Hearing Date: May 26, 2005
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ITEM 10

RECONSIDERATION OF PRIOR STATEMENT OF DECISION PROPOSED STATEMENT OF DECISION

Education Code Sections 60607, subdivision (a), 60609, 60615, 60630, 60640, 60641, and 60643, as added or amended by Statutes 1997, Chapter 828;
California Code of Regulations, Title 5, Sections 850-904
(Excluding Cal.Code Regs., tit. 5, §§ 853.5, 864.5, 867.5, 894 & 898)

97-TC-23

Standardized Testing and Reporting (STAR)
(04-RL-9723-01)

Reconsideration Directed by Statutes 2004, Chapter 216, Section 34 (Sen. Bill No. 1108, eff. 8/11/04) and Statutes 2004, Chapter 895, Section 19 (Assem. Bill No. 2855, eff. 1/1/05)

EXECUTIVE SUMMARY

The sole issue before the Commission on State Mandates ("Commission") is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the May 26, 2005 hearing on the above named test claim.[1]

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page two, which accurately reflects the staff recommendation on the test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission's vote on item 9, however, modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a Proposed Statement of Decision be continued to the July 2005 Commission hearing.

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[1] California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR COMMISSION DECISION ON: Education Code Sections 60607, subdivision (a), 60609, 60615, 60630, 60640, 60641, and 60643, as added or amended by Statutes 1997, Chapter 828; California Code of Regulations, Title 5, Sections 850-904 (Excluding Cal.Code Regs., tit. 5, §§ 853.5, 864.5, 867.5, 894 & 898) Claim No. 97-TC-23 Directed by Statutes 2004, Chapter 216, Section 34 (S.B. 1108) and Statutes 2004, Chapter 895, Section 19 (A.B. 2855) Effective July 1, 2004.	No. 04-RL-9723-01 *Standardized Testing and Reporting (STAR)* 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 *(Proposed for adoption on May 26, 2005)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on May 26, 2005. [Witness list will be included in the final Statement of Decision.]

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/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision].

BACKGROUND

Statutes 2004, chapter 216, section 34 (Sen. Bill No. 1108, eff. Aug. 11, 2004) and Statutes 2004, chapter 895, section 19 (Assem. Bill No. 2855, eff. Jan. 1, 2005) direct the Commission to reconsider its prior final decision and parameters and guidelines for the *Standardized Testing and Reporting* (STAR) program. Section 34 of Senate Bill 1108 (almost identical to Assem. Bill No. 2855, section 19) states the following:

> Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision in 97-TC-23, relating to the Standardized Testing and Reporting (STAR) program mandate, and its parameters and guidelines for calculating the state reimbursement for that mandate pursuant

to Section 6 of Article XIII B of the California Constitution for each of the following statutes[2] in light of federal statutes enacted and state court decisions rendered since these statutes were enacted:

(a) Chapter 975 of the Statutes of 1995.

(b) Chapter 828 of the Statutes of 1997.

(c) Chapter 576 of the Statutes of 2000.

(d) Chapter 722 of the Statutes of 2001.[3]

The STAR Program

The precursor to the STAR program was enacted in 1995 (Stats. 1995, ch. 975, Assem. Bill No. 265) as the Leroy Greene California Assessment of Academic Achievement Act. The Act required the Superintendent of Public Instruction (SPI) to design and implement a statewide pupil assessment program, with specified content (former Ed. Code, § 60604). The State Board of Education (SBE), by January 1, 1998, was required to adopt statewide academically rigorous content and performance standards (former Ed. Code, § 60605, subd. (a)), and to recommend achievement tests (former Ed. Code, § 60605, subd. (b)) to assess basic academic skills in grades 4, 5, 8 and 10 ((former Ed. Code, § 60605, subd. (c)).[4] Former section 60640,[5] the Pupil Testing Incentive Program, offered apportionments of $5 per pupil tested to districts that administer to all pupils in grades 2 through 10, inclusive, an achievement test selected from among those approved by the SBE. To be eligible for the apportionment, districts had to certify that (1) tests were administered at the time of year specified by the SPI; (2) test results were reported to pupils' parents or guardians, (3) test results were reported to the pupil's school and teachers, and were included in the pupil's records; and (4) district-wide and school-level results were reported to the governing board of the school district at a regularly scheduled meeting (former Ed. Code, § 60641). The Leroy Greene California Assessment of Academic Achievement Act also provided for other programs and requirements not applicable to this reconsideration.

