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STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES

REPORT TO THE LEGISLATURE: DENIED MANDATE CLAIMS

January 1, 2007 – December 31, 2007

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INTRODUCTION

The Commission on State Mandates (Commission) is required to annually report to the Legislature on the number of claims it denied during the preceding calendar year and the basis on which each of the claims was denied.[1]

This report includes nine Statements of Decision adopted by the Commission during the period from January 1, 2007 through December 31, 2007.

This report includes summaries and complete text of the Commission's decisions. Each decision is based on the administrative record of the claim and includes findings and conclusions of the Commission as required by the California Code of Regulations, Title 2, section 1188.2.

[1] Government Code section 17601.

SUMMARY OF DENIED CLAIMS

Reconveyance of Deed of Trust and Mortgage Discharge Certificate, 02-TC-41

The test claim statute requires county recorders to process and record deed of trust reconveyances and mortgage discharge certificates within two business days from the day of receipt. Prior law imposed no specific deadline for county recorders to process and record these documents.

The test claimant alleged that the test claim statute constitutes a reimbursable state-mandated program, because prior to the enactment of the test claim legislation, the county recorder was not legally required to stamp and record the full reconveyance or certificate of discharge within 2 business days from the day of receipt. Enactment of this statute has increased the duties of the county recorder, and requires the county recorder to provide a higher level of service for an existing program.

The Commission denied this test claim, finding that the test claim statute does not constitute a reimbursable state-mandated program, or impose a new program or higher level of service on counties, because trust reconveyances and mortgage discharge certificates were required to be processed and recorded before the enactment of the test claim statute. Thus, the test claim statute merely imposes a deadline, and does not mandate any new activities or provide any tangible increase in the level of service to the public.

California Youth Authority: Sliding Scale for Charges, 02-TC-01

The test claim statutes increased fees paid by counties to the state for the least serious juvenile offenders (category 5 through 7) committed to the California Department of the Youth Authority (CYA).

The test claimant alleged that the test claim statutes impose a reimbursable state-mandated program because the state has shifted financial responsibility to the counties in imposing the higher sliding scale fees for CYA commitments.

The Commission denied this test claim, finding that it does not mandate a new program or higher level of service because the additional sliding scale costs for CYA commitments of category 5 through 7 juvenile offenders *only* result from an underlying discretionary decision by the county to commit such juveniles to the CYA.

Training Requirements for Instructors and Academy Staff, 02-TC-03

The test claim regulations adopted by the Commission on Peace Officer Standards and Training (POST) require specified training of certain POST instructors and key staff of POST training academies.

The test claimant alleges that the staff time necessary to administer the training program, prepare for and present the training, monitor who is attending the training and related administrative duties are necessary to implement the program and are therefore reimbursable.

The Commission denied this test claim, finding that the POST regulations do not mandate a new program or higher level of service because the underlying decision to participate in POST, provide POST-certified training or establish a POST training academy is discretionary, and local agencies have alternatives to providing POST-certified training or establishing a POST training academy.

Peace Officer Instructor Training, 02-TC-26

The test claim regulations adopted by the Commission on Peace Officer Standards and Training (POST) require training of specified POST instructors and key staff of POST training academies at California community colleges.

The test claimant alleges that the staff time necessary to administer the training program, prepare for and present the training, monitor who is attending the training and related administrative duties are necessary to implement the program and are therefore reimbursable.

The Commission denied this test claim, finding that the POST regulations do not mandate a new program or higher level of service because the underlying decision to participate in POST, provide POST-certified training or establish a POST training academy is discretionary.

Worker's Compensation Disability Benefits for Government Employees, 00-TC-20; 02-TC-02

This test claim statutes expand the applicability of an existing workers' compensation leave benefit to specified local safety officers. That benefit entitles employees to a leave of absence without loss of salary for up to one year when disabled by injury or illness arising out of and in the course of employment.

The test claimant alleges that the county has incurred new duties and increased costs in complying with the new requirement that leave of absence with full salary must now be provided to specified employees instead of less costly temporary disability or maintenance payments required under prior law. The asserted increased costs in providing these benefits are the difference between the 70% temporary disability salary that was previously required and the 100% salary required for newly specified employees under the test claim statutes.

The Commission denied this test claim, finding that the workers' compensation program is a *state*-administered program rather than a locally-administered program; one that provides a statewide compulsory and exclusive scheme of employer liability, without fault, for injuries arising out of and in the course of employment. Moreover, although the claimants may be faced with a higher cost of compensating their employees as a result of extending the workers' compensation leave benefits to additional employees, this does not equate to a higher cost of providing services to the public.

Adult Education Enrollment Reporting, 02-TC-37

This test claim was filed on statutes and on letters from the California Department of Education (CDE) that address the data collection and reporting requirements of school districts that provide state and/or federally funded adult education programs

The test claim statutes are line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999, 2000, 2001, and 2002, and appropriate specified amounts from the General Fund and Federal Trust Fund to be allocated by the CDE to school districts, county offices of education , and other agencies for adult education programs. The appropriated amounts are subject to various provisions, including the requirements that the CDE develop a data and accountability system, and that school districts receiving funding for adult education collect and report specified data to the CDE.

The letters from the CDE, dated July 6, 1999; April 24, 2000; and August 1, 2002, contain language indicating the development of "Tracking of Programs and Students" (TOPSpro), the

data and accountability system requested by the Budget Acts, and that the TOPSpro system is to be used to report adult education data.

The test claimants argue that although data reporting occurred before the enactment of the test claim statutes and issuance of the CDE letters, the process, system, method, and timing of reporting has dramatically changed since the mandated introduction of the TOPSpro system. Therefore, the test claim statutes and letters impose a new program or higher level of service and costs mandated by the state upon adult education schools and school districts.

The Commission denied the test claim on various grounds, finding that line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999 and 2000, and the CDE letters dated July 6, 1999 and April 24, 2000 are not subject to article XIII B, section 6 of the California Constitution because any alleged costs would have occurred outside of the period of reimbursement July 1, 2001 to August 15, 2003.

The Commission further found that line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 2001 and 2002 did not mandate a new program or higher level of service because school districts were already required to collect and report adult education data prior to the enactment of the Budget Acts of 2001 and 2002.

In addition, although the CDE letter dated August 1, 2002 mandated a new program or higher level of service by requiring the use of the TOPSpro system, the Commission found that during the period of reimbursement there was no evidence of increased costs mandated by the state, as defined by Government Code section 17514, because the state provided program funds to school districts that could be used to cover the necessary program expenses.

Presumption of Causation in Workers' Compensation Claims: Tuberculosis, Hepatitis and Other Blood-Borne Infectious Diseases, or Meningitis, 01-TC-20, 01-TC-23, 01-TC-24

This consolidated test claim was filed by County of Tehama and California State Association of Counties-Excess Insurance Authority (CSAC-EIA) regarding statutes that address evidentiary presumptions in workers' compensation cases given to certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop tuberculosis, hepatitis and other blood-borne infectious diseases, or meningitis during employment.. The County of Tehama and CSAC-EIA, a joint powers authority formed by and for California counties for insurance and risk management purposes, filed the consolidated test claims, seeking reimbursement for costs incurred by CSAC-EIA and its member counties.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.

The test claimants allege that the test claim statutes create and/or expand compensable injuries under workers' compensation, provide presumptions of industrial causation, and restrict arguments to rebut those presumptions. The claimant concludes in each test claim that the net effect of this legislation is to cause an increase in workers' compensation claims for [tuberculosis/hepatitis and blood-borne infectious diseases/meningitis], 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.

The Commission denied the test claim, finding that CSAC-EIA has standing to pursue the test claim on behalf of its member counties, but does not have standing to claim reimbursement for its

own costs. Under the principles of collateral estoppel, the Commission finds that the Second District Court of Appeal's unpublished decision on this issue in *CSAC Excess Insurance Authority v. Commission on State Mandates* (Dec. 22, 2006, B188169) is binding and applies to this test claim.

The Commission further finds that the test claim statutes do not impose any state-mandated requirements on local agencies. Rather, the decision to dispute these types of workers' compensation claims and prove that the injury did not arise out of and in the course of employment remains entirely with the local agency. Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.

Hepatitis Presumption (K-14), 02-TC-17

The test claim statutes address an evidentiary presumption in workers' compensation cases given to certain members of school district police departments that develop hepatitis and other blood-borne infectious diseases.

Generally, 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.

The Legislature eased the burden of proving industrial causation for certain public employees that provide vital and hazardous services by establishing a series of evidentiary presumptions for certain "injuries."

In 2000, the Legislature enacted Labor Code section 3212.8, which provides a rebuttable presumption that hepatitis developed during the period of employment for certain law enforcement officers and firefighters arose out of and in the course of employment. If the school district employer decides to dispute the claim, the burden of proving the hepatitis did not arise out of and in the course of employment is shifted to the employer. In 2001, the Legislature amended Labor Code section 3212.8 by replacing "hepatitis" with "blood-borne infectious disease," thus expanding the types of blood related illness covered by the presumption.

The claimant alleges that the test claim statutes require school districts to conduct the following activities to implement the statutes:

- Develop and periodically revise polices and procedures for the handling of workers' compensation claims related to the contraction of hepatitis or blood-borne infectious diseases.
- Payment of additional costs of claims caused by the presumption of industrial causation of hepatitis or blood-borne infectious diseases.
- Payment of increased workers' compensation insurance coverage in lieu of additional costs of claims caused by the presumption of industrial causation.
- Physical examinations of community college district police officers prior to employment.
- Training of police officer employees to prevent contraction of hepatitis or blood-borne infectious disease on the job.

The Commission denied the test claim, finding that the express language of Labor Code section 3212.8 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 did not arise out of and in the course of employment remains entirely with the school district. Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.

Prevailing Wages, 03-TC-13

This test claim addresses changes to the California Prevailing Wage Law (CPWL). The CPWL is a comprehensive statutory scheme that is designed to enforce prevailing wage standards on projects funded in whole or in part with public funds. Private contractors under contract to public agencies for public works projects are required to pay local prevailing wages to construction workers on public works projects that exceed $1,000. Local prevailing wage rates are set by the Director of the Department of Industrial Relations. The CPWL does not apply to work carried out by a public agency with its own forces. The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project.

The test claimant alleges that the test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes.

The Commission denied the test claim, finding that public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred.

COMMISSION ON STATE MANDATES
STATEMENTS OF DECISION
DENIED TEST CLAIMS

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Civil Code Section 2941 Statutes 2000, Chapter 1013 (AB 996) Filed on June 27, 2003, By County of San Bernardino, Claimant.	Case No.: 02-TC-41 *Reconveyance of Deed of Trust and Mortgage Discharge Certificate* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on April 16, 2007)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during the hearing on April 16, 2007. Ms. Bonnie Ter Keurst represented and appeared for the claimant. Ms. Carla Castañeda and Ms. Susan Geanacou appeared for the Department of Finance.

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

The Commission adopted the staff analysis at the hearing by a vote of 5 to 2 to deny this test claim.

Summary of Findings

This test claim was filed on June 27, 2003, by the County of San Bernardino on a statute that establishes the deadline at which county recorders must process and record deed of trust reconveyances (reconveyances) and mortgage discharge certificates (discharge certificates). In 2000, the Legislature passed Assembly Bill 996, amending section 2941 of the Civil Code. The amendments to Civil Code section 2941 required county recorders to process and record deed of trust reconveyances and mortgage discharge certificates within two business days from the day of receipt. Prior law imposed no specific deadline for county recorders to process and record these documents.

The Commission finds that the test claim statute does not constitute a reimbursable state-mandated program, as it does not impose a new program or higher level of service on counties. Trust reconveyances and mortgage discharge certificates were required to be processed and recorded before the enactment of the test claim statute. Thus, the test claim statute merely imposes a deadline, and does not mandate any new activities or provide any tangible increase in the level of service to the public.

The Commission concludes that Civil Code section 2941, as amended by Statutes 2000, chapter 1013, does not impose a new program or higher level of service on counties and, thus,

does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

COMMISSION FINDINGS

Background

This test claim addresses the deadline at which county recorders must process and record deed of trust reconveyances (reconveyances) and mortgage discharge certificates (discharge certificates). Pursuant to Civil Code section 2941, a mortgagee (the lendor) must execute a certificate of discharge and record it or cause it to be recorded in the office of the county recorder within 30 days after the mortgage has been satisfied. When a deed of trust has been satisfied the beneficiary of the trust (the lendor) shall execute and deliver to the trustee the original note and any other documents necessary to reconvey the deed of trust. The trustee must then execute the full reconveyance and record or cause it to be recorded with the county recorder within 21 days of receipt of the original note, fees, and any other documents necessary for reconveyance.

Prior law required county recorders to process and record reconveyances and discharge certificates received from trustees and mortgagees, but did not impose a specific deadline to complete these tasks. Instead, Government Code section 27320 provides that "[t]he recorder shall record it without delay…"[2]

The test claim legislation, Statutes 2000, chapter 1013 (AB 996), made various amendments to Civil Code section 2941 affecting mortgagees and deed of trust beneficiaries.[3] However, in regard to the claimant, the test claim statute requires county recorders to process and record reconveyances and discharge certificates within two business days from the day of receipt. Specifically, Civil Code section 2941, subdivision (c), (formerly codified in subdivision (d)) states in relevant part:

> Within two business days from the day of receipt, if received in recordable form together with all required fees, the county recorder shall stamp and record the full reconveyance or certificate of discharge.

Claimant's Position

Claimant, County of San Bernardino, contends that the test claim statute 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 test claim statute mandates a new program or higher level of service, stating:

> Prior to the enactment of the Chapter 1013, Statutes of 2000, the county recorder was not legally required to stamp and record the full reconveyance or certificate of discharge within 2 business days from the day of receipt. Enactment of this

[2] Prior to the enactment of the test claim statute the Civil Code did not address the specific duties of county recorders, instead the Civil Code referenced the Government Code.

[3] Civil Code section 2941, subdivision (d) as amended in Statutes 2000, chapter 1013 defined "cause to be recorded" and "cause it to be recorded" as pertaining to Civil Code section 2941 and provided trustees the benefit of specific evidentiary presumptions.

> statute has increased the duties of the county recorder, and requires the county recorder to provide a higher level of service for an existing program.[4]

Additionally, claimant argues that the test claim statute "clearly meets both tests that the [California] Supreme Court created in the [*sic*] *County of Los Angeles v. State of California* (1987) for determining what constitutes a reimbursable state mandated local program."[5]

The claimant further states that meeting the new requirement of Civil Code section 2941, as amended by the test claim statute, required increased costs associated with the following activities:

- receiving and processing incoming certified mail;
- document examination;
- outbound mail processing;
- policy and procedure development;
- training and monitoring.

On February 9, 2007, the Commission received claimant's comments in rebuttal to the draft staff analysis. Claimant's comments will be addressed, as appropriate in the analysis below.

Department of Finance's Position

The Department of Finance filed comments, dated July 17, 2003, addressing claimant's test claim allegations. The Department of Finance did not dispute claimant's position, stating, "the statute may have resulted in a reimbursable State mandate."

The Department of Finance submitted subsequent comments, dated January 22, 2007, agreeing with the conclusions in the draft staff analysis, stating:

> Finance agrees with the Commission staff's recommendation to deny the test claim. The test claim statute does not mandate a new program or higher level of service on county recorders within the meaning of Article XIIIB, Section 6 of the California Constitution, as determined by the courts. Processing and recording trust reconveyances and mortgage discharge certificates were required activities pursuant to Government Code section 27320 prior to Chapter 1013, Statutes of 2000, which amended Civil Code section 2941.[6]

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[4] Test Claim, page 2.

[5] Test Claim, page 5. It should be noted that the test as set forth in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, does *not* determine what constitutes a *reimbursable* state-mandated program. Rather, the test is used to determine whether test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution. To determine whether a "program" is a *reimbursable* program it is necessary to determine if the "program" is a new program or higher level of service mandated on counties and whether it imposes increased costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

[6] Department of Finance comments on the draft staff analysis, dated January 22, 2007, p. 1.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[7] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[8] "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."[9] 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.[10] 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.[11]
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.[12] 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.[13] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[14]

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[7] 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."

[8] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

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

[11] *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*).

[12] *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*, *supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

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

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

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[15]

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.[16] 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."[17]

Issue 1: Does the test claim statute mandate a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution?

The courts have held that legislation mandates a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution when: (a) the requirements are new in comparison with the pre-existing scheme *and* the requirements were intended to provide an enhanced service to the public,[18] or (b) the state has shifted fiscal responsibility for a program from the state to a local agency.[19]

The claimant disputes the above definition of a "new program or higher level of service," and contends that "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."[20] Claimant further states that the test claim is being submitted based on the contention that the test claim statute is a "higher level of service" and concedes that the test claim statute does not constitute a "new program" or a shift in fiscal responsibility from the state to the county.

In support of its contentions, claimant cites to staff's remarks regarding a "higher level of service" made during the October 4, 2006 Commission hearing of *Fifteen -Day Close of Voter Registration* (01-TC-15). Staff's remarks, however, do not support claimant's contentions.[21] Instead, staff states that a test claim statute can constitute a "higher level of service" only with a

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[15] *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.

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

[17] *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.

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

[19] *County of Los Angeles v. Commission on State Mandates* (2003)110 Cal.App.4th 1176, 1194; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[20] Claimant response, dated February 9, 2007, p. 1, original italics.

[21] It should be noted that the Commission came to the same conclusion in *Fifteen – Day Close of Voter Registration* (01-TC-15) as the Commission does here for *Reconveyance of Deed of Trust and Mortgage Discharge Certificate* (02-TC-41).

finding that the state is mandating new requirements on local agencies. As quoted by claimant, staff states:

> There aren't too many higher-level-of-service cases that have been decided by the courts. One of them, though, is Long Beach Unified School District v. The State of California. And that case was a higher level of service regarding racial desegregation, where you had existing federal law, and the state came and required additional requirements imposed. And the court said that was a higher level of service. *In the process, to find a higher level of service is requiring a finding that the State is mandating new requirements on the local agencies and school districts*.[22] (Italics added.)

The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[23] A statute or executive order mandates a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service to the public provided in the existing program.[24]

Thus, to determine whether a test claim statute constitutes a "new program or higher level of service" requires a finding that the requirements are new in comparison with the pre-existing scheme *and* the requirements were intended to provide an enhanced service to the public, or the state has shifted fiscal responsibility for a program from the state to local agencies.

Are the Test Claim Requirements New in Comparison With the Pre-existing Scheme and Intended to Provide an Enhanced Service to the Public?

To make this determination, the test claim statute must initially be compared with the legal requirements in effect immediately prior to its enactment.[25]

Prior to the enactment of the test claim statute, the Civil Code did not address the specific duties of county recorders. Rather, Civil Code section 1172 provides, "The duties of county recorders, in respect to recording instruments, are prescribed by the Government Code."

Government Code section 27320 (enacted in 1947), as pertaining to county recorders' duties regarding recording instruments such as reconveyances and discharge certificates, provides in relevant part:

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[22] Claimant response, dated February 9, 2007, p. 2. Citing Reporter's Transcript of Proceedings, for the October 4, 2006 Commission hearing regarding *Fifteen -Day Close of Voter Registration* (01-TC-15).

[23] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

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

> When any instrument authorized by law to be recorded is deposited in the recorder's office for record, the recorder shall endorse upon it in the order in which it is deposited, the year, month, day, hour, and minute of its reception, and the amount of fees for recording. The recorder shall record it without delay…[26]

After the enactment of the test claim statute, Civil Code section 2941 provided in relevant part:

> Within two business days from the day of receipt, if received in recordable form together with all required fees, the county recorder shall stamp and record the full reconveyance or certificate of discharge.

The only change the test claim statute made pertaining to the duties of county recorders is the imposition of a two business-day deadline to record reconveyances and discharge certificates. While the imposition of a deadline for county recorders is new to Civil Code section 2941, the activities of processing and recording trust reconveyances and mortgage discharge certificates are not new activities. As shown by the language of Government Code section 27320, county recorders' offices have been required to perform these activities prior to the passage and enactment of the test claim statute.

Claimant contends that the imposition of a compressed timeline has increased the costs and duties of the county recorder, and thus enhanced service to the public. However, the mere shortening of time in which county recorders must process and record trust reconveyances and mortgage discharge certificates does not change the level of service related to those activities. In discussing its decision in the 1987 *County of Los Angeles* case, the California Supreme Court stated, "[t]he law increased the cost of employing public servants, but it did not in any tangible manner increase the level of service provided by those employees to the public."[27] Similarly, imposing a deadline may have increased costs of recording certain documents as argued by claimant, but it has not provided any tangible increase in the level of service to the public, as the documents would have been required to be processed and recorded with or without the test claim statute.

In claimant's response to the draft staff analysis, claimant relies upon *Long Beach Unified School Dist.*, which found state regulations requiring specific activities to alleviate the racial imbalance in schools to be a higher level of service.[28] In *Long Beach Unified School Dist.*, the regulations required specific activities not previously required under state law and beyond those required under the United States Constitution and relevant case law.[29] Unlike *Long Beach Unified School Dist.*, the test claim statute does not impose any new activity upon claimant. As stated above, prior to and after enactment of the test claim statute claimant was required to process and record reconveyances and discharge certificates. Thus, under *Long Beach Unified School Dist.*, the test claim statute does not constitute a higher level of service.

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[26] Government Code section 27320 (added by Stats. 1947, ch. 424, § 1) as amended by Statutes 1982, chapter 843, section 5.

[27] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 875.

[28] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155.

[29] *Long Beach Unified School Dist., supra,* 225.Cal.App.3d 155, 173.

Claimant argues that the test claim statute's legislative history suggests an intent that the test claim statute would reduce litigation against mortgagees and trustees. As a result, claimant contends that the test claim provides a higher level of service to the public. However, as of this date, courts have found reimbursable mandates only in situations in which a new activity has been imposed or a shift in fiscal responsibility from the state to the local agency has been shown. Here, no new activity has been imposed on claimant, thus it must be determined if the state has shifted fiscal responsibility from the state to counties.

Has the State Shifted Fiscal Responsibility to a Local Agency?

A test claim statute can constitute a new program or higher level of service if the state has transferred from the state to counties complete or partial financial responsibility for a required program for which the state previously had complete or partial financial responsibility.[30]
In this case, there has not been a shift in financial responsibility for a program from the state to the counties. The costs attributed to processing and recording trust reconveyances and mortgage discharge certificates have historically been borne by counties.[31] Here, the test claim statute merely sets a deadline for processing and recording these documents. Thus, the test claim statute has not shifted financial responsibility for a program from the state to the counties.
For the reasons stated above, the Commission finds that the test claim statute does not mandate a new program or higher level of service on counties within the meaning of article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concludes that Civil Code section 2941, as amended by Statutes 2000, chapter 1013, does not mandate a new program or higher level of service on counties and, thus, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

[30] California Constitution, article XIII B, section 6, subdivision (c). The court in *County of Los Angeles* further states, "an increase in costs does not result in a reimbursement requirement…[r]ather the state must be attempting to divest itself of its responsibility to provide fiscal support for a program…" *County of Los Angeles 2003, supra,* 110 Cal.App.4th 1176, 1194.

[31] Government Code section 27360 (added by Stats. 1947, ch. 424, § 1) provides "For services performed by him, the county recorder shall charge and collect the fees fixed in this article."

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Welfare and Institutions Code
Sections 912, 912.1 & 912.5

Statutes 1996, Chapter 6 (SB 681)
Statutes 1998, Chapter 632 (SB 2055)

Filed on July 5, 2002, by the County of San Bernardino, Claimant.

Case No.: 02-TC-01

California Youth Authority: Sliding Scale For Charges

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 31, 2007*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 31, 2007. Bonnie Ter Keurst appeared on behalf of claimant, County of San Bernardino. Michael Hanretty and Lisa Goodwill appeared on behalf of the Department of Corrections. Carla Castañeda and 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 5-2 to deny this test claim.

Summary of Findings

This test claim addresses increased fees paid by counties to the state for the least serious juvenile offenders (category 5 through 7) committed to the California Department of the Youth Authority ("CYA").

No state law requires the counties or the juvenile courts to commit category 5 through 7 juvenile offenders to the CYA. The juvenile court's decision for such placements is based on recommendations from the county probation department which consider, among other things, available treatment options within that county. There is ample evidence in the record and in the law indicating that counties do in fact have discretion to effectuate placement options other than CYA for these juvenile offenders. Moreover, state funding is available for local juvenile treatment programs.

Because the additional sliding scale costs for CYA commitments of category 5 through 7 juvenile offenders *only* result from an underlying discretionary decision by the county to commit such juveniles to the CYA, the Commission finds the test claim statutes do not mandate a "new

program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution.

BACKGROUND

This test claim addresses increased fees that counties are required to pay the state for each person committed by the juvenile court to the California Department of the Youth Authority ("CYA").[32]

CYA is the state agency responsible for protecting society from the criminal and delinquent behavior of juveniles.[33] The department operates training and treatment programs that seek to educate, correct, and rehabilitate youthful offenders rather than punish them.[34] It is charged with operating 11 institutions and supervising parolees through 16 offices located throughout the state.[35] Individuals can be committed to the CYA by the juvenile court or on remand by the criminal court,[36] or returned to CYA by the Youthful Offender Parole Board.[37] Those juveniles committed to CYA are assigned a category number, ranging from 1 to 7, based on the seriousness of the offense committed; 1 being the most serious and 7 being the least serious.[38]

The Juvenile Court Law[39] establishes the California juvenile court within the superior court in each county.[40] Its purpose is "to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public."[41]

The juvenile court's jurisdiction extends to persons under 18 when the person violates federal, state or local criminal law;[42] however, certain crimes by persons who are 14 or older can be tried

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[32] In a reorganization of California corrections programs in 2005, CYA became the Division of Juvenile Justice under the Department of Corrections and Rehabilitation. However, this analysis will reference "CYA" in accordance with the agency's title at the time the test claim statutes were enacted.

[33] Welfare and Institutions Code section 1700; according to the Legislative Analyst's Office, juveniles committed to CYA are generally between the ages of 12 and 24, and the average age is 19. (Legislative Analyst's Office, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 4.)

[34] Welfare and Institutions Code section 1700.

[35] Legislative Analyst's Office, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 4.

[36] Welfare and Institutions Code section 707.2, subdivision (a).

[37] Legislative Analyst's Office, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 5.

[38] California Code of Regulations, title 15, sections 4951-4957.

[39] Welfare and Institutions Code sections 200, et. seq.

[40] Welfare and Institutions Code section 245.

[41] Welfare and Institutions Code section 202, subdivision (a).

[42] Welfare and Institutions Code section 602, subdivision (a).

by the criminal courts.[43] With some exceptions, the juvenile court may retain jurisdiction over any person who is found to be a ward of that court until the ward attains the age of 21.[44]

If the juvenile court decides that it has jurisdiction of a juvenile who violated a criminal law, the judge – taking into account the recommendations of county probation department staff[45] – decides whether to make the offender a ward of the court[46] and ultimately determines the appropriate placement and treatment for the juvenile. Placement decisions are based on such factors as the age of the juvenile, circumstances and gravity of the offense committed, criminal sophistication, the juvenile's previous delinquent history,[47] and the county's capacity to provide treatment.[48]

The court may limit control by the parent or take the juvenile from physical custody of the parent under specified circumstances.[49] Treatment can take the form of probation without supervision of the probation officer, probation under the officer's supervision in the home of the parent or guardian or in a foster home,[50] placement in a community care facility,[51] confinement within juvenile hall, placement in a private or county camp, [52] or commitment to the CYA.[53] However, before committing a person to CYA, the court must be satisfied that the minor has the mental and physical capacity to benefit from such an experience.[54]

Counties are responsible for the expense of support and maintenance of a ward or dependent child of the juvenile court, generally when the parents or other person liable for the juvenile are unable to pay the county such costs of support or maintenance.[55] In 1947, section 869.5 was added to the Welfare and Institutions Code to require county payments to the state for wards committed by the juvenile court to the CYA. That section stated:

> For each person … committed to the Department of Institutions for placement in a correctional school and for each ward of the juvenile court committed to the Youth Authority[,] the county from which he is committed

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[43] Welfare and Institutions Code section 602, subdivision (b).

[44] Welfare and Institutions Code section 607, subdivision (a).

[45] Welfare and Institutions Code sections 702, 706 and 706.5; California Rules of Court, Rule 1492, subdivisions (a) and (b).

[46] Welfare and Institutions Code section 725.

[47] Welfare and Institutions Code section 725.5.

[48] Test Claim, page 3.

[49] Welfare and Institutions Code section 726.

[50] Welfare and Institutions Code section 727.

[51] Welfare and Institutions Code section 740.

[52] Welfare and Institutions Code section 730.

[53] Welfare and Institutions Code section 731.

[54] Welfare and Institutions Code section 734.

[55] Welfare and Institutions Code sections 900 and 903.

> shall pay the State at the rate of twenty-five dollars ($25) per month for the time such person so committed remains in such state school or in any camp or farm colony, custodial institution, or other institution under the direct supervision of the Youth Authority to which such person may be transferred, in the California Vocational Institution, or in any boarding home, foster home, or other private or public institution in which he is placed by the Youth Authority, on parole or otherwise, and cared for and supported at the expense of the Youth Authority. …[56]

Thus, for several decades, each county was responsible to pay the CYA $25 per month for each person committed to the CYA. Statutes 1961, chapter 1616, renumbered Welfare and Institutions Code section 869.5 to section 912; that section, as well as sections 912.1 (as added in 1998) and 912.5 (as added in 1996), are the subject of this test claim.

Test Claim Statutes

In 1996, the Legislature increased the fees CYA charges the counties by enacting Statutes 1996, chapter 6 (Sen. Bill No. (SB) 681). Chapter 6 increased the monthly fee from $25 to $150[57] for category 1 through 4 offenders, i.e., the most serious offenders, and established a "sliding scale" of fees for category 5 through 7 offenders,[58] based on specified percentages of the per capita institutional cost of CYA.[59] Statutes 1998, chapter 632 (SB 2055), capped the per capita institutional cost to the cost the CYA charged counties as of January 1, 1997.[60] The charge against the county is not applicable to periods of confinement that are solely pursuant to a revocation of parole by the Youthful Offender Parole Board.[61]

The Senate Floor analysis for SB 2055 (Stats. 1998, ch. 632) stated that, according to the author:

> SB 681 [Stats. 1996, ch. 6] imposed a fee schedule upon counties for "low level" offenders sent to the California Youth Authority (CYA). The intent of the legislation was to provide a monetary disincentive for sending "low

[56] Statutes 1947, chapter 190.

[57] Welfare and Institutions Code section 912.

[58] Typical offenses: Category 5 – assault with deadly weapon, robbery, residential burglary, sexual battery, unless offense results in substantial injury which would make it a category 4 offense (baseline parole consideration date is 18 months); Category 6 – carrying a concealed firearm, commercial burglary, battery, all felonies not contained in categories 1 – 5 (baseline parole consideration date is one year); Category 7 – technical parole violations, all offenses not contained in categories 1 – 6 such as misdemeanors (baseline parole consideration date is one year or less).

[59] Welfare and Institutions Code section 912.5, subdivision (a).

[60] Welfare and Institutions Code section 912.1.

[61] Welfare and Institutions Code section 912.5, subdivision (c).

> level" juvenile offenders to the CYA. Clearly, the Legislature wanted counties to treat, punish and house these offenders at the local level.[62]

With the enactment of SB 681, the Legislature also provided $32.7 million in funding to assist the counties in the operation of local juvenile facilities,[63] established the Juvenile Challenge Grant program allocating $50 million to fund a five-year program cycle for 29 different community-based demonstration programs targeting juvenile offenders,[64] and initiated the Repeat Offender Prevention Project (ROPP) with another $3.3 million for seven counties to identify and intervene at an early stage with potential repeat offenders.[65] The Challenge Grant and ROPP programs have received additional funding to continue in subsequent years. In 1998, $100 million was appropriated by the state to support renovation, reconstruction, and deferred maintenance of county juvenile facilities.[66] Thus, the Legislature has provided and continues to provide significant funding for assistance to counties in providing such locally-based programs.[67]

Claimant's Position

The claimant states that the test claim statutes impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The basis for the claim is that the state has shifted financial responsibility to the counties in imposing the higher sliding scale fees for CYA commitments, which imposes a "new program or higher level of service" pursuant to article XIII B, section 6.

The claimant estimates the following costs, but limits the claim to *only the sliding scale fees*:

[62] SB 2055 Senate Bill Analysis, Senate Rules Committee, Office of Senate Floor Analyses, August 28, 1998, page 6.

[63] Statutes 1996, chapter 7 (AB 1483).

[64] Statutes 1996, chapter 133 (SB 1760), known as the Juvenile Crime Enforcement and Accountability Challenge Grant Program.

[65] 1996-97 Budget Act.

[66] Statutes 1998, chapter 499 (AB 2796), known as the County Juvenile Correctional Facilities Act.

[67] See Statutes 2006, chapter 47 (2006 Budget Bill), line items 5225-104-0890 and 5430-109-0890.

Fiscal Year 2000-2001	
Total amount payable to CYA for juvenile court commitments	$ 6,257,537
Amount payable for baseline fees of $150 per youth, per mo. (WIC § 912)	$ 1,079,850
Test claim - Amount payable for sliding scale fees (WIC § 912.5)	$ 5,177,687
Fiscal Year 2001-2002	
Total amount payable to CYA for juvenile court commitments	$ 7,535,940
Amount payable for baseline fees of $150 per youth, per mo. (WIC § 912)	$ 1,066,350
Test Claim - Amount payable for sliding scale fees (WIC § 912.5)	$ 6,469,590

The claimant filed a rebuttal to the CYA comments on this test claim as well as comments on the first draft staff analysis. These comments are addressed, as necessary, in the analysis.

Position of Department of Finance

The Department of Finance asserts that the test claim is without merit and should be denied for the following reasons:

- Payment of the additional sliding scale fee merely reimburses the state for a portion of the costs of housing youthful offenders who cannot be held at county facilities. Therefore, the test claim statutes do not result in a shift of financial responsibility from the state to local governments.
- Although the test claim statutes do set a higher fee related to the housing and treatment of youthful offenders by the state, the statutes do not require a "new program or higher level of service" to be implemented by the county, as the payment of the fee is related to a service that is being provided by the state and not by the county.
- The county could avoid payment of the fee by providing placement options for less serious youthful offenders within the county. Payment of any fee is predicated on the county not being able to house the youthful offender within its own facilities and hence the court committing the offender to confinement in a state facility.

The Department of Finance filed comments agreeing with the first draft staff analysis as well as the revised draft staff analysis, recommending denial of the test claim.

Position of California Youth Authority

The CYA asserts that the test claim statutes do not impose a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution, nor do they impose "costs mandated by the state" within the meaning of Government Code section 17514 for the following reasons:

- Pursuant to *County of San Diego v. State* (1997) 15 Cal.4th 68, article XIII B, section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed *complete* financial responsibility before adoption of section 6. The test claim statutes merely increase the charges to local agencies for discretionary placements in CYA, which local agencies have long had a share in supporting. Therefore, no new program or higher level of service was created by the test claim statutes because CYA placements were not funded entirely by the state when article XIII B, section 6 became effective.[68]
- The original statutory mandate requiring that counties pay a fee for CYA placements was enacted before January 1, 1975, rendering state subvention permissive rather than mandatory under article XIII B, section 6.
- Costs resulting from actions undertaken at the option of the local agency are not reimbursable. The test claim statutes do not eliminate a juvenile court's discretion to choose other dispositions for minors adjudicated to come within the terms of Welfare and Institutions Code section 602, nor do they *require* CYA commitments for minors under any circumstances. Welfare and Institutions Code section 731, subdivision (a), makes it clear that a CYA commitment is only one of several dispositions available to a juvenile court as to minors who are found to have committed criminal offenses.
- In certain cases, a juvenile court that removes a juvenile offender from the care and custody of his or her parents may simply place the ward under the supervision of the probation officer, who in turn exercises his or her discretion in selecting the appropriate placement for the minor. (Welf. & Inst. Code, § 727.)
- A juvenile court also has the discretion to place wards eligible for probation into a neighborhood youth correctional center, an option clearly intended as a more positive placement alternative to CYA. (Welf. & Inst. Code, § 1851.) CYA shares in the cost of construction of such centers, and *reimburses* counties up to $200 per month per ward. (Welf. & Inst. Code, §§ 1859, 1860.)

[68] These comments were filed prior to the adoption of Proposition 1A in November 2004, which added subdivision (c) of article XIII B, section 6 providing: "A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of *complete or partial* financial responsibility for a required program for which the State previously had *complete or partial* financial responsibility." (Emphasis added.)

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[69] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[70] "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."[71, 72]

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.[73] 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.[74]

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.[75] 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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[69] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[70] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

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

[72] Article XIII B, section 9 of the California Constitution states that the spending limits are *not* applicable to "[a]ppropriations required to comply with mandates of the courts … which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly." (Art. XIII B, §9, subd.(c).)

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

[74] *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*).

[75] *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 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

legislation.[76] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[77]

In addition, effective November 2, 2004, article XIII B, section 6, subdivision (c), also specifically defines a "mandated new program or higher level of service" as including "a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility."[78]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[79]

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.[80] 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."[81]

The analysis addresses the following issues:

- Are the test claim statutes subject to article XIII B, section 6 of the California Constitution?
- Do the test claim statutes mandate a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

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

Article XIII B, section 6 was adopted in recognition of the state constitutional restrictions on the powers of local government to tax and spend, and requires a subvention of funds to reimburse local agencies when the state imposes a new program or higher level of service upon those agencies. However, article XIII B further provides that certain appropriations shall not be subject to the limitations otherwise imposed by articles XIII A and XIII B. One such exclusion to those limitations is set forth in article XIII B, section 9, subdivision (b): "Appropriations required to comply with mandates of the courts or the federal government which, without

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

[77] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

[78] Enacted by the voters as Proposition 1A, November 2, 2004.

[79] *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.

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

[81] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

The test claim statutes set new sliding scale fees that must be paid by the counties for specified juveniles committed to the CYA by the juvenile court. Because commitment to the CYA is ordered by the juvenile courts, the question here is whether the sliding scale fees for CYA commitments fall within the court-mandate exclusion to the article XIII B spending limit. For the reasons stated below, the Commission finds that the mandate requiring new sliding scale fees for juvenile commitments to CYA does *not* operate as a mandate of the courts within the meaning of article XIII B, section 9, subdivision (b), of the California Constitution.

The Third District Court of Appeal in *County of Placer v. Corin* (1980) 113 Cal.App.3d 443 (*County of Placer*) explained Article XIII B as follows:

> Article XIII B was adopted less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13" [article XIII A]. While article XIII A was generally aimed at controlling ad valorem property taxes and the imposition of new "special taxes" [citations], the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, article XIII B places limits on the authorization to expend the "proceeds of taxes." (§ 8, subd. (c).)
>
> Article XIII B provides that beginning with the 1980-1981 fiscal year, "an appropriations limit" will be established for each "local government." … (§ 8, subd. (h).) No "appropriations subject to limitation" may be made in excess of this appropriations limit, and revenues received in excess of authorized appropriations must be returned to the taxpayers within the following two fiscal years. (§ 2.)[82]

In *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 (*City of Sacramento*), the California Supreme Court further explained article XIII B:

> Article XIII B – the so-called "Gann limit" — restricts the amounts state and local governments may appropriate and spend each year from the "proceeds of taxes." (§§ 1, 3, 8, subds. (a)-(c).) … In language similar to that of earlier statutes, article XIII B also requires state reimbursement of resulting local costs whenever, after January 1, 1975, "the Legislature or any state agency mandates a new program or higher level of service on any local government, …" (§ 6.) Such mandatory state subventions are excluded from the local agency's spending limit, but included within the state's. (§ 8, subds. (a), (b).) Finally, article XIII B excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly." (§ 9, subd. (b) ….)[83]

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[82] *County of Placer, supra,* 113 Cal.App.3d 443, 446.

[83] *City of Sacramento, supra,* 50 Cal.3d 51, 58-59.

Thus, article XIII B, section 6 requires state reimbursement to local governments in view of taxing and spending limits, but section 9 provides exclusions to the spending limits. Although the courts have not dealt with the *court* mandate exclusion identified in section 9, subdivision (b), the *federal* mandate exclusion from that subdivision was addressed in *City of Sacramento.* In that case, the court found that a state statute extending mandatory unemployment insurance coverage to local government employees imposed "federally mandated" costs on local agencies and not state-mandated costs; hence, local agencies subject to the new statutory requirements may tax and spend as necessary subject to superseding constitutional ceilings on taxation by state and local governments to meet the expenses required to comply with the legislation.[84] Because the plain language of article XIII B, section 9, subdivision (b), also excludes court mandates from the spending limit, these principles must, by extension, apply to court mandates. And, as the courts have made clear, a local agency cannot accept the benefits of being exempt from appropriations limits while asserting an entitlement to reimbursement under article XIII B, section 6.[85]

Since the sliding scale fees are triggered by a commitment to CYA, and that commitment is mandated by the juvenile court,[86] the court's action might be viewed as the actual cause for the increased costs. Claimant asserts, however, that the mandated costs cited in the test claim did not arise from a mandate of the courts, but rather the Legislature, when it enacted the sliding scale fees. Noting that Welfare and Institutions Code section 869.5 established the longstanding requirement for the county to pay the state for each person committed to CYA, claimant argues that "[t]he sliding scale costs were not the result of a required expenditure for additional services, nor were they established because the provisions of the mandates of the courts made the existing services more costly."[87]

The Commission agrees. The plain language of section 9 references court and federal mandates that impose additional expenditures on a local agency, without discretion. The Supreme Court in *City of Sacramento* addressed the issue of "discretion" in the context of such a federal mandate. There, the court noted it was ambiguous whether the *state* had discretion, in light of the federal law, to require local agencies to provide unemployment insurance to their employees. After making a full analysis of the federal program, the court found that "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense,"[88] and concluded that the unemployment insurance requirements were indeed a federal mandate within the section 9, subdivision (b), exclusion.

Thus, in applying the federal mandate exclusions from section 9, the court in *City of Sacramento* focused on which entity was exercising discretion *to cause the increased cost*. Here, the test claim statutes have increased the costs the counties must pay the state for housing juvenile

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[84] *City of Sacramento, supra*, 50 Cal.3d 51, 76.

[85] *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282.

[86] Welfare and Institutions Code section 731.

[87] Letter from Bonnie Ter Keurst, Office of the Auditor/Controller-Recorder, County of San Bernardino, page 2, submitted March 6, 2007.

[88] *City of Sacramento, supra*, 50 Cal.3d 51, 73-74.

offenders who happen to be committed to CYA. The juvenile court is exercising its discretion to make the commitment, but has no discretion with regard to how much such a commitment costs the counties. Consequently, it is the state, rather than the juvenile courts, that has exercised its discretion in increasing the costs for juveniles committed to CYA.

Thus, although juvenile courts do make the order for a CYA commitment, it is the test claim statutes which established the additional sliding scale costs for counties. The Commission therefore finds that the test claim statutes *do not fall within* the article XIII B, section 9, subdivision (b), exclusion to the appropriations limit, and the statutes *are subject to* article XIII B, section 6, if the Commission also finds that the text claim statutes mandate a "new program or higher level of service."

Issue 2: Do the test claim statutes mandate a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

Courts have recognized the purpose of article XIII B, section 6 is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[89] A test claim statute may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task,[90] and the required activity or task is new, constituting a "new program," or it creates a "higher level of service" over the previously required level of service.[91]

However, in light of the intent of article XIII B, section 6, a reimbursable state-mandated program has been found to exist in some instances when the state shifts fiscal responsibility for a mandated program to local agencies but no actual activities have been imposed by the test claim statute or executive order.[92] Moreover, as of November 3, 2004, article XIII B, section 6, subdivision (c), of the California Constitution defines a "mandated new program or higher level of service" as including "a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a *required program* for which the State previously had complete or partial financial responsibility."[93] (Emphasis added.)

Here, the test claim statutes do not require local agencies to engage in any activity or task. The statutes do, however, increase costs to the counties for category 5 through 7 juvenile offenders that are committed to the CYA. However, based on the following analysis, the Commission finds that since the increased costs flow from an *initial discretionary decision* by counties to commit their category 5 through 7 juveniles to the CYA, the test claim statutes do not constitute

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[89] *County of San Diego, supra,* 15 Cal. 4th 68, 81 (citing *Lucia Mar, supra,* 44 Cal.3d 830).

[90] *Long Beach, supra,* 225 Cal.App.3d 155, 174.

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

[92] *Lucia Mar, supra,* 44 Cal.3d 830, 836.

[93] Enacted by the voters as Proposition 1A, November 2, 2004.

a "required program" within the meaning of article XIII B, section 6, subdivision (c).

Although the decision to commit a juvenile offender to the CYA is ultimately made by the juvenile court, that decision is based on a variety of factors including information and recommendations of the county probation department.[94] Placement decisions are based on such factors as the age of the juvenile, circumstances and gravity of the offense committed, criminal sophistication, the juvenile's previous delinquent history,[95] and the county's capacity to provide treatment.[96]

California Rules of Court, rule 1495, provides that "[p]rior to every disposition hearing, the probation officer shall prepare a social study concerning the child, which shall contain those matters relevant to disposition and a recommendation for disposition." In *In re L. S.* the court stated:

> The information contained in a properly prepared social study report is central to the juvenile court's dispositional decision. … The social study should also include 'an exploration of and recommendation to wide range of alternative facilities potentially available to rehabilitate the minor." [citations omitted.] Implicit in this requirement appears to be some insight into the minor's problems in order for the probation officer to make a recommendation with rehabilitation in mind.
>
> In arriving at its dispositional decision, the juvenile court must also have in mind the provisions of [Welf. & Inst. Code] section 734 and section 202, subdivision (b) as well as the command of *In re Aline D.* (1975) 14 Cal.3d 557 [ ], which requires proper consideration be given to less restrictive programs before a commitment to CYA is made.[97]

The Department of Finance noted in its comments that the county could avoid payment of the sliding scale fees by providing placement options for less serious youthful offenders within the county, and that payment of any fee is predicated on the county not being able to house the youthful offender within its own facilities and hence the court committing the offender to confinement in a state facility.

Furthermore, the CYA stated in its comments that the test claim statutes do not eliminate a juvenile court's discretion to choose dispositions other than CYA for minors adjudicated to come within the terms of Welfare and Institutions Code section 602, nor do they *require* CYA commitments for minors under any circumstances. CYA further notes that "Welfare and Institutions Code section 731(a) makes it clear that a CYA commitment is only one of several dispositions available to a juvenile court as to minors who are found to have committed criminal

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[94] Welfare and Institutions Code sections 702, 706 and 706.5; California Rules of Court, Rule 1492, subdivisions (a) and (b).

[95] Welfare and Institutions Code section 725.5.

[96] Test Claim, page 3.

[97] *In re L. S.* (1990) 220 Cal.App.3d 1100, 1104-1105 (disapproved on another ground in *People v. Bullock* (1994) 26 Cal.App.4th 985).

offenses."[98] The CYA cites additional options available to the court, including placing the ward under the supervision of the probation officer who exercises discretion in selecting the appropriate placement of the minor, and placing wards eligible for probation into a neighborhood youth correction center in which the CYA provides monetary assistance.[99]

Claimant states the following:

> The judges in those counties that do not have an adequate and available placement within the county generally order CYA as the only appropriate and available option. This is especially critical when a county has limited funds and has not been able to construct or operate its own institution for these youth.[100]

However, given the above-referenced availability of state funding for establishing and maintaining juvenile treatment facilities, the claimant has provided no evidence to show why it may or may not have availed itself of such funding.

The test claim statutes were intended to divert low-level offenders from the CYA. The Senate Floor analysis for SB 2055 (Stats. 1998, ch. 632) stated that, according to the author:

> SB 681 [Stats. 1996, ch. 6] imposed a fee schedule upon counties for "low level" offenders sent to the California Youth Authority (CYA). The intent of the legislation was to provide a monetary disincentive for sending "low level" juvenile offenders to the CYA. Clearly, the Legislature wanted counties to treat, punish and house these offenders at the local level.[101]

The Legislative Analyst's Office provided the following pertinent information regarding the test claim statutes, indicating that their intent is being realized:

> Legislation that took effect in 1997 to substantially increase the fees paid by counties for committing less serious offenders to the [CYA] appears to be having its desired effects. Admissions in less serious offense categories are down significantly, and counties are moving to increase their menu of local programming options for these offenders. County efforts in this direction have been aided by the availability of over $700 million in state and federal funds for juvenile probation programs. As a result of these successes, we recommend that the state maintain the sliding scale structure. [102]
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> … Prior to the passage of the legislation, counties had a strong fiscal incentive to send offenders to the CYA because they only paid a nominal

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[98] Letter from Meg Halloran, Deputy Attorney General, on behalf of CYA, August 16, 2002, page 4.

[99] *Ibid.*

[100] Test Claim, page 5.

[101] SB 2055 Senate Bill Analysis, Senate Rules Committee, Office of Senate Floor Analyses, August 28, 1998, page 6.

[102] Legislative Analyst's Office, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 8.

> $25 monthly fee per ward. As a result, [CYA] commitments, while often more expensive than other sanction and treatment options, were far less expensive from the counties' perspective.
>
> While some counties developed their own locally based programs despite these incentives, other counties appeared to be over-relying on [CYA] commitments. This disparate usage of the [CYA] was reflected in the widely ranging first admission rates across counties. …
>
> The problems with the prior fee structure were threefold. First, a large body of research on juvenile justice programs suggests that most juvenile offenders can and should be handled in locally based programs. In part, this is because locally based programs can work more closely with the offender, his family, and the community. Second, these locally based programs tend to be less expensive than a [CYA] commitment, which meant that state funding was encouraging counties to use a more expensive as well as less effective sanctioning option for many offenders. Finally, taxpayers in those counties with lower admissions rates for less serious offenders were paying not only for their own locally based options, but also for a share of the costs created by those other counties with higher [CYA] admissions rates. In response to these shortcomings, the Legislature acted to align the fiscal incentives faced by counties with more cost-effective policies, thereby encouraging counties to invest in preventive and early intervention strategies.[103]
>
> … In the two years since the sliding scale fee took effect, it has significantly reduced the numbers of first admissions to the [CYA]. Overall, first admissions in 1997 were 30 percent lower than in 1996. Admissions data for 1998 continue the 1997 trends. …
>
> Not only have overall admissions [to the CYA] declined, but admissions for the least serious offenders have dropped significantly. … [F]irst admissions for the more serious offenses declined by 15 percent, while admissions in the less serious offense categories declined by 41 percent. This change suggests that counties have responded to the sliding scale fees, but have not been deterred by the increase in the monthly fee from committing more serious offenders when appropriate.[104, 105]

In the case of *Lucia Mar*, the Supreme Court recognized that a "new program or higher level of service" within the meaning of article XIII B, section 6 could include a shift in costs from the state to school districts for the purpose of funding state schools for the handicapped,[106] and remanded the case to the Commission for further findings regarding whether the school districts

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[103] *Id.* at page 10.

[104] *Id.* at pages 11-12.

[105] Reports of the Legislative Analyst are cognizable legislative history for purposes of statutory construction. *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 788.

[106] *Lucia Mar, supra,* 44 Cal.3d 830, 836.

were "mandated" by the statute in question to make the contributions.[107] Article XIII B, Section 6, subdivision (c), also requires reimbursement for shift of cost cases if the program is "required."

The question of whether a statute imposes a state mandate was addressed in *Kern High School Dist.* There, reaffirming the rule of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, the 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.[108] Here, as noted above, there is no legal compulsion for counties to bear the additional costs because: a) no state law requires the counties or the juvenile courts to commit category 5 through 7 juvenile offenders to the CYA; and b) the juvenile court's decision is based on recommendations from the county probation department which consider, among other things, available treatment options within that county. Instead, there is ample evidence in the record and in the law indicating that counties do in fact have discretion to effectuate placement options other than CYA for these juvenile offenders. Moreover, the claimant has provided no evidence to show why it cannot avail itself of state funding to establish and maintain local juvenile treatment programs for these low-level offenders.

The cases have further found that, in the absence of strict legal compulsion, a local agency might be "practically" compelled to take an action thus triggering costs that would be reimbursable. In *Kern High School Dist.*, the court concluded that "even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate."[109] The court did provide language addressing what might constitute *practical* compulsion, for instance if the state were to impose a substantial penalty for nonparticipation in a program, as follows:

> Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur notice- and agenda-related costs. Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion — for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program — claimants here faced no such practical compulsion. Instead, although claimants argue that they have had "no true option or choice" other than to participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of various funded programs "too good to refuse" — even though, as a condition of program participation, they have been forced to incur some costs. On the facts presented, the cost of compliance with conditions of participation in these

[107] *Id.* at pages 836-837.

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

[109] *Id.* at page 736.

> funded programs does not amount to a reimbursable state mandate. (Emphasis in original.)[110]

The court further concluded that, unlike the circumstances in a previous case which found a state mandate existed,[111] the *Kern* claimants "have not faced 'certain and severe … penalties' such as 'double … taxation' and other 'draconian' consequences."[112]

The 2004 *San Diego Unified School Dist.* case further clarified the Supreme Court's views on the practical compulsion issue. In that case, the test claim statutes required K-12 school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[113] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[114] Regarding expulsion recommendations that were discretionary on the part of the district, the court acknowledged the school district's arguments, stating that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement for K-12 school districts to provide safe schools.[115] Ultimately, however, the Supreme Court denied reimbursement for the hearing procedures regarding discretionary expulsions on alternative grounds.[116]

In summary, where no "legal" compulsion is set forth in the plain language of a test claim statute or regulation, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. Here, as noted above, a commitment to the CYA is not legally required. Nor does the Commission find any support for the notion that claimants are "practically" compelled to make the underlying CYA commitment on a theory that there is a strong safety reason to do so. In fact, the circumstances here are substantially similar to those in the *Kern High School Dist.* case, where the district was denied reimbursement because its participation in the underlying program was voluntary, i.e., no "certain and severe" or "substantial" penalty would result if counties use placement options other than CYA for their low-level juvenile offenders, particularly since state funding for such local juvenile treatment programs is available.

Citing *Lucia Mar*, claimant argues that whenever the state through legislative or regulatory action "drastically changes the basis for 'shared costs' that shifts those costs to local agencies, it has created a new program or higher level of service that requires reimbursement"[117] under

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[110] *Id.* at 731.

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

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

[113] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[114] *Id.* at pages 881-882.

[115] *Id.* at page 887, footnote 22.

[116] *Id.* at page 888.

[117] Letter from Mark W. Cousineau, Supervising Accountant III, Auditor/Controller-Recorder's Office for County of San Bernardino, January 22, 2003, page 2.

article XIII B, section 6. However, as noted in that case and in section 6, subdivision (c), the program in question must be *state mandated*. Because the additional sliding scale costs for CYA commitments of category 5 through 7 juvenile offenders *only* result from an underlying discretionary decision by the county to commit such juveniles to the CYA, the Commission finds the test claim statutes do not mandate a "new program or higher level of service" within the meaning of article XIII B, section 6.

CONCLUSION

The Commission finds that additional sliding scale costs associated with commitment of category 5 through 7 juvenile offenders to the CYA were established by the test claim statutes. However, these costs result from an underlying discretionary decision by the local agency to place those juveniles with CYA. Therefore, the test claim statutes do not mandate a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

California Code of Regulations, Title 11, Sections 1001, 1052, 1053, 1055, 1070, 1071, and 1082 (Register 2001, No. 29)

Filed on August 6, 2002, by the County of Sacramento, Claimant.

Case No.: 02-TC-03

Training Requirements for Instructors and Academy Staff

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 31, 2007*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") held two hearings on this test claim.

The first hearing was held on March 29, 2007, in which the following persons testified: Cheryl MacCoun, Gail Wilczynski, Nancy Gust, and Christine Hess appeared on behalf of claimant County of Sacramento; Allan Burdick and Juliana Gmur appeared on behalf of the California State Association of Counties SB-90 Service; Leonard Kaye appeared on behalf of County of Los Angeles; Bryon Gustafson appeared on behalf of the Commission on Peace Officer Standards and Training; and Carla Castañeda appeared on behalf of the Department of Finance.

The Commission heard and decided this test claim during a regularly scheduled hearing on May 31, 2007. Nancy Gust, Christine Hess, Cheryl MacCoun, and Juliana Gmur appeared on behalf of claimant County of Sacramento; Allan Burdick appeared on behalf of the California State Association of Counties SB-90 Service; Laura Filatoff appeared on behalf of the Los Angeles City Police Department; Bryon Gustafson and Alan Deal appeared on behalf of the Commission on Peace Officer Standards and Training; and Carla Castañeda and 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 by a vote of 7-0 to deny this test claim.

Summary of Findings

This test claim addresses regulations adopted by the Commission on Peace Officer Standards and Training ("POST") that require training of specified POST instructors and key staff of POST training academies. POST training is provided to law enforcement officers by POST-approved institutions or agencies, and POST can certify training courses and curriculum developed by other entities as meeting required minimum standards.

Although the test claim regulations require persons who provide specified POST training to engage in certain activities, the Commission finds that those requirements flow from an initial discretionary decision by the local agency to participate in POST, and another discretionary decision to provide POST-certified training or establish an academy and employ training staff. Because the underlying decisions to participate in POST and provide POST-certified training are discretionary, and local agencies have alternatives to providing POST-certified training or establishing a POST training academy, the test claim regulations are not subject to article XIII B, section 6 of the California Constitution, and therefore do not impose a state-mandated program on local agencies.

BACKGROUND

This test claim addresses POST regulations that require training of specified POST instructors and key staff of POST training academies. This claim *does not* involve the requirement imposed on individual peace officers to receive basic training pursuant to Penal Code section 832.

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.[118] The POST program is funded primarily by persons who violate the laws that peace officers are trained to enforce. [119] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[120]

POST training is provided to law enforcement officers by POST-approved institutions or agencies, and POST can certify training courses and curriculum developed by other entities as meeting required minimum standards.[121] POST states the following:

> To assist the more than 600 law enforcement agencies that voluntarily agree to abide by its minimum training standards, POST certifies hundreds of courses annually. These courses are developed and offered by more than 800 presenters statewide. POST also provides instructional resources and technology, quality leadership training programs, and professional certificates to recognize peace officer achievement.[122]

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[118] Penal Code section 13500 et seq.

[119] *About California POST,* <http://www.POST.ca.gov>.

[120] Penal Code sections 13522 and 13523.

[121] Penal Code sections 13510, 13510.1, 13510.5, and 13511; California Code of Regulations, Title 11, section 1053.

[122] *Training, Certificates & Services: Overview,* <http://www.POST.ca.gov>.

A POST participating agency can offer its own in-house POST-certified training, or send its personnel to POST-certified training institutions operated by other entities, such as community colleges or other law enforcement agencies.[123]

On March 26, 2001, POST issued Bulletin number 01-05 entitled "Proposed Regulatory Action: Training Requirements for Instructors and Academy Staff of Specialized Training Courses." In that bulletin, POST stated:

> For years, the training community has shared an informal expectation that persons who instruct in certain high risk/liability areas should attend a POST-certified instructor development course (or an equivalent one) on the related subject area. The same expectation has been maintained for certain key academy staff, and has, in fact, been formalized in the *POST Basic Course Management Guide*. The pertinent POST-certified instructor development courses are listed in the *POST Catalog of Certified Courses*. The proposed regulations also include provisions for equivalency determinations and exemptions from the training requirements.

Test Claim Regulations

POST subsequently adopted the regulations proposed in Bulletin number 01-05, which are the subject of this test claim.[124] The regulations require that, effective July 1, 2002, primary instructors[125] of designated specialized training courses complete a specified training standard, or its equivalent, prior to instructing in the specialized subject.[126] Instructors of specialized training that are not primary instructors must complete the specified training standard, or its equivalent, if they are appointed on or after July 1, 2002, or if they instruct at a new training institution on or after July 1, 2002.[127] A process was also established to allow presenters of the specialized courses to perform an equivalency evaluation of non-POST-certified training to meet the minimum training standard for the specialized subject.[128] Presenters of the specialized courses are required to maintain documentation demonstrating satisfaction of the minimum training standard by their instructors who teach any of the specialized courses.[129]

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[123] Letter from Kenneth J. O'Brien, Executive Director of POST, submitted October 31, 2002, page 1.

[124] The test claim was filed with the Commission on August 6, 2002, on regulations in effect at that time. The subject regulations have subsequently been modified, however, those modified regulations have not been claimed and, thus, the Commission makes no finding with regard to them.

[125] "Primary instructor" is an individual responsible for the coordination and instruction for a particular topic. The responsibility includes oversight of topic content, logistics, and other instructors. (Cal. Code Regs., tit. 11, § 1001, subd. (aa).)

[126] California Code of Regulations, Title 11, section 1070, subdivision (a).

[127] *Ibid.*

[128] California Code of Regulations, Title 11, section 1070, subdivision (b).

[129] California Code of Regulations, Title 11, section 1070, subdivision (c).

The test claim regulations also require that Academy Directors, Academy Coordinators, and Academy Recruit Training Officers who are appointed to those positions on or after July 1, 2002, shall complete specified minimum training standards within one year from the date of appointment to the position.[130] Academy Directors are required to maintain documentation demonstrating satisfaction of the minimum training standard for the designated staff position.[131]

Three additional requirements are set forth in the test claim regulations with regard to specialized course instructors and Academy instructors. First, qualifications of certain academy staff, in addition to other instructors and coordinators, must now be evaluated by POST in requests for course certification.[132] Second, specified elements of instructor resumes must now be provided for course certification requests.[133] And third, certificates of completion must be issued by presenters to students who successfully complete POST-certified instructor development courses listed in section 1070, the Academy Director/Coordinator Workshop and the Recruit Training Officer Workshop.[134]

In July 2004, the Commission denied a consolidated test claim, filed by the County of Los Angeles and Santa Monica Community College District, regarding POST Bulletin 98-1 and POST Administrative Manual Procedure D-13, in which POST imposed field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties (*Mandatory On-The-Job Training For Peace Officers Working Alone*, 00-TC-19/ 02-TC-06). The Commission found that these executive orders do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the following reasons:

- 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; and
- 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.

Claimant's Position

The claimant asserts that the test claim regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that development costs commencing in fiscal year 2001-2002 for the following activities will be incurred and are reimbursable:

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[130] California Code of Regulations, Title 11, section 1071, subdivision (a). Content for the courses for each staff position is specified in section 1082.

[131] California Code of Regulations, Title 11, section 1071, subdivision (b).

[132] California Code of Regulations, Title 11, section 1052, subdivision (a)(2).

[133] California Code of Regulations, Title 11, section 1053, subdivision (a)(2).

[134] California Code of Regulations, Title 11, section 1055, subdivision (*l*).

1. Staff time to complete or update any necessary general, operations, or special orders as required.
2. Staff time to compile information to be distributed to instructors and key staff informing them of changes in regulations and what information they need to provide such as updated resumes, completed class certificates, etc.
3. Staff time to collect, review for completeness and evaluate contents of current, and any new, instructor and key academy staff information packages turned in.
4. Staff time to review information submitted for equivalency evaluation as instructor or key staff.
5. Staff time to oversee specific parts of the equivalency process such as the Learner's First CD and the POST video.
6. Staff time to observe and evaluate the instructor presentations as part of the equivalency process.
7. Staff time to provide required Basic Instructor Development course to new instructors.
8. Purchase of necessary computer hardware, software and any necessary programming services to set up database or modify existing database to track information on #6 above.
9. Staff time to enter information into database to track class, individual, instructor, academy staff, certificate information and any other data required by POST. Database to be used for annual renewals, to provide POST information as necessary and during any audits of the program.
10. Staff time to fill out required documentation for POST.
11. Staff time to schedule required training for instructors and key staff as necessary.
12. Develop or update training for data entry, report management and required notices in the database.
13. Meet and confer with POST representatives.
14. Costs for printing class material for Basic Instructor Course and necessary office supplies for filing paperwork turned in by instructors and key academy personnel.

For the foregoing activities, estimated costs for staff time are $26,298 and estimated costs for computer hardware, software and programming services are "unknown at this time but could range from $5,000 - $20,000."

Claimant asserts that the following ongoing costs will be incurred and are reimbursable:

1. Staff time to collect, review for completeness and evaluate contents of new instructor and key academy staff resumes.
2. Staff time to collect, review for completeness and evaluate contents of annual renewal packages of instructor and key academy staff resumes.
3. Staff time to review information submitted for equivalency evaluation as instructor or key academy staff.

4. Staff time to oversee specific parts of the equivalency process such as the Learner's First CD and the POST video.
5. Staff time to observe and evaluate the instructor presentations as part of the equivalency process.
6. Staff time to provide required Basic Instructor Development course to new instructors.
7. Staff time to compile information to be distributed to instructors and key staff informing them of any changes to these regulations.
8. Staff time to enter information into database to track class, individual, instructor, academy staff and certificate information and any other data required by POST.
9. Staff time to fill out required certificates.
10. Staff time to fill out required documentation for POST.
11. Staff time to schedule required training for instructors and key staff as necessary.
12. Staff time to meet and confer with POST representatives.
13. Costs for printing class material for Basic Instructor Course and necessary office supplies for filing paperwork turned in by instructors and key academy personnel.

For the foregoing activities, claimant estimates ongoing costs of $25,000 per year.

The claimant filed additional comments in response to the staff's recommendation to deny the test claim. These comments are addressed in the analysis.

Position of Department of Finance

The Department of Finance stated in its comments that:

> As the result of our review, we have concluded that the [test claim regulations] may have resulted in a higher level of service for an existing program. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines which will then have to be developed for the program.

The Department submitted subsequent comments agreeing with the staff recommendation to deny the test claim.

Position of POST

POST stated in its comments that it believes the test claim regulations do not impose a new program or higher level of service within an existing program upon local agencies within the meaning of article XIII B, section 6 of the California Constitution and costs mandated by the state pursuant to Government Code section 17514.

First, under Penal Code sections 13503, 13506, and 13510, POST is a voluntary program in which agencies may or may not participate, and any agency choosing not to participate is not subject to POST's requirements. Only when a law enforcement agency commits to participate by local ordinance is it obliged to adhere to program requirements.

Second, any law enforcement agency voluntarily participating in the POST program *may* seek to have its training programs certified by POST. A participating agency can elect to not present training courses in-house and instead send its personnel to POST-certified training institutions operated by other entities, e.g., community colleges or other law enforcement agencies. There is no requirement for a participating agency to have POST-certified training courses. Since the test claim regulations affecting instructor/academy staff training requirements only apply to POST-certified training institutions, there is no requirement for the state to reimburse for such costs under the Government Code or the California Constitution.

Third, the new POST training requirements for instructors and academy staff are worded in such a way that they are directed to the individual instructor and academy staff members, not the training institutions. POST-certified training institutions are free to require applicants to complete this training on their own at their own expense. If POST-certified training institutions voluntarily provide their staff with this training, it is no reason to expect the state to reimburse for these costs.

Since POST has facilitated the ready availability of this instructor/academy staff training by certifying the training to virtually any POST-certified training institution that can demonstrate a need and capability, law enforcement trainers in the POST program can conduct much of this required training within their own facilities without sending their personnel away.

POST provided testimony at the March 29, 2007 hearing, stating the following:

- There are examples of police departments in California that do not participate in the POST program.[135]
- Those agencies that do not participate in POST can have their own standards that parallel POST, the disadvantage being that the travel and per diem for the training is not reimbursed by POST. Those agencies are still law enforcement agencies, and their trainers are still law enforcement trainers.[136]
- 44 of the 58 counties in California do not have their own academy; agencies that do have their own academy have local control and can train their officers to meet the particular needs of their community.[137]

[135] Reporter's Transcript of Proceedings, March 29, 2007 Commission Hearing, page 42, line number 11.

[136] *Id.* page 43, line number 13.

[137] *Id.* page 43, line number 1.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[138] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[139] "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."[140] 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.[141] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[142]

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.[143] 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.[144] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[145]

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

[139] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

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

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

[142] *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*).

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

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

[145] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[146]

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.[147] 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."[148]

The analysis addresses the following issue:

- Are the test claim regulations subject to article XIII B, section 6 of the California Constitution?

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

In order for the test claim regulations to impose a reimbursable state-mandated program under article XIII B, section 6, the language must order or command a local agency to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where participation in the *underlying* program is voluntary, courts have held that new requirements imposed within that underlying program do not constitute a reimbursable state mandate.[149]

Do the test claim regulations mandate any activities?

The test claim regulations require the following activities:

1. As of July 1, 2002, primary instructors of designated specialized POST training courses must complete a specified training standard, or its equivalent, prior to instructing in the subject.
2. Instructors of designated specialized POST training courses that are not primary instructors must complete the specified training standard, or its equivalent, if they are appointed on or after July 1, 2002, or if they instruct at a new training institution on or after July 1, 2002.
3. Presenters of specialized courses must maintain documentation demonstrating their instructors who teach any of the specialized courses have satisfied the minimum training standard, and such documentation shall be made available for POST inspection upon request.

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[146] *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.

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

[148] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

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

4. Academy Directors, Academy Coordinators, and Academy Recruit Training Officers who are appointed to those positions on or after July 1, 2002, shall complete the specified minimum training standards for their positions within one year from the date of appointment.
5. Academy Directors shall maintain documentation demonstrating satisfaction of the minimum training standard for each designated staff position, and such documentation shall be made available for POST inspection upon request.
6. Any person or organization desiring to have a course certified by POST shall now provide instructor resumes in addition to other information previously required.
7. Any presenter of a POST-Certified instructor development course, or any presenter of the Academy Director/Coordinator Workshop or Recruit Training Officer Workshop, shall issue certificates to students who successfully complete the training.

Thus, the plain language of the test claim regulations does require specified persons involved in POST training to engage in certain activities. However, based on the following analysis, the Commission finds that the requirements flow from the *initial discretionary decisions* by the local agency to become a member of POST, and to provide POST-certified training or establish a POST training academy. Therefore, the test claim regulations are not subject to article XIII B, section 6 and, thus, do not constitute a state-mandated program.

POST was created in 1959 "[f]or the purpose of raising the level of competence of local law enforcement officers …"[150] 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 for the training of peace officers. However, these rules apply only to those cities, counties, and school districts that participate in the POST program and apply for state aid.[151] If the local agency decides to file an application for state aid, the agency must adopt an ordinance or regulation agreeing to abide by POST rules and regulations.[152] Not all local agencies have applied for POST membership,[153] nor do all local agencies provide POST-certified training. Nor is there any state statute, or other state law, that requires local agencies to participate in the POST program or provide POST-certified training. Moreover, consistent with POST's long standing interpretation of the Penal Code, POST's regulations state that participation in the POST program is voluntary.[154] POST stated the following in its comments on this test claim:

> [U]nder Penal Code sections 13503, 13506, and 13510, POST is a voluntary program in which agencies may or may not participate, and any agency choosing not to participate is not subject to POST's requirements. Only

[150] Penal Code section 13510.

[151] Penal Code section 13520.

[152] Penal Code section 13522.

[153] POST's website at http://www.post.ca.gov/library/other/agency_page.asp lists law enforcement agencies and participation status.

[154] California Code of Regulations, title 11, section 1010, subdivision (c).

> when a law enforcement agency commits to participate by local ordinance is it obliged to adhere to program requirements.

With regard to providing training, section 13511, subdivision (a), states that, "[i]n establishing standards for training, [POST] shall, so far as consistent with the purposes of this chapter, permit required training to be obtained at institutions approved by [POST]." On its website at http://www.post.ca.gov/training/default.asp, POST gives an overview of Training, Certificates & Services it provides which states:

> To assist the more than 600 law enforcement agencies that voluntarily agree to abide by its minimum training standards, POST certifies hundreds of courses annually. These courses are developed and offered by more than 800 presenters statewide. POST also provides instructional resources and technology, quality leadership training programs, and professional certificates to recognize peace officer achievement….

In comments on this test claim, POST also stated that:

> [A]ny law enforcement agency voluntarily participating in the POST program may seek to have its training programs certified by POST. A participating agency can elect to not present training courses in-house and instead send its personnel to POST-certified training institutions operated by other entities, e.g., community colleges or other law enforcement agencies. The point here is that there is no requirement for a participating agency to have POST-certified training courses….[155]

Thus, according to the Penal Code, and as the Penal Code provisions are interpreted by POST, participating in the POST program,[156] obtaining POST certification of training courses and providing POST-certified training are discretionary decisions on the part of the training provider. The courts have found it is a well-established principle that "contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation, while not necessarily controlling, is of great weight; and courts will not depart from such construction unless it is clearly erroneous or unauthorized."[157] The Commission finds no other provision in statute or regulation to contradict POST's interpretation of the Penal Code.

Therefore, based on the plain language of the governing statutes and regulations as set forth above, local law enforcement agencies have no legal compulsion to participate in POST or establish a POST training academy. However, where no "legal" compulsion is set forth in the test claim statutes or regulations, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the

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[155] Letter from Kenneth J. O'Brien, Executive Director of POST, submitted October 31, 2002, page 1.

[156] California Code of Regulations, title 11, section 1010, subdivision (c).

[157] *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1995) 37 Cal.App.4th 675, 683 (citing *Industrial Indemnity Co. v. Workers' Comp. Appeals Board* (1985) 165 Cal.App.3d 633, 638).

court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[158]

In the case of *San Diego Unified School Dist*., the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[159] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[160] Regarding expulsion recommendations that were discretionary on the part of the district, the court acknowledged the school district's arguments, stating that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[161] Ultimately, however, the Supreme Court denied reimbursement for the hearing procedures regarding discretionary expulsions on alternative grounds.[162]

Here, as noted above, participation in the underlying POST program and providing POST-certified training is voluntary, i.e., no legal compulsion exists. Nor does the Commission find any support for the notion that "practical" compulsion is applicable in the instant case. The test claim regulations do not address a situation in any way similar to the circumstances in *San Diego Unified School Dist.*, where the expulsion of a student might be needed to comply with the constitutional requirement for safe schools. In fact, the circumstances here are substantially similar to those in the *Kern High School Dist.* case, where the district was denied reimbursement because its participation in the underlying program was voluntary, and no "certain and severe penalties" would result if local agencies fail to participate in POST or provide their own POST-certified training.

The Supreme Court in *San Diego Unified School Dist*. underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision to require the costs to be incurred.[163] In this case, the state has not required the local public agency to participate in POST or provide POST-certified training; the local agency has made that decision. Moreover, the court in *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 (*County of Los Angeles II),* in interpreting the holding in *Lucia Mar*,[164] noted that where local entities have alternatives under the statute other than paying the costs in question, the costs do not constitute a state mandate.[165] Here, local agencies have alternatives available in that they

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[158] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

[159] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[160] *Id.* at pages 881-882.

[161] *Id.* at page 887, footnote 22.

[162] *Id.* at page 888.

[163] *Id.* at page 880.

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

[165] *County of Los Angeles II, supra,* 32 Cal.App. 4th 805, page 818.

can: 1) choose not to become members of POST; 2) elect not to present training courses in-house and instead send their law enforcement officers to POST-certified training institutions operated by other entities such as community colleges or other law enforcement agencies; or 3) hire only those individuals who are already POST-certified peace officers.

Claimant argues that this analysis "does not fully address the unique situation of test claimant with regard to its relationship with the [POST]."[166] Claimant asserts that participation in POST is *de facto* compelled, even though there is no state statute requiring participation in POST. Claimant argues that, "[i]n what amounts to statutory double-speak, however, the officers are most certainly bound by the requirements of POST and so are the local agencies to the extent that they can hire such officers."[167] In support of this argument, claimant states that if a law enforcement agency does not wish to be involved in POST, the Penal Code section requiring every *peace officer* to have POST basic training[168] makes that decision impossible. Claimant further notes that "POST has undeniable control of the hiring practices of even non-participating agencies"[169] and "those who are intimately involved in this arena know the pervasive and inescapable control of the POST."[170]

The claimant has provided declarations asserting the following points:

- In order for the Sacramento County Sheriff's Department to have qualified law enforcement employees, pursuant to the requirements of Penal Code section 832, the Department must either hire someone who has already been through a POST certified academy or provide its own academy and training.
- It is not cost effective for the Sacramento County Sheriff's Department or the County of Sacramento as a public entity to send new officers to an outside agency for training.
- Once an officer is hired, continuing education is required by POST. It is not cost effective for an agency as large as Sacramento County or Los Angeles County to send its officers outside for such continuing education, thus these counties must have instructors that meet the new POST standards for instructors and academy staff.
- For most POST courses, travel and per diem costs are reimbursable from POST. However, POST reimbursement does not cover backfill or tuition, nor does it cover the administrative costs associated with maintaining the records to support the new instructor requirements or the cost of completing equivalent training.
- It is true that the counties are not required to have a training academy, nor is any community college required to have one. Thus, while no individual agency is required to have a training academy, some agency or college somewhere has to provide the training so that officers throughout California can get their POST-mandated training.

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[166] Comments on Staff Analysis from County of Sacramento, submitted May 2, 2007, page 1.

[167] Comments on Staff Analysis from County of Sacramento, submitted May 2, 2007, page 3.

[168] Penal Code section 832.

[169] Comments on Staff Analysis from County of Sacramento, submitted May 2, 2007, page 5.

[170] *Ibid.*

- Although it has been asserted that law enforcement agencies do not have to participate in POST, POST minimum standards are now an issue of "standard of care." POST sets minimum standards by which officers and instructors are able to engage in their profession, similar to the Medical Board setting standards for doctors.

Claimant is, however, confusing *peace officer* requirements with *local law enforcement agency* requirements. It is true that peace officers are required to meet certain standards set by POST. Penal Code section 832 requires peace officers to complete a POST basic training requirement, as follows:

> (a) Every person described in this chapter as a peace officer shall satisfactorily complete an introductory course of training prescribed by [POST]. On or after July 1, 1989, satisfactory completion of the course shall be demonstrated by passage of an appropriate examination developed or approved by [POST]. Training in the carrying and use of firearms shall not be required of any peace officer whose employing agency prohibits the use of firearms.
>
> (b)(1) Every peace officer described in this chapter, prior to the exercise of the powers of a peace officer, shall have satisfactorily completed the course of training described in subdivision (a).
>
> (2) Every peace officer described in Section 13510 or in subdivision (a) of Section 830.2 may satisfactorily complete the training required by this section as part of the training prescribed pursuant to Section 13510.
>
> (c) Persons described in this chapter as peace officers who have not satisfactorily completed the course described in subdivision (a), as specified in subdivision (b), shall not have the powers of a peace officer until they satisfactorily complete the course.

But there is no state statute or executive order requiring a local law enforcement agency itself to adopt an ordinance to participate in POST or establish its own POST training classes or a POST academy. Claimant argues that because the individual officer is required to be certified by POST under Penal Code section 832, and the "pervasive and inescapable control of the POST," it is impossible for the law enforcement agency to avoid being a member of POST. Yet POST regulations clearly state that participation by the local agency in POST is voluntary.

Moreover, claimant has not demonstrated it is "practically" compelled to participate in POST or establish a training academy. Claimant asserts the "more complete analysis" set forth in *San Diego Unified School Dist.* is applicable in this instance, wherein the Supreme Court cautioned "there is reason to question an extension of 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."[171] In that passage, the court referenced the case of *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, which found a reimbursable state mandate was created by an executive order that required county firefighters to be provided with protective clothing and safety equipment.[172] The *San Diego* court theorized that, because

[171] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887.

[172] *Ibid.*

the local agency possessed discretion concerning how many firefighters it would employ and could in that sense control costs, a strict application of the *City of Merced* rule could foreclose reimbursement in such a situation "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."[173] The court found it "doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result…"[174]

The Commission finds the court's analysis inapplicable in the instant case. In the context of the Supreme Court's warning regarding an overly-strict application of the *City of Merced* rule, claimant is attempting to liken its discretionary decisions to participate in the POST program and establish a POST training academy, with a local fire agency's exercise of discretion concerning the number of firefighters it needs to employ for a program which, based on the plain language of the executive order, mandates the local agency to provide protective clothing and equipment to its employees. However, the *San Diego* court did not have such a situation before it, nor, more importantly, did it overrule *Kern High School Dist.*, the rule of which is plainly applicable in this instance as set forth above. As noted above, the Supreme Court in *Kern High School Dist.* ruled on a substantially similar set of facts. In that case, the school district had participated in optional funded programs in which new requirements were imposed. Here, new requirements are imposed on local law enforcement agencies that choose to participate in POST and establish POST-certified training or POST academies, and those agencies can receive POST reimbursement for certain program-related costs.

In *Kern,* the court determined there was no practical compulsion to participate in the underlying programs, since a district that elects not to participate or to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[175] Claimant concedes that local law enforcement agencies are not subject to draconian consequences but argues this ruling is not on point because a local agency cannot "fully discontinue participation due to the pervasive control of the POST." There is no evidence in the record to support the claim that a local law enforcement agency cannot discontinue participation in POST, other than the assertion that control by POST is "pervasive and inescapable," and establishing POST training programs in house is "cost effective."

However, the relevant holding is from *Kern* wherein the Supreme Court states that school districts that have discretion will make the choices that are ultimately the most beneficial for the district:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests

[173] *Ibid.*

[174] *Ibid.*

[175] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

> of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[176]

The circumstances discussed above are analogous to this case. Claimant states that it is "cost effective" for the Counties of Sacramento and Los Angeles, because of their size, to establish training academies and provide training in house rather than send their peace officers outside for training. Presumably, law enforcement agencies have made and will continue to make discretionary decisions regarding POST training that are the most beneficial to the agency. When those agencies have such discretion, the program is *not* state-mandated.

Therefore, any activities or costs a local agency might incur for participation in POST, establishing a training academy, and, as a result, providing POST training to trainers or ensuring academy staff have appropriate qualifications, are not subject to article XIII B, section 6, and thus do not constitute a state-mandated program.

CONCLUSION

The Commission finds that because the underlying decisions to participate in POST, provide POST-certified training or establish a POST training academy are discretionary, and that local agencies have alternatives to providing POST-certified training or establishing a POST training academy, the test claim regulations are not subject to article XIII B, section 6 of the California Constitution, and therefore do not impose a state-mandated program on local agencies.

[176] *Id.* at 753.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

California Code of Regulations, Title 11, Sections 1001, 1052, 1053, 1055, 1070, and 1071 (Register 2001, No. 29);
Section 1056 (Register 2001, No. 4);
Section 1058 (Register 1991, No. 50); and
Section 1082 (Register 2002, No. 35)

Filed on June 10, 2003, by the San Bernardino Community College District, Claimant.

Case No.: 02-TC-26

Peace Officer Instructor 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 May 31, 2007*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 31, 2007. Keith Peterson appeared on behalf of claimant, San Bernardino Community College District. Bryon Gustafson and Alan Deal appeared on behalf of the Commission on Peace Officer Standards and Training. 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 4-3 to deny this test claim.

Summary of Findings

This test claim addresses regulations adopted by the Commission on Peace Officer Standards and Training ("POST") that require training of specified POST instructors and key staff of POST training academies at California community colleges. POST training is provided to law enforcement officers by POST-approved institutions or agencies, and POST can certify training courses and curriculum developed by other entities as meeting required minimum standards.

Although the test claim regulations require persons who provide specified POST training and key staff of POST training academies to engage in certain activities, the Commission finds that these requirements flow from the initial discretionary decisions by the community college district to provide POST-certified training or establish a POST training academy. Because those underlying decisions are discretionary, the test claim regulations are not subject to article XIII B, section 6 of the California Constitution and consequently do not impose a reimbursable state-mandated program on community college districts.

BACKGROUND

This test claim addresses POST regulations[177] that require training of specified POST instructors and key staff of POST training academies.

POST was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.[178] POST is authorized to adopt regulations as necessary to carry out the purposes of the statutes that established it.[179] The POST program is funded primarily by persons who violate the laws that peace officers are trained to enforce.[180] Participating agencies agree to abide by the standards established by POST and may apply to POST for state aid.[181]

Among other things, POST has the power to "develop and implement programs to increase the effectiveness of law enforcement and when such programs involve training and education courses to cooperate with and secure the cooperation of state-level officers, agencies, and bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs."[182] POST training is provided to law enforcement officers by POST-approved institutions or agencies, and POST can certify training courses and curriculum developed by other entities as meeting required minimum standards.[183] POST states the following:

> To assist the more than 600 law enforcement agencies that voluntarily agree to abide by its minimum training standards, POST certifies hundreds of courses annually. These courses are developed and offered by more than 800 presenters statewide. POST also provides instructional resources and technology, quality leadership training programs, and professional certificates to recognize peace officer achievement.[184]

A POST participating agency can offer its own in-house POST-certified training, or send its personnel to POST-certified training institutions operated by other entities, such as community colleges or other law enforcement agencies.[185]

On March 26, 2001, POST issued Bulletin number 01-05 entitled "Proposed Regulatory Action: Training Requirements for Instructors and Academy Staff of Specialized Training Courses." In that bulletin, POST stated:

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[177] California Code of Regulations, title 11.

[178] Penal Code section 13500 et seq.

[179] Penal Code section 13506.

[180] *About California POST*, <http://www.POST.ca.gov>.

[181] Penal Code sections 13522 and 13523.

[182] Penal Code section 13503, subdivision (e).

[183] Penal Code sections 13510, 13510.1, 13510.5, and 13511; California Code of Regulations, Title 11, section 1053.

[184] POST Website, *Training, Certificates & Services: Overview*, <http://www.POST.ca.gov>.

[185] Letter from POST to the Commission, dated October 30, 2002.

> For years, the training community has shared an informal expectation that persons who instruct in certain high risk/liability areas should attend a POST-certified instructor development course (or an equivalent one) on the related subject area. The same expectation has been maintained for certain key academy staff, and has, in fact, been formalized in the *POST Basic Course Management Guide*. The pertinent POST-certified instructor development courses are listed in the *POST Catalog of Certified Courses*. The proposed regulations also include provisions for equivalency determinations and exemptions from the training requirements.

POST subsequently adopted the regulations proposed in Bulletin number 01-05, which constitute a portion of this test claim. These training regulations require that, effective July 1, 2002, primary instructors[186] of designated specialized training courses complete a specified training standard, or its equivalent, prior to instructing in the specialized subject.[187] Instructors of specialized training that are not primary instructors must complete the specified training standard, or its equivalent, if they are appointed on or after July 1, 2002, or if they instruct at a new training institution on or after July 1, 2002.[188] A process was also established to allow presenters of the specialized courses to perform an equivalency evaluation of non-POST-certified training to meet the minimum training standard for the specialized subject.[189] Presenters of the specialized courses are required to maintain documentation demonstrating satisfaction of the minimum training standard by their instructors who teach any of the specialized courses.[190]

The test claim regulations also require that Academy Directors, Academy Coordinators, and Academy Recruit Training Officers who are appointed to those positions on or after July 1, 2002, shall complete specified minimum training standards within one year from the date of appointment to the position.[191] Academy Directors are required to maintain documentation demonstrating satisfaction of the minimum training standard for the designated staff position.[192]

Three additional requirements are set forth in these regulations with regard to specialized course instructors and Academy instructors. First, qualifications of certain academy staff, in addition to other instructors and coordinators, must now be evaluated by POST in requests for course certification.[193] Second, specified elements of instructor resumes must now be provided for

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[186] "Primary instructor" is an individual responsible for the coordination and instruction for a particular topic. The responsibility includes oversight of topic content, logistics, and other instructors. (Cal. Code Regs., tit. 11, § 1001, subd. (aa).)

[187] California Code of Regulations, Title 11, section 1070, subdivision (a).

[188] *Ibid.*

[189] California Code of Regulations, Title 11, section 1070, subdivision (b).

[190] California Code of Regulations, Title 11, section 1070, subdivision (c).

[191] California Code of Regulations, Title 11, section 1071, subdivision (a). Content for the courses for each staff position is specified in section 1082.

[192] California Code of Regulations, Title 11, section 1071, subdivision (b).

[193] California Code of Regulations, Title 11, section 1052, subdivision (a)(2).

course certification requests.[194] And third, certificates of completion must be issued by presenters to students who successfully complete POST-certified instructor development courses listed in section 1070, the Academy Director/Coordinator Workshop and the Recruit Training Officer Workshop.[195]

Claimant's Position

The claimant asserts that the test claim regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that new duties mandated by the state upon community college districts require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff and student training and travel to implement the following activities:

1. Establish and implement policies and procedures, and to revise those policies and procedures from time to time, to provide for the certification of courses and personnel by POST. (Cal. Code Regs., tit. 11, §§ 1001 and 1052 through 1082.)
2. Request course certifications which set forth:
    a. course content and hours;
    b. qualification of instructors, coordinators and academy staff;
    c. physical facilities appropriate for the training;
    d. cost of the course;
    e. potential clientele and volume of trainees;
    f. need and justification for the course;
    g. methods of course presentation;
    h. availability of staff to administer the course;
    i. course evaluation process;
    j. instructor to trainee ratios; and
    k. provisions for student safety.

    (Cal. Code Regs., tit. 11, §§ 1052, subd. (a).)
3. When requesting course certifications:
    a. designating an academy director whose qualifications include a demonstrated ability to manage an academy;
    b. designating an academy coordinator whose qualifications include a demonstrated ability to coordinate the instruction and management of the Regular Basic Course instructional system;

[194] California Code of Regulations, Title 11, section 1053, subdivision (a)(2).

[195] California Code of Regulations, Title 11, section 1055, subdivision (l).

c. insuring that the academy shall be supervised at all times by an academy director or coordinator when instruction is being conducted;

d. insuring that an advisory committee of law enforcement officials has been instituted to assist in providing logistical support and validation of the training; and

e. insuring that the college district complies with the minimum training standards for directors, coordinators, and recruit training officers.

(Cal. Code Regs., tit. 11, § 1052, subd. (b).)

4. When requesting course certifications after July 1, 2002:

   a. first telephonically contacting a POST Training Delivery Consultant for an evaluation;

   b. for favorable telephonic evaluations, submitting a complete course certification request package which shall include:

      1. Course Certification Request form;

      2. instructor resumes;

      3. course budget if the proposed course will require tuition;

      4. an expanded course outline including subject topics to the third level of detail;

      5. an hourly distribution schedule indicating, by day of the week, the instructors and topics scheduled for each course hour; and

      6. student safety policies and procedures for courses that include manipulative skills training.

   (Cal. Code Regs., tit. 11, § 1053.)

5. Renew courses annually by fiscal year. (Cal. Code Regs., tit. 11, § 1055, subd. (a).)

6. Display POST certification numbers on all materials being publicized, using the exact title as certified, and clearly indicating on all course announcements, brochures, bulletins or publications that POST has certified the individual course. (Cal. Code Regs., tit. 11, § 1055, subd. (c).)

7. Prior to change or modification of any course or budget, request POST approval and report any changes in subventions from outside sources within 30 days of the change. (Cal. Code Regs., tit. 11, § 1055, subd. (d).)

8. At least 30 calendar days prior to presentation of any course, submit to POST a course announcement with an attached hourly distribution schedule, and use the course control number issued by POST upon approval when referencing a particular course. (Cal. Code Regs., tit. 11, § 1055, subd. (e).)

9. Contact POST for approval of any necessary changes related to the presentation of a course, such as dates, times, location or hours. (Cal. Code Regs., tit. 11, § 1055, subd. (h).)

10. Complete and submit to POST a Course Certification Report of each certified course prior to the beginning of a new fiscal year to ensure certification for the following fiscal year, including an evaluation of the continuing need for the course, currency of curriculum, and adherence to course requirements, which has been reviewed and signed by the presenter or designee. (Cal. Code Regs., tit. 11, § 1056.)
11. When appropriate, appeal a certification or decertification decision to the POST Executive Director and the POST Commission itself as follows:
    a. file written appeal to Executive Director, along with all supporting documentation, within 30 days of the certification or decertification notice;
    b. file written appeal to Commission itself, along with all supporting documentation, within 30 days of the date of the Executive Director's decision; and
    c. appear at POST Commission hearing and present evidence when necessary or appropriate.

    (Cal. Code Regs., tit. 11, § 1058.)
12. Effective July 1, 2002, ensure that the district's primary instructors of specified courses complete the required training standards. Ensure that instructors appointed on or after July 1, 2002, or who instruct at a new institution after July 1, 2002, complete the specified training standards. (Cal. Code Regs., tit. 11, § 1070, subd. (a).)
13. Maintain documentation which demonstrates satisfaction of the minimum training standards of instructors, which shall be a copy of the certificate of course completion issued by the training presenter, or a POST training record, or the expanded course outline used for training equivalence. (Cal. Code Regs., tit. 11, § 1070, subd. (c).)
14. Effective July 1, 2002, ensure that the district's academy directors, academy coordinators and academy recruit training officers complete the training standards specified for the position. (Cal. Code Regs., tit. 11, § 1071, subd. (a).)
15. As Academy Director, maintain documentation demonstrating satisfaction of the minimum training standards for each staff position. (Cal. Code Regs., tit. 11, § 1071, subd. (b).)
16. Ensure POST-certified courses presented by community college meet specified minimum content requirements, assess student proficiency in each topic area, and ensure assessment is consistent with learning objectives. (Cal. Code Regs., tit. 11, § 1082, subd. (a).)

Claimant states that the District will incur approximately a minimum of $1,000 annually in staffing for certifying POST courses and training POST instructors, and "other costs in excess of fees and subventions provided to community college districts from July 1, 2001 through June 30, 2002 to implement these new duties mandated by the state which the district has not been reimbursed by any federal, state, or local government agency, and for which it cannot otherwise obtain reimbursement."[196]

[196] Test Claim, Declaration of Gloria Fischer, Dean, Police Science Program, San Bernardino Community College District, pages 7-8.

Claimant also filed comments on April 19, 2004, in response to the California Community Colleges Chancellor's Office comments, which were submitted on November 17, 2003. These comments are addressed, as necessary, in the following analysis. On March 8, 2007, claimant notified the Commission that it would be providing no further written comments on the draft staff analysis.

Position of the California Community Colleges Chancellor's Office

The Chancellor's Office argues that the test claim regulations do not impose a reimbursable state-mandated program on community college districts, since there is no legal compulsion, pursuant to *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, for the districts to offer POST courses and thus incur the attendant costs. The Chancellor's Office recognizes that the new regulatory requirements may make the POST courses more expensive to operate than other courses, but further notes that, "it is a fact of academic life that some courses cost more than others," and "[c]olleges need not offer courses that they decide they cannot afford."[197] And the fact that the claimant has discretion to offer these courses "underscores the absence of a mandate to do so and defeats the [test] [c]laim."[198]

The Chancellor's Office also points out that, pursuant to Education Code section 76300, community colleges are generally required to charge enrollment fees for their credit courses, and claimant's website indicates that its POST training courses are offered as credit courses. As a result, students should be paying enrollment fees, and possibly nonresident tuition if they are not California residents. In addition, the District is authorized to submit attendance in credit classes for state apportionment or aid.

Government Code section 17556, subdivision (d), provides that no mandated costs will be found where the district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. The Chancellor's Office maintains that section 17556, subdivision (d), prohibits approval of the claim because claimant offers no evidence that authorized fees cannot be used to meet any expenses it might incur under the test claim regulations.

Furthermore, the test claim regulations do not impose a new program or increased level of service, because the California Attorney General has opined that "where a statute enacted prior to 1975 required a body to establish minimum standards, revising those standards does not constitute a new program or increased level of an existing program."[199]

Finally, the Chancellor's Office asserts that claimant has not established that offering POST training classes is the same as running an academy, and therefore any activities resulting from requirements on academy personnel are not mandated on community college districts.

On March 16, 2004, the Chancellor's Office submitted a letter reiterating the above comments.

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[197] Letter from Thomas J. Nussbaum, Chancellor, California Community Colleges, Chancellor's Office, received November 17, 2003, page 2.

[198] *Ibid.*

[199] *Id.* at page 3, citing 83 Opinions California Attorney General 111, issued May, 2000.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[200] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[201] "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."[202] 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.[203] 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.[204]

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.[205] 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.[206] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[207]

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

[201] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

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

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

[204] *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*).

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

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

[207] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[208]

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.[209] 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."[210]

The analysis addresses the following issue:

- Are the test claim regulations subject to article XIII B, section 6 of the California Constitution?

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

Do the test claim regulations mandate any activities?

In order for the test claim regulations to impose a reimbursable state-mandated program under article XIII B, section 6, the language must order or command a local agency to engage in an activity or task.[211] If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where participation in the *underlying* program is voluntary, courts have held that new requirements imposed within that underlying program do not constitute a reimbursable state mandate.[212]

Claimant is seeking reimbursement for activities resulting from several enactments of the California Code of Regulations, title 11 ("POST regulations"), as specified on the test claim form submitted. In the text of the test claim, the claimant provided specific dates of adoption or amendment for these POST regulations, but is claiming reimbursement for several activities within the regulations that existed prior to the dates specified. For the reasons stated below, the activities that existed *prior to* the regulatory amendments specified by the claimant in this test claim were not properly claimed and will not be analyzed.

Government Code section 9605 sets forth the rules of statutory construction when a statute is amended. That section states in pertinent part:

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[208] *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.

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

[210] *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[211] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 174.

[212] *Kern High School Dist. supra*, 30 Cal.4th 727, 727, reaffirming *City of Merced v. State of California (City of Merced)* (1984) 153 Cal.App.3d 777.

> Where a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions which are not altered are to be considered as having been the law from the time when they were enacted; the new provisions are to be considered as having been enacted at the time of the amendment; and the omitted portions are to be considered as having been repealed at the time of the amendment. …"

The same rules of construction apply in interpreting regulations that apply in interpreting statutes,[213] and the California Attorney General has opined that Government Code section 9605 is applicable to a regulatory amendment.[214] Thus, regulatory provisions adopted on a specific date include only the new provisions, and not the pre-existing provisions. For the regulations cited in this test claim, therefore, only the *new or changed provisions* that were enacted on the dates specified are analyzed.

Accordingly, only the following activities are properly before the Commission:

1. When requesting course certifications after July 1, 2002, provide to POST newly specified information regarding course hours and qualifications of academy staff. (Cal. Code Regs., tit. 11, § 1052, subd. (a)(1) and (2); Register 2001, No. 29.)
2. When requesting course certifications after July 1, 2002, provide to POST newly specified information on instructor resumes. (Cal. Code Regs., tit. 11, § 1053, subd. (a)(2); Register 2001, No. 29.)
3. Complete and submit to POST a Course Certification Report of each certified course prior to the beginning of a new fiscal year to ensure certification for the following fiscal year, including an evaluation of the continuing need for the course, currency of curriculum, and adherence to course requirements, which has been reviewed and signed by the presenter or designee. (Cal. Code Regs., tit. 11, § 1056; Register 2001, No. 4.)
4. When appropriate, appeal a certification or decertification decision to the POST Executive Director and the POST Commission itself as follows:
    a. file written appeal to Executive Director, along with all supporting documentation, within 30 days of the certification or decertification notice;
    b. file written appeal to Commission itself, along with all supporting documentation, within 30 days of the date of the Executive Director's decision; and
    c. appear at POST Commission hearing and present evidence when necessary or appropriate.

    (Cal. Code Regs., tit. 11, § 1058; Register 91, No. 50.)
5. Effective July 1, 2002, ensure that the district's primary instructors of specified courses complete the required training standards. Ensure that instructors appointed on or after July 1, 2002, or who instruct at a new institution after July 1, 2002, complete the

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[213] *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687.

[214] 59 Opinions California Attorney General 298 (1976).

specified training standards. (Cal. Code Regs., tit. 11, § 1070, subd. (a); Register 2001, No. 29.)

6. Maintain documentation which demonstrates satisfaction of the minimum training standards of instructors, which shall be a copy of the certificate of course completion issued by the training presenter, or a POST training record, or the expanded course outline used for training equivalence. (Cal. Code Regs., tit. 11, § 1070, subd. (c); Register 2001, No. 29.)
7. Effective July 1, 2002, ensure that the district's academy directors, academy coordinators and academy recruit training officers complete the training standards specified for the position. (Cal. Code Regs., tit. 11, § 1071, subd. (a); Register 2001, No. 29.)
8. As Academy Director, maintain documentation demonstrating satisfaction of the minimum training standards for each staff position. (Cal. Code Regs., tit. 11, § 1071, subd. (b); Register 2001, No. 29.)
9. Ensure POST-certified courses, on the topic of racial profiling only,[215] presented by community college meet specified minimum content requirements, assess student proficiency, and ensure assessment is consistent with learning objectives. (Cal. Code Regs., tit. 11, § 1082, subd. (a); Register 2002, No. 35.)

The plain language of the test claim regulations does require specified persons involved in POST training to engage in some of the activities listed above. However, based on the following analysis, the Commission finds that since the requirements flow from an *initial discretionary decision* by the community college district to provide the specialized training or establish an academy and employ POST training staff, the test claim regulations are not subject to article XIII B, section 6 and consequently do not constitute a state-mandated program.

Penal Code section 13510, subdivision (a), states that, "[f]or the purpose of raising the level of competence of local law enforcement officers, [POST] shall adopt, and may from time to time amend, rules establishing minimum standards relating to physical, mental, and moral fitness that shall govern the recruitment of" various local law enforcement officers. Section 13511, subdivision (a), states that, "[i]n establishing standards for training, [POST] shall, so far as consistent with the purposes of this chapter, permit required training to be obtained at institutions approved by [POST]."

On its website at http://www.post.ca.gov/training/default.asp, POST gives an overview of Training, Certificates & Services it provides which states:

> To assist the more than 600 law enforcement agencies that voluntarily agree to abide by its minimum training standards, POST certifies hundreds of courses annually. These courses are developed and offered by more than 800 presenters statewide. POST also provides instructional resources and technology, quality leadership training programs, and professional certificates to recognize peace officer achievement….

[215] The previous version of Section 1082 contained these requirements for 19 other topic areas; the racial profiling topic was added with Register 2002, No. 35, and is the only topic area which is being analyzed.

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."[216] Education Code section 70902 states the following:

> … [T]he governing board [of each community college district] may initiate and carry on any program, activity, or may otherwise act in any manner that is not in conflict with or inconsistent with, or preempted by, any law that is not in conflict with the purposes for which community college districts are established.

There are no provisions in the California Constitution, or California statutes or regulations that require community college districts to provide POST training or establish a POST training academy.

The California Community Colleges Chancellor's Office ("CCC") argues that the test claim regulations do not impose a reimbursable state-mandated program on community college districts, since there is no legal compulsion, pursuant to the *Kern High School Dist.* case, for the districts to offer POST courses and thus incur the attendant costs. The claimant points out that a finding of legal compulsion is not a prerequisite to finding a reimbursable state mandate.

In *Kern High School Dist.*, the California Supreme Court reaffirmed the holding of *City of Merced, supra*, stating that the requirements imposed by a test claim statute are not state-mandated if the claimant's participation in the underlying program is voluntary.[217] Here, as noted above, there is no legal compulsion because no state law requires community college districts to provide POST training or establish a POST training academy.

The cases have further found that, in the absence of strict legal compulsion, a local agency might be "practically" compelled to take an action thus triggering costs that would be reimbursable. In *Kern High School Dist.*, the court concluded that "even if there are some circumstances in which a state mandate may be found in the absence of legal compulsion, the circumstances presented in this case do not constitute such a mandate."[218] The court did provide language addressing what might constitute *practical* compulsion, for instance if the state were to impose a substantial penalty for nonparticipation in a program, as follows:

> Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter they have been compelled to do so and hence to incur notice- and agenda-related costs. Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion — for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program — claimants here faced no such practical compulsion. Instead, although claimants argue that they have had "no true option or choice" other than to participate in the underlying funded

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

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

[218] *Id.* at page 736.

> educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of various funded programs "too good to refuse" — even though, as a condition of program participation, they have been forced to incur some costs. On the facts presented, the cost of compliance with conditions of participation in these funded programs does not amount to a reimbursable state mandate. (Emphasis in original.)[219]

The court further concluded that, unlike the circumstances in a previous case which found a state mandate existed,[220] the *Kern* claimants "have not faced 'certain and severe … penalties' such as 'double … taxation' and other 'draconian' consequences."[221]

The 2004 *San Diego Unified School Dist.* case further clarified the Supreme Court's views on the practical compulsion issue. In that case, the test claim statutes required K-12 school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[222] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[223] Regarding expulsion recommendations that were discretionary on the part of the district, the court acknowledged the school district's arguments, stating that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement for K-12 school districts to provide safe schools.[224] Ultimately, however, the Supreme Court denied the reimbursement for the hearing procedures regarding discretionary expulsions on alternative grounds.[225]

In summary, where no "legal" compulsion is set forth in the plain language of a test claim statute or regulation, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. Here, as noted above, providing POST-certified training and/or establishing a POST training academy is not legally required of community college districts. Nor does the Commission find any support for the notion that "practical" compulsion is applicable in the instant case. The test claim regulations do not address a situation in any way similar to the circumstances where "certain and severe" penalties could result for nonparticipation in the program or might be needed to comply with the constitutional requirement imposed on K-12 school districts for safe schools. In fact, the circumstances here are substantially similar to those in the *Kern High School Dist.* case, where the district was denied reimbursement because its participation in the underlying program was voluntary, and no

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[219] *Id.* at 731.

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

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

[222] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[223] *Id.* at pages 881-882.

[224] *Id.* at page 887, footnote 22.

[225] *Id.* at page 888.

"certain and severe" or "substantial" penalty would result if community college districts fail to provide POST-certified training or establish a POST training academy.

Claimant further argues that, pursuant to *Butt v. State of California* (1992) 4 Cal.4th 668, 680-681, there is a constitutional mandate to educate California students, and that the state's ultimate responsibility for public education cannot be delegated to any other entity. Since the state has not legislated the subject matter for instruction at community colleges, and there is no state mandate for any particular course of study at community colleges, the claimant argues it is irrelevant that there is no state mandate for peace officer instruction.

However, the *Butt* case is applicable to K-12 school districts rather than community college districts. Moreover, the claimant's conclusion drawn from that case ignores a fundamental principle of state mandates law as set forth above, i.e., that either legal or practical compulsion to undertake the activity must exist. Here, neither one exists. The Supreme Court in *San Diego Unified School Dist*. underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision to require the costs to be incurred.[226] In this case, the state has not required the community college district to provide POST-certified training or establish a POST training academy; the district has made that decision.

Finally, claimant asserts that the state created POST to increase the effectiveness of law enforcement, and is "charged with the obligation to train peace officers." *Lucia Mar, supra,* states that article XIII B, section 6 was intended to preclude the state from shifting to local agencies the financial responsibility of providing public services. Claimant argues that the test claim regulations shift the burden of peace officer training costs to community college districts.

In response to claimant's assertion that POST is "charged with the obligation to train peace officers," the law states that POST is charged with adopting "rules establishing minimum standards relating to physical, mental, and moral fitness" to govern the recruitment of peace officers.[227] In order to carry out its duties and responsibilities, POST has the power to "cooperate and secure the cooperation of county, city, city and county, and other local law enforcement agencies" and, when training and education is involved, "to cooperate with and secure the cooperation of state-level officers, agencies, and bodies having jurisdiction over systems of public higher education in continuing the development of college-level training and education programs…"[228] Thus, the statutes authorizing POST and its programs envisioned a cooperative effort among POST, local agencies and educational institutions in order to carry out training of peace officers. When community college districts *choose* to provide POST curriculum, there is no state mandate.

Therefore, the test claim regulations are not subject to article XIII B, section 6 and consequently do not constitute a state mandate.

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[226] *Id.* at page 880.

[227] Penal Code sections 13510.

[228] Penal Code section 13503, subdivisions (d) and (e).

CONCLUSION

The Commission finds that because the underlying decisions to provide POST-certified training or establish a POST training academy are discretionary, the test claim regulations are not subject to article XIII B, section 6 of the California Constitution and consequently do not impose a state-mandated program on community college districts.[229]

[229] The Commission does not reach the issue raised by the Chancellor's Office that Government Code section 17556, subdivision (d), applies to deny this claim since the Commission denies the claim on other grounds.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Labor Code Section 4850, as amended by Statutes 1977, Chapter 981 (SB 989); Statutes 1989, Chapter 1464 (SB 1172); Statutes 1999, Chapter 270[230] (AB 224) and Chapter 970 (AB 1387); Statutes 2000, Chapter 920 (AB 1883) and Chapter 929 (SB 2081); Filed on June 29, 2001 by the County of Los Angeles, Claimant; and Amended on July 25, 2002 to add San Diego Unified School District, Co-claimant.	Case No.: 00-TC-20/02-TC-02 *Workers' Compensation Disability Benefits for Government Employees* 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 31, 2007*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 31, 2007. Leonard Kaye and Alex Rossi appeared on behalf of claimant, County of Los Angeles. Art Palkowitz appeared on behalf of co-claimant, San Diego Unified School District. Carla Castañeda and 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 5-1 to deny this test claim.

Summary of Findings

This test claim addresses modifications to Labor Code section 4850, statutes that expanded the applicability of an existing workers' compensation leave benefit to specified local safety officers. That benefit entitles employees to a leave of absence without loss of salary for up to one year when disabled by injury or illness arising out of and in the course of employment.

The Commission finds that the test claim statutes do not mandate a new program or higher level of service in an existing program. The California Appellate and Supreme Court cases have consistently held that additional costs for increased employee benefits, in the absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not impose a new program or

[230] Claimant incorrectly identified Statutes 1999, chapter *224* on the test claim form, but correctly identified the 1999 statute as chapter 270 on page 5 of the test claim text.

higher level of service on local governments within the meaning of article XIII B, section 6 of the California Constitution.

The workers' compensation program is a *state*-administered program rather than a locally-administered program, one that provides a statewide compulsory and exclusive scheme of employer liability, without fault, for injuries arising out of and in the course of employment. Labor Code section 4850 is part of that comprehensive statutory scheme. Moreover, although the claimants may be faced with a higher cost of compensating their employees as a result of extending the workers' compensation leave benefits to additional employees, this does not equate to a higher cost of providing services to the public. Therefore, the Commission concluded that Labor Code section 4850, as amended by Statutes 2000, chapters 920 and 929, Statutes 1999, chapters 270 and 970, Statutes 1989, chapter 1464, and Statutes 1977, chapter 981, does not constitute a reimbursable state-mandated program.

BACKGROUND

This test claim addresses statutes that expanded applicability of an existing workers' compensation leave benefit to specified local safety officers. That benefit entitles employees to a leave of absence without loss of salary for up to one year when disabled by injury or illness arising out of and in the course of employment.

Article XIV, section 4 of the California Constitution vests the Legislature with plenary power to create and enforce a complete system of workers' compensation. The Legislature initially addressed the issue of workers' compensation in 1911 in the Workmen's Compensation Act,[231] which was amended significantly in 1913[232] and 1917.[233] The current statutory scheme, enacted in 1937, consolidated workers' compensation and worker health and safety provisions into the Labor Code.[234] The workers' compensation system provides for a compulsory and exclusive scheme of employer liability, without fault, for injuries arising out of and in the course of employment, with remedies for temporary and permanent disability, medical care and employer discrimination.[235]

Section 4850 was added to the Labor Code in 1939 to provide city police officers and fire fighters that were members of the State Employees' Retirement System (now the Public Employees' Retirement System [PERS]) a benefit that entitled them to leave of absence without loss of salary for up to one year when disabled by injury or illness arising out of and in the course of employment.[236] Over the years, Labor Code section 4850 has been amended several times to expand the groups of employees covered and to address other provisions of the benefit. Section 4850, as amended in 1977 and thereafter, is the subject of this test claim.

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[231] Statutes 1911, chapter 399.

[232] Statutes 1913, chapter 176.

[233] Statutes 1917, chapter 586.

[234] Labor Code sections 3200 et seq. and 6300 et seq., Statutes 1937, chapter 90.

[235] 65 California Jurisprudence Third (1998), Work Injury Compensation, section 7, pages 29-30.

[236] Statutes 1939, chapter 926.

Prior to 1977, section 4850 read:

> Whenever any city policeman, city fireman, county fireman, fireman of any fire district, sheriff or any officer or employee of a sheriff's office, or any inspector, investigator, detective or personnel with comparable title in any district attorney's office, who is a member of the Public Employees' Retirement System or subject to the County Employees Retirement Law of 1937 … is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his duties, he shall become entitled, regardless of his period of service with the city or county, to leave of absence while so disabled without loss of salary, in lieu of temporary disability payments, if any, which would be payable under this chapter, for the period of such disability but not exceeding one year, or until such earlier date as he is retired on permanent disability pension … It shall also apply to deputy sheriffs subject to the County Employees Retirement law of 1937 ….

The section excluded persons such as telephone operator, clerk, stenographer, machinist, mechanic or otherwise, whose functions did not clearly fall within active law enforcement service or active firefighting and prevention service. It also provided that if the employer was insured through the workers' compensation system, then any payments the workers' compensation system would be obligated to make as disability indemnity could be paid to the employer. A later statute, not pled in this test claim, established a program for advanced disability pension payments.[237] Under that program, the local government agency may make advance pension payments to a local safety officer who has qualified for the continued salary benefit under section 4850; for PERS members, the local government is entitled to reimbursement from PERS for any such advance pension payments.

Test Claim Statutes

The test claim statutes consist of several amendments to section 4850. Following is a summary of the changes relevant for this analysis.

Statutes 1977, Chapter 981

- Added lifeguards employed year round on a regular, full-time basis by Los Angeles County, who are members of PERS or subject to the County Employees Retirement Law of 1937, to the group of employees covered by the one-year paid leave benefit.

Statutes 1989, Chapter 1464

- Reenacted section 4850, which would have sunset on January 1, 1990, without any changes that are relevant for this analysis.

Statutes 1999, Chapter 270[238]

- Added certain peace officers defined in Penal Code section 830.31[239] that are employed on a regular full time basis by Los Angeles County, who are members of PERS or subject

[237] Statutes 1985, Chapter 1254; Labor Code section 4850.3.

[238] Claimant incorrectly identified Statutes 1999, chapter *224* on the test claim form, but correctly identified the 1999 statute as chapter 270 on page 5 of the test claim text.

to the County Employees Retirement Law of 1937, to the group of employees covered by the one-year paid leave benefit.

Statutes 1999, Chapter 970

- Added county probation officers, group counselors, juvenile services officers, or officers or employees of a probation office, who are members of PERS or subject to the County Employees Retirement Law of 1937, to the group of employees covered by the one-year paid leave benefit.
- Provided that safety employees employed by the County of San Luis Obispo could be entitled to the one-year paid leave benefit upon the adoption of a resolution of the board of supervisors of the County of San Luis Obispo, even though the employee is not a member of PERS or subject to the County Employees Retirement Law of 1937.

Statutes 2000, Chapters 920 & 927 (double-joined)

- Added the Los Angeles City Retirement System as another retirement program to which the specified employees may belong in order to receive the one-year paid leave benefit.
- Added the one-year paid leave benefit for the following employees:
  - airport law enforcement officers under subdivision (d) of section 830.33 of the Penal Code;
  - harbor or port police officers, wardens, or special officers of a harbor or port district or city or county harbor department under subdivision (a) of section 830.1 or subdivision (b) of section 830.33 of the Penal Code; and
  - police officers of the Los Angeles Unified School District.

Claimant's Position

Claimant, the County of Los Angeles, contends that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that the County has incurred "new duties" and increased costs in complying with the new requirement that leave of absence with full salary must now be provided to specified employees instead of less costly temporary disability or maintenance payments required under prior law. The asserted increased costs in providing these benefits are the difference between the 70% temporary disability salary that was previously required and the 100% salary required for newly specified employees under the test claim statutes.

Claimant disagrees with the conclusion in the draft staff analysis that the test claim statutes do not create a reimbursable state-mandated program because they do not result in an increase in the actual level or quality of governmental service provided to the public. The County provided additional comments, citing a California Attorney General opinion that exceptional treatment of police officers and firefighters by Labor Code section 4850 is intended to ensure that these

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[239] Penal Code section 830.31 designates the following persons as peace officers: (a) a police officer of the County of Los Angeles; (b) a person designated by a local agency as a park ranger; (c) a peace officer of the Department of General Services of the City of Los Angeles; and (d) a housing authority patrol officer.

employees would not be deterred from "zealous performance of their mission of protecting the public by fear of loss of livelihood" and therefore the test claim statutes impose a new program or higher level of service under article XIII B, section 6. This argument is addressed in the analysis.

Co-Claimant's Position

Co-claimant, San Diego Unified School District, contends that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for the District's police officers, since the Fourth District Court of Appeal case of *San Diego Unified School District v. Workers' Compensation Appeals Board*[240] upheld a Workers' Compensation Appeals Board determination that a San Diego Unified School District peace officer was entitled to the paid leave benefit provided in Labor Code section 4850.

Department of Finance Position

Department of Finance submitted comments recommending that "the test claim be denied since the chaptered legislation cited in the test claim does not appear to mandate a new program or higher level of service of an existing program pursuant to Article XIII B, Section 6 of the California Constitution." The Department filed additional comments agreeing with the conclusions in the staff analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[241] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[242] "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."[243] 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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[240] *San Diego Unified School District v. Workers' Compensation Appeals Board*, July 19, 2001, D038032 (nonpub. opn., cert. denied).

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

[242] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

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

task.[244] 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.[245]

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.[246] To determine if the program is new or imposes a higher level of service, the test claim statutes must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[247] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[248]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[249]

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.[250] 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."[251]

This test claim presents the following issue:

- Do the test claim statutes mandate a "new program or higher level of service" on local governments within the meaning of article XIII B, section 6 of the California Constitution?

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[244] *Long Beach Unified School Dist. v. State of California (Long Beach Unified School Dist.)* (1990) 225 Cal.App.3d 155, 174; *Kern High School Dist., supra,* 30 Cal.4th 727, 732.

[245] *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*).

[246] *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 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835].

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

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

[249] *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.

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

[251] *County of Sonoma v. Commission on State Mandates,* 84 Cal.App.4th 1264, 1280 (*County of Sonoma*), citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Do the test claim statutes mandate a "new program or higher level of service" on local governments within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 requires the state to reimburse local governments for the costs of a new program or higher level of service mandated by the Legislature or any state agency. Although the stated purpose of section 6 is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies which have limited resources, imposing increased costs alone does not require reimbursement under article XII B, section 6.[252]

Rather, a test claim statute may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task,[253] and the required activity or task is new, constituting a "new program," or it creates a "higher level of service" over the previously required level of service.[254] As noted above, the term "program" in the context of section 6 has been defined by the courts as a program 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.[255]

The test claim statutes modified Labor Code section 4850 to specify new categories of public safety employees that are eligible for a workers' compensation leave benefit. When the specified employee is disabled by injury or illness arising out of his or her duties, he or she "shall become entitled … to a leave of absence while so disabled without loss of salary…"[256] Section 4850 thus requires the employees to receive the benefit.

Claimant argues that it has incurred "new duties" and "costs" as a result of the test claim statutes. However, the plain language of the test claim statutes does not impose any state-mandated *activities*. Moreover, even if the test claim statutes were to impose additional *costs* on local agency employers for the newly eligible employees, the Commission finds that the test claim statutes do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6, because case law uniformly holds that statutes that increase the cost of employee benefits do not mandate a new program or higher level of service in an existing program.

The Supreme Court, in the landmark decision *County of Los Angeles*, held that a general cost of living increase in workers' compensation benefits did not impose on local agencies either a new program or a higher level of service in an existing program. The court made it clear that

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[252] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[253] *Long Beach Unified School Dist., supra,* 225 Cal.App.3d 155, 174; *Kern High School Dist., supra,* 30 Cal.4th 727, 732.

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

[255] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874 (reaffirming the test set out in *County of Los Angeles, supra,* 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[256] Labor Code section 4850, subdivision (a).

workers' compensation is not a program administered by local agencies to provide a service to the public. The court stated:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (Citations omitted.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[257]

The court provided additional explanation regarding the effect of article XIII B, section 6 on general employee costs:

> Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage – costs which all employers must bear – neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.[258]

In the years since the Supreme Court's *County of Los Angeles* decision, California courts have consistently denied reimbursement for increased costs for employee benefits where the benefit programs are not administered by a local government agency.

Thus, reimbursement was denied in *City of Anaheim v. State of California (City of Anaheim)* (1987) 189 Cal.App.3d 1478, where the City was seeking reimbursement for costs incurred as a result of a test claim statute that temporarily increased retirement benefits to public employees. The City argued that since the test claim statutes specifically dealt with pensions for public employees, the statutes imposed unique requirements on local governments that did not apply to all state residents or entities.[259] The court held that reimbursement was not required because the program involved, i.e., the Public Employees' Retirement System, was not a *locally*-administered program but a *state*-administered program.[260] Moreover, the court stated, "…[the] City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public."[261]

In *City of Sacramento v. State of California (City of Sacramento)* (1990) 50 Cal.3d 51, the Supreme Court likewise denied reimbursement for a state law extending mandatory coverage

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[257] *County of Los Angeles, supra,* 43 Cal.3d 46, 58.

[258] *Id.* at 61.

[259] *City of Anaheim, supra,* 189 Cal.App. 3d 1478, 1483-1484.

[260] *Id.* at 1484.

[261] *Ibid.*

under the state's unemployment insurance law to include state and local governments. The court held that the requirement for local agencies to provide unemployment insurance benefits to their own employees "has not compelled provision of new or increased "service to the public" at the local level.[262] Nor did the requirement impose "a state policy 'unique[ly]' on local governments" since most private employers in the state were already required to provide unemployment insurance to their employees.[263]

Where a workers' compensation death benefit was extended to local safety officers, the subject of *City of Richmond,* reimbursement was also denied. In that case, the City argued that the test claim statutes applied only to local safety members and therefore imposed a unique requirement on local governments that was not applicable to all residents and entities in the state.[264] The court held that the statutes merely eliminated a previous exemption from workers' compensation death benefits to local safety members, and thus made the workers' compensation death benefits "as applicable to local governments as they are to private employers … [and] impose[] no 'unique requirement' on local governments."[265]

The City of Richmond further argued that "increased death benefits are provided to generate a higher quality of local safety officers and thus provide the public with a higher level of service" as did providing protective clothing and equipment for fire fighters in *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.[266] The court rejected that argument since the program at issue addressed death benefits rather than equipment use by local safety members.[267] The court then reiterated the *City of Anaheim* conclusion that "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public."[268]

The Supreme Court reaffirmed and clarified what constitutes an "enhanced service to the public" in the *San Diego Unified School Dist.* case.[269] The court, in reviewing several cases on point including *City of Richmond*, stated that the cases "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.)[270]

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[262] *City of Sacramento, supra,* 50 Cal.3d 51, 67.

[263] *Ibid.*

[264] *Ibid.*

[265] *Id.* at 1199.

[266] *Ibid.*

[267] *Id.* at 1196.

[268] *Ibid.*

[269] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 876-877.

[270] *Id.* at 877.

The Supreme Court went on to describe what *would* constitute a higher level of service:

> By contrast, Courts of Appeal have found a reimbursable "higher level of service" concerning an existing program when a state law or executive order mandates not merely some change that increases the cost of providing services, but an increase in the actual level or quality of governmental services provided. In *Carmel Valley Fire Protection Dist. v. State of California* [citations omitted], for example, an executive order required that county firefighters be provided with protective clothing and safety equipment. Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public … ."[271]

The Supreme Court also cited circumstances in *Long Beach Unified School Dist.*, where an executive order required school districts to take specific steps to measure and address racial segregation in local public schools.[272] There, the appellate court held that the executive order constituted a "higher level of service" to the extent that it exceeded federal constitutional and case law requirements by mandating local school districts to "undertake defined remedial actions and measures that were merely advisory under prior governing law."[273]

The reasoning in the aforementioned cases is applicable in the instant case. The workers' compensation program is a *state*-administered program rather than a locally-administered program, one that provides a statewide compulsory and exclusive scheme of employer liability, without fault, for injuries arising out of and in the course of employment.[274] Labor Code section 4850 is part of that comprehensive statutory scheme. Moreover, although the claimants may be faced with a higher cost of compensating their employees as a result of extending the workers' compensation leave benefits to additional employees, this does not equate to a higher cost of providing services to the public.

Claimant County of Los Angeles commented that the California Attorney General, in a 1968 opinion, finds that "Labor Code section 4850 results in an enhanced service to the public."[275] Claimant also relies on a past decision of the Commission, *Threats Against Peace Officers* (CSM 96-365-02), which found a reimbursable state mandated program was imposed by statutes that required local agencies employing peace officers to reimburse such employees, or any member of their immediate family residing with the officer, for moving and relocation expenses incurred when a peace officer has received a credible threat of life threatening action against the peace officer or the officer's immediate family.

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[271] *Ibid.*

[272] *Ibid.*

[273] *Ibid.*

[274] 65 California Jurisprudence Third (1998), Work Injury Compensation, section 7, pages 29-30.

[275] Letter from J. Tyler McCauley, Auditor-Controller, County of Los Angeles, received April 20, 2007, page 2.

The Commission disagrees that Labor Code section 4850, for purposes of article XIII B, section 6 analysis, results in an enhanced service to the public. Neither of the documents cited by the County provides any authority that can be relied upon for this analysis, since there are numerous California cases directly on point for workers' compensation and other employee benefits in the context of state mandates. Moreover, the argument made by claimant that workers' compensation or other employee benefits provided to local safety officers results in an enhanced service to the public has been repeatedly raised by local agencies *and denied by the courts* in those cases.

The Supreme Court in *San Diego Unified School Dist.* reaffirmed the finding in *City of Richmond* that providing a workers' compensation death benefit *does not* equate to a higher level of service to the public.[276] The Supreme Court's statements of law must be applied in any inferior court of the state where the facts of a case are not fairly distinguishable from the facts of the case in which the principle of law has been declared.[277] Here, the workers' compensation paid leave benefit for newly specified local safety officers cannot be distinguished from the benefits at issue in *City of Richmond* or *City of Anaheim* for purposes of subvention. As the issue was further interpreted in *San Diego Unified School Dist.*, examples of an enhanced service to the public in this context were the provision of protective clothing and safety equipment for firefighters, or undertaking defined remedial actions to address racial segregation, rather than increased benefits to employees.

The claimant, County of Los Angeles, further asserts that that "[t]he governmental protections are special."[278] Citing *City of Oakland Integrated Resources v. Workers' Compensation Appeals Board* (2007) 72 Cal.Comp.Cases 249 to support the principle that these salary continuation benefits are "clearly different than workers' compensation short term disability benefits,"[279] claimant concludes that the salary continuation benefits are separately administered and paid for by the County and not administered and paid for as part of temporary disability workers' compensation benefits.

The Commission does not dispute that the salary continuation benefits are different from temporary disability benefits. However, the fact remains that the plain language of the statutes providing these salary continuation benefits *does not* impose any state-mandated activities on the local agency. Labor Code section 4850 states:

> (a) Whenever any person listed in subdivision (b) who is a member of the Public Employees' Retirement System or the Los Angeles City Employees' Retirement System or subject to the County Employees Retirement Law of 1937, is disabled, whether temporarily or permanently, by injury or illness arising out of and in the course of his or her duties, *he or she shall become entitled*, regardless of his or her period of service with the city, county, or

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[276] *San Diego Unified School Dist , supra*, 33 Cal.4th 859, 877.

[277] *People v. Triggs* (1973) 8 Cal.3d 884 (disapproved on other grounds by *People v. Lilienthal* (1978) 22 Cal.3d 891).

[278] Comments from J. Tyler McCauley, Auditor-Controller, County of Los Angeles, submitted May 29, 2007, page 2.

[279] *Ibid.*

> district, to a leave of absence while so disabled without loss of salary in lieu of temporary disability payments or maintenance allowance payments under section 139.5, if any, which would be payable under this chapter, for the period of the disability, but not exceeding one year, or until that earlier date as he or she is retired on permanent disability pension, and is actually receiving disability pension payments or advanced disability pension payments pursuant to Section 4850.3. (Emphasis added.)

Furthermore, the salary continuation benefit is a *workers' compensation* benefit. It is part of Division 4 of the Labor Code, entitled "Workers' Compensation and Insurance," which sets forth the workers' compensation statutory scheme in California. Thus, the California cases addressing workers' compensation and other employee benefits in the context of state mandates are unquestionably applicable to Labor Code section 4850.

Thus, the California Appellate and Supreme Court cases have consistently held that additional costs for increased employee benefits, in the absence of some increase in the actual level or quality of governmental services *provided to the public*, do not constitute an "enhanced service to the public" and therefore do not mandate a "new program or higher level of service" on local governments within the meaning of article XIII B, section 6 of the California Constitution.

Claimant County of Los Angeles asserted that a recent Los Angeles *Superior* Court case, *CSAC Excess Insurance Authority v. Commission on State Mandates*[280] was inconsistent with the conclusions in the staff analysis. However, that case was recently appealed to and overturned by the Second District Court of Appeal in an unpublished decision.[281] The unpublished decision was subsequently appealed to the California Supreme Court, which denied the petition for review on March 21, 2007.[282]

CONCLUSION

The Commission finds that because the test claim statutes do not mandate a new program or higher level of service in an existing program, the statutes do not create a reimbursable state-mandated program on local governments within the meaning of article XIII B, section 6 of the California Constitution.

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[280] *CSAC Excess Insurance Authority v. Commission on State Mandates (CSAC),* Superior Court, Los Angeles County, 2005, No. BS095456.

[281] *CSAC Excess Insurance Authority v. Commission on State Mandates, et al.,* Second District Court of Appeal, 2006, Case Number B188169 (nonpub. opn., cert. denied).

[282] *CSAC Excess Insurance Authority v. Commission on State Mandates, et. al.*, California Supreme Court, 2007, Case Number S149772.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Statutes 1999, Chapter 50, line items 6110-156-0001 and 6110-156-0890, Statutes 2000, Chapter 52, line items 6110-156-0001 and 6110-156-0890, Statutes 2001, Chapter 106, line items 6110-156-0001 and 6110-156-0890, Statutes 2002, Chapter 379, line items 6110-156-0001 and 6110-156-0890, and Letters from California Department of Education (Dated July 6, 1999; April 24, 2000; and August 1, 2002) Filed on June 26, 2003, By Berkeley Unified School District and Sacramento City Unified School District, Claimants.	Case No.: 02-TC-37 *Adult Education Enrollment Reporting* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on July 26, 2007)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 26, 2007. David Scribner appeared on behalf of claimant, Berkeley Unified School District. Donna Ferebee and Russell Edwards appeared on behalf of Department of Finance.

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

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

Summary of Findings

This test claim was filed on June 26, 2003, by Berkeley Unified School District and Sacramento City Unified School District on letters from the California Department of Education (CDE) and statutes that address the data collection and reporting requirements of school districts that provide state and/or federally funded adult education programs. The test claim statutes are line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999, 2000, 2001, and 2002 that were enacted by Statutes 1999, chapter 50; Statutes 2000, chapter 52; Statutes 2001, chapter 106; and Statutes 2002, chapter 379. Line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999, 2000, 2001, and 2002, appropriate specified amounts from the General Fund and Federal Trust Fund to be allocated by the CDE to school districts, county offices of education , and other agencies for adult education programs. The appropriated amounts are subject to

various provisions, including the requirements that the CDE develop a data and accountability system, and that school districts receiving funding for adult education collect and report specified data to the CDE.

In addition, the CDE issued three letters dated July 6, 1999; April 24, 2000; and August 1, 2002. The July 6, 1999 CDE letter indicated that the CDE had developed a statewide data and accountability system "Tracking of Programs and Students" (TOPSpro), which was requested in the Budget Act of 1998. The July 6, 1999 CDE letter also provided that "beginning July 1, 1999, all adult schools must fully implement the new TOPSpro data collection system for all students and all ten-program areas funded through state apportionment." The letter further indicates the date and location where collected data must be sent. Additionally, the letter indicates that the TOPSpro forms and software may be obtained from CASAS at no charge.

The April 24, 2000 CDE letter contains language similar to the July 6, 1999 CDE letter, but only suggests the use of the TOPSpro system for the collection and reporting of Adult Education Data. In contrast, the August 1, 2002 CDE letter requires the use of the TOPSpro system for all adult education data collection requirements, not merely for "all students and all ten-program areas funded through state apportionment" as required by the July 6, 1999 CDE letter.

The Commission finds that based on the test claim filing date[283] and the plain language of the CDE letters, claimants are not eligible for reimbursement of costs incurred before July 1, 2001. Thus, Statutes 1999, chapter 50, Statutes 2000, chapter 52 (which enacted the Budget Acts of 1999 and 2000), are not subject to article XIII B, section 6 of the California Constitution because the provisions of the test claim statutes are effective only for the fiscal years of the enacted budget acts. Similarly, the Commission finds that the CDE letters dated July 6, 1999 and April 24, 2000 are not subject to article XIII B, section 6 of the California Constitution, because they were only effective until August 15, 2000.

The Commission also finds that the plain language of line item 6110-156-0890 of Statutes 2001, chapter 106, Statutes 2002, chapter 379 (which enacted the Budget Acts of 2001 and 2002) does not require any activity of school districts, and therefore, does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

In addition, the Commission finds under *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, that Statutes 2001, chapter 106, Statutes 2002, chapter 379, and the CDE letter dated August 1, 2002, do not impose state-mandated activities upon claimants as they relate to the general provision of adult education, because adult education is provided on a voluntary basis pursuant to Education Code sections 52501-52503.

However, in specified situations, school districts are required to provide adult English and citizenship classes pursuant to Education Code sections 52540 and 52552. Although the 2001 and 2002 budget acts required school districts that provide adult English and citizenship classes to collect and report adult education data, the Commission finds that these statutes do not impose a new program or higher level of service upon school districts within the meaning of article XIII

[283] See Government Code section 17557, subdivision (e).

B, section 6 of the California Constitution because school districts were already required to collect and report adult education data prior to the enactment of Statutes 2001, chapter 106, and Statutes 2002, chapter 379.

The CDE letter dated August 1, 2002 requires school districts that provide adult English and citizenship classes pursuant to Education Code sections 52540 and 52552 to implement the TOPSpro system. Since CDE did not require implementation of the TOPSpro system prior to this letter, the Commission finds that the CDE letter dated August 1, 2002 mandates a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution from July 1, 2002 to August 15, 2003.

However, the Commission finds that claimants are not entitled to reimbursement of costs related to the implementation of the TOPSpro system for the provision of adult English and citizenship classes pursuant to Education Code sections 52540 and 52552.

During the course of the reimbursement period of July 1, 2001 to August 15, 2003, school districts, that may have been required to establish adult English classes and citizenship classes, have had available state funds not subject to specific use limitations to pay for required adult education program expenses. As in *Kern High School Dist*., the state in providing program funds to claimants, has already provided funds that may be used to cover the necessary program expenses, and, thus, there is no evidence of increased costs mandated by the state as defined by Government Code section 17514.

The Commission concludes that Statutes 1999, chapter 50, Statutes 2000, chapter 52, Statutes 2001, chapter 106, Statutes 2002, chapter 379, and the letters issued by the California Department of Education, dated July 6, 1999, April 24, 2000 and August 1, 2002 do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

BACKGROUND

This test claim addresses the data collection and reporting requirements of school districts that provide state and/or federally funded adult education programs. The Legislature passed the Budget Act of 1998 by enacting Statutes 1998, chapter 324 (Assem. Bill No. (AB) 1656).[284] As part of the Budget Act of 1998, line items 6110-156-0001 and 6110-156-0890 appropriated specified amounts from the General Fund and Federal Trust Fund, respectively, for local assistance to be allocated by the CDE to school districts, county offices of education, and other agencies for adult education programs.

As one of several provisions to the funds appropriated for adult education programs in the Budget Act of 1998, provision 5(h) of line item 6110-156-0001 required the CDE to develop a data and accountability system to obtain information on education and job training services provided through state-funded adult education programs. The CDE is also required to provide school districts with a list of the required data elements for the data and accountability system. School districts receiving funds provided in the line item are required to collect and submit specified data to the CDE.[285]

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[284] Claimants did not plead Statutes 1998, chapter 324, in this test claim.

[285] Statutes 1998, chapter 324 (AB 1656), line item 6110-156-0001, provisions (i) and (j).

Other sources of data collection and reporting requirements for school districts receiving state and/or federal funds for adult education programs include Performance Based Accountability (PBA)[286] and the Workforce Investment Act of 1998 (WIA).[287] Prior to its repeal in 2006, PBA required school districts receiving state and/or federal funding from various sources for adult education programs to report information to the State Job Training Coordinating Council.[288] This information was used to develop an education and job training report card program that assessed the accomplishments of California's work force preparation system.

The United States Congress enacted the WIA with the purpose of creating "a partnership among the Federal Government, States, and localities to provide, on a voluntary basis, adult education and literacy services."[289] In order to receive a grant under the WIA, a state is required to submit a five-year plan setting forth, among other things, a description of how the CDE will evaluate annually the effectiveness of the adult education and literacy activities based on specified performance measures.[290] California's five-year plan requires school districts that wish to be eligible to receive WIA grant money to meet certain criteria, which includes submitting specified data to the CDE.[291]

In general, adult education programs are provided by school districts and other local education agencies on a voluntary basis.[292] The only exceptions are adult English classes and classes in citizenship. Education Code section 52540 requires a high school district to establish classes in English upon application of 20 or more persons above the age of 18 residing in the high school district that are unable to speak, read, or write in English at an eighth grade level.[293] Similarly, Education Code section 52552 requires a high school district to establish special classes in training for citizenship upon application of 25 or more persons.[294]

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[286] Statutes 1995, chapter 771 (SB 645), adding Unemployment Insurance Code section 15037.1; repealed by Statutes 2006, chapter 630, section 7 (SB 293).

[287] 112 Statutes 936, 20 U.S.C. section 9201 et seq.

[288] The State Job Training Coordinating Council membership includes the CDE.

[289] 20 U.S.C. 9201.

[290] 20 U.S.C. 9224.

[291] Cal. Dept. Of Education, Workforce Investment Act, Title II, Adult Education and Family Literacy Act, California State Plan 1999-2004, as revised January 10, 2002, p. 33-34 (CDE link to outside source: <http://www.otan.us/webfarm/stateplan/PDF%27s%202004/Stateplan1999-2004.PDF> [as of May 2, 2007]).

[292] Education Code section 52301 allows the county superintendent of schools of each county, with the consent of the state board, to establish and maintain a regional occupational center, or regional occupational program (ROC/P) in the county to provide education and training in career technical courses. Education Code sections 52501, 52502, and 52503 allow high school districts or unified school districts to establish and maintain adult education classes and/or schools.

[293] Education Code section 52540. Derived from Political Code section 1764, subdivision (c), added by Statutes 1923, chapter 268, p. 577, section 1.

[294] Education Code section 52552. Derived from Statutes 1921, chapter 488, p. 742, section 4.

The test claim statutes are line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999, 2000, 2001, and 2002 that were enacted by Statutes 1999, chapter 50; Statutes 2000, chapter 52; Statutes 2001, chapter 106; and Statutes 2002, chapter 379. Like the Budget Act of 1998, line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999, 2000, 2001, and 2002, appropriate specified amounts from the General Fund and Federal Trust Fund to be allocated by the CDE to school districts, county offices of education, and other agencies for adult education programs.[295] The appropriated amounts are subject to many of the same provisions found in the Budget Act of 1998, including the requirements that the CDE develop a data and accountability system, and that school districts receiving funding for adult education collect and report specified data to the CDE.[296]

On July 6, 1999, the CDE issued a letter to "Adult Education Administrators," indicating that the CDE had developed a statewide data and accountability system "Tracking of Programs and Students" (TOPSpro), as requested in the Budget Act of 1998. Provided by Comprehensive Adult Student Assessment System (CASAS), TOPSpro is a computerized database system that automatically scores CASAS tests; tracks student and program outcomes and progress; generates reports for students, teachers, and program administrators; provides individual, class and agency-wide profiles of skills; collects student demographics; and manages data for state and federal accountability.[297]

The CDE letter further states, "Due to the enormous increase in state and federal demands for data collection and accountability, the [CDE] suggest using one accountability system that can be used for all data collection requirements."[298] The TOPSpro system has the ability to be used for all adult data collection requirements, which consist of: (1) State Budget Act Language, (2) CalWORKs, (3) PBA, and (4) WIA.[299] When discussing the "State Budget Act Language" in the outline of data and accountability requirements the letter provides:

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[295] Statutes 1999, chapter 50, line items 6110-156-0001 and 6110-156-0890 appropriate $542.4 million and $42.3 million respectively; Statutes 2000, chapter 52, line items 6110-156-0001 and 6110-156-0890 appropriate $573.6 million and $48.3 million respectively; Statutes 2001, chapter 106, line items 6110-156-0001 and 6110-156-0890 appropriate $610.7 million and $74.1 million respectively; and Statutes 2002, chapter 379, line items 6110-156-0001 and 6110-156-0890 appropriate $605 million and $91.8 million respectively.

[296] Statutes 1999, chapter 50, line item 6110-156-0001, provisions 5(g)(h)(i); Statutes 2000, chapter 52, line item 6110-156-0001, provisions 4(g)(h); Statutes 2001, chapter 106, line item 6110-156-0001, provisions 4(g)(h); and Statutes 2002, chapter 379, line item 6110-156-0001, provisions 4(g)(h).

[297] Description provided by the Comprehensive Adult Student Assessment System website at <https://www.casas.org/home/index.cfm?fuseaction=home.showContent&MapID=125>, as of May 2, 2007.

[298] CDE letter, dated July 6, 1999, p. 1.

[299] Claimants did not plead the enacting statutes of CalWORKs, the PBA, or WIA.

> **[B]eginning July 1, 1999, all adult schools** must fully implement the new TOPSpro data collection system for all students and all ten-program areas funded through state apportionment. [Original emphasis.][300]

The letter further indicates the date and location where collected data must be sent. Additionally, the letter indicates that the TOPSpro forms and software may be obtained from CASAS at no charge.

On April 24, 2000 and August 1, 2002, the CDE issued letters similar to the July 6, 1999 letter. Unlike the July 6, 1999 letter, the April 24, 2000 letter only suggests the use of the TOPSpro system, stating:

> The [CDE] suggests using one accountability system that can be used for all data collection requirements. The TOPSpro system, including both software and entry/update record sheets, can be used to collect data for all four of the mandates listed below.[301]

This language is not coupled with language requiring the full implementation of the TOPSpro system, as was done in the July 6, 1999 letter.

The August 1, 2002 letter requires the use of the TOPSpro system for all data collection requirements outlined by the August 1, 2002 letter, providing:

> CDE uses the CASAS TOPSpro software system to meet the reporting requirements for both the state and federally funded programs. All adult schools must fully implement the TOPSpro data collection system for all students in all ten program areas funded through state apportionment. All agencies that receive WIA Title II funds must implement the TOPSpro software system as a condition of funding.[302]

Claimants' Position

Claimants, Berkeley Unified School District and Sacramento City Unified School District, contend that the test claim statutes and letters issued by the CDE constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimants assert the test claim statutes and the letters issued by the CDE mandate the following activities:

- the completion of required forms for each student in each program at the school site level;
- input of the form data collected on each student in each program at the school site level;
- transmission of the aggregate school site data to the District;

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[300] CDE letter, *supra*, p. 2, original emphasis.

[301] CDE letter, dated April 24, 2000, p. 1.

[302] CDE letter, dated August 1, 2002, p. 2.

- comparison of TOPSpro data to school site and District attendance data to ensure data is complete and accurate;
- annual reporting of data to Comprehensive Adult Student Assessment System (CASAS);
- obtaining necessary computer hardware and software to properly implement the TOPSpro system;
- training district staff regarding the test claim activities;
- drafting or modifying policies and procedures to reflect the test claim activities; and
- any additional activities identified as reimbursable during the Parameters and Guidelines phase.

Claimants argue that use of the TOPSpro system to report adult education data to the CDE constitutes a "program" because "[p]ublic education in California is a peculiarly governmental function administered by local agencies as a service to the public."[303] In addition, the test claim statutes and letters only apply "to public schools and as such imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state."[304]

Claimants also assert that use of the TOPSpro system constitutes a "new program" or "higher level of service," stating:

> While data reporting occurred before the enactment of the test claim [statutes] and issuance of the [letters from the CDE], the process, system, method, and timing of reporting has dramatically changed since the mandated introduction of the TOPSpro system.[305]

In addition, claimants contend that the test claim statutes and letters are not subject to any of the "exceptions" listed in Government Code section 17556. Therefore, the test claim statutes and letters impose costs mandated by the state upon adult education schools and school districts.

Department of Finance's Position

The Department of Finance (Finance) filed comments dated June 21, 2004 disagreeing with claimants' test claim allegations. Finance asserts that the test claim statutes and letters do not constitute a reimbursable state mandate because the test claim statutes and letters: (1) do not mandate any activity upon school districts, (2) do not constitute a "new program" or "higher level of service," and (3) do not impose increased costs mandated by the state.

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[303] Test Claim, p. 7. Claimant cites *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 172, as support for this contention. However, the court's statement that education is a peculiarly governmental function was made in regard to Kindergarten through 12th grade education, and not adult education.

[304] *Ibid.*

[305] *Ibid.*

Finance contends that the plain language of the test claim statutes and letters do not mandate any activity upon school districts, stating, "The actual language [of the test claim statutes] does not place any requirements upon the [school districts]. Instead the language places a specific requirement upon the [CDE]."[306] Finance argues that the July 6, 1999, and April 24, 2000 letters only "suggest" the use of TOPSpro. In regard to the August 1, 2002 letter, Finance contends that although the letter requires the use of TOPSpro, the requirement is only a condition of receiving funds and the CDE does not have the statutory authority to enforce the submission of data or the use of TOPSpro. Thus, the language of the test claim statutes and letters do not mandate any activity upon school districts.

Finance also argues that any data collection and reporting requirements contained in the test claim statutes and letters are not mandated upon claimants. Finance states that with two exceptions,[307] "adult education classes are voluntary and are conducted at the discretion of the [school district]. Therefore, any incidental reporting or claiming required are costs incurred at the [school district's] option."[308] In regard to the two exceptions, English classes and citizenship classes, Finance states that those requirements were "not created after 1975 and [are] not subject to reimbursement."[309]

In addition, Finance asserts that the test claim statutes and letters do not impose requirements that constitute a "new program" or "higher level of service." Finance contends:

> As a condition of receipt of funding, districts have historically been required to report on the number of [average daily attendance] served along with other information standards established by the [CDE]. … Therefore, the use of TOPSpro does not represent a higher level of service, but merely a different and likely much less expensive and more efficient manner in which to meet reporting standards to receive funding.[310]

Finance further contends that the test claim statutes and letters should not impose increased costs mandated by the state. Finance argues:

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[306] Finance comments to the test claim dated June 21, 2004, p. 2.

[307] Education Code section 52540 requires school districts to offer classes for adults for whom English is a second language upon the demand of 20 or more students. Education Code section 52552 requires school districts to offer classes in United States citizenship upon the demand of 25 or more students.

[308] Finance comments to the test claim dated June 21, 2004, p. 3.

[309] *Ibid.*

[310] *Ibid.*

> The Budget Act of 2003 provided $550.8 million in Proposition 98 General Fund and $82.2 million in federal funds for adult education programs. Thus the State provides more than adequate funding to be used to offset any costs associated with adult education reporting.[311]

Finance indicates that the CDE, through CASAS, provides all school districts with a free set of TOPSpro software and all of the forms that the system uses. CASAS has indicated that they have worked with many districts to ensure that their individual school and district attendance systems work with TOPSpro in order to make the system as seamless as possible. CASAS also provides free training on the use of the TOPSpro system. Finance concludes that "the use of TOPSpro does not represent a higher level of service, but merely a different and likely much less expensive and more efficient manner in which to meet reporting standards to receive funding."[312]

Commission Findings

The courts have found that article XIII B, section 6 of the California Constitution[313] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[314] "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."[315] 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.[316] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[317]

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[311] *Ibid.*

[312] *Ibid.*

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

[314] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

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

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

[317] *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*).

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.[318] 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.[319] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[320]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[321]

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.[322] 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."[323]

Issue 1: Are the test claim statutes and letters issued by the CDE subject to article XIII B, section 6 of the California Constitution?

Government Code section 17500 et seq., implements article XIII B, section 6 of the California Constitution. Government Code section 17557, subdivision (e), establishes the reimbursement period for reimbursable state-mandated programs and provides that "[a] test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year."

Here, claimants submitted the test claim on June 26, 2003, during the 2002-2003 fiscal year. As a result, claimants are eligible for possible reimbursement beginning on July 1, 2001, the start of the 2001-2002 fiscal year. Any costs for activities associated with the alleged state-mandated program incurred before July 1, 2001 are not reimbursable.

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

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

[320] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

[321] *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.

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

[323] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Claimants have pled line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 1999, 2000, 2001, and 2002, and three letters issued by the California Department of Education (CDE) dated July 6, 1999, April 24, 2000, and August 1, 2002, as test claim statutes and alleged executive orders, respectively. The provisions of test claim statutes were effective only for the fiscal year for which the Budget Acts were enacted. Similarly the CDE letters were effective for limited durations.

The July 6, 1999 and April 24, 2000 CDE letters were both issued during the 1999-2000 fiscal year (July 1, 1999 through June 30, 2000). The July 6, 1999 CDE letter provides, "The following information outlines the data and accountability requirements of all adult schools beginning July 1, 1999."[324] This outline consisted of: (1) the language of the Budget Act of 1999, (2) CalWORKs, (3) PBA, and (4) WIA. Under the heading for the Budget Act language of 1999, which is only effective for July 1, 1999 through June 30, 2000 (the 1999-2000 fiscal year), the letter provides:

> **[B]eginning July 1, 1999,** all adult schools must fully implement the new TOPSpro data collection system for all students and all ten-program areas funded through state apportionment. [Original emphasis.][325]

Under the CalWORKs and PBA headings, the July 6 letter requires the submission of data collected between January 1, 1999 through June 30, 1999, no later than August 15, 1999. Under the WIA heading, the July 6 CDE letter requires submission of data collected during 1999-2000 no later than August 15, 2000. The April 24, 2000 CDE letter provides, "The following information outlines the data and accountability requirements of all adult schools for fiscal year 1999-2000."[326] The letter proceeds to outline the same requirements outlined in the July 6, 1999 CDE letter, however, only suggests the use of the TOPSpro system, providing:

> The [CDE] suggests using one accountability system that can be used for all data collection requirements. The TOPSpro system, including both software and entry/update record sheets, can be used to collect data for all four of the mandates listed below.[327]

The April 24, 2000 CDE letter also provides that adult education data collected for the 1999-2000 fiscal year for the State Budget Act, CalWORKs, PBA, and WIA requirements are due no later than August 15, 2000.

Accordingly, the requirements of the July 6, 1999 CDE letter, which cover the same areas as the April 24, 2000 CDE letter, were effective only until the issuance of the April 24, 2000 CDE letter. Also, as indicated in the April 24, 2000 CDE letter, the requirements of the letter were applicable to the 1999-2000 fiscal year and were effective until August 15, 2000.

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[324] CDE letter, dated July 6, 1999, p. 1.

[325] CDE letter, *supra*, p. 2, original emphasis.

[326] CDE letter, dated April 24, 2000, p. 1.

[327] CDE letter, dated April 24, 2000, p. 1.

Given that claimants are not eligible for reimbursement of costs incurred before July 1, 2001, and that the provisions of the test claim statutes are effective only for the fiscal year that the Budget Acts were enacted, the Budget Acts of 1999 and 2000 are not subject to article XIII B, section 6 of the California Constitution. Similarly, the July 6, 1999 and April 24, 2000 CDE letters are not subject to article XIII B, section 6 of the California Constitution, because they were only effective until August 15, 2000.

The August 1, 2002 CDE letter provides as its subject, "FY 2002-03 Accountability Requirements."[328] The letter subsequently provides that adult education data collected for the 2002-2003 fiscal year is due no later than August 15, 2003. Thus, the requirements in the August 1, 2002 CDE letter were applicable to the 2002-2003 fiscal year and effective until August 15, 2003.

The Commission therefore, finds that the Budget Acts of 2001 and 2002, and the August 1, 2002 CDE letter are subject to article XIII B, section 6 of the California Constitution. However, because the August 1, 2002 CDE letter is effective only until August 15, 2003, and claimants have not pled any subsequent Budget Acts or alleged executive orders, the possible reimbursement period begins July 1, 2001 and ends August 15, 2003.

Issue 2: Do the line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 2001 and 2002, and the CDE letter dated August 1, 2002, mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

In order for a test claim statute and/or executive order to impose a reimbursable, state-mandated, program under article XIII B, section 6, the statutory language must mandate an activity or task upon local governmental entities. If the statutory language does not mandate or require the claimant to perform a task, then article XIII B, section 6, does not apply.

Line items 6110-156-0001 and 6110-156-0890 of the Budget Acts of 2001 and 2002 indicate the amounts appropriated from the State General Fund and Federal Trust Fund to be distributed to school districts that provide adult education programs. For example, line item 6110-156-0001 of the Budget Act of 2001, which appropriates $610.7 million General Fund, provides:

> For local assistance, [CDE] (Proposition 98), for transfer to Section A of the State School Fund, for allocation by the Superintendent of Public Instruction to school districts, county offices of education, and other agencies for the purposes of Proposition 98 educational programs funded by this item, in lieu of the amount that otherwise would be appropriated pursuant to statute.[329]

[328] CDE letter, dated July 6, 1999, p. 1.

[329] Statutes 2001, chapter 106, line item 6110-156-0001.

Line item 6110-156-0001 of the Budget Act of 2001 then "schedules" the amount appropriated into four categories (three adult education program areas and reimbursements). The $610.7 million in General Fund is scheduled amongst the four categories as follows:

(1) 10.50.010.001 - Adult Education…….574,705,000
(2) 10.50.010.008 - Remedial education services for participants in the CalWORKs…….18,293,000
(3) 10.50.010.009 - Local Education Agencies—Education Services for participants in CalWORKs……26,447,000
(4) Reimbursements - CalWORKs……...-8,739,000

These "scheduled" amounts are then subject to several "provisions" that limit the use of the funds or require certain activities if any appropriated funds are received. For example, line item 6110-156-0001 of the Budget Act of 2001 provides:

> As a condition of receiving funds provided in Schedules (2) and (3) of this item or any other General Fund appropriation made to the [CDE] specifically for education and training services to welfare recipient students and those in transition off of welfare, local adult education programs and regional occupational centers and programs shall collect program and participant data as described in this section and as required by the [CDE]. The [CDE] shall require that local providers submit to the state aggregate data for the period July 1, 2001, through June 30, 2002.[330]

The Budget Act of 2002 contains the same provision with minor technical changes.[331] Thus, as a condition of receiving appropriated funds, line item 6110-156-0001 of the Budget Acts of 2001 and 2002 require school districts to collect and report data to the CDE.

The language of line item 6110-156-0890 of the Budget Acts of 2001 and 2002 appropriates money from the Federal Trust Fund for adult education. However, the language of line item 6110-156-0890 does not require any activity of school districts (claimants). Therefore, line item 6110-156-0890 of the Budget Acts of 2001 and 2002 do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. Hereafter, "test claim statutes" will refer only to line item 6110-156-0001 of the Budget Acts of 2001 and 2002.

In addition to the test claim statutes, on August 1, 2002, the CDE issued a letter that claimants have alleged to be an executive order that imposes a reimbursable state-mandated program. An "executive order" is defined as any order, plan, requirement, rule, or regulation issued by: (1) the Governor; (2) any officer or official serving at the pleasure of the Governor; or (3) any agency, department, board, or commission of state government.[332]

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[330] Statutes 2001, chapter 106, line item 6110-156-0001, provision 4(h).

[331] Statutes 2002, chapter 379, line item 6110-156-0001, provision 4(h).

[332] Government Code section 17516.

The August 1, 2002 CDE letter indicates that the CDE is required to collect and report statewide accountability data for adult education programs as directed by federal and state law which include: (1) the Workforce Investment Act (WIA), (2) the State Budget Act, and (3) the California State Plan 1999-2004. In addition the CDE letter specifically requires the implementation of the TOPSpro system for all data collection requirements outlined in the letter, providing:

> CDE uses the CASAS TOPSpro software system to meet the reporting requirements for both the state and federally funded programs. All adult schools must fully implement the TOPSpro data collection system for all students in all ten program areas funded through state apportionment. All agencies that receive WIA Title II funds must implement the TOPSpro software system as a condition of funding.[333]

The letter further indicates that data reported is for the period of July 1, 2002 through June 30, 2003, and should be submitted to CASAS no later than August 15, 2003.

Thus, the August 1, 2002 CDE letter requires the implementation of the TOPSpro system and the submission of adult education data to CASAS on a specified date, and, therefore, constitutes an executive order within the definition of Government Code section 17516.

Although the test claim statutes require the collection and reporting of adult education data to the CDE and the August 1, 2002 CDE letter requires the implementation of the TOPSpro system and the submission of adult data to CASAS on a specified date, the test claim statutes and the August 1, 2002 CDE letter do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for general adult education classes established pursuant to Education Code section 52501, 52502, and 52503 for the reasons stated below.

Adult Education Under Education Code Sections 52501-52503

Generally, adult education programs are provided by school districts and other local education agencies on a voluntary basis pursuant to Education Code sections 52501-52503. The only exceptions are adult language classes in English and citizenship pursuant to Education Code sections 52540 and 52552, which are discussed in the next section of this analysis (beginning on page 18).

In *Kern High School Dist.*, the California Supreme Court considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[334] Within its discussion, the court addressed whether a mandate could be created by requirements that attached to a school district as a result of that district's participation in an underlying voluntary program. In *Kern High School Dist.*, school districts requested reimbursement for notice and agenda costs for meetings of their school site councils and advisory bodies. These bodies were established as a condition of various education-related programs that were funded by the state and federal government.

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[333] CDE letter, dated August 1, 2002, p. 2.

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

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[335] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[336]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[337] The court stated:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[338]

Thus, the court held:

> [W]e reject claimant's 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* [*sic*] *participation in the underlying program is voluntary or compelled*. [Emphasis added.][339]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist*., the court determined that school districts were not legally compelled to participate in eight of the nine underlying programs.[340]

The school districts in *Kern High School Dist*., however, urged the court to define "state mandate" broadly to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance. The court previously applied such a construction to the definition of a federal mandate in the case of *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74, where the state's failure to comply with federal legislation that extended mandatory coverage under the state's unemployment insurance law would result in

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[335] *Id*. at p. 737.

[336] *Ibid*.

[337] *Id*. at p. 743.

[338] *Ibid*.

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

[340] *Id*. at p. 744-745.

California businesses facing "a new serious penalty – full, double unemployment taxation by both state and federal governments." After reflecting on the purpose of article XIII B, section 6, which is to preclude the state from shifting financial responsibilities onto local agencies that have limited tax revenue, the court stated that it "would not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[341] However, based on the facts presented in *Kern High School Dist*., the court declined to find a state mandate, holding:

> Finally, we reject claimants' alternative contention that even if they have not been *legally* compelled to participate in the underlying funded programs, as a *practical* matter, they have been compelled to do so and hence to incur notice-and agenda-related costs. Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion – for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program – claimants here faced no such practical compulsion. Instead, although claimants argue that they have had "no true option or choice" other than to participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstances that claimants have found the benefits of various funded programs "too good to refuse" - even though, as a condition of program participation, they have been forced to incur some costs. On the facts presented, the costs of compliance with conditions of participation in these funded programs does not amount to a reimbursable state mandate.[342]

Thus, under the facts in *Kern High School Dist*., the court found that requirements imposed on a claimant due to the claimant's participation in an underlying voluntary program do not constitute a reimbursable state mandate. In addition, the court held open the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion, such as the imposition of "'certain and severe … penalties' such as 'double … taxation' and other 'draconian' consequences.'"[343] For the reasons below, *Kern High School Dist*. is applicable here.

Education Code sections 52501, 52502, and 52503, *authorize*, but do not require, high school districts or unified school districts to establish and maintain adult education classes and/or schools. School districts that elect to establish adult education classes are eligible to apply for and receive funding for these classes through various sources (such as CalWORKs and the WIA). As a condition of receiving funding through these sources, state and federal law require the collection and reporting of adult education data. These laws include: (1) The State Budget Acts, and (2) the California State Plan 1999-2004 which is required by the WIA.

The State Budget Acts (test claim statutes) appropriate funds subject to various provisions. These provisions require that funds are used for specific purposes (such as CalWORKs and WIA

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

[342] *Id*. at p. 731, emphasis in original.

[343] *Id*. at p. 751, quoting *City of Sacramento*, *supra*, 50 Cal.3d at p. 74.

programs), and that certain activities occur (including data collection and reporting) if funds are received. Therefore, school districts that offer and provide adult education classes pursuant to Education Code sections 52501-52503 may avoid being subject to the provisions of the test claim statutes and August 1, 2002 CDE letter by electing to forgo receipt of these funds. Similarly, the California State Plan 1999-2000, which is required by the WIA, provides, "Local providers will be eligible to receive funds if they meet [specified] criteria," which includes submitting data to the CDE.[344] As with the test claim statutes, school districts elect to receive WIA funding, subjecting school districts to conditions attached to the funds. As a result, any data collection and reporting requirements, for which the test claim statutes and the executive order require the implementation of the TOPSpro system, are only conditions to receive funding from these various sources and are not mandated unless the school district *elects* to offer adult education and to receive funding from these sources. Thus, school districts are not legally compelled to comply with the requirements because the underlying activity is not required.

In addition, a school district's failure to establish adult education programs pursuant to Education Code sections 52501-52503, comply with data collection and reporting requirements, and implement the TOPSpro system does not result in any certain and severe penalties independent of the program funds at issue. Instead, similar to the claimants in *Kern High School Dist*., a school district only faces forgoing the benefits of various voluntary adult education programs funded by the state and federal governments, which the court in *Kern High School Dist*. found did not constitute certain and severe penalties. Thus, school districts have not, as a "practical" matter, been compelled to establish adult education programs, or incur costs associated with adult education data collection and reporting and the implementation of the TOPSpro system.

Accordingly, the Commission finds with respect to the requirements to implement the TOPSpro system and to collect and submit adult education data for general adult education under Education Code sections 52501-52503, Statutes 2001, chapter 106, Statutes 2002, chapter 379 (test claim statutes) and the CDE letter dated August 1, 2002 do not impose a state-mandated program on school districts, and thus, are not reimbursable pursuant to article XIII B, section 6 of the California Constitution. Therefore, the remaining discussion involves whether the test claim statutes and the executive order impose a reimbursable state-mandated program as they relate to adult English and citizenship classes.

Adult Language Classes in English and Citizenship Classes Pursuant to Education Code Sections 52540 and 52552

Education Code section 52540 requires a high school district to establish classes in English upon application of 20 or more persons above the age of 18 residing in the high school district that are unable to speak, read, or write in English at an eighth grade level.[345] Education Code section 52552 requires a high school district to establish special classes in training for citizenship upon application of 25 or more persons.[346] As a result, a school district's provision of adult English and citizenship classes is not voluntary. School districts must comply with the test claim statutes

[344] Cal. Dept. Of Education, Workforce Investment Act, Title II, *supra*, p. 33.

[345] Education Code section 52540. Derived from Political Code section 1764, subdivision (c), added by Statutes 1923, chapter 268, p. 577, section 1.

[346] Education Code section 52552. Derived from Statutes 1921, chapter 488, p. 742, section 4.

and the August 1, 2002 CDE letter, which require the collection and reporting of adult education data and the implementation of the TOPSpro system, to receive funding for these requested classes. Therefore, the Commission finds that Statutes 2001, chapter 106, Statutes 2002, chapter 379 (test claim statutes) and the CDE letter dated August 1, 2002 constitute a state-mandated program for school districts providing English and citizenship classes pursuant to Education Code sections 52540 and 52552.

The courts have held that legislation constitutes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution when the requirements are new in comparison with the pre-existing scheme and the requirements were intended to provide an enhanced service to the public.[347] To make this determination, the test claim statutes and the August 1, 2002 CDE letter's requirements must initially be compared with the legal requirements in effect immediately prior to its enactment.[348]

Prior to the enactment of line item 6110-156-0001 of the Budget Acts of 2001 and 2002, line item 6110-156-0001 of the Budget Acts of 1998, 1999, and 2000 already required the collection and reporting of adult education data to the CDE.[349] Thus, the collection and reporting of adult education data to the CDE is not a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

After the CDE issued the August 1, 2002 letter, all adult schools that received funding through state apportionment and /or WIA were required to fully implement the TOPSpro system. Immediately prior to the August 1, 2002 CDE letter, the CDE only suggested implementing the TOPSpro system, which could be used for all data collection requirements.[350] Thus, the Commission finds that the implementation of the TOPSpro system constitutes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

However, even if the implementation of the TOPSpro system is considered a mandated new program or higher level of service imposed upon school districts that are required to provide adult English classes and/or citizenship classes, the August 1, 2002 CDE letter must also impose costs mandated by the state in order to constitute a reimbursable state-mandated program as defined by article XIII B, section 6 of the California Constitution.

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

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

[349] Statutes 1998, chapter 324 (AB 1656), line item 6110-156-0001, provisions (i) and (j); Statutes 1999, chapter 50, line item 6110-156-0001, provisions (h) and (i); Statutes 2000, chapter 52, line item 6110-156-0001, provision (h).

[350] CDE letter, dated April 24, 2000, p. 1.

Issue 3: Does the CDE letter dated August 1, 2002, impose "costs mandated by the state" on school districts within the meaning of the article XIII B, section 6 of the California Constitution and Government Code section 17514?

In order for an executive order to impose a reimbursable state-mandated program under the California Constitution, the executive order must impose costs mandated by the state.[351] Government Code section 17514 defines costs mandated by the state as:

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

When discussing costs resulting from funded underlying programs that may have been mandated on claimants, the court in *Kern High School Dist*. held:

> [A]ssuming (without deciding) that claimants have been legally compelled to participate in *one* of nine [underlying] programs, we conclude that claimants nonetheless have no entitlement to reimbursement from the state for such expenses, because they have been free at all relevant times to use funds provided by the state for that program to pay required program expenses- including the notice and agenda costs here at issue.[352]

Finance indicates that the Budget Act of 2003 provided "$550.8 million in Proposition 98 General Fund and $82.2 million in federal funds for adult education programs."[353] Like the Budget Act of 2003, and as noted above, the test claim statutes appropriated General Fund and federal funds for adult education programs. The test claim statutes funded adult education programs as follows:

	Budget Act of 2001	Budget Act of 2002
General Fund (GF)	$610.7	$605
Federal Trust Fund (FTF)	$74.1	$91.8

(Amounts in millions)

These General Fund appropriations are scheduled into separate categories (adult education program areas and reimbursements). These categories are subject to various provisions, some of which limit the use of a portion of the funds for specified purposes. Similarly, the Federal Trust Fund appropriations are subject to various provisions limiting the use of the funds appropriated.

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[351] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

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

[353] Finance comments to the test claim dated June 21, 2004, p. 3.

The $610.7 million General Fund and the $74.1 million Federal Trust Fund appropriated by the Budget Act of 2001 are scheduled between CalWORKs reimbursements (Reimbursements) and three program areas which include: (1) 10.50.010.001 – Adult Education (Adult Education), (2) 10.50.010.008 – Remedial education services for participants in the CalWORKs (CalWORKs remedial education), (3) 10.50.010.009 – Local Education Agencies—Education Services for participants in CalWORKs (LEA CalWORKs). The amounts appropriated for each program and the amounts limited for specific purposes are as follows:

Program Areas	GF Scheduled Amounts	GF Use Limited Amounts	GF Not Use Limited	FTF Scheduled Amounts	FTF Use Limited Amounts	FTF Not Use Limited
Adult Education	$574.7	--	--	$74.1	$12.6[354]	--
CalWORKs remedial education	$18.3	$18.3[355]	--	--	--	--
LEA CalWORKs	$26.4	$26.4[356]	--	--	--	--
Reimbursements	-$8.7	--	--	--	--	--
	--	Misc.-- $37.1[357]	--	--	--	--
Total:	$610.7	$81.8	**$528.9**	$74.1	$12.6	**$61.5**

(Amounts in millions)

Subtracting the total General Fund Scheduled Amount from the total GF Use Limited Amount, and subtracting likewise for the Federal Trust Fund amounts, results in at least $528.9 million General Fund[358] and $61.5 million Federal Trust Fund that is not subject to use limitations beyond the general limitation that funds be used for adult education programs for the 2001-2002 fiscal year.

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[354] Statutes 2001, chapter 106, line item 6110-156-0890, provision 1.

[355] Statutes 2001, chapter 106, line item 6110-156-0001, provisions 4 and 4(i). The federal government, pursuant to the Personal Responsibility Act of 1996 (P.L. 104-193), provides grants to the state for Temporary Assistance for Needy Families (TANF). CalWORKs is California's TANF program.

[356] *Ibid.*

[357] *Id.*, provision 5. Reserving from the total $610.7 General Fund appropriated, $14.3 million for increases in average daily attendance and $22.8 million for cost-of-living adjustments.

[358] TANF allows for a portion of TANF funds to be used for administrative costs. (45 CFR § 263.2(a)(5)(i).)

The $605 million General Fund and the $91.8 million Federal Trust Fund appropriated by the Budget Act of 2002 are scheduled for each program and the amounts limited for a specific purpose are as follows:

Program Areas	GF Scheduled Amounts	GF Use Limited Amounts	GF Not Use Limited	FTF Scheduled Amounts	FTF Use Limited Amounts	FTF Not Use Limited
Adult Education	$582	--	--	$91.8	$5[359]	--
CalWORKs remedial education	$31.7	$31.7[360]	--	--	--	--
Reimbursements	-$8.7	--	--	--	--	--
	--	Misc.-- $27.3[361]	--	--		--
Total:	$605	$59	**$546**	$91.8	$5	**$86.8**

(Amounts in millions)

Subtracting the total General Fund Scheduled Amount from the total GF Use Limited Amount, and subtracting likewise for the Federal Trust Fund amounts, results in at least $546 million General Fund and $86.8 million Federal Trust Fund that is not subject to use limitations beyond the general limitation that funds be used for adult education programs for the 2002-2003 fiscal year.

Claimants have stated in the test claim that, "It is estimated that the claimant will/has incurred significantly more than $1000.00 to implement these new state mandated activities… ."[362] However, there is no evidence in the record that indicates why the funds that were not subject to use limitations ($528.9 million GF and $61.5 million FTF for the 2001-2002 fiscal year and $546 million GF and $86.8 million FTF for the 2002-2003 fiscal year) were not sufficient to cover costs associated with the implementation of the TOPSpro system as it relates to adult English classes and citizenship classes.

Thus, during the course of the reimbursement period of July 1, 2001 to August 15, 2003, school districts, that may have been required to establish adult English classes and citizenship classes, have had available state funds not subject to specific use limitations to pay for required adult

[359] Statutes 2002, chapter 379, line item 6110-156-0890, provision 6, which reserves $5 million for the Naturalization Services Program, but does not expressly prohibit the use of these funds for data collection and implementation of the TOPSpro system as it relates to the Naturalization Services Program.

[360] Statutes 2002, chapter 379, line item 6110-156-0001, provision 4.

[361] *Id*., provision 5. Reserving from the total $605 General Fund appropriated, $15 million for increases in average daily attendance and $12.3 million for cost-of-living adjustments.

[362] Test Claim, declarations Margaret Kirkpatrick, p.2; and Joan Polster, p.2.

education program expenses. As a result, under *Kern High School Dist*., school districts are not entitled to reimbursement from the state for costs associated with the implementation of the TOPSpro system as it relates to adult English classes and citizenship classes because there is no evidence in the record of increased costs mandated by the state as defined by Government Code section 17514.

It should be noted that the court in *Kern High School District* states that a "compulsory program participant likely would be able to establish the existence of a reimbursable state mandate"[363] in situations where:

> [I]ncreased compliance costs imposed by the state … become so great-or funded program grants … become so diminished that funded program benefits would not cover the compliance costs, or … expenditure of granted program funds on administrative costs … violate a spending limitation set out in applicable regulations or statutes.[364]

However, there is no evidence in the record that the increased costs resulting from the implementation of the TOPSpro system are so great, or program grants have become so diminished that funded program benefits would not cover the costs of implementing the TOPSpro system. In fact, provisions 6 and 7 of line item 6110-156-0001 of the Budget Act of 2001 provide for the use of unencumbered funds from the prior fiscal year. Similarly, provision 5 of line item 6110-156-0890 of the Budget Act of 2002 states that $18 million of the $91.8 million appropriated in the item is available as a one-time carryover of unexpended funds from the 2001-2002 fiscal year. In addition, the August 1, 2002 CDE letter indicates that the TOPSpro forms and software may be obtained from CASAS at no charge to school districts.[365]

Thus, the Commission finds that claimants are not entitled to reimbursement of costs related to the CDE letter dated August 1, 2002, for the provision of adult English and citizenship classes. As in *Kern High School Dist*., the state in providing program funds to claimants, has already provided funds that may be used to cover the necessary program expenses, and, thus, there is no evidence of increased costs mandated by the state as defined by Government Code section 17514.

CONCLUSION

Therefore, the Commission concludes that, Statutes 1999, chapter 50, Statutes 2000, chapter 52, Statutes 2001, chapter 106, Statutes 2002, chapter 379, and the CDE letters dated July 6, 1999, April 24, 2000 and August 1, 2002, do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[363] *Kern High School Dist*., *supra*, 30 Cal.4th 727, 747-748.

[364] *Id*. at p. 747.

[365] CDE letter, dated August 1, 2002, p. 3.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Labor Code Sections 3212.6, 3212.8, and 3212.9; Statutes 1995, Chapter 683; Statutes 1996, Chapter 802; Statutes 2000, Chapter 883; Statutes 2000, Chapter 490; Statutes 2001, Chapter 833; Filed on February 27, 2003, By County of Tehama and California State Association of Counties-Excess Insurance Authority (CSAC-EIA), Claimants.	Case Nos.: 01-TC-20, 01-TC-23, and 01-TC-24 *Presumption of Causation in Workers' Compensation Claims*: *Tuberculosis, Hepatitis and Other Blood-Borne Infectious Diseases, and Meningitis* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on September 27, 2007)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. Ms. Juliana Gmur represented and appeared for the claimant. Ms. Carla Castañeda and Ms. Donna Ferebee appeared for the Department of Finance.

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

The Commission adopted the staff analysis at the hearing by a vote of 7 to 0 to deny this test claim.

Summary of Findings

This consolidated test claim was filed on June 28, 2002, by County of Tehama and California State Association of Counties-Excess Insurance Authority (CSAC-EIA) regarding statutes that address evidentiary presumptions in workers' compensation cases given to certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop tuberculosis, hepatitis and other blood-borne infectious diseases, or meningitis during employment.. The test claim statute is Labor Code sections 3212.6, 3212.8, and 3212.9.

The County of Tehama and CSAC-EIA, a joint powers authority formed by and for California counties for insurance and risk management purposes, filed the consolidated test claims, seeking reimbursement for costs incurred by CSAC-EIA and its member counties.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.

The test claim statutes, Labor Code sections 3212.6, 3212.8, and 3212.9, provide these evidentiary presumptions to certain employees of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop or manifest tuberculosis, hepatitis or other blood-borne infectious disease, or meningitis, during the period of employment. In these situations, the tuberculosis, hepatitis or other blood-borne infectious disease, or meningitis, is presumed to have arisen out of and in the course of the employment. If the local agency employer decides to dispute the claim, the burden of proving that the "injury" did not arise out of and in the course of employment is shifted to the employer.

The Commission finds that CSAC-EIA has standing to pursue the test claim on behalf of its member counties, but does not have standing to claim reimbursement for its own costs. Under the principles of collateral estoppel, the Commission finds that the Second District Court of Appeal's unpublished decision on this issue in *CSAC Excess Insurance Authority v. Commission on State Mandates* (Dec. 22, 2006, B188169) is binding and applies to this test claim.

The Commission further finds that the test claim statutes are not subject to article XIII B, section 6 of the California Constitution because they do not mandate new programs or higher levels of service on local agencies within the meaning of article XIII B, section 6. The express language of Labor Code sections 3212.6, 3212.8, and 3212.9, do not impose any state-mandated requirements on local agencies. Rather, the decision to dispute these types of workers' compensation claims and prove that the injury did not arise out of and in the course of employment remains entirely with the local agency. Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.

The Commission concludes that Labor Code section 3212.6, as amended by Statutes 1995, chapter 683, and Statutes 1996, chapter 802; Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833; and Labor Code section 3212.9, as added by Statutes 2000, chapter 883, are not subject to article XIII B, section 6 of the California Constitution because they do not mandate a new program or higher level of service on local agencies.

BACKGROUND

This consolidated test claim addresses evidentiary presumptions in workers' compensation cases given to certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office that develop tuberculosis, hepatitis and other blood-borne infectious diseases, or meningitis during employment.

The County of Tehama and CSAC-EIA, a joint powers authority formed by and for California counties for insurance and risk management purposes, filed the consolidated test claims, *Hepatitis and Blood-Borne Illnesses Presumption* (01-TC-20), *Tuberculosis Presumption for Firefighters, Jail Guards, and Correctional Officers* (01-TC-23), and *Meningitis Presumption for Law Enforcement and Firefighters* (01-TC-24), seeking reimbursement for costs incurred by CSAC-EIA and its member counties.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.[366] Although the workers' compensation law must be "liberally construed" in favor of the injured employee, the burden is normally on the employee to show proximate cause by a preponderance of the evidence.[367] If liability is established, the employee is entitled to compensation for the full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as defined and calculated by the Labor Code.[368]

As early as 1937, the Legislature began to ease the burden of proof for purposes of liability for certain public employees that provide "vital and hazardous services" by establishing a presumption of industrial causation; that the injury arose out of and in the course of employment.[369] The presumptions have the effect of shifting to the employer the burden of proof as to the nonexistence of the presumed fact. Thus, the employer has the burden to prove that the employee's injury did not arise out of or in the course of employment.[370]

Labor Code section 3208, which was last amended in 1971, defines "injury" for purposes of workers' compensation as "any injury or disease arising out of the employment." As described below, this definition of "injury" includes tuberculosis, hepatitis, and meningitis.

Test Claim Statutes

Labor Code section 3212.6 provides that "injury" includes tuberculosis for purposes of workers' compensation claims brought by certain members of police and sheriff's departments and inspectors or investigators of a district attorney's office, when the tuberculosis develops or manifests itself during a period that the member is in service with his/her department or office. In addition, the tuberculosis shall be presumed to arise out of and in the course of employment, if the tuberculosis develops or manifests itself during a period while these employees are in service of that department or office.[371] This presumption may be rebutted.[372] In 1995, Labor Code section 3212.6 was amended to extend this rebuttable presumption of industrial causation to certain members of fire departments.[373] In 1996, Labor Code section 3212.6, was amended again to extend the rebuttable presumption of industrial causation of tuberculosis to prison and jail guards, and correctional officers employed by a public agency.[374]

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[366] Labor Code section 3600, subdivisions (a)(2) and (3).

[367] Labor Code sections 3202, 3202.5.

[368] Labor Code sections 4451, et seq.

[369] *Zipton v. Workers' Comp. Appeals* Bd. (1990) 218 Cal.App.3d 980, 987.

[370] *Id*. at page 988, footnote 4.

[371] Statutes 1976, chapter 466, section 6.

[372] *Ibid*.

[373] Statutes 1995, chapter 683.

[374] Statutes 1996, chapter 802.

Labor Code section 3212.8 was added in 2000, and provides that, for the purposes of workers' compensation, "injury" includes hepatitis for certain members of police, sheriff's, and fire departments when any part of the hepatitis develops or manifests itself during the period of employment. In such cases the hepatitis shall be presumed to arise out of and in the course of employment.[375] This presumption may be rebutted, however, the employer cannot attribute the hepatitis to any disease existing prior to its development or manifestation.[376] In 2001, Labor Code section 3212.8 was amended by replacing "hepatitis" with "blood-borne infectious disease," and thus, providing a rebuttable presumption for more blood related "injuries."[377]

Labor Code section 3212.9 was added in 2000, and provides that, for the purposes of workers' compensation, "injury" includes meningitis for certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office, when the meningitis develops or manifests itself during the period of employment.[378] In such cases, the meningitis shall be presumed to arise out of and in the course of employment.[379] As with Labor Code sections 3212.6 and 3212.8, the presumption created by Labor Code section 3212.9 is rebuttable.

All test claim statutes provide that the compensation which is awarded for tuberculosis/hepatitis and blood-borne infectious disease/meningitis shall include full hospital, surgical, medical treatment, disability indemnity, and death benefits as provided by California workers' compensation laws.

Related Test Claims and Litigation

In 2006, the Second District Court of Appeal, in an unpublished decision for *CSAC Excess Insurance Authority v. Commission on State Mandates*, Case No. B188169, upheld the Commission's decisions to deny related test claims entitled *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19), *Lower Back Injury Presumption for Law Enforcement* (01-TC-25), and *Skin Cancer Presumption for Lifeguards* (01-TC-27), which addressed issues identical to those raised in the current consolidated test claim.

In the test claim entitled *Cancer Presumption for Law Enforcement and Firefighters*, CSAC-EIA and the County of Tehama alleged that Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, and Statutes 2000, chapter 887, imposed state-mandated costs for which reimbursement is required under article XIII B, section 6. Labor Code section 3212.1 provides a rebuttable presumption of industrial causation to certain law enforcement officers and firefighters that develop cancer, including leukemia, during the course of employment. Under the 1999 amendment to section 3212.1, the employee need only show that he or she was exposed to a known carcinogen while in the service of the employer. The employer still has the right to dispute the employee's claim as it did under prior law. But when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer is shifted to the employer. The 2000 amendment to Labor Code section 3212.1 extended the cancer presumption to peace

[375] Statutes 2000, chapter 490.

[376] *Ibid.*

[377] Statutes 2001, chapter 833.

[378] Statutes 2000, chapter 883.

[379] *Ibid.*

officers defined in Penal Code section 830.37, subdivisions (a) and (b); peace officers that are members of an arson-investigating unit or are otherwise employed to enforce the laws relating to fire prevention or fire suppression.

In the test claim entitled *Lower Back Injury Presumption for Law Enforcement*, CSAC-EIA and the County of Tehama alleged that Labor Code section 3213.2, as added by Statutes 2001, chapter 834, imposes a reimbursable state-mandated program. Labor Code section 3213.2 provides a rebuttable presumption of industrial causation to certain publicly employed peace officers who wear a duty belt as a condition of employment and, either during or within a specified period after termination of service, suffer a lower back injury.

In the test claim entitled *Skin Cancer Presumption for Lifeguards*, the City of Newport Beach alleged that Labor Code section 3212.11, as added by Statutes 2001, chapter 846, imposes a reimbursable state-mandated program. Labor Code section 3212.11 provides a rebuttable presumption of industrial causation to certain publicly employed lifeguards who develop skin cancer during or immediately following their employment.

The Commission denied each test claim finding that pursuant to existing case law interpreting article XIII B, section 6, the statutes do not mandate new programs or higher levels of service on local agencies.[380]

On December 22, 2006, the Second District Court of Appeal issued its unpublished decision in *CSAC Excess Insurance Authority v. Commission on State Mandates*, affirming the Commission's decision that the 1999, 2000, 2001 additions and amendments to Labor Code section 3212.1, 3212.11, and 3213.2, do not constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[381] Final judgment in the case was entered on May 22, 2007.[382] In its decision affirming the Commission's finding that the test claim statutes did not constitute reimbursable state-mandated programs, the Second District Court of Appeal found:

- CSAC EIA does not have standing as a claimant under article XIII B, section 6, in its own right, but does have standing to seek reimbursement on behalf of its member counties.
- Workers' compensation is not a program administered by local governments, as a result, the test claim statutes' presumptions of industrial causation do not mandate a new program or higher level of service within an existing program, even assuming that the test claim statutes' presumptions will impose increased workers' compensation costs solely on local entities.
- Costs alone do not equate to a higher level of service within the meaning of article XIII B, section 6, even if paid only by local entities and not the private sector. The

[380] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 (*Kern High School Dist.*); *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[381] Exhibit E, Supporting Documentation, *CSAC Excess Insurance Authority v. Commission on State Mandates*, Second District Court of Appeal, Case No. B188169 (Unpubl. Opn.).

[382] Exhibit E, Supporting Documentation, Judgment.

service provided by the counties represented by CSAC-EIA and the city, workers' compensation benefits to its employees, is unchanged. The fact that some employees are more likely to receive those benefits does not equate to an increased level of service within the meaning of article XIII B, section 6.

Claimant's Position

Co-claimants, County of Tehama and CSAC-EIA, contend that the test claim statutes constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Co-claimants assert that Labor Code sections 3212.6, 3212.8, and 3212.9, create and/or expand compensable injuries under workers' compensation, provide presumptions of industrial causation, and restrict arguments to rebut those presumptions.

Co-claimants conclude in each test claim:

> The net effect of this legislation is to cause an increase in workers' compensation claims for [tuberculosis/hepatitis and blood-borne infectious diseases/meningitis], 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.[383]

Department of Finance's (Finance) Position

The Department of Finance filed comments on July 31, 2002, August 1, 2002, and August 2, 2002, concluding that the test claim statutes may create a reimbursable state-mandated program.[384] Finance filed comments on August 27, 2007 concurring with the draft staff analysis.

Department of Industrial Relations (DIR) Position

The DIR contends that the test claim statutes are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution. The DIR asserts that the presumption of industrial causation available for certain members of police, sheriff's and fire departments and inspectors or investigators of a district attorney's office 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.
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.[385]

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[383] Exhibit A, p. 105, 126, 142.

[384] Exhibit B.

Commission Findings

The courts have found that article XIII B, section 6 of the California Constitution[386] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[387] "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."[388] 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.[389] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[390]

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.[391] 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.[392] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[393]

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[385] Exhibit C.

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

[387] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

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

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

[390] *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*).

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

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

[393] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[394]

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.[395] 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."[396]

Issue 1: Does CSAC-EIA have standing as a claimant in its own right and/or as a representative seeking reimbursement on behalf of its member counties for this consolidated test claim?

In the *CSAC Excess Insurance Authority* case, the Second District Court of Appeal held that CSAC-EIA does not have standing as a claimant in its own right under article XIII B, section 6. The court reasoned that CSAC-EIA, as a joint powers authority, does not constitute a "local agency" or "special district" as defined by Government Code sections 17518 and 17520, and therefore, is not eligible to claim reimbursement of costs under article XIII B, section 6. The court also held that CSAC-EIA does have standing to seek reimbursement on behalf of its member counties. The court noted that the joint powers agreement expressly authorized CSAC-EIA to exercise all of the powers common to counties in California, to do all acts necessary for the exercise of those powers, and to sue and be sued in its own name. As a result, the court reasoned that the joint powers agreement authorized CSAC-EIA to bring test claims on behalf of its member counties, each of which qualifies as a local agency to bring a test claim under Government Code section 17518.

As an unpublished opinion, the *CSAC Excess Insurance Authority* decision of the Second District Court of Appeal may not be cited as a binding precedential decision unless it is relevant under the doctrine of collateral estoppel.[397] Collateral estoppel precludes a party from re-litigating the matters previously litigated and determined in a prior proceeding and makes the decision on the matter in the prior proceeding binding in the subsequent matter. In order for collateral estoppel to apply, the following elements must be satisfied: (1) the issue necessarily decided in the previous proceeding is identical to the one that is currently being decided; (2) the previous proceeding terminated with a final judgment on the merits; (3) the party against whom collateral estoppel is asserted is a party to or in privity with a party in the previous proceeding; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the

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[394] *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.

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

[396] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[397] California Rules of Court, Rule 8.1115.

issue.[398] For the reasons below, the Commission finds that the elements of collateral estoppel are satisfied in this case.

For purposes of collateral estoppel, issues are identical when the factual allegations at issue in the previous and current proceeding are the same.[399] The issue presented here is the same issue in the *CSAC-Excess Insurance Authority* case; whether CSAC-EIA has standing to pursue the claims on its own behalf for the costs it incurred as the insurer of its member counties and/or pursue test claims on behalf of its member counties. On May 22, 2007, the *CSAC Excess Insurance Authority* case terminated with a final judgment on the merits. Furthermore, CSAC-EIA is a party involved in both the *CSAC Excess Insurance Authority* case and the consolidated test claim at issue here. Moreover, the parties in the *CSAC Excess Insurance Authority* case, specifically CSAC-EIA, had a full and fair opportunity to litigate the standing issue before the court. Thus, the court's holding in *CSAC Excess Insurance Authority*, that CSAC-EIA *does not* have standing to pursue the claims on its own behalf for the costs it incurred as the insurer of the member counties *and* that CSAC-EIA *does* have standing to pursue the claims on behalf of its member counties, is binding and applies to this test claim.

The Commission concludes CSAC-EIA does not have standing as a claimant in its own right, however, CSAC-EIA does have standing as a representative seeking reimbursement on behalf of its member counties for this consolidated test claim.

Issue 2: Do Labor Code sections 3212.6, 3212.8, and 3212.9, as added and amended in 1995, 1996, 2000, and 2001, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

The case law is clear that even though a statute is addressed only to local government and imposes new costs on them, the statute may not constitute a reimbursable state-mandated program under article XIII B, section 6.[400] It is well-established that local agencies are not entitled to reimbursement for all increased costs, but only those resulting from a new program or higher level of service mandated by the state.[401] The costs identified by claimant for the test claim statutes are the total costs of tuberculosis, hepatitis and blood-borne infectious diseases, and meningitis claims, from initial presentation to ultimate resolution.

However, Labor Code sections 3212.6, 3212.8, and 3212.9, as added and amended in 1995, 1996, 2000, and 2001,[402] do not mandate local agencies to incur these costs. The statute simply

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[398] *Roos v. Red* (2006) 130 Cal.App.4th 870, 879-880.

[399] *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342.

[400] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1190; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[401] *Kern High School Dist., supra,* 30 Cal.4th 727, 735-736.

[402] Labor Code section 3212.6, amended by Statutes 1995, chapter 638, and Statutes 1996, chapter 802, Labor Code section 3212.8, added and amended by Statutes 2000, chapter 490, and Statutes 2001, chapter 833, and Labor code section 3212.9, added by Statutes 2000, chapter 883.

creates the presumptions of industrial causation for the employee, but does not require a local agency to provide a new or additional service to the public. The relevant language in Labor Code sections 3212.6, 3212.8, and 3212.9, as they existed following 1996, 2001, and 2000, respectively, state that:

> The [tuberculosis/blood-borne infectious disease/meningitis] so developing or manifesting itself [in those cases] shall be presumed to arise out of and in the course of the employment [or service]. 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. (Emphasis added.)

These statutes authorize, but do not require, local agencies to dispute the claims of injured employees. Thus, it is the decision made by the local agency to dispute the claim that triggers any litigation costs incurred. Litigation costs are not mandated by the state.[403]

In addition, the Labor Code sections 3212.6, 3212.8, and 3212.9, on their face, do not mandate local agencies to pay workers' compensation benefits to injured employees. Even if the statute required the payment of increased benefits, the payment of benefits to employees would still have to constitute a new program or higher level of service. Local agencies, however, have had the responsibility to pay workers' compensation benefits for "any injury or disease arising out of employment" since 1971.[404] Labor Code section 4850 has further provided special compensation benefits to injured peace officers and firefighters since 1983, well before the enactment of the test claim statutes. Thus, the payment of employee benefits is not new and has not been shifted to local agencies from the state.

Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.[405] Rather, the California Supreme Court and other courts of appeal have determined that the following programs required under law are not administered by local agencies to provide a service to the public and, thus, reimbursement under article XIII B, section 6 of the California Constitution is not required: providing workers' compensation benefits to public employees; providing unemployment compensation protection to public employees; increasing Public Employment Retirement System (PERS) benefits to

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[403] *Kern High School Dist., supra*, 30 Cal.4th 727, 742-743. Furthermore, there is no evidence that counties and cities are practically compelled to dispute the claims. The statutes do not impose a substantial penalty for not disputing the claim. (*Kern High School Dist., supra*, 30 Cal.4th at p. 751.)

[404] Labor Code section 3208, as last amended in 1971.

[405] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 877.

retired public employees; and paying death benefits to local safety officers under the PERS and workers' compensation systems.[406]

More specifically within the context of workers' compensation, the Supreme Court decided *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, and, for the first time, defined a "new program or higher level of service" pursuant to article XIII B, section 6. Counties were seeking the costs incurred as a result of legislation that required local agencies to provide the same increased level of workers' compensation benefits to their employees as private individuals or organizations. The Supreme Court recognized that workers' compensation is not a new program and, thus, determined whether the legislation imposed a higher level of service on local agencies.[407] Although the Court defined a "program" to include "laws which, to implement a state policy, impose unique requirements on local governments," the Court emphasized that a new program or higher level of service requires "state mandated increases in the services provided by local agencies in existing programs."

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[408]

The Court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[409]

Applying these principles, the Court held that reimbursement for the increased costs of providing workers' compensation benefits to employees was not required by the California Constitution. The Court stated the following:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of

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[406] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57; *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67; and *City of Richmond v. Commission on State Mandates, supra,* 64 Cal.App.4th 1190, 1195.

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

[408] *Ibid,* emphasis added.

[409] *Id*. at pages 56-57, emphasis added.

> the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[410]

In 2004, the California Supreme Court, in *San Diego Unified School Dist*., reaffirmed the conclusion that simply because a statute, which establishes a public employee benefit program, may increase the costs to the employer, the statute does not "in any tangible manner increase the level of service provided by those employers to the public" within the meaning of article XIII B, section 6.[411]

These principles apply even though the presumption is granted uniquely to public safety employees. In the Second District Court of Appeal case of *City of Anaheim*, the city sought reimbursement for costs incurred as a result of a statute that temporarily increased retirement benefits to public employees. The city argued that since the statute "dealt with pensions for *public* employees, it imposed unique requirements on local governments that did not apply to all state residents and entities."[412] The court held that reimbursement was not required because the statute did not impose any state-mandated activities on the city and the PERS program is not a program administered by local agencies as a service to the public.[413] The court reasoned as follows:

> Moreover, the goals of article XIII B of the California Constitution "were to protect residents from excessive taxation and government spending … and preclude a shift of financial responsibility for carrying out governmental functions from the state to local agencies. … Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61.) Similarly, City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public.[414]

The reasoning in *City of Anaheim* applies here. Simply because a statute applies uniquely to local government does not mean that reimbursement is required under article XIII B, section 6.[415]

Accordingly, the Commission finds that Labor Code section 3212.6, as amended in 1995 and 1996; Labor Code section 3212.8, as added and amended in 2000 and 2001; and Labor Code section 3212.9, as added in 2000, do not mandate new programs or higher levels of service and,

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[410] *Id.* at pages 57-58, fn. omitted.

[411] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 875.

[412] *City of Anaheim, supra*, 189 Cal.App.3d at pp. 1483-1484.

[413] *Id*. at page 1484.

[414] *Ibid*.

[415] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 877, fn. 12; *County of Los Angeles, supra*, 110 Cal.App.4th at page 1190; *City of Richmond, supra*, 64 Cal.App.4th at page 1197.

thus, do not constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concludes California State Association of Counties-Excess Insurance Authority does not have standing to claim reimbursement under article XIII B, section 6 of the California Constitution, on its own behalf for the costs it incurred as the insurer of its member counties. However, California State Association of Counties-Excess Insurance Authority does have standing to pursue test claims for reimbursement on behalf of its member counties.

The Commission further concludes that Labor Code section 3212.6, as amended by Statutes 1995, chapter 683, and Statutes 1996, chapter 802; Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833; and Labor Code section 3212.9, as added by Statutes 2000, chapter 883, are not subject to article XIII B, section 6 of the California Constitution because they do 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: Labor Code Section 3212.8; Statutes 2000, Chapter 490, Statutes 2001; Chapter 833 Filed on February 27, 2003, By Santa Monica Community College District, Claimant.	Case No.: 02-TC-17 *Hepatitis Presumption (K-14)* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5. ARTICLE 7 *(Adopted on September 27, 2007)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on September 27, 2007. Mr. Keith Petersen represented and appeared for the claimant. Ms. Carla Castañeda and Ms. Donna Ferebee appeared for the Department of Finance.

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

The Commission adopted the staff analysis at the hearing by a vote of 7 to 0 to deny this test claim.

Summary of Findings

This test claim was filed on February 27, 2003, by Santa Monica Community College District regarding a statute that addresses an evidentiary presumption in workers' compensation cases given to certain members of school district police departments that develop hepatitis and other blood-borne infectious diseases. The test claim statute is Labor Code section 3212.8.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.

Labor Code section 3208, which was last amended in 1971, defines "injury" for purposes of workers' compensation as "any injury or disease arising out of the employment." This definition of "injury" includes hepatitis and any blood-borne infectious disease.

The test claim statute, provides an evidentiary presumption to certain members of school district police departments that develop or manifest hepatitis and other blood-borne infectious diseases during the period of employment. This evidentiary presumption shifts the burden of proof to the

public school district to show that the hepatitis did not arise out of or in the course of the police officer's employment with the district.

The Commission finds that the express language of Labor Code section 3212.8 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 did not arise out of and in the course of employment remains entirely with the school district. Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.

The Commission concludes that Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833, 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.

BACKGROUND

This test claim addresses an evidentiary presumption in workers' compensation cases given to certain members of school district police departments that develop hepatitis and other blood-borne infectious diseases.

In the usual workers' compensation case, before an employer can be held liable for benefits, the employee must show that the injury arose out of and in the course of employment, and that the injury is proximately caused by the employment.[416] Although the workers' compensation law must be "liberally construed" in favor of the injured employee, the burden is normally on the employee to show proximate cause by a preponderance of the evidence.[417] If liability is established, the employee is entitled to compensation for the full hospital, surgical, and medical treatment, disability indemnity, and death benefits, as defined and calculated by the Labor Code.[418]

As early as 1937, the Legislature began to ease the burden of proof for purposes of liability for certain public employees that provide "vital and hazardous services" by establishing a presumption of industrial causation; that the injury arose out of and in the course of employment.[419] The presumptions have the effect of shifting to the employer the burden of proof as to the nonexistence of the presumed fact. Thus, the employer has the burden to prove that the employee's injury did not arise out of or in the course of employment.[420]

Labor Code section 3208, which was last amended in 1971, defines "injury" for purposes of workers' compensation as "any injury or disease arising out of the employment." This definition of "injury" includes hepatitis and any blood-borne infectious disease.

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[416] Labor Code section 3600, subdivisions (a)(2) and (3).

[417] Labor Code sections 3202, 3202.5.

[418] Labor Code sections 4451, et seq.

[419] *Zipton v. Workers' Comp. Appeals* Bd. (1990) 218 Cal.App.3d 980, 987.

[420] *Id*. at page 988, footnote 4.

Test Claim Statute

Labor Code section 3212.8 was added in 2000, and provides that, for the purposes of workers' compensation, "injury" includes hepatitis for certain members of police, sheriff's, and fire departments when any part of the hepatitis develops or manifests itself during the period of employment. In such cases, the hepatitis shall be presumed to arise out of and in the course of employment.[421] This presumption may be rebutted, however, the employer cannot rebut this presumption by attributing the hepatitis to any disease existing prior to its development or manifestation.[422] In 2001, Labor Code section 3212.8 was amended by replacing "hepatitis" with "blood-borne infectious disease," and thus, providing a rebuttable presumption for more blood related "injuries."[423]

Related Test Claims and Litigation

Although not having precedential effect, the Second District Court of Appeal, in an unpublished decision for *CSAC Excess Insurance Authority v. Commission on State Mandates*, Case No. B188169, upheld the Commission's decisions to deny related workers' compensation test claims entitled *Cancer Presumption for Law Enforcement and Firefighters* (01-TC-19), *Lower Back Injury Presumption for Law Enforcement* (01-TC-25), and *Skin Cancer Presumption for Lifeguards* (01-TC-27), which addressed the issues raised in the current test claim.

The test claim entitled *Cancer Presumption for Law Enforcement and Firefighters*, addressed Labor Code section 3212.1, as amended by Statutes 1999, chapter 595, and Statutes 2000, chapter 887. Labor Code section 3212.1 provides a rebuttable presumption of industrial causation to certain law enforcement officers and firefighters that develop cancer, including leukemia, during the course of employment. Under the 1999 amendment to section 3212.1, the employee need only show that he or she was exposed to a known carcinogen while in the service of the employer. The employer still has the right to dispute the employee's claim as it did under prior law. But when disputing the claim, the burden of proving that the carcinogen is not reasonably linked to the cancer is shifted to the employer. The 2000 amendment to Labor Code section 3212.1 extended the cancer presumption to peace officers defined in Penal Code section 830.37, subdivisions (a) and (b); peace officers that are members of an arson-investigating unit or are otherwise employed to enforce the laws relating to fire prevention or fire suppression.

The test claim entitled *Lower Back Injury Presumption for Law Enforcement*, addressed Labor Code section 3213.2, as added by Statutes 2001, chapter 834. Labor Code section 3213.2 provides a rebuttable presumption of industrial causation to certain publicly employed peace officers who wear a duty belt as a condition of employment and, either during or within a specified period after termination of service, suffer a lower back injury.

The test claim entitled *Skin Cancer Presumption for Lifeguards*, addressed Labor Code section 3212.11, as added by Statutes 2001, chapter 846. Labor Code section 3212.11 provides a rebuttable presumption of industrial causation to certain publicly employed lifeguards who develop skin cancer during or immediately following their employment.

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[421] Statutes 2000, chapter 490.

[422] *Ibid.*

[423] Statutes 2001, chapter 833.

The Commission denied each test claim finding that pursuant to existing case law interpreting article XIII B, section 6, the statutes do not mandate new programs or higher levels of service on local agencies.[424]

On December 22, 2006, the Second District Court of Appeal issued its unpublished decision in *CSAC Excess Insurance Authority v. Commission on State Mandates*, affirming the Commission's decision that the 1999, 2000, and 2001 additions and amendments to Labor Code section 3212.1, 3212.11, and 3213.2, do not constitute reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[425] Final judgment in the case was entered on May 22, 2007.[426] In its decision affirming the Commission's finding that the test claim statutes did not constitute reimbursable state-mandated programs, the Second District Court of Appeal found:

- Workers' compensation is not a program administered by local governments as a service to the public. As a result, the test claim statutes' presumptions of industrial causation do not mandate a new program or higher level of service within an existing program, even assuming that the test claim statutes' presumptions will impose increased workers' compensation costs solely on local entities.
- Costs alone do not equate to a higher level of service within the meaning of article XIII B, section 6. The service provided by the counties represented by CSAC-EIA and the city, workers' compensation benefits to its employees, is unchanged. The fact that some employees are more likely to receive those benefits does not equate to an increased level of service to the public within the meaning of article XIII B, section 6.

Claimant's Position

Claimant, Santa Monica Community College District, contends that the test claim statute constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant asserts that it is entitled to reimbursement for costs incurred as a result of the following activities required by the test claim statute:

- Develop and periodically revise polices and procedures for the handling of workers' compensation claims related to the contraction of hepatitis or blood-borne infectious diseases.
- Payment of additional costs of claims caused by the presumption of industrial causation of hepatitis or blood-borne infectious diseases.
- Payment of increased workers' compensation insurance coverage in lieu of additional costs of claims caused by the presumption of industrial causation.

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[424] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727 (*Kern High School Dist.*); *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[425] Exhibit E, Supporting Documentation, *CSAC Excess Insurance Authority v. Commission on State Mandates*, Second District Court of Appeal, Case No. B188169 (Unpubl. Opn.).

[426] Exhibit E, Supporting Documentation, Judgment.

- Physical examinations of community college district police officers prior to employment.
- Training of police officer employees to prevent contraction of hepatitis or blood-borne infectious disease on the job.[427]

Department of Finance's (Finance) Position

Finance filed comments on May 12. 2003,[428] arguing that the plain language of the test claim statute does not mandate the following activities:

- Increased workload associated with the development and periodic revision of policies and procedures for the handling of workers' compensation claims related to the contraction of blood-borne infectious disease.
- Increased requirements for physical examinations prior to employment.
- Increased training to prevent the contraction of blood-borne infectious disease.
- Increased workers' compensation insurance coverage for blood-borne infectious diseases.

As a result, Finance contends that claimants are not entitled to reimbursement for these activities. However, Finance finds that the test claim statute may impose a reimbursable state-mandated program requiring:

- Increased workers' compensation claims for blood-borne infectious diseases.

Thus, claimant may be entitled to reimbursement for this activity under article XIII B, section 6 of the California Constitution.

Commission Findings

The courts have found that article XIII B, section 6 of the California Constitution[429] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[430] "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

[427] Exhibit A, p. 109-110.

[428] Exhibit B.

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

[430] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

impose."[431] 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.[432] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[433]

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.[434] 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.[435] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[436]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[437]

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.[438] 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."[439]

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

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

[433] *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*).

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

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

[436] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

[437] *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.

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

[439] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: Does Labor Code section 3212.8, as added and amended in 2000, and 2001, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution?

The case law is clear that even though a statute is addressed only to local government and imposes new costs on them, the statute may not constitute a reimbursable state-mandated program under article XIII B, section 6.[440] It is well-established that school districts and local agencies are not entitled to reimbursement for all increased costs, but only those resulting from a new program or higher level of service mandated by the state.[441] The costs identified by claimant for the test claim statute are the additional costs of developing and revising polices and procedures for the handling of workers' compensation claims involving hepatitis and blood-borne infectious diseases claims, the additional costs of handling these claims, the cost of increased workers' compensation insurance coverage for these types of claims in lieu of costs to handle these claims, costs of pre-employment physical examinations, and the cost of training peace officer employees to prevent contraction of hepatitis or blood-borne infectious diseases.

However, Labor Code section 3212.8, as added and amended in 2000, and 2001,[442] does not mandate school districts to incur these costs. The statute simply *creates* the presumption of industrial causation for the peace officer employee, but does not require a school district to provide a new or additional service to the public. The relevant language in Labor Code section 3212.8, as added in 2000 states that:

> The hepatitis so developing or manifesting itself in those cases shall be presumed to arise out of and in the course of the employment or service. 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. That presumption shall be extended to a person covered by subdivision (a) following termination of service for a period of three calendar months for each full year of service, but not to exceed 60 months in any circumstance, commencing with the last date actually worked in the specified capacity. (Emphasis added.)

The 2001 amendment merely replaces "hepatitis" with "blood-borne infectious diseases" and makes no other substantive change. This statute authorizes, but does not require, school districts that employ police officers to dispute the claims of injured officers. Thus, it is the decision made by the school district to dispute the claim that triggers any litigation costs incurred. Litigation costs are not mandated by the state.[443]

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[440] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1190; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[441] *Kern High School Dist., supra,* 30 Cal.4th 727, 735-736.

[442] Statutes 2000, chapter 490, and Statutes 2001, chapter 833.

[443] *Kern High School Dist., supra,* 30 Cal.4th 727, 742-743. Furthermore, there is no evidence that counties and cities are practically compelled to dispute the claims. The statutes do not

In addition, the Labor Code section 3212.8, on its face, does not mandate school districts to pay workers' compensation benefits to injured employees. Even if the statute required the payment of increased benefits, the payment of benefits to employees would still have to constitute a new program or higher level of service. School districts, however, have had the responsibility to pay workers' compensation benefits for "any injury or disease arising out of employment" since 1971.[444] Labor Code section 4850 has further provided special compensation benefits to injured peace officers and firefighters since 1983, well before the enactment of the test claim statute. Thus, the payment of employee benefits is not new and has not been shifted to school districts from the state.

Moreover, no court has found that the payment of benefits to local employees provides an increased level of governmental service to the public, a finding that is required for a statute to constitute a new program or higher level of service.[445] Rather, the California Supreme Court and other courts of appeal have determined that the following programs required under law are not administered by local government to provide a service to the public and, thus, reimbursement under article XIII B, section 6 of the California Constitution is not required: providing workers' compensation benefits to public employees; providing unemployment compensation protection to public employees; increasing Public Employment Retirement System (PERS) benefits to retired public employees; and paying death benefits to local safety officers under the PERS and workers' compensation systems.[446]

More specifically within the context of workers' compensation, the Supreme Court decided *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, and, for the first time, defined a "new program or higher level of service" pursuant to article XIII B, section 6. Counties were seeking the costs incurred as a result of legislation that required local agencies to provide the same increased level of workers' compensation benefits to their employees as level of service requires "state mandated increases in the services provided by local agencies in existing programs." private individuals or organizations. The Supreme Court recognized that workers' compensation is not a new program and, thus, determined whether the legislation imposed a higher level of service on local agencies.[447] Although the Court defined a "program" to include "laws which, to implement a state policy, impose requirements on local governments," the Court emphasized that a new program or higher

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impose a substantial penalty for not disputing the claim. (*Kern High School Dist., supra*, 30 Cal.4th at p. 751.)

[444] Labor Code section 3208, as last amended in 1971. See also, Labor code section 3300, defining "employer" for purposes of workers' compensation as "Each county, city, district, and all public and quasi public corporations and public agencies therein," and Education Code sections 44043 and 87042.

[445] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 877.

[446] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57; *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67; and *City of Richmond v. Commission on State Mandates, supra*, 64 Cal.App.4th 1190, 1195.

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

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[448]

The Court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[449]

Applying these principles, the Court held that reimbursement for the increased costs of providing workers' compensation benefits to employees was not required by the California Constitution. The Court stated the following:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[450]

Moreover, in 2004, the California Supreme Court, in *San Diego Unified School Dist*., reaffirmed the conclusion that simply because a statute, which establishes a public employee benefit program, may increase the costs to the employer, the statute does not "in any tangible manner increase the level of service provided by those employers to the public" within the meaning of article XIII B, section 6.[451]

These principles apply even though the presumption is granted uniquely to public safety employees. In the Second District Court of Appeal case of *City of Anaheim*, the city sought reimbursement for costs incurred as a result of a statute that temporarily increased retirement benefits to public employees. The city argued that since the statute "dealt with pensions for *public* employees, it imposed unique requirements on local governments that did not apply to all state residents and entities."[452] The court held that reimbursement was not required because the

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[448] *Ibid,* emphasis added.

[449] *Id*. at pages 56-57, emphasis added.

[450] *Id.* at pages 57-58, fn. omitted.

[451] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 875.

[452] *City of Anaheim, supra*, 189 Cal.App.3d at pp. 1483-1484.

statute did not impose any state-mandated activities on the city and the PERS program is not a program administered by local agencies as a service to the public.[453] The court reasoned as follows:

> Moreover, the goals of article XIII B of the California Constitution "were to protect residents from excessive taxation and government spending … and preclude a shift of financial responsibility for carrying out governmental functions from the state to local agencies. … Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 61.) Similarly, City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public.[454]

The reasoning in *City of Anaheim* applies here. Simply because the test claim statute applies uniquely to local governments and school districts does not mean that reimbursement is required under article XIII B, section 6.[455]

Accordingly, the Commission finds that Labor Code section 3212.8, as added and amended in 2000 and 2001, does not mandate a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concludes that Labor Code section 3212.8, as added and amended by Statutes 2000, chapter 490 and Statutes 2001, chapter 833; 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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[453] *Id*. at page 1484.

[454] *Ibid*.

[455] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 877, fn. 12; *County of Los Angeles, supra*, 110 Cal.App.4th at page 1190; *City of Richmond, supra*, 64 Cal.App.4th at page 1197.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM:

Labor Code Sections 1720, 1720.3, 1720.4, 1726, 1727, 1735, 1742, 1770, 1771, 1771.5, 1771.6, and 1773.5;

Statutes 1976, Ch. 1084 (SB 2010); Statutes 1976, Ch. 1174 (AB 3365); Statutes 1980, Ch. 992 (AB 3165); Statutes 1983, Ch. 142 (AB 1390); Statutes 1983, Ch. 143 (AB 1949); Statutes 1989, Ch. 278 (AB 2483); Statutes 1989, Ch. 1224 (AB 114); Statutes 1992, Ch. 913 (AB 1077); Statutes 1992, Ch. 1342 (SB 222); Statutes 1999, Ch. 83 (SB 966); Statutes 1999, Ch. 220 (AB 302); Statutes 2000, Ch. 881 (SB 1999); Statutes 2000, Ch. 954 (AB 1646); Statutes 2001, Ch. 938 (SB 975); Statutes 2002, Ch. 1048 (SB 972)

Title 8, California Code of Regulations, Sections 16000-16802
(Register 56, No. 8; Register 72, No. 13; Register 72, No. 23; Register 77, No. 02; Register 78, No. 06; Register 79, No. 19; Register 80, No. 06; Register 82, No. 51; Register 86, No. 07; Register 88, No. 35; Register 90, No. 14; Register 90, No. 42; Register 91, No. 12; Register 92, No. 13; Register 96, No. 52; Register 99, No. 08; Register 99, No. 25; Register 99, No. 41; Register 00, No. 03; Register 00, No. 18);

Filed on September 26, 2003, by the City of Newport Beach, Claimant.

Case No.: 03-TC-13

Prevailing Wages

PROPOSED 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 6, 2007*)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 6, 2007. Juliana Gmur from MAXIMUS, Glen Everroad and Tony Brine from the City of Newport Beach, appeared on behalf of claimant. Anthony Mischel and Gary O'Mara appeared on behalf of the Department of Industrial

Relations. Carla Castañeda and 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 7-0 to deny this test claim.

SUMMARY OF FINDINGS

This test claim addresses changes to the California Prevailing Wage Law (CPWL). The CPWL is a comprehensive statutory scheme that is designed to enforce prevailing wage standards on projects funded in whole or in part with public funds. Private contractors under contract to public agencies for public works projects are required to pay local prevailing wages to construction workers on public works projects that exceed $1,000. Local prevailing wage rates are set by the Director of the Department of Industrial Relations. The CPWL does not apply to work carried out by a public agency with its own forces.

The provisions of the CPWL are only applicable when a local agency contracts with a private entity to carry out a public works project. The test claim statutes and regulations modified several provisions of the CPWL, and local agencies that contract out for their public works projects are affected by these changes. However, the cases have consistently held that when a local agency makes an underlying discretionary decision that triggers mandated costs, no state mandate is imposed.

Public works projects can arise in a myriad of ways, but there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred. Therefore, the Commission finds that the test claim statutes and regulations do not mandate a new program or higher level of service, and thus do not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6.

BACKGROUND

This test claim addresses changes to the California Prevailing Wage Law (CPWL),[456] which is "a comprehensive statutory scheme designed to enforce minimum wage standards on construction projects funded in whole or in part with public funds."[457] Private contractors under contract to public agencies for public works projects are required to pay local prevailing wages to construction workers on public works projects that exceed $1,000.[458] Local prevailing wage

[456] Labor Code sections 1720 et seq.

[457] *Road Sprinkler Fitters, Local Union 669 v. G & G Fire Sprinkler, Inc.* (2002) 102 Cal.App.4th 765, 776.

[458] Labor Code section 1771.

rates are set by the Director of the Department of Industrial Relations.[459] The requirement to pay prevailing wages does not apply to work carried out by a public agency with its own forces.[460]

In addition to state agencies, the CPWL applies to "political subdivisions," which include any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts.[461] The agency or authority awarding the private contract for public work is known as the "awarding body."[462]

The overall purpose of the CPWL is to benefit and protect employees on public works projects.[463] Its specific goals are to: 1) protect employees from substandard wages that might be paid if contractors could recruit from cheap-labor areas; 2) permit union contractors to compete with nonunion contractors; 3) benefit the public through the superior efficiency of well-paid employees; and 4) compensate nonpublic employees with higher wages for the absence of job security and benefits enjoyed by public employees.[464]

The CPWL does not cover federal projects. Those projects are addressed in the federal Davis-Bacon Act (40 USC § 276a, subdivision (a)), which was enacted for a similar purpose, i.e., to protect local wage standards by preventing federal contractors from basing their bids on wages lower than those prevailing in the area.[465]

Public Works Defined

The Labor Code generally defines "public works" as construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds,[466] and includes: 1) design and preconstruction work;[467] 2) work done for irrigation, utility, reclamation and improvement districts;[468] 3) street, sewer, or other improvement work for public

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[459] Labor Code section 1770.

[460] Labor Code section 1771.

[461] Labor Code section 1721.

[462] Labor Code section 1720.

[463] *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987.

[464] *Ibid.*

[465] *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.

[466] Labor Code section 1720, subdivision (a)(1).

[467] *Ibid.*

[468] Labor Code section 1720, subdivision (a)(2).

agencies;[469] 4) laying of carpet;[470] 5) certain public transportation demonstration projects;[471] and 6) hauling of refuse from a public works site to an outside disposal location.[472]

The Labor Code also defines "paid for in whole or in part out of public funds" as payment of funds directly to or on behalf of a public works contractor, subcontractor or developer,[473] including various other types of payments,[474] and provides several types of projects that are excluded from that definition.[475]

Prevailing Wage Rates

Prevailing wage rates are set by the Director of the Department of Industrial Relations (DIR),[476] generally by reviewing local wage rates established by collective bargaining agreements and rates that may have been predetermined for federal public works.[477] The awarding body for any contract for public works is required to specify in the call for bids, the bid specifications and the contract itself, what the prevailing wage rate is for each craft, classification or type of worker needed to execute the contract.[478] In lieu of specifying the wage rates in the call for bids, bid specifications and the contract itself, the awarding body may include a statement in those documents that copies of the prevailing wage rates are on file at its principal office, which shall be made available to any interested party on request.[479] The awarding body is required to post at each job site a copy of the determination by the DIR Director of the prevailing wage rates.[480]

Prospective bidders, representatives of any craft classification or type of worker involved, or the awarding body may challenge the declared prevailing wage rates with DIR within 20 days after commencement of advertising of the bids.[481] The Director of DIR begins an investigation and within 20 days, or longer if agreed upon by all the parties, makes a determination and transmits it in writing to the awarding body and the interested parties, which delays the closing date for

[469] Labor Code section 1720, subdivision (a)(3).

[470] Labor Code section 1720, subdivisions (a)(4) and (a)(5).

[471] Labor Code section 1720, subdivision (a)(6).

[472] Labor Code section 1720.3.

[473] Labor Code section 1720, subdivision (b)(1).

[474] Labor Code section 1720, subdivisions (b)(2) through (b)(6).

[475] Labor Code section 1720, subdivision (c).

[476] Labor Code section 1770.

[477] Labor Code section 1773.

[478] Labor Code section 1773.2.

[479] *Ibid.*

[480] *Ibid.*

[481] Labor Code section 1773.4.

submitting bids or starting of work until five days after the determination.[482] The Director's determination is final, and shall be considered the determination of the awarding body.[483]

Payroll Records

Contractors and subcontractors subject to the CPWL are required to keep accurate payroll records showing name, address, social security number, work classification, straight time and overtime hours worked each day and week and actual wages paid to each worker in connection with the public work,[484] and provide certified copies or make such records available for inspection, upon request of the employee, the awarding body, Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards.[485] Requests by the public are required to be made through the awarding body, the Division of Apprenticeship Standards, or the Division of Labor Standards Enforcement,[486] and shall be redacted to prevent disclosure of an individual's name, address and social security number.[487] The requesting party is required to reimburse the costs of preparing the records by the contractor, subcontractors, and the entity through which the request was made.[488] The awarding body is required to insert stipulations in the contract to effectuate these provisions.[489]

Discrimination on Public Works Employment Prohibited

Labor Code section 1735 prohibits contractors from discriminating on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for a violation of the CPWL.

Enforcement of CPWL

The awarding body is required to "take cognizance" of violations of the CPWL committed in the course of the public works contract, and shall promptly report any suspected violations to the Labor Commissioner.[490]

The Labor Commissioner is charged with enforcing the CPWL.[491] If the Labor Commissioner determines after an investigation that there has been a violation of the CPWL, the Labor Commissioner issues a civil wage and penalty assessment to the contractor or subcontractor or both.[492] Prior to July 1, 2001, the only way to challenge such an assessment was in court. On

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[482] *Ibid.*

[483] *Ibid.*

[484] Labor Code section 1776, subdivision (a).

[485] Labor Code section 1776, subdivision (b).

[486] Labor Code section 1776, subdivision (b)(3).

[487] Labor Code section 1776, subdivision (e).

[488] Labor Code section 1776, subdivision (b)(3).

[489] Labor Code section 1776, subdivision (h).

[490] Labor Code section 1726.

[491] Labor Code section 1741.

[492] *Ibid.*

and after July 1, 2001, contractors or subcontractors may obtain review of a civil wage and penalty assessment through an informal settlement meeting with the Labor Commissioner,[493] or via an administrative hearing.[494] Until January 1, 2009, hearings are conducted before the DIR Director with an impartial hearing officer; thereafter the hearing will be conducted by an administrative law judge.[495] An affected contractor or subcontractor may appeal the administrative decision within 45 days of service of the decision by filing a petition for writ of mandate under Code of Civil Procedure section 1094.5.[496] This process provides the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner.[497]

When the Labor Commissioner issues a civil wage and penalty assessment, the awarding body is required to withhold and retain such moneys from contractor payments sufficient to satisfy the assessment.[498] The amounts withheld cannot be disbursed until receipt of a final order that is no longer subject to judicial review.[499] The awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner.[500]

Labor Compliance Program

The awarding body can avoid paying prevailing wages for public works projects of $25,000 or less when the project is for construction, and $15,000 or less when the project is for alteration, demolition, repair or maintenance work, if the awarding body elects to initiate and enforce a labor compliance program (LCP) for all of its public works projects.[501] As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a pre-job conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.[502]

If the awarding body enforces the CPWL as an LCP, the awarding body is entitled to keep any penalties assessed. Before taking any action, the awarding body is required to provide notice of

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[493] Labor Code section 1742.1, subdivision (b).

[494] Labor Code section 1742, subdivisions (a) and (b).

[495] Labor Code section 1742, as amended by Statutes 2004, chapter 685.

[496] Labor Code section 1742, subdivision (c).

[497] Labor Code section 1742, subdivision (g).

[498] Labor Code section 1727, subdivision (a).

[499] Labor Code section 1727, subdivision (b).

[500] Labor Code section 1742, subdivision (f).

[501] Labor Code section 1771.5, subdivision (a).

[502] Labor Code section 1771.5, subdivision (b).

the withholding of any contract payments to the contractor and any subcontractor.[503] The same process for review of a civil wage and penalty assessment made by the Labor Commissioner, as set forth in Labor Code sections 1742 and 1742.1, is invoked.[504] Any amount recovered from the contractor shall first satisfy the wage claim, before being applied to penalties, and if insufficient money is recovered to pay each worker in full, the money shall be prorated among all workers.[505] Wages for workers who cannot be located are placed in the Industrial Relations Unpaid Wage Fund and held in trust.[506] Penalties of not more than $50 per day for each worker paid less than the prevailing wage rates[507] are paid into the general fund of the awarding body that enforced the CPWL.[508]

Awarding bodies for a public works project financed in any part with funds from the Water Security, Clean Drinking Water, Coastal Beach Protection Act of 2002,[509] are required to adopt and enforce an LCP or contract with a third party to adopt and enforce an LCP.[510]

Employment of Apprentices on Public Works Projects

Properly registered apprentices are allowed to work on public works projects and must be paid prevailing wages for apprentices in the trade.[511] Apprenticeship standards are established by the DIR Division of Apprenticeship Standards,[512] and ratios of apprentices to journey level workers in a particular craft or trade on the public work are established by the particular apprenticeship program.[513] Contractors must meet various requirements with regard to employing apprentices, and the awarding body is required to include stipulations to that effect in the contract.[514]

Contracting Out for Public Works Projects

The Public Contract Code establishes contracting requirements for various types of public projects.[515] Depending on the type of local agency, purpose of the project, and estimated dollar

[503] Labor Code section 1771.6, subdivision (a).

[504] Labor Code section 1771.6, subdivisions (b) and (c).

[505] Labor Code section 1771.6, subdivision (d).

[506] Labor Code section 1771.6, subdivision (e).

[507] Labor Code section 1775.

[508] Labor Code section 1771.6, subdivision (e).

[509] Approved by the voters at the November 5, 2002 statewide general election.

[510] Labor Code sections 1771.7 and 1771.8.

[511] Labor Code section 1777.5, subdivisions (a) and (b).

[512] Labor Code section 1777.5, subdivision (c).

[513] Labor Code section 1777.5, subdivision (g).

[514] Labor Code section 1777.5, subdivision (n).

[515] The Local Agency Public Construction Act (Pub. Contract Code, § 20100 et seq.).

amount, the local agency may be required to contract out to the lowest responsible bidder to accomplish the project. The major requirements are outlined below.[516]

1. Cities

For general law cities, when the expenditure for a public project, as defined,[517] will exceed $5,000, the project must be contracted for and let to the lowest responsible bidder.[518] In the case of an emergency, however, the legislative body may pass a resolution by a four-fifths vote declaring that the public interest and necessity demand the immediate expenditure of public money to safeguard life, health or property, in which case complying with the contracting and bidding requirements is not required.[519]

In its discretion, the city may reject any bids presented and readvertise; if no bids are received on the public project, the city may perform the project without further complying with the Public Contract Code provisions.[520] Moreover, after rejecting bids, the city's legislative body may pass a resolution by a four-fifths vote declaring that the project can be performed more economically by day labor, or the materials or supplies furnished at a lower price in the open market, in which case the city may have the project done in the manner stated in the resolution without further complying with the Public Contract Code provisions.[521]

For charter cities, the Public Contract Code provisions for general law cities are applicable in the absence of an express exemption, or where a city charter provision or ordinance conflicts with the relevant provision of the Public Contract Code.[522] In several instances, the courts have declared the charter city project a matter of municipal concern thereby rendering the state statutes inapplicable.[523]

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[516] Throughout the Local Agency Public Construction Act there are specified requirements on public entities that deal with such projects as street and highway improvements, street lighting, bridges and subways, which are not addressed here.

[517] Public Contract Code section 20161 defines "public project" as:

(a) A project for the erection, improvement, painting, or repair of public buildings and works.

(b) Work in or about streams, bays, waterfronts, embankments, or other work for protection against overflow.

(c) Street or sewer work except maintenance or repair.

(d) Furnishing supplies or materials for any such project, including maintenance or repair of streets or sewers.

[518] Public Contract Code section 20162.

[519] Public Contract Code section 20168.

[520] Public Contract Code section 20166.

[521] Public Contract Code sectin 20167.

[522] Public Contract Code section 1100.7.

[523] *Piledrivers' Local Union No. 2375 v. City of Santa Monica* (1984) 151 Cal.App.3d 509; *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188.

2. Counties

Counties containing a population of less than 500,000 are required to contract out for specified public projects when the cost of the project exceeds $4,000.[524] Counties with a population of 500,000 or more are required to contract out for the specified public projects when the estimated cost of the project is $6,500 or more,[525] but in counties containing a population of 2,000,000 or more, there is no requirement to contract out for alteration or repair work of a county-owned building if the cost of the work is less than $50,000.[526] In cases of emergency, however, when repair or replacements are necessary to permit the continued conduct of county operations or services, the board of supervisors by majority consent may proceed at once to replace or repair any and all structures either by day labor under the direction of the board, by contract, or by a combination of the two.[527]

The county board of supervisors may reject all bids if advised by the county surveyor or engineer that any wharf, chute, or other shipping facility can be constructed or repaired for a cost less than the lowest responsible bid, in which case the board may order the work done by day labor under the supervision and direction of the surveyor or engineer.[528] Moreover, the county may, at its discretion, reject any bids presented and readvertise; if after readvertising the county rejects all bids presented, the county may proceed with the project by using county personnel or again readvertise. If no bids are received, the county may have the project done without further complying with the Public Contract Code provisions.[529] For projects estimated at less than $75,000 in which the county has rejected all bids, the county may, after reevaluating its cost estimates for the project, pass a resolution by a four-fifths vote of its board that the project can be performed more economically by county personnel, or a contract can be negotiated with the original bidders at a lower price, or the materials or supplies can be furnished at a lower price on the open market.[530] Upon adoption of the resolution, the county may have the project done in the manner stated in the resolution without further complying with the Public Contract Code provisions.[531]

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[524] Public Contract Code section 20121; projects include: "construction of any wharf, chute, or other shipping facility, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building, stadium, coliseum, sports arena or sports pavilion or other building for holding sports events, athletic contests, contests of skill, exhibitions, spectacles and other public meetings, or other public building … or … any painting, or repairs thereto …"

[525] Public Contract Code section 20122.

[526] Public Contract Code section 20123.

[527] Public Contract Code section 20134, subdivision (a).

[528] Public Contract Code section 20130.

[529] Public Contract Code section 20150.9.

[530] Public Contract Code section 20150.10.

[531] *Ibid.*

Similar to charter cities, the provisions of county charters – or regulations enacted pursuant to the charter – supersede the aforementioned general laws, but where the charter is silent with regard to whether a project must be let to competitive bid, then the general laws will control.[532]

3. Special Districts

The Public Contract Code also establishes a variety of requirements for special districts to contract out to accomplish public projects. There are nearly 120 articles in the Public Contract Code addressing such projects in the various types of districts, including specifically named local districts. In general, the requirements are similar to those for cities and counties.

The Uniform Public Construction Cost Accounting Act[533]

The Uniform Public Construction Cost Accounting Act was enacted to "promote uniformity of the cost accounting standards and bidding procedures on construction work performed or contracted by public entities in the state."[534] The Act provides for developing such cost accounting standards by the California Uniform Construction Cost Accounting Commission, and an alternative method for the bidding of public works projects by public entities.[535] A public agency whose governing board has by resolution elected to become subject to this Act may use its own employees to perform public projects of $25,000 or less.[536]

Test Claim Statutes and Regulations

The test claim statutes encompass changes to the CPWL in the Labor Code, starting in 1976, wherein new types of projects have been added to the definition of public works and certain new activities are imposed on awarding bodies. The relevant provisions of these statutes are summarized below.

Statutes 1976, Chapter 1084*:* Added Labor Code section 1720.3 which makes hauling refuse from a public works site for state contracts (including California State Universities and Colleges and University of California) a public works project for purposes of CPWL. This statute did not affect local agencies.

Statutes 1976, Chapter 1174: Amended Labor Code section 1735 to prohibit discrimination on public works employment for particular categories of persons, and every contractor violating the section is subject to all the penalties imposed for violations of the chapter.

Statutes 1980, Chapter 992: Amended Labor Code section 1735 to modify the categories and names for categories of those persons for whom discrimination is prohibited.

Statutes 1983, Chapter 142: As statutory cleanup, amended Labor Code section 1720.3 to update California State Universities and Colleges to California State University. This statute did not affect local agencies.

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[532] 59 California Attorney General Opinions 242, 245-246 (1976).

[533] Public Contract Code sections 22000 et seq.

[534] Public Contract Code section 22001.

[535] *Ibid.*

[536] Public Contract Code section 22032.

Statutes 1983, Chapter 143: This bill is an alternate version of Chapter 142, and the language for Labor Code section 1720.3 is identical.

Statutes 1989, Chapter 278: Amended Labor Code section 1720 to add public transportation demonstration projects authorized pursuant to Streets and Highways Code section 143 to the definition of public works. The statute thus added a new type of public works project that became subject to the CPWL.

Statutes 1989, Chapter 1224: Added Labor Code sections 1720.4, 1771.5 and 1771.6; amended Labor Code section 1773.5.

New *Labor Code section 1720.4* excluded from the CPWL public works performed entirely by volunteer labor for private non-profit community facilities upon approval by the Director of DIR.

New *Labor Code sections 1771.5 and 1771.6* established the ability of an awarding body to elect to initiate and enforce a Labor Compliance Program (LCP). In exchange, payment of prevailing wages is not required for any public works project of $25,000 or less when the project is for construction, or for any public works project of $15,000 or less when the project is for alteration, demolition, repair or maintenance work. An awarding body that establishes an LCP is also allowed to keep any fines or penalties assessed when it takes enforcement action. As part of its duties as an LCP, the awarding body is required to do the following: 1) place appropriate language concerning CPWL in all bid invitations and public works contracts; 2) conduct a prejob conference with the contractor and subcontractors to discuss federal and state labor law requirements applicable to the contract; 3) review and audit payroll records (that the contractor is required to keep) to verify compliance with CPWL; 4) withhold contract payments when payroll records are delinquent or inadequate; and 5) withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

Labor Code section 1773.5, which previously gave the Director of DIR authority to establish rules and regulations, was amended to add "including, but not limited to, the responsibilities and duties of awarding bodies under this chapter."

Statutes 1992, Chapter 913: Amended Labor Code section 1735 to modify the categories of individuals for whom discrimination is prohibited. The statute affected many state programs; the bill's stated legislative intent was to strengthen California law in areas where it is weaker than the federal Americans with Disabilities Act ("ADA") and retain California law when it provides more protection than the ADA.

Statutes 1992, Chapter 1342: Amended Labor Code section 1727 to change the word "amounts" to "wages and penalties," and to change the name "Division of Labor Law Enforcement" to "Division of Labor Standards Enforcement."

Statutes 1999, Chapter 83: As code maintenance, no relevant changes were made.

Statutes 1999, Chapter 220: Amended Labor Code section 1720.3 to add the requirement to pay prevailing wages on public works projects for the removal of refuse from the public works construction site, which was previously only applicable to state agencies. The statute added a new category of public works projects subject to the CPWL for local agencies.

Statutes 2000, Chapter 881: Amended Labor Code section 1720 to include design and preconstruction, including inspection and land surveying, within the definition of public works.

The Senate Rules Committee Analysis[537] stated that the bill codified current DIR practice and regulation by including construction inspectors and land surveyors among those workers deemed to be employed upon public works and by insuring that workers entitled to prevailing wage during the construction phase of a public works project will get prevailing wage on the design and pre-construction phases of a project.

On June 9, 2000, the DIR issued a decision (Public Works Case No. 99-046) finding that construction inspectors hired to do inspection for compliance with applicable building codes and other standards for a public works project were deemed to be employed upon public works and therefore entitled to prevailing wage. This DIR decision was the subject of a lawsuit, *City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, which held that even though the DIR had interpreted preexisting statute to include the preconstruction activities as public works and argued that the new statute merely clarified existing law, the Supreme Court found the change in the statute operated prospectively only. Therefore, pursuant to the Supreme Court's interpretation, this statute added a new category of public works projects subject to the CPWL.

Statutes 2000, Chapter 954: Amended Labor Code sections 1726 and 1727, and added section 1742.

In *Labor Code section 1726* a requirement was added for the awarding body (which was already required to "take cognizance" of violations) to promptly report suspected violations to the Labor Commissioner; if the awarding body determines as a result of its *own* investigation, i.e., if it has an LCP, that there has been a violation and withholds its own contract payments, the LCP procedures in section 1771.6 shall be followed.

Labor Code section 1727 was changed to state that if the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a *subcontractor's* violations, the *contractor* is required to withhold money upon request of the Labor Commissioner and transfer that money to the awarding body. In either case, the awarding body is limited to disbursing such withheld assessments until after receipt of a final order that is no longer subject to judicial review.

Pre-existing law allowed for challenges to wage and penalty assessments in court only; new *Labor Code section 1742* provides for an administrative process. Specifically, the new section provides that contractors or subcontractors may obtain review of a civil wage and penalty assessment by the Labor Commissioner, and establishes procedures and additional appeal provisions. Based on this statute pled, the hearing is conducted before the DIR Director with an impartial hearing officer until January 1, 2005, thereafter the hearing is conducted by an administrative law judge. This provision was amended in 2004 to extend the first scenario until January 1, 2007, and again in 2007 to extend the first scenario to January 1, 2009. Subdivision (f) provides that the awarding body that has withheld funds in response to a civil wage and penalty assessment, upon receipt of the final order, shall remit withheld funds to the Labor Commissioner. Subdivision (g) provides that the section is the exclusive remedy for review of a civil wage and penalty assessment by the Labor Commissioner or the awarding body pursuant to section 1771.5.

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[537] Senate Rules Committee, Office of Senate Floor Analyses, SB 1999, August 29, 2000, page 2.

The bill's declared legislative intent is to provide contractors and subcontractors with prompt administrative hearing if they disagree with alleged violations of the CPWL. The Senate Rules Committee analysis stated that its supporters intended the bill to cure a defect in current law which a federal court found to be an unconstitutional violation of a subcontractor's due process rights (*G & G Fire Sprinklers v. Bradshaw* (1998) 156 Fed.3d 893 (now vacated)).[538] Even though the Labor Commissioner, as a result of that case, already adopted regulations to allow for such an administrative hearing, the sponsor still wanted to go forward.[539] The bill provides that the exclusive remedy for challenging an administrative decision is a Code of Civil Procedure section 1094.5 writ. The bill was intended to streamline the procedures for review of a decision to withhold funds, reduce existing layers of litigation by providing for an administrative hearing and mandamus action but no right to a de novo trial in court, thus providing a more streamlined and efficient process while protecting due process rights of all parties.

Statutes 2001, Chapter 938: Amended Labor Code section 1720 to add "installation" to the definition of public works, to add a definition for "paid for in whole or in part out of public funds" and provided for exemptions. The bill was intended to close a loophole that exempted from CPWL projects financed through Industrial Development Bonds issued by the California Infrastructure and Economic Development Bank (I-Bank, a state agency).[540] It also establishes a definition for "public funds" that conforms to several precedential coverage decisions made by DIR, and seeks to remove ambiguity regarding the definition of public subsidy of development projects.[541]

Regulations: California Code of Regulations, Title 8, sections 16000 through 16802, as pled in the test claim and in Exhibit I, implement and make specific the statutory provisions cited above.

Claimant's Position

The claimant states that the test claim statutes and regulations impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Claimant asserts that the following activities and costs are reimbursable:

1. Increased labor and administrative costs to pay prevailing wage rates to all workers on a project, if the project cost is greater than $1,000, for new types of projects now classified as public works. (Lab. Code, §§ 1771 and 1774, and Cal. Code Regs., tit. 8, § 16000.)
2. Post at each job site prevailing wage rates for the project. (Lab. Code, § 1773.2.)

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[538] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis, AB 1646, September 19, 2000, page 5.

[539] *Id.* page 6.

[540] Senate Rules Committee, Office of Senate Floor Analyses, SB 975, September 5, 2001, page 4.

[541] *Ibid.*

3. Maintain and make available for inspection certified payroll records containing detailed information for each worker. (Lab. Code, § 1776 and Cal. Code Regs., tit. 8, § 16400, subdivision (e).)
4. Comply with statutory apprenticeship requirements. (Lab. Code, § 1777.5.)
5. Training of public agency's administrative and legal staff.
6. Increased cost for disposal of refuse at a public works site. (Lab. Code, § 1720.3.)
7. Increased cost of dealing with certain nonprofit volunteer projects. (Lab. Code, § 1720.4.)
8. Notify Labor Commissioner of any suspected violations of the CPWL. (Lab. Code, § 1726.)
9. Tracking more carefully the amounts under contract and progress payments, increased administrative costs and expenses, and training, to address changes in procedures for withholding moneys from contract payments for violations. (Lab. Code, § 1727.)
10. Additional administrative and contract monitoring efforts to address changes in anti-discrimination provisions of the CPWL. (Lab. Code, § 1735.)
11. Additional administrative expense in tracking contracts and progress payments for purposes of civil wage and penalty assessments, serving notice of those assessments, withholding of contract payments, and training on contract and payment management for staff of awarding body. (Lab. Code, § 1742.)
12. Establish a Labor Compliance Program (LCP) with the following requirements:
    a. Include appropriate language in all bid invitations and contracts for public works concerning the CPWL.
    b. Conduct a prejob conference with the contractor and all subcontractors to discuss federal and state labor law requirements applicable to the contract.
    c. All contractors and subcontractors shall maintain and furnish, at a designated time, a certified copy of each weekly payroll containing a statement of compliance signed under penalty of perjury.
    d. Review and, if appropriate, audit payroll records to verify compliance with the CPWL.
    e. Withhold contract payments when payroll records are delinquent or inadequate.
    f. Withhold contract payments equal to the amount of underpayment and applicable penalties when, after investigation, it is established that underpayment has occurred.

(Lab. Code, § 1771.5.)

13. Enforce CPWL by withholding penalties or forfeitures from contract payments. (Lab. Code, § 1771.6.)
14. As a result of the Director of Industrial Relations' new authority to establish rules and regulations for the purpose of carrying out the chapter, "*including, but not limited to, the*

responsibilities and duties of awarding bodies under this chapter,"[542] the following new responsibilities imposed by regulation:

a. File with DIR and/or receive service of request to DIR to determine whether or not a particular work is covered by the CPWL. (Cal. Code Regs., tit. 8, §§ 16000 and 16100.)

b. Appeal DIR determination of coverage, with notice including all factual and legal grounds upon which the determination is sought and whether a hearing is requested. (Cal. Code Regs., tit. 8, § 16002.5.)

c. As responding party for any request for determination or appeal of such determination, submit all documentation and legal arguments pertaining to the issue.

d. If volunteer labor is to be used, serve a written request to use such labor 45 days prior to the commencement of work, setting forth the basis for belief that use of volunteer labor is authorized pursuant to Labor Code sections 1720.4, and name all unions in the locality where the work is to be performed. (Cal. Code Regs., tit. 8, § 16003.)

e. Pursuant to California Code of Regulations, title 8, section 16100, subdivision (b):

    i. Obtain prevailing wage rate from DIR.

    ii. Specify the appropriate prevailing wage rates in bids and contracts.

    iii. Ensure that requirement for posting prevailing wage rates is applied to each job.

    iv. Make request for special determination by the DIR Division of Labor Statistics and Research at least 45 days prior to project bid advertisement date, if the wage for a particular craft, classification, or type of worker is not already available from DIR (See also Cal. Code Regs., tit. 8, § 16202).

    v. Notify the Division of Apprenticeship Standards.

    vi. Notify the prime contractors of the relevant public work requirements, which include:

        1. Appropriate number of apprentices.

        2. Workers' compensation coverage.

        3. Requirement to keep accurate work records.

        4. Inspection of payroll records.

[542] Statutes 1989, chapter 1224, added the italicized text; previously, Labor Code section 1773.5 stated: "The Director of Industrial Relations may establish rules and regulations for the purpose of carrying out the prevailing wage provisions of this article."

5. Other requirements imposed by law, including a plethora of requirements that are imposed upon local agencies when awarding a contract.

f. Pursuant to California Code of Regulations, title 8, section 16100:

   i. Withhold monies.

   ii. Ensure that public works are not split into smaller projects to evade prevailing wages.

   iii. Deny the right to bid on public contracts to those who have violated public works laws.

   iv. Prohibit workers from working more than 8 hours per day or more than 40 hours per week, unless paid not less than time and one half pay.

   v. Refrain from taking any portion of the workers' wages or fee.

   vi. Comply with requirements set forth in Labor Code sections 1776, subdivision (g), 1777.5, 1810, 1813 and 1860.

g. When the awarding body believes that the Director of DIR has not adopted appropriate prevailing wage rates for its area or for the classifications in question, file a petition to DIR for the review of the prevailing wage rate determination pursuant to Labor Code section 1773.4 and California Code of Regulations, title 8, section 16302. Such petition must include:

   i. The name, address, telephone number and job title of the person filing the petition and the person verifying the petition, as well as his or her attorney.

   ii. Whether the petitioning party is the local agency, prospective bidder, or a representative of one or more of the crafts.

   iii. The nature of the petitioner's business.

   iv. The name of the awarding body.

   v. The date on which the call for bids was first published.

   vi. The name and location of the newspaper in which the publication was made and a copy thereof.

   vii. If the petitioner is an awarding body other than a county, city and county, city, township, or regional district, it shall describe the parent or principal organization and the statutory authority for the award of the work.

   viii. The manner in which the wage determination failed to comply with Labor Code section 1773.

   ix. The prevailing wage rate that petitioner believes to be accurate.

   x. If there are facts relating to a particular employer, the facts must identify the employer by name and address and give the number of workers involved.

xi. If the facts relate to rates actually paid on public or private projects in the area, the facts surrounding that payment must be included.

xii. If the DIR has failed to consider rates, those rates must be alleged in detail.

h. Receive service of the petition, if petitioner is not the awarding body. (Lab. Code, § 1773.4.)

i. Respond to the petition, if petitioner is not the awarding body.

j. If a hearing on the petition is conducted by the Director pursuant to California Code of Regulations, title 8, section 16304, receive service of notice of the hearing, introduce evidence, and cross-examine witnesses.

k. Costs of handling a request for detailed payroll records including acknowledging receipt of the request and estimating the costs of providing the records. (Lab. Code, § 1776, Cal. Code Regs., tit. 8, § 16400.)

l. If the Labor Commissioner issues a civil wage and penalty assessment as permitted by Labor Code section 1727, receive written notice of the decision and withhold, retain or forfeit the amount stated in the notice. (Lab. Code, § 1727, Cal. Code Regs., tit. 8, §§ 16411 and 16412.)

m. If the contractor or subcontractor challenges the Labor Commissioner's decision and a hearing is held, receive a copy of the decision. (Cal. Code Regs., tit. 8, § 16414.)

n. To get initial approval of a Labor Compliance Program (LCP), pursuant to California Code of Regulations, title 8, section 16426, provide information to the Director of DIR regarding the following factors:

i. The experience of the awarding body's personnel on public works labor compliance issues.

ii. The average number of public works contracts annually administered.

iii. Whether the proposed LCP is a joint or cooperative venture among awarding bodies, and how the resources and responsibilities of the proposed LCP compare to the awarding bodies involved.

iv. The awarding body's record of taking cognizance of Labor Code violations and of withholding in the preceding five years.

v. The availability of legal support for the proposed LCP.

vi. The availability and quality of a manual outlining the responsibilities of an LCP.

vii. The methods by which the awarding body will transmit notice to the Labor Commissioner of willful violations.

o. To get final approval of LCP, pursuant to California Code of Regulations, title 8, section 16427, provide evidence to the Director of DIR that the awarding body has satisfactorily demonstrated its ability to monitor compliance with the requirements of the Labor Code and the regulations, and has filed timely, complete and accurate reports as required.

p. If an interested party requests the Director of DIR to revoke an awarding body's LCP, provide a supplemental report as required by the Director. (Cal. Code Regs., tit. 8, §§ 16428, subdivision (b)(2), and 16431.)

q. If LCP is approved, comply with the requirements of California Code of Regulations, title 8, section 16430, including:

    i. Specify in the call for bids and the contract or purchase order the appropriate language concerning Labor Code requirements.

    ii. Conduct a prejob conference with contractors and subcontractors in the bid, at which time federal and state labor law requirements applicable to the contract are discussed, and copies of applicable forms are provided, including 14 points suggested in Appendix A.

    iii. Create a form, as necessary, meeting the minimum requirements of a certified weekly payroll, or use the DIR "Public Works Payroll Reporting Form."

    iv. Establish a program for orderly review of payroll records and, if necessary, audit the payroll records.

    v. Establish a prescribed routine for withholding penalties, forfeitures and underpayment of wages for violations of the Labor Code.

    vi. Include a provision in all contracts to which prevailing wage requirements apply a provision that contract payments will not be made if payroll records are delinquent or inadequate.

r. If LCP is approved, submit an annual report to the Director of DIR within 60 days after the close of the awarding body's fiscal year, pursuant to California Code of Regulations, title 8, section 16431, to include the following:

    i. Number of contracts awarded and their total value.

    ii. Number, description and total value of contracts which were exempt from prevailing wages.

    iii. Summary of penalties and forfeitures imposed or withheld from any money due contractors as well as the amount recovered by court action.

    iv. Summary of wages due to employees resulting from contractors failing to pay prevailing wage rates, the amount withheld from money due the contractors, and the amount recovered through court action.

s. If LCP is approved, pursuant to California Code of Regulations, title 8, section 16432 and Appendix B, conduct audits at discretion of awarding body or when ordered to do so by the Labor Commissioner, to consist of the following:

    i. A comparison of payroll records to the best available information concerning the hours worked and the classification of employees.

    ii. Sufficient detail for the Labor Commissioner and the LCP to draw reasonable conclusions as to whether there has been compliance with

prevailing wage laws and to ensure accurate computation of underpayment of wages to workers as well as applicable penalties and forfeitures.

t. If LCP is approved, enforce the CPWL in a manner consistent with the practice of the DIR Division of Labor Standards Enforcement, pursuant to California Code of Regulations, title 8, section 16434.

u. If LCP is approved, and LCP wishes the Labor Commissioner to determine the appropriate amount of a forfeiture, the LCP shall file a request, pursuant to California Code of Regulations, title 8, section 16437, which includes deadlines, evidence of violation, evidence of audit or investigation, evidence that contractor was given opportunity to respond, previous record of contractor in meeting prevailing wage obligations, whether the LCP has been granted initial, extended initial or final approval, and notice procedures.

v. If LCP is approved, awarding body takes enforcement action, and contractor appeals such enforcement action to DIR Director, provide to DIR Director within 30 days a full copy of the record of the enforcement proceedings and any further documents, arguments, or authorities it wishes the Director to consider, and, as requested by the Director, a supplemental report on the activities of the LCP. (Cal. Code Regs., tit. 8, § 16439.)

w. If the DIR Division of Labor Standards Enforcement investigates violations, the awarding body is required to inform prime contractors of the requirements of Labor Code section 1776 and any other requirements imposed by law in order to assist the Division of Labor Standards Enforcement with its investigation.

With regard to cost estimates for complying with the program, claimant states: "[N]ot only is the cost of each contract increased by 15-30% for the increase in wages, but the administrative cost of monitoring as required by these laws runs many thousands of dollars on an annual basis."

Claimant filed comments on the draft staff analysis which are addressed, as necessary, in the analysis.

Position of Department of Finance

The Department of Finance states that the claimant did not establish a clear or concise argument that the claimant is mandated to pay prevailing wages for public works projects, since the prevailing wage laws only apply to private contractors bidding for, and working on, public works contracts paid for by local agencies or school districts. Although the definition of what constitutes a public works project has substantially increased by statute since 1975, under existing state law, local agencies and school districts are not limited to private contractors to build, repair or maintain public works projects. Since local agencies are free to use their own employees for projects, and are also allowed to purchase, rather than construct, structures for government purposes mandated under state law, the payment of prevailing wages cannot be considered mandatory for local agencies.

Citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 and *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, the Department concludes the courts have held that costs to a local entity resulting from an action undertaken at the option of the local entity are not reimbursable as costs mandated by the state. The Department believes that the provisions of California Code of Regulations, Title 8, sections 16000-16802, last amended

January 26, 1997, simply make an optional program available to local agencies, the costs of which are not reimbursable because they are not costs mandated by the state.

The Department further claims that all penalties and enforcement duties imposed for non-compliance with prevailing wage laws cannot be considered state-reimbursable mandates because article XIII B, section 6 does not apply to the creation of new crimes or costs related to the enforcement of crimes. Federally-mandated labor laws also do not apply to article XIII B, section 6.

The Department filed comments on the draft staff analysis agreeing with the staff recommendation.

Position of Department of Industrial Relations (DIR)

DIR asserts that the claim should be denied because no new state mandate has been created, concluding the following:

> The very decision to perform construction using private contractors and private workers is a voluntary act, and the results that flow from this voluntary act are not subject to subvention. Further, local and state governments share the responsibility to comply with the CPWL with private employers. When viewed as a whole, the inevitable changes over almost 30 years in the CPWL have reduced the burdens on local governments by shifting more responsibility to the state for determining public works, setting prevailing wages, and enforcing the obligation to pay prevailing wages. For this reason, the claim should be denied.

The DIR filed additional comments on the draft staff analysis, essentially reiterating previous arguments. In a rebuttal to claimant comments on the draft staff analysis, DIR asserted that the Public Contract Code requirements to contract out for public works projects do not apply to chartered cities unless the city chooses to be covered, the Public Contract Code does not apply to all expenditures of public funds for construction, and the Public Contract Code does not necessarily apply to any project since a city can opt out on a project by project basis. DIR further states that in order to obtain reimbursement, claimants would have to show there is a requirement to build a building or structure, there is a requirement under the Public Contract Code to contract with the private sector, there is no ability to avoid the requirements of the Public Contract Code, and changes to the CPWL have increased the requirements for cities on those particular projects. DIR reiterates its previous arguments, stating there is no mandate.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[543] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[544] "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."[545]

A test claim statute or regulation 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.[546] 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.[547]

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.[548] To determine if the program is new or imposes a higher level of service, the test claim requirements must be compared with the legal requirements in effect immediately before the enactment of the test claim statutes.[549] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[550]

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

[544] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 735.

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

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

[547] *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*).

[548] *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 (*County of Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

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

[550] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 877.

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[551]

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.[552] 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."[553]

The analysis addresses the following issue: Do the test claim statutes and regulations mandate a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1: Do the test claim statutes and regulations mandate a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

For the test claim statutes and regulations to impose a reimbursable state-mandated program under article XIII B, section 6, the language must order or command a local agency to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the local agency has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[554] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than local officials, has made the decision requiring the local agency to incur the costs of the new program.[555]

The plain language of the test claim statutes and regulations do require certain activities of the awarding body to comply with the CPWL. However, the question here is whether the state has ordered or commanded local agencies to engage in an activity or task, since the provisions of the CPWL are only applicable when a local agency contracts with a private entity to undertake a public works project.[556] Notwithstanding claimant's allegations that local agencies are sometimes required by law to contract for public works projects, the Commission finds there is no evidence in the record or the law to demonstrate that the test claim statutes and regulations

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[551] *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.

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

[553] *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817 (*City of San Jose*).

[554] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[555] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

[556] Labor Code section 1771.

legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. The Commission therefore finds that the test claim statutes and regulations do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

Labor Code section 1720 sets forth the types of public works projects that are subject to the CPWL:

- construction, including design and preconstruction phases such as inspection and land surveying;
- alteration;
- demolition;
- installation;
- repair;
- work done for irrigation, utility, reclamation and improvement districts (but not operation of irrigation or drainage system of any irrigation or reclamation district);
- street, sewer or other improvement work;
- laying of carpet;
- public transportation or demonstration projects authorized pursuant to Streets and Highways Code section 143; and
- hauling of refuse from a public works site to outside disposal location.

It is clear that the CPWL covers a broad range of projects, and the undertaking of such projects could arise in a myriad of ways, from a local administrative decision to an initiative enacted by the voters. Claimant states on page 11 of the test claim:

> [I]t is critical to keep in mind the fact that not all projects are discretionary to the local government entity. First of all, this law applies to maintenance of all buildings as well as infrastructure. Additionally, it applies to repairs as well as replacements. Thus, if a street needs to be fixed, a water main breaks, or a building because it has been used for years is in need of repair lest it become a hazard, these works are all subject to prevailing wages.

There is no evidence in the test claim statutes, regulations or the record, however, that the *state* has required local agencies to undertake such public works projects.

First, there is no evidence in the record to demonstrate that the decision to undertake a public works project is legally compelled by the plain language of the test claim statutes or regulations, or any other provision of law.

Absent legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern High School Dist.* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences.[557]

[557] *Kern High School Dist., supra,* 30 Cal.4th 727, 754.

In the case of *San Diego Unified School Dist*., the test claim statutes required school districts to afford to a student specified hearing procedures whenever an expulsion recommendation was made and before a student could be expelled.[558] The Supreme Court held that hearing costs incurred as a result of statutorily required expulsion recommendations, e.g., where the student allegedly possessed a firearm, constituted a reimbursable state-mandated program.[559] Regarding expulsion recommendations that were discretionary on the part of the district, the court stated that in the absence of legal compulsion, compulsion *might* nevertheless be found when a school district exercised its discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[560] Ultimately, however, the Supreme Court decided the discretionary expulsion issue on an alternative basis.[561]

There is no evidence in the record to indicate that failure to undertake public works projects would result in certain and severe penalties such as double taxation or other draconian consequences as set out in the *Kern* case. Nor does the record show that the circumstances here are similar to those faced by the *San Diego* court. And, although claimant has alleged that there could be negative consequences if the local agency fails to undertake a public works project in certain instances, no evidence has been provided to support such a claim.

Instead, the Commission finds that the local decision to undertake a public works project is analogous to the situation in *City of Merced*. There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[562] The court stated:

> "Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost."[563]

The Supreme Court in *Kern High School District* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> "The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain

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[558] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 866.

[559] *Id.* at pages 881-882.

[560] *Id.* at page 887, footnote 22.

[561] *Id.* at page 888.

[562] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

[563] *Id.* at 783.

> 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."[564]

Claimant argues that in *City of Merced*, the discretionary nature of the decision to exercise eminent domain was set forth in the statute itself, i.e., Code of Civil Procedure section 1230.030, which stated the exercise of eminent domain was a discretionary act. Claimant acknowledges that the city had, at its own option, embarked on a course that resulted in it having to pay for loss of goodwill.

Claimant then argues that "even the *City of Merced* court recognized that underlying decisions within the purview of governmental function are not outside the scope of reimbursable state mandate,"[565] since the *City of Merced* court did not find that the initial decision to *acquire* the property "was a voluntary decision that would prevent recovery of costs by the city."[566] Carrying this concept further to the *Kern High School District* and *San Diego Unified School District* cases, claimant asserts that the court's lack of analysis as to the initial decision to create a district or educate pupils indicates there is "a line to be drawn between those decisions that are functions of government and those that are truly voluntary."[567]

The Commission disagrees. The Government Code provides statutory authority for cities and counties to acquire property,[568] and the courts have held that the power to purchase land and erect buildings is both legislative and discretionary.[569] The *City of Merced* case dealt with eminent domain, which is also a "function of government" for acquiring property for public use, and still the court denied reimbursement.

There are several eminent domain statutes which address the discretionary nature of property acquisition by local agencies. Government Code section 37350.5 provides that "[a] city *may* acquire by eminent domain any property necessary to carry out any of its powers or functions." (Emphasis added.) For counties, Government Code section 25350.5 provides that "[t]he board of supervisors of any county *may* acquire by eminent domain any property necessary to carry out

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[564] *Kern High School District, supra*, 30 Cal.4th 727, 743.

[565] Claimant comments, November 7, 2007, page 5.

[566] *Ibid.*

[567] *Ibid.*

[568] Government Code section 37350 states: "A city *may* purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit." (Emphasis added.) Government Code section 25353 states: "The board [of supervisors] *may* purchase, receive by donation, lease, or otherwise acquire water rights or real or personal property necessary for use of the county for any county buildings, public pleasure grounds, public parks, botanical gardens, harbors, historical monuments, and other public purposes, or upon which to sink wells to obtain water for sprinkling roads and other county purposes. The board may improve, preserve, take care of, manage, and control the property. …" (Emphasis added.)

[569] *Nickerson v. County of San Bernardino* (1918) 179 Cal. 518, 522.

any of the powers or functions of the county." (Emphasis added.) Moreover, Code of Civil Procedure section 1240.010 states, in pertinent part, that "[t]he power of eminent domain *may* be exercised to acquire property only for a public use." (Emphasis added.) Code of Civil Procedure section 1240.130 further states that "any public entity *authorized* to acquire property for a particular use by eminent domain *may* also acquire such property for such use by grant, purchase, lease, gift, devise, contract, or other means." (Emphasis added.)

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[570]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. …[571]

The holding in *City of Merced* applies here. A local agency's discretionary decision to undertake a public works project is very similar to the discretionary decision to acquire property via eminent domain.

In comments on the draft staff analysis, claimant alleged that there are Public Contract Code provisions that require local agencies to contract for public works projects in certain instances. However, none of the statutes pled by claimant in this test claim require the local agency to contract out for public works projects. Labor Code section 1771 expressly states that the requirement to pay prevailing wages is limited to work performed under contract:

> This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

This provision affords the local agency discretion to contract prior to being subject to the CPWL. And since there have been no statutes pled to demonstrate that local agencies are required to enter into such contracts that would trigger all the provisions of the CPWL, the Commission has no jurisdiction to make findings with regard to that issue.

The *San Diego Unified School District* case, in dicta, warned against an overly strict interpretation of *City of Merced* in stating: "[W]e agree there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement … whenever an entity makes

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[570] Code of Civil Procedure section 1230.030.

[571] California Law Revision Commission comment, 19 West's Annotated Code of Civil Procedure (1982 ed.) following section 1230.030, p. 414.

an initial discretionary decision that in turn triggers mandated costs."[572] The court provided only one example of where it believed this reasoning might go beyond the intent of article XIII B, section 6 – that is, a fire district's discretionary decision on how many firefighters to employ.[573] But neither the *San Diego* case, nor any other case, has overruled *City of Merced*. Consequently, the well-settled principles of *City of Merced* are directly on point in this analysis and must be followed.

As previously noted, public works projects can arise in a myriad of ways. But there is no evidence in the record or in law to demonstrate that the test claim statutes and regulations legally or practically compel a local agency to undertake a public works project, with a private contractor, subject to the CPWL. In fact, like the exercise of eminent domain in *City of Merced*, the local agency has discretion to undertake public works projects. The courts have underscored the fact that a state mandate is found when the state, rather than a local official, has made the decision that requires the costs to be incurred.[574] Therefore, the Commission finds that the test claim statutes and regulations do not mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6.

CONCLUSION

The Commission finds that the test claim statutes and regulations do not constitute a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution.

[572] *San Diego Unified School Dist., supra,* (2004) 33 Cal.4th 859, 887.

[573] *Id.* at 888.

[574] *Id.* at page 880.