals Board by presenting a preponderance of evidence showing the non-existence of industrial causation.
- Statutes mandating a higher level of compensation to local government employees, such as workers' compensation benefits, are not "new programs" whose costs would be subject to reimbursement under article XIII B, section 6.
- There is no shift of a financial burden from the State to local governments because local governments, by statute, have always been solely liable for providing workers' compensation benefits to their employees.[525]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[526] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[527] "Its purpose is to preclude the state from shifting financial responsibility for carrying out

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[525] Comments from Department of Industrial Relations, dated August 7, 2002.

[526] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 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."

[527] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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."[528] 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.[529] 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.[530]

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.[531] 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.[532] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[533]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[534]

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.[535] 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."[536]

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

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

[530] *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*).

[531] *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.)

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

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

[534] *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.

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

[536] *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.

Issue 1: Does CSAC-EIA have standing as a claimant for this test claim?

Government Code sections 17550 and 17551 authorize local agencies and school districts to file test claims seeking reimbursement pursuant to article XIII B, section 6. Government Code section 17518 defines "local agencies" to mean "any city, county, special district, authority, or other political subdivision of the state." Government Code section 17520 currently defines "special district" to include a "joint powers agency."

CSAC-EIA is a joint powers authority established pursuant to the Joint Exercise of Powers Act ("Act") in Government Code section 6500 et seq. and is formed for insurance and risk management purposes.[537] Under the Act, school districts and local agencies are authorized to enter into agreements to "jointly exercise any power common to the contracting parties."[538] The entity provided to administer or execute the agreement (in this case CSAC-EIA) may be a firm or corporation, including a nonprofit corporation, designated in the agreement.[539] A joint powers authority is a separate entity from the parties to the agreement and is not legally considered to be the same entity as its contracting parties.[540] CSAC-EIA contends that, as a joint powers agency, it is a type of local agency that can file a test claim based on the plain language of Government Code section 17520. Based on the facts of this case, the Commission disagrees.

In 1991, the California Supreme Court decided *Kinlaw v. State of California*, *supra*, a case that is relevant here. In *Kinlaw*, medically indigent adults and taxpayers brought an action against the state alleging that the state violated article XIII B, section 6 by enacting legislation that shifted financial responsibility for the funding of health care for medically indigent adults to the counties. The Supreme Court denied the claim, holding that the medically indigent adults and taxpayers lacked standing to prosecute the action and that the plaintiffs have no right to reimbursement under article XIII B, section 6.[541] The court stated the following:

> Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. *Plaintiffs' interest*, although pressing, *is indirect* and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind.[542] (Emphasis added.)

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[537] Letter dated August 3, 2004, by Gina C. Dean, Assistant General Manager for CSAC-EIA.

[538] Government Code section 6502.

[539] Government Code section 6506.

[540] Government Code section 6507; 65 Opinions of the California Attorney General 618, 623 (1982).

[541] *Kinlaw, supra*, 54 Cal.3d at pages 334-335.

[542] *Ibid.*

Like the plaintiffs in *Kinlaw*, CSAC-EIA, as a separate entity from the contracting counties, is not directly affected by the test claim legislation. The Legislature, in Labor Code section 3213.2, gave specified peace officers a presumption of industrial causation that the lower back injury arose out of and in the course of their employment. The counties, as employers of peace officers, argue that the presumption creates a reimbursable state-mandated program and that the increased costs are reimbursable.

But, CSAC-EIA does not employ peace officers specified in the test claim legislation.[543] Thus, while CSAC-EIA may have an interest in this claim as the insurer, its interest is indirect. As expressed in an opinion of the California Attorney General, a joint powers authority "is simply not a city, a county, or the state as those terms are normally used."[544] Thus, under the *Kinlaw* decision, CSAC-EIA lacks standing in this case to act as a claimant.

This conclusion is further supported by the decision of the Third District Court of Appeal in *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976. Although Government Code section 17520[545] expressly includes redevelopment agencies in the definition of "special districts" that are eligible to file test claims with the Commission, the court found that redevelopment agencies are not subject to article XIII B, section 6 since they are not bound by the spending limitations in article XIII B, and are not required to expend any "proceeds of taxes." The court stated:

> Because of the nature of the financing they receive, tax increment financing, redevelopment agencies are not subject to this type of appropriations limitations or spending caps; they do not expend any "proceeds of taxes." Nor do they raise, through tax increment financing, "general revenues for the local entity."[546]

The Third District Court of Appeal affirmed the *Redevelopment Agency* decision in *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281, again finding that redevelopment agencies are not entitled to claim reimbursement for state-mandated costs because they are not required to expend "proceeds of taxes."

In the present case, CSAC-EIA is also not subject to the appropriations limitation of article XIII B and does not expend any "proceeds of taxes" within the meaning of article XIII B. According to the letter dated August 3, 2004, from CSAC-EIA, "CSAC-EIA has no authority to tax" and instead receives proceeds of taxes from its member counties in the form of premium payments. Therefore, the Commission concludes CSAC-EIA is not an eligible claimant for this

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[543] In the November 5, 2004 response to the draft staff analysis, the claimant states the following: "Indeed, CSAC-EIA is a separate entity comprised of counties to act as a mechanism to protect the counties' fisc. Although CSAC-EIA does not employ peace officers, when it comes to their workers' compensation, the buck stops at CSAC-EIA."

[544] 65 Opinions of the California Attorney General 618, 623 (1982).

[545] Consistent with case law, operative January 1, 2005, the Legislature amended Government Code section 17520, eliminating redevelopment agencies and joint powers entities from the express definition of "special districts" for mandate reimbursement. (Stats. 2004, ch. 890 (AB 2856).)

[546] *Redevelopment Agency, supra*, 55 Cal.App.4th at page 986.

test claim; however, the Commission may hear and decide the test claim as filed on behalf of the County of Tehama.

Issue 2: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

Labor Code section 3213.2, as added by Statutes 2001, chapter 834, provides:

> (a) In the case of a member of a police department of a city, county, or city and county, or a member of the sheriff's office of a county, or a peace officer employed by the Department of the California Highway Patrol, or a peace officer employed by the University of California, who has been employed for at least five years as a peace officer on a regular, full-time salary and has been required to wear a duty belt as a condition of employment, the term "injury," as used in this division, includes lower back impairments. The compensation that is awarded for lower back impairments shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by the provisions of this division.
>
> (b) The lower back impairment so developing or manifesting itself in the peace officer shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board is bound to find in accordance with it. This presumption shall be extended to a person following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
>
> (c) For purposes of this section, "duty belt" means a belt used for the purpose of holding a gun, handcuffs, baton, and other items related to law enforcement.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> There was no requirement prior to 1975, nor in any of the intervening years, until the passage of [the test claim legislation in 2001] which mandated the inclusion of lower back injury as a compensable injury for law enforcement, and the creation of a presumption in favor of lower back injury occurring on the job.[547]

In the November 5, 2004 response to the draft staff analysis, the claimant states:

> The presumption in the applicant's favor increases the likelihood that his claim will result in money payments from his employer as well as full coverage of his medical costs. The greater the number of successful applicants, the more the

[547] Test Claim, page 2.

> employer will pay in workers' compensation benefits. Thus the new program or higher level of service is the creation of the presumption.[548]

The claimant reads requirements into Labor Code section 3213.2, which, by the plain meaning of the statute, are not there. First, the claimant asserts in the test claim filing that the legislation created a new compensable injury for peace officers. However, Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "'Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.]

The express language of Labor Code section 3213.2 does not impose any other state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the local agency. The plain language of Labor Code section 3213.2 states that the "presumption is disputable and *may* be controverted by other evidence . . .". [Emphasis added.]

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][549]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[550] Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[551]

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[548] Claimants' response to draft staff analysis, page 4.

[549] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[550] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[551] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[552] In *Kern High School Dist.*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[553] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[554]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[555] 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. (Emphasis in original.)[556]

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.* [Emphasis added.][557]

The Supreme Court left undecided whether 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."[558]

The claimant, in November 5, 2004 comments on the draft staff analysis argues that the Commission should look to the 2004 decision of the California Supreme Court, *San Diego Unified School Dist., supra,* in which the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an

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

[553] *Id.* at page 737.

[554] *Ibid.*

[555] *Id.* at page 743.

[556] *Ibid.*

[557] *Id.* at page 731.

[558] *Ibid.*

initial discretionary decision that in turn triggers mandated costs."[559] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case,* an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

The Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta; however, the Commission recognizes that the Court was giving clear notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced,* or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning continues to apply in this case. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[560] As indicated above, local agencies are not legally compelled by state law to dispute a presumption in a workers' compensation case. The decision and the manner in which to litigate such cases is made at the local level and is within the discretion of the local agency. Thus, the employer's burden to prove that the lower back injury is not arising out of and in the course of employment is also not state-mandated. The evidentiary burden is simply an aspect of having to defend against a workers' compensation lawsuit, if the employer chooses to do so.

There is no evidence in the law or in the record that local agencies are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that local agencies will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue of whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs

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[559] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887.

[560] *Kern High School Dist., supra,* 30 Cal.4th at page 743.

alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[561]

Returning to the recently decided *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

Therefore, the potential for increased costs resulting from the statute, without more, does not impose a reimbursable state-mandated program.

Prior Test Claim Decisions on Cancer Presumptions

Finally, the claimant points to two prior test claim decisions approving reimbursement in cancer presumption workers' compensation cases. In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers' compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.

However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, 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.[562] In *Weiss v. State Board of Equalization,* the

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[561] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th at page 735.

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

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:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [563]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[564] While opinions of the Attorney General are not binding, they are entitled to great weight.[565]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 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.[566] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.[567]

Accordingly, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.[568]

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[563] *Id*. at page 776.

[564] 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989).

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

[566] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[567] Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.

[568] Because this conclusion is dispositive of the case, the Commission need not reach the other issues raised by the Department of Industrial Relations.

CONCLUSION

Based on the foregoing, the Commission concludes that CSAC-EIA does not have standing, and is not a proper claimant for this test claim. The Commission further concludes that Labor Code section 3213.2, as added by the test claim legislation, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.11; Statutes 2001, Chapter 846; Filed on July 1, 2002, By City of Newport Beach, Claimant	No. 01-TC-27 *Skin Cancer Presumption for Lifeguards* 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 December 9, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this consolidated test claim during a regularly scheduled hearing on December 9, 2004. Julianna Gmur and Glen Everroad appeared on behalf of the claimant, City of Newport Beach. Susan Geanacou and Jaci Thomson appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

This test claim addresses an evidentiary presumption given to state and local lifeguards in workers' compensation cases. Normally, before an employer is liable for payment of workers' compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is usually on the employee to show proximate cause by a preponderance of the evidence.[569]

The Legislature eased the burden of proving industrial causation for certain public employees, primarily fire and safety personnel, by establishing a series of presumptions.[570] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption …, the burden of proof shifts to the party, against whom it operates [i.e., the

[569] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[570] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin cancer developing or manifesting during or for a defined period immediately following employment "shall be presumed to arise out of and in the course of employment." Under the statute, the employer may offer evidence disputing the presumption.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts the following:

> [The test claim legislation] creates a new injury heretofore not compensable and provides a presumption that shifts the burden of proof to the employer.
>
> The effect of a presumption is that the employee does not have to demonstrate that the illness arose out of and in the course of his or her employment. The first effect of a presumption is to encourage the filing of workers' compensation claims because of the fact that otherwise it would be often difficult, if not impossible, to demonstrate that a particular illness arose out of and in the course of one's employment. The presumption … works to the detriment of the employer who must now prove that the illness did not arise out of or in the course of the employee's employment, which is difficult. … With this legislation, however, the defense that the employee had skin cancer prior to employment has been eliminated.[571]

The claimant further argues that the "net effect of this legislation is to cause an increase in workers' compensation claims for skin cancer and decrease the possibility that any defenses can be raised by the employer to defeat the claims. Thus, the total costs of these claims, from initial presentation to ultimate resolution are reimbursable."[572]

Claimant's comments on the draft staff analysis argue: 1) Labor Code section 3212.11 "sets forth a clear mandate;" 2) staff fails to apply statutory construction rules "to the plain language of the statute;" and 3) staff fails to properly apply the recent California Supreme Court decision, *San Diego Unified School District v. Commission on State Mandates*.

State Agency's Position

The Department of Finance filed comments on August 8, 2002, concluding that the test claim legislation may create a reimbursable state-mandated program.

On October 18, 2004, the Department of Finance filed comments withdrawing any previous conclusions supporting the test claim allegations, and asserting that the test claim "legislation does not mandate a new program or higher level of service on local agencies." They also state:

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[571] Test Claim, page 2.

[572] *Ibid.*

"A complete estimate of mandated costs was not identified during the deliberation of the test claim legislation."

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[573] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[574] "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."[575] 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.[576] 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.[577]

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.[578] 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

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[573] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 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."

[574] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

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

[577] *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*).

[578] *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.)

claim legislation.[579] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[580]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[581]

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.[582] 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."[583]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

Labor Code section 3212.11, as added by Statutes 2001, chapter 846, provides:

> This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.
>
> Skin cancer so developing or manifesting itself shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board shall find in accordance with it. This presumption shall be extended to a lifeguard following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.

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

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

[581] *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.

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

[583] *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.

> Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.
>
> This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> There was no requirement prior to 1975, nor in any of the intervening years, until the passage of [the test claim legislation in 2001] which mandated the inclusion of skin cancer as a compensable injury for lifeguards, the creation of a presumption in favor of skin cancer on the job, and the elimination of the pre-existing condition defense for employers.[584]

In the October 15, 2004 response to the draft staff analysis, the claimant states:

> The presumption in the applicant's favor increases the likelihood that his claim will result in money payments from his employer as well as full coverage of his medical costs. The greater the number of successful applicants; the more the employer will pay in workers' compensation benefits. Thus the new program or higher level of service lies in the creation of the presumption.[585]

The claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. First, the claimant asserts in the test claim filing that the legislation created a new compensable injury for lifeguards. However, Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "'Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.] Assembly Bill 663's sponsor, the California Independent Public Employees Legislative Counsel, stated that since 1985, one-third of the 30 City of San Diego lifeguards who received industrial disability did so due to skin cancer.[586] Thus, public lifeguards' ability to make a successful workers' compensation claim for an on-the-job injury from skin cancer predates the 2001 enactment of Labor Code section 3212.11.

The express language of Labor Code section 3212.11 does not impose any other state-mandated requirements on local agencies. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the local agency. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

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[584] Test Claim, page 2.

[585] Claimants' response to draft staff analysis, page 2.

[586] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assembly Bill No. 663 (2001-2002 Reg. Sess.), page 4, September 7, 2001.

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][587]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[588] Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[589]

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[590] In *Kern High School Dist.*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[591] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[592]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[593] 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

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[587] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[588] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[589] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

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

[591] *Id.* at page 737.

[592] *Ibid.*

[593] *Id.* at page 743.

> 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. (Emphasis in original.)[594]

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.* [Emphasis added.][595]

The Supreme Court left undecided whether 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."[596]

The claimant, in October 15, 2004 comments on the draft staff analysis argues that the Commission should look to the 2004 decision of the California Supreme Court, *San Diego Unified School Dist., supra,* in which the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[597] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse,*

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[594] *Ibid.*

[595] *Id.* at page 731.

[596] *Ibid.*

[597] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887.

> *in this case*, an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

The Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta; however, the Commission recognizes that the Court was giving clear notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced*, or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning continues to apply in this case. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[598] As indicated above, local agencies are not legally compelled by state law to dispute a presumption in a workers' compensation case. The decision and the manner in which to litigate such cases is made at the local level and is within the discretion of the local agency. Thus, the employer's burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated. The evidentiary burden is simply an aspect of having to defend against a workers' compensation lawsuit, if the employer chooses to do so.

There is no evidence in the law or in the record that local agencies are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that local agencies will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[599]

Returning to the recently decided *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra*, 43 Cal.3d 46, *City of Sacramento, supra*, 50 Cal.3d 51, and *City of Richmond, supra*, 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

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[598] *Kern High School Dist., supra*, 30 Cal.4th at page 743.

[599] *County of Los Angeles, supra*, 43 Cal.3d at page 54; see also, *Kern High School Dist., supra*, 30 Cal.4th at page 735.

Therefore, the potential for increased costs resulting from the statute, without more, does not impose a reimbursable state-mandated program.

Prior Test Claim Decisions on Cancer Presumptions

Finally, the claimant points to two prior test claim decisions approving reimbursement in cancer presumption workers' compensation cases. In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers' compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.

However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California 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.[600] In *Weiss v. State Board of Equalization*, 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, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis*. Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [601]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor

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

[601] *Id*. at page 776.

unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[602] While opinions of the Attorney General are not binding, they are entitled to great weight.[603]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 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.[604] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.[605]

Accordingly, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on local agencies.

CONCLUSION

The Commission concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on local agencies.

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[602] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

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

[604] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[605] Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Labor Code Section 3212.11; Statutes 2001, Chapter 846; Filed on February 27, 2003, By Santa Monica Community College District, Claimant	No. 02-TC-16 *Lifeguard Skin Cancer Presumption (K-14)* 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 December 9, 2004)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this consolidated test claim during a regularly scheduled hearing on December 9, 2004. Keith Petersen appeared on behalf of the claimant, Santa Monica Community College District. Susan Geanacou and Jaci Thomson appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

On July 1, 2002, the Commission received a test claim filing on behalf of claimant, City of Newport Beach, entitled *Skin Cancer Presumption for Lifeguards* (01-TC-27). On February 27, 2003, the Commission received a test claim filing, *Lifeguard Skin Cancer Presumption (K-14)* (02-TC-16), on behalf of claimant Santa Monica Community College District. Although the same statutory provision is involved, these two test claims were not consolidated. Both test claims address an evidentiary presumption given to state and local lifeguards in workers' compensation cases. Normally, before an employer is liable for payment of workers' compensation benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury was proximately caused by the employment. The burden of proof is usually on the employee to show proximate cause by a preponderance of the evidence.[606]

[606] Labor Code sections 3202.5 and 3600. Labor Code section 3202.5 defines preponderance of the evidence as such evidence, "when weighed with that opposed to it, has more convincing

The Legislature eased the burden of proving industrial causation for certain public employees, primarily fire and safety personnel, by establishing a series of presumptions.[607] The courts have described the rebuttable presumption as follows: "Where facts are proven giving rise to a presumption …, the burden of proof shifts to the party, against whom it operates [i.e., the employer], to prove the nonexistence of the presumed fact, to wit, an industrial relationship." (*Zipton v. Workers' Compensation Appeals Board* (1990) 218 Cal.App.3d 980, 988, fn. 4.)

In 2001, the Legislature passed Assembly Bill 663, adding section 3212.11 to the Labor Code. For the first time, publicly-employed lifeguards were granted a rebuttable presumption that skin cancer developing or manifesting during or for a defined period immediately following employment "shall be presumed to arise out of and in the course of employment." Under the statute, the employer may offer evidence disputing the presumption.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant asserts the following:

> [The test claim legislation] mandated costs reimbursable by the state for school districts and community college districts to pay increased worker's compensation claims or premiums for lifeguards as a result of the new presumption that skin cancer developing or manifesting itself during employment arose out of or in the course of employment and the prohibition from claiming the injury may be attributed to a pre-existing disease or condition.[608]

The claimant further argues that the test claim legislation newly requires the following activities or costs:

- develop and update policies and procedures for handling lifeguard workers' compensation claims alleging skin cancer arising from his or her employment;
- all of the costs associated with payment of the claims caused by the shifting of the burden of proof and by the prohibition of the use of a pre-existing condition defense, *or* payment of the additional costs of insurance premiums to cover such claims.
- physical examinations to screen lifeguard applicants for pre-existing skin cancer;
- training lifeguards to take precautionary measures to prevent skin cancer on the job.

Claimant's comments on the draft staff analysis, dated October 7, 2004, contend that: 1) school districts "are practically compelled" to engage in the activities listed above; 2) "the test claim

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force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence."

[607] See, Labor Code sections 3212, 3212.1 – 3212.7, and 3213.

[608] Test Claim, page 2.

legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public;" and 3) failing to follow earlier Commission decisions granting mandate reimbursement for cancer presumption statutes is "arbitrary and unreasonable."

State Agency's Position

The Department of Finance filed comments dated May 12, 2003, concluding that the test claim legislation may create a reimbursable state-mandated program for increased workers' compensation claims for skin cancer in lifeguards. However, the Department of Finance disputes any additional duties identified by the claimant on the grounds that the test claim statute does not expressly require them.

No comments on the draft staff analysis were received.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[609] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[610] "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."[611] 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.[612] 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.[613]

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

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[609] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 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."

[610] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

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

[613] *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*).

policy, but does not apply generally to all residents and entities in the state.[614] 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.[615] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[616]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[617]

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.[618] 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."[619]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

The Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6.

Labor Code section 3212.11, as added by Statutes 2001, chapter 846, provides:

> This section applies to both of the following: (a) active lifeguards employed by a city, county, city and county, district, or other public or municipal corporation or political subdivision, and (b) active state lifeguards employed by the Department of Parks and Recreation. The term "injury," as used in this division, includes skin cancer that develops or manifests itself during the period of the lifeguard's employment. The compensation awarded for that injury shall include full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as provided by the provisions of this division.

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[614] *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.)

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

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

[617] *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.

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

[619] *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.

> Skin cancer so developing or manifesting itself shall be presumed to arise out of and in the course of the employment. This presumption is disputable and may be controverted by other evidence, but unless so controverted, the appeals board shall find in accordance with it. This presumption shall be extended to a lifeguard following termination of service for a period of three calendar months for each full year of the requisite service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity.
>
> Skin cancer so developing or manifesting itself in these cases shall not be attributed to any disease existing prior to that development or manifestation.
>
> This section shall only apply to lifeguards employed for more than three consecutive months in a calendar year.

The claimant contends that the test claim legislation constitutes a new program or higher level of service:

> Prior to 1975, there was no statute, code section or regulation that created a presumption that skin cancer developing or manifesting itself on lifeguards arose out of or in the course of their employment with the district. Nor was there any statute, code section, or regulation which prohibited such skin cancer from being attributed to a pre-existing disease or condition.[620]

Although it is true that the legal presumption in favor of the lifeguard employee is new law, the claimant reads requirements into Labor Code section 3212.11, which, by the plain meaning of the statute, are not there. Nothing in the statute mandates public employers of lifeguards to develop policies and procedures to handle lifeguard workers' compensation claims. Nothing in the language of Labor Code section 3212.11 requires a pre-employment physical exam for lifeguards, nor requires the employer to offer training on skin cancer prevention. While all of these "new activities" may be prudent, they are solely undertaken at the discretion of the employing agency, and are not mandated by the state.

Labor Code section 3208, as last amended in 1971, specifies that for the purposes of workers' compensation, "'Injury' includes *any* injury or disease arising out of the employment." [Emphasis added.] Assembly Bill 663's sponsor, the California Independent Public Employees Legislative Counsel, stated that since 1985, one-third of the 30 City of San Diego lifeguards who received industrial disability did so due to skin cancer.[621] Thus, public lifeguards' ability to make a successful workers' compensation claim for an on-the-job injury from skin cancer predates the 2001 enactment of Labor Code section 3212.11.

The express language of Labor Code section 3212.11 does not impose any state-mandated requirements on school districts. Rather, the decision to dispute this type of workers' compensation claim and prove that the injury is non-industrial remains entirely with the school district. The plain language of Labor Code section 3212.11 states that the "presumption is disputable and *may* be controverted by other evidence ..." [Emphasis added.]

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[620] Test Claim, page 3.

[621] Senate Rules Committee, Office of Senate Floor Analyses, third reading analysis of Assembly Bill No. 663 (2001-2002 Reg. Sess.), page 4, September 7, 2001.

Under the rules of statutory construction, when the statutory language is plain, as the statute is here, the court is required to enforce the statute according to its terms. The California Supreme Court determined that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted.][622]

Moreover, the court may not disregard or enlarge the plain provisions of a statute, nor may it go beyond the meaning of the words used when the words are clear and unambiguous. Thus, the court is prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[623] Consistent with this principle, the courts have strictly construed the meaning and effects of statutes analyzed under article XIII B, section 6, and have not applied section 6 as an equitable remedy:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." [Citations omitted.]["Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation."] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies.[624]

This is further supported by the California Supreme Court's decision in *Kern High School Dist.*[625] In *Kern High School Dist.*, the court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[626] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[627]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.[628] The court stated the following:

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[622] *Estate of Griswald* (2001) 25 Cal.4th 904, 910-911.

[623] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757.

[624] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

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

[626] *Id.* at page 737.

[627] *Ibid.*

[628] *Id.* at page 743.

> 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. (Emphasis in original.)[629]

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.* [Emphasis added.][630]

The Supreme Court left undecided whether 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."[631]

The claimant, in comments on the draft staff analysis dated October 7, 2004, argues that the Commission should look to the 2004 decision of the California Supreme Court, *San Diego Unified School Dist., supra,* in which the Court discusses the potential pitfalls of extending "the holding of *City of Merced* so as to preclude reimbursement ... whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[632] In particular, the Court examines the factual scenario from *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, in which:

> an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. (*Id.*, at pp. 537-538, 234 Cal.Rptr. 795.) The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ--and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced, supra,* 153 Cal.App.3d 777, 200 Cal.Rptr. 642, such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many

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[629] *Ibid.*

[630] *Id.* at page 731.

[631] *Ibid.*

[632] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887.

> firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and *hence we are reluctant to endorse, in this case,* an application of the rule of *City of Merced* that might lead to such a result. [Emphasis added.]

The Court did not rely on this analysis to reach its conclusions, thus the statements are considered dicta; however, the Commission recognizes that the Court was giving clear notice that the *City of Merced* "discretionary" rationale is not without limitation. What the Court did *not* do was disapprove either the *City of Merced,* or its own rationale and holding in *Kern High School Dist.*

Rather, the 2003 decision of the California Supreme Court in *Kern High School Dist.* remains good law, relevant, and its reasoning continues to apply in this case. The Supreme Court explained, "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[633] As indicated above, school districts are not legally compelled by state law to dispute a presumption in a workers' compensation case. The decision and the manner in which to litigate such cases is made at the local level and is within the discretion of the school district. Thus, the employer's burden to prove that the skin cancer is not arising out of and in the course of employment is also not state-mandated. The evidentiary burden is simply an aspect of having to defend against a workers' compensation lawsuit, if the employer chooses to do so.

The claimant wants to analogize the "mandate" being claimed here to the *Carmel Valley* case and the Court's recent discussion in *San Diego Unified School Dist*.: "Here, in this test claim, the test claim legislation is for the benefit of lifeguards and, therefore, is evidently intended to produce a higher level of service to the public."[634] But Labor Code section 3212.11 does not mandate training as proposed by the claimant, or the purchase of materials as in the *Carmel Valley* case; it states that if skin cancer is diagnosed during and briefly after the employment of the lifeguard, for purposes of workers' compensation lawsuits, the skin cancer is presumed to arise out of the employment. Not every statute that is of benefit to public employees and results in costs to the employer imposes a reimbursable state mandated program.

There is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to dispute such cases. While it may be true that school districts will incur increased costs from workers' compensation claims as a result of the test claim legislation, as alleged by the claimant here, increased costs alone are not determinative of the issue whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone, even when those costs are deemed necessary by the local agency, do not result in a reimbursable state-mandated program under article XIII B, section 6:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all

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[633] *Kern High School Dist., supra*, 30 Cal.4th at page 743.

[634] Claimant comments dated October 7, 2004, page 4.

> increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[635]

Returning to the recently decided *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

Therefore, the potential for increased costs resulting from the statute, without more, does not impose a reimbursable state-mandated program.

Prior Test Claim Decisions on Cancer Presumptions

In 1982, the Board of Control approved a test claim on Labor Code section 3212.1, as originally added by Statutes 1982, chapter 1568 (*Firefighter's Cancer Presumption*). The parameters and guidelines authorize insured local agencies and fire districts to receive reimbursement for increases in workers' compensation premium costs attributable to Labor Code section 3212.1. The parameters and guidelines also authorize self-insured local agencies to receive reimbursement for staff costs, including legal counsel costs, in defending the section 3212.1 claims, and benefit costs including medical costs, travel expenses, permanent disability benefits, life pension benefits, death benefits, and temporary disability benefits paid to the employee or the employee's survivors.

In 1992, the Commission adopted a statement of decision approving a test claim on Labor Code section 3212.1, as amended by Statutes 1989, chapter 1171 (*Cancer Presumption – Peace Officers*, CSM 4416.) The parameters and guidelines authorize reimbursement to local law enforcement agencies that employ peace officers defined in Penal Code sections 830.1 and 830.2 for the same costs approved in the Board of Control decision in the *Firefighter's Cancer Presumption* test claim.

However, prior Board of Control and Commission decisions are not controlling in this case.

Since 1953, the California 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.[636] In *Weiss v. State Board of Equalization*, 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

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[635] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th at page 735.

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

plaintiffs' contention and found that the board did *not* act arbitrarily. The Court stated, in pertinent part, the following:

> [P]laintiffs argument comes down to the contention that because the board may have erroneously granted licenses to be used near the school in the past it must continue its error and grant plaintiffs' application. That problem has been discussed: *Not only does due process permit omission of reasoned administrative opinions but it probably also permits substantial deviation from the principle of stare decisis.* Like courts, agencies may overrule prior decisions or practices and may initiate new policy or law through adjudication. (Emphasis added.) [637]

In 1989, the Attorney General's Office issued an opinion, citing the *Weiss* case, agreeing that claims previously approved by the Commission have no precedential value. Rather, "[a]n agency may disregard its earlier decision, provided that its action is neither arbitrary nor unreasonable [citing *Weiss, supra*, 40 Cal.2d. at 777]."[638] While opinions of the Attorney General are not binding, they are entitled to great weight.[639]

Moreover, the merits of a claim brought under article XIII B, section 6 of the California Constitution, must be analyzed individually. Commission decisions under article XIII B, section 6 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.[640] The analysis in this case complies with these principles, particularly when recognizing the recent California Supreme Court statements on the issue of voluntary versus compulsory programs -- direction that the Commission must now follow. In addition, the Commission followed this same analysis in its most recent decisions regarding the issue of reimbursement for cancer presumption statutes.[641]

Accordingly, the Commission finds that the test claim legislation is not subject to article XIII B, section 6 of the California Constitution because the legislation does not mandate a new program or higher level of service on school districts.

CONCLUSION

The Commission concludes that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, is not subject to article XIII B, section 6 of the California Constitution because it does not mandate a new program or higher level of service on school districts.

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[637] *Id*. at page 776.

[638] 72 Opinions of the California Attorney General 173, 178, fn.2 (1989).

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

[640] *City of San Jose, supra,* 45 Cal.App.4th at 1816-1817; *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280-1281.

[641] Test claim *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19) was denied at the May 27, 2004 Commission hearing, and *Cancer Presumption (K-14)* (02-TC-15) was denied at the July 29, 2004 Commission hearing.