The STAR program was enacted in October 1997 (Stats. 1997, ch. 828, Sen. Bill No. 376). It required school districts to administer the achievement test of section 60640 (formerly administered on an incentive basis) to all pupils in grades 2 through 11 inclusive, and required reporting various statistics to the SPI. Two sets of pupils were exempted: (1) those whose

[2] The only STAR statute on which Commission issued a Statement of Decision is Statutes 1997, chapter 828.

[3] In Assembly Bill 2855, section 19, the order of subdivisions (c) and (d) is reversed.

[4] Claimants and Commission staff agreed to sever Education Code sections 60605 and 60607 from the original test claim. These provisions made up the Academic Skills Assessment Program, but regulations were never adopted and the program was discontinued by Statutes 2000, chapter 576.

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

Individualized Education Plans[6] specified that they were to have an alternate assessment, and (2) those for whom a parent/guardian requested in writing to exempt the pupil from testing.

As a result, the SBE designated the Stanford Achievement Test Series, Ninth Edition (Stanford 9) as the national norm-referenced achievement test for the STAR program. It was first administered to public school pupils in grades two through 11 during spring 1998 and was last administered during spring 2002. Pupils in grades two through eleven were tested in reading, language, and mathematics. Pupils in grades two through eight were also tested in spelling, and pupils in grades nine through eleven were tested in science and social science. The purpose of the Stanford 9 was to compare each pupil's achievement of general skills taught throughout the United States to the achievement of a national sample of pupils tested in the same grade at the same time.[7]

In 1998, the SBE designated the Spanish Assessment of Basic Education, Second Edition (SABE/2) as the primary language test for the STAR program. Starting in spring 1999, Spanish-speaking English learners who were enrolled in public schools less than 12 months when testing began were required to take the SABE/2, as well as the Stanford 9 and the Stanford 9 Augmentation/California Standards Tests. Districts were given the option of also testing Spanish-speaking English learners enrolled 12 months or more with the SABE/2.[8]

In 2000, the Legislature enacted changes to the program (Stats. 2000, ch. 576, Assem. Bill No. 2812), the foremost of which deleted the requirements of the Academic Skills Assessment Program for pupils in grades 4, 5, 8 and 10. In its place, the SPI was required to develop a standards-based achievement test to include, at a minimum, a direct writing assessment once in elementary school and once in middle or junior high school (Ed. Code, § 60642.5). The Commission's STAR Statement of Decision did not address this standards-based achievement test.

In 2001 (Stats. 2001, ch. 722, Sen. Bill No. 233) the Legislature extended the sunset date for the Leroy Greene California Assessment of Academic Achievement Act (that includes the STAR program) to January 1, 2005.[9] In addition to other changes, that bill named the standards-based achievement test the California Standards Tests (CSTs) and required an assessment in history/social science and science in at least one elementary or middle school grade level, to be decided by the SBE.

The purpose of the CSTs[10] is to determine pupil achievement of the California Academic Content Standards for each grade or course. Pupils' scores are compared to preset criteria to

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[6] An Individualized Education Plan (IEP) is a program for special education students that stems from the federal Individuals with Disabilities Education Act (IDEA). (20 U.S.C. § 1414 (d)).

[7] See <http://star.cde.ca.gov/star2004/aboutSTAR_programbg.asp> as of February 15, 2005.

[8] *Ibid.*

[9] It was extended to January 1, 2011 by Statutes 2004, chapter 233.

[10] The CSTs are in English-Language Arts (grades 2-11, but the writing test is in grades 4 and 7), Mathematics (grades 2-11), Science (grades 5 and 9-11) and History/Social Science (grades 8, 10 and 11). See <http://star.cde.ca.gov/star2004/aboutSTAR_gradesandsubjects.asp> as of February 15, 2005.

determine if performance on the test is advanced, proficient, basic, below basic, or far below basic. The state target is for all students to score at the proficient and advanced levels.[11]

In 2002, the SBE selected the California Achievement Tests, Sixth Edition Survey (CAT/6 Survey) to replace the Stanford 9 as the national norm-referenced test for the program beginning with spring 2003. The SBE also authorized the development of the California Alternate Performance Assessment (CAPA), for pupils with significant cognitive disabilities that preclude them from taking the CSTs and CAT/6 Survey. First administered in spring 2003, the CAPA assesses a subset of the California English-Language Arts and Mathematics Content Standards that are appropriate for pupils with significant cognitive disabilities. The Commission's STAR Statement of Decision did not address the CAPA.

The current STAR Program has four components: (1) CSTs; (2) CAPA; (3) CAT/6 Survey; and (4) SABE/2. As stated above, however, the CSTs (or standards-based achievement tests) and the CAPA are not reimbursable under the Commission's STAR Statement of Decision because they were not pled in the test claim.[12]

The CST and CAPA are a major part of California's accountability system for schools and districts, and the results of those tests are also the major criteria for calculating each school's Academic Performance Index. The results are also used to determine if elementary and middle schools are making adequate progress in pupil proficiency on the state's academic content standards under the federal No Child Left Behind Act (NCLB).[13] NCLB will be further discussed below.

Commission Statement of Decision

On August 24, 2000, the Commission determined that the STAR program (as enacted by Stats. 1997, ch. 828, Sen. Bill No. 376) imposes a reimbursable mandate on school districts (claim 97-TC-23, filed by the San Diego Unified School District).

The Commission determined, in summary, that:

> The STAR Program requires school districts, between March 15 and May 15 each year, to test all students in grades 2 through 11 with a nationally normed achievement test designated by the State Board of Education. [Footnote omitted.] School districts must also: designate a STAR Program district coordinator and STAR Program test site coordinator at each test site; administer an additional test to pupils of limited English proficiency who are enrolled in grades 2 through 11 if the pupil was enrolled in the district for less than 12 months before the time the last STAR Program test was administered; exempt pupils under certain circumstances; include STAR Program test results in the pupil's record or [sic] achievement; report STAR Program test results to the district's governing board

[11] See <http://star.cde.ca.gov/star2004/aboutSTAR_programbg.asp> as of February 15, 2005.

[12] According to the STAR parameters and guidelines adopted by the Commission (97-TC-23), "Only the designated achievement and primary language tests enacted by Statutes of 1997, chapter 828 are reimbursable, pursuant to these parameters and guidelines." (See p. 2, fn. 3).

[13] See <http://star.cde.ca.gov/star2004/aboutSTAR_programbg.asp> as of February 15, 2005.

> or county board of education and to the pupil's parent or guardian; submit a report to the Superintendent of Public Instruction; contract with a test publisher to receive the tests; and submit whatever information the State Department of Education deems necessary to permit the State Superintendent of Public Instruction to prepare reports on the results of the STAR Program.[14]

A detailed description of the STAR program's reimbursable activities is in the Commission's parameters and guidelines, listed below.

Commission Parameters and Guidelines

The Commission adopted parameters and guidelines (Ps&Gs) for the test claim statute in January 2002. Under the heading "Reimbursable Costs," the Ps&Gs state:

> For each eligible claimant, the following activities to administer the designated achievement and primary language tests are eligible for reimbursement:
>
> A. Training, Policies, and Procedures
>
> Reviewing the requirements of the STAR Program and conducting or attending training sessions. Increased costs for substitute teacher time during the school day or for teacher stipends to attend training sessions outside the regular school day (after school or on Saturday) are eligible for reimbursement. However, the time the teacher spends to attend training sessions during that teacher's normal classroom hours is not reimbursable. (One-time activity per employee per test site).
>
> Developing internal policies, procedures, and forms to implement *Standardized Testing and Reporting.* (One-time activity)
>
> The cost of travel for and materials and supplies used or distributed in training sessions is reimbursable under this activity.
>
> B. Test Materials, Supplies, and Equipment *(Reimbursement period: January 2, 1998 – December 15, 1999)*[15]
>
> [¶]…[¶] [Based on the dates listed, these activities are no longer reimbursable.]
>
> C. Pretest and Posttest Coordination *(Reimbursement period begins January 2, 1998)*
>
> Processing requests for exemption from testing filed by parents and guardians. (Ed. Code, §§ 60615, 60640, subd. (j); Cal. Code Regs., tit. 5, §§ 852, subd. (a), & 881, subd. (a).)

[14] Commission on State Mandates, STAR Statement of Decision, pages 3-4. Findings are based on Education Code sections 60607, 60615, 60630, 60640, 60641, 60643, and Title 5, California Code of Regulations, sections 851-853, 855-860, 865, 867-869, 871, 873.

[15] California Code of Regulations, title 5, sections 856, 869, and 871 were repealed effective December 16, 1999.

Reviewing the Individualized Education Program (IEP) of children with disabilities to determine if the IEP contains an express exemption from testing.[16] (Ed. Code, § 60640, subds. (e), (j); Cal. Code Regs., tit. 5, §§ 852, subd. (b), & 881, subd. (b).)

Determining the appropriate grade level test for special education pupils and providing appropriate testing adaptations and accommodations for these pupils. (Cal. Code Regs., tit. 5, §§ 853, subd. (c),[17] & 882, subd (c).)

Designating a school district employee as a STAR program district coordinator. The school district shall notify the publisher of the identity and contact information for the STAR program district coordinator. (Cal. Code Regs., tit. 5, §§ 857, 859, 865, 867, 868, 886, 888, 895, 897, & 899.)

- [¶]…[¶] [Based on the dates listed, this activity is no longer reimbursable.]
- Beginning January 1, 2001, the STAR program district coordinator, or the school district superintendent or his or her designee, shall be available through August 15 to complete school district testing.

Designating a school district employee as a STAR program test site coordinator at each test site. (Cal. Code Regs., tit. 5, §§ 858, 859, 867, 868, 887, 888, 897, & 899.)

- [¶]…[¶] [Based on the dates listed, this activity is no longer reimbursable.]
- Beginning January 1, 2001, the STAR program test site coordinator, or the site principal or his or her designee, shall be available to the STAR program district coordinator by telephone through August 15 for purposes of resolving discrepancies or inconsistencies in materials or errors in reports.

STAR Program District Coordinator

Activities performed by the STAR program district coordinator include, but are not limited to:

Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), & 886.)

Determining school district and individual school test and test material needs in conjunction with the test publisher, using California Basic Education Data System (CBEDS) and current enrollment data. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), & 886.)

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[16] Section 60640, subdivision (e) was amended in 2002 (Stats. 2002, ch. 492) to include disabled pupils in testing, and to add a citation to IDEA.

[17] California Code of Regulations, title 5, section 853, subdivision (c), was formerly section 852, subdivision (b). [Section 853, subdivision (c), was amended in Feb. 2004 to allow for testing IEP pupils below grade level for the 2003-04 school year only, and to prohibit it beginning in the 2004-05 school year.]

Overseeing the acquisition and distribution of tests and test materials to individual schools and test sites. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), 866, subd. (a), 886, & 896, subd. (a).)

Providing a signed receipt to the test publisher upon receipt of the testing materials. (Cal. Code Regs., tit. 5, §§ 865, subd. (a), & 895, subd. (a).)

Coordinating testing dates and make-up testing dates for the school district. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), & 886.)

Maintaining security over test material and test data. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), & 886.)

Overseeing the administration of the designated achievement test and primary language test, if applicable, to eligible students. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), & 886.)

Overseeing the collection and return of all test materials and tests to the publisher. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), & 886.)

Resolving any discrepancies in the quantity of test and test materials received from and returned to the test publisher. (Cal. Code Regs., tit. 5, §§ 857, subd. (b), 868, 886, & 899.)

Certifying information with respect to the designated achievement test to the California Department of Education within five (5) working days of completed school district testing. (Cal. Code Regs., tit. 5, §§ 857, subd. (c), & 886.)

Preparing, executing, and collecting STAR Test Security Agreements and Affidavits from every person who has access to tests and other test materials. (Cal. Code Regs., tit. 5, §§ 859 & 888.)

Returning test materials, test order data, and enrollment data by grade level to the test publisher. (Cal. Code Regs., tit. 5, § 867.5.)

<u>STAR Program Test Site Coordinator</u>

Activities performed by the STAR test site coordinator include, but are not limited to:

Determining site test and test material needs. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Overseeing the acquisition and distribution of tests and test materials at the test site. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Cooperating with the STAR program district coordinator to provide the testing and make-up testing days for the site. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Maintaining security over test material and test data. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Overseeing the administration of the designated achievement test and primary language test, if applicable, to eligible students at the test site. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Overseeing the collection and return of all testing materials and tests to the STAR program district coordinator. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Assisting the STAR program district coordinator and the test publisher in resolving any discrepancies in the test information and materials. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Certifying information to the STAR program district coordinator within three (3) working days of complete site testing. (Cal. Code Regs., tit. 5, §§ 858, subd. (b), & 887.)

Preparing, executing, and collecting STAR Test Security Agreements and Affidavits from every person who has access to tests and other test materials. (Cal. Code Regs., tit. 5, §§ 859 & 888.)

D. Test Administration *(Reimbursement period begins January 2, 1998)*

Conducting and monitoring the STAR Program designated achievement and primary language tests given to all pupils in grades 2 through 11, inclusive. (Ed. Code, §§ 60640, subds. (b), (c), 60641, subd. (a); Cal. Code Regs., tit. 5, §§ 851, 853, 855, 880, 882, & 884.)

To the extent that such tests are available, giving an additional test to pupils of limited English proficiency who are enrolled in grades 2 through 11 if the pupil was initially enrolled in any school district less than 12 months before the date that the English language STAR Program test was given. (Ed. Code, § 60640, subd. (g); Cal. Code Regs., tit. 5, § 880, subd. (a).)

Time spent by the classroom teacher during his or her normal classroom hours for test administration is not reimbursable.

E. Reporting and Record Keeping *(Reimbursement period begins January 2, 1998)*

Recording and maintaining individual records of the tests in pupil records. (Ed. Code, §§ 60607, subd. (a) & 60641, subd. (a).)

Preparing and mailing reports of the individual results of the STAR Program tests to the pupils' parents or guardians, to the pupils' schools, and to the pupils' teachers. (Ed. Code, § 60641, subds. (b) & (c); Cal. Code Regs., tit. 5, §§ 863 & 892.)

Reporting the results of the STAR Program tests to the school district governing board or county office of education on a districtwide and school-by-school basis. (Ed. Code, § 60641, subd. (d); Cal. Code Regs., tit. 5, §§ 864 & 893.)

Collecting, collating, and submitting to the Superintendent of Public Instruction the information on the STAR Program apportionment information report. (Ed. Code, § 60640, subd. (j); Cal. Code Regs., tit. 5, §§ 862 & 891.)

Submitting to the California Department of Education whatever information the Department deems necessary to permit the Superintendent of Public Instruction to prepare a report analyzing, on a school-by-school basis, the results and test scores of the STAR Program. (Ed. Code, § 60630, subd. (b); Cal. Code Regs., tit. 5, §§ 861 & 890.)

The cost of materials and supplies used for reports (including, paper and envelopes), the cost of postage for mailing reports to parents, and the cost of computer programming used for reporting purposes is reimbursable under this activity.

Federal Law

Some of the assessment requirements under the STAR program also arise under federal law, warranting an examination of the federal statutes.

Improving America's Schools Act of 1994: The federal government required statewide systems of assessment and accountability for schools and districts participating in the Title I program under the Improving America's Schools Act (IASA) of 1994. Section 1111 (b)(3) of IASA requires all pupils to be assessed "in at least mathematics and reading or language arts" some time during grades 3-5, grades 6-9 and grades 10-12. Section 1111 (a)(1) of the Act states that the requirements apply to states, "desiring to receive a grant under this part." Section 1604 (a) of IASA, under Title I, states, "Nothing in this title shall be construed to authorize … the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content or pupil performance standards and assessments, curriculum, or program of instruction as a condition of eligibility to receive funds under this title." Thus, the IASA requirements were conditions on funding.

No Child Left Behind Act: In 2002, Congress enacted the NCLB Act to replace the IASA. Under NCLB, annual assessments in mathematics, reading and science are required,[18] although the science assessments are conducted starting in the 2007-2008 school year.[19] States are also required, by school year 2002-2003, to "provide for an annual assessment of English proficiency …of all students with limited English proficiency…."[20] The assessment system is required, among other things, to "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English

[18] Title 20 United States Code section 6311 (b)(3)(A); 34 Code of Federal Regulations part 200.2 (a) (2002). NCLB requires testing pupils in math and reading or language arts not less than once during grades 3-5, grades 6-9, and grades 10-12 (20 U.S.C. § 6311 (b)(3)(C)(v), and the same for science beginning school year 2007-2008 (*Ibid).* It also requires, beginning 2005-2006, assessing pupils in grades 3-8 "against the challenging State academic content and student academic achievement standards" in math and reading or language arts. (20 U.S.C. § 6311 (b)(3)(C)(vii)).

[19] Title 20 United States Code section 6311 (b)(3)(A); 34 Code of Federal Regulations part 200.2 (a) (2002).

[20] 20 United States Code section 6311 (b)(7).

proficiency."[21] The assessment system, like all the NCLB requirements, is a condition on grant funds.[22] Among the act's "penalties" for noncompliance is withholding federal funds.[23] Thus, like IASA, NCLB requirements are conditions on funds and not "requirements" in the strict sense.

Individuals with Disabilities Education Act: Administering statewide assessments with accommodations to disabled students, and Individualized Education Plans (IEPs) are provided for under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.), the purposes of which are as follows:

> (1)(A) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services … (B) to ensure that the rights of children with disabilities and parents … are protected; and (C) to assist States, localities, educational services agencies, and Federal agencies to provide for the education of all children with disabilities …[24]

Other purposes of the IDEA include, "early intervention services for infants and toddlers with disabilities … to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities…and to assess, and ensure the effectiveness of efforts to educate children with disabilities."[25] Assistance is available to states[26] and local educational agencies[27] that meet specified criteria.[28] IDEA requires that disabled children be "included in general State and district-wide assessment programs, with appropriate accommodations, where necessary"[29] IDEA also provides for the IEP, a document with specified contents that includes (1) measurable annual goals to meet the disabled child's needs regarding the curriculum and other educational needs, and (2) the special education and aids and

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[21] 34 Code of Federal Regulations part 200.2 (b)(2) (2002).

[22] 20 United States Code section 6311 (a)(1). 20 United States

[23] 20 United States Code section 6311 (g)(2). "In addition to these provisions contained in the NCLBA, there are remedies available to the Secretary of Education to take action against a federal funds recipient who fails to comply with legal requirements imposed by a federal education statute, including withholding of funds and conducting proceedings for the recovery of funds and the issuance of cease and desist orders. *See* 20 §§ U.S.C. 1234 (a)-(i)." *Associates of Community Organizations for Reform Now v. New York City Department of Education* (2003) 269 F. Supp. 2d 338, 342.

[24] 20 United States Code section 1400 (d).

[25] *Ibid*.

[26] 20 United States Code sections 1411 and 1412.

[27] 20 United States Code section 1413.

[28] 34 Code of Federal Regulations part 300.110 (1999).

[29] 20 United States Code section 1412 (a)(17); 34 Code of Federal Regulations part 300.138 (1999).

services to be provided to the child.[30] The STAR statutes and regulations generally conform to IDEA's statewide assessment, accommodations, and IEP requirements.[31]

The predecessor to IDEA is the federal Education of the Handicapped Act, which since its 1975 amendments has,

> … required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education. (20 U.S.C. § 1412 (a).) The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states [citations omitted]. … The Supreme Court has noted that Congress intended the act to establish "a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children." [Citations omitted.][32]

In *Hayes v. Commission on State Mandates*, the court held that the Education of the Handicapped Act is a federal mandate.[33] *Hayes* also held,

> To the extent the state implemented the act [IDEA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[34]

Equal Education Opportunities Act: The Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal educational opportunity for national origin minority students. It states,

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." (20 U.S.C. § 1703 (f)).

This federal statutory scheme (EEOA) is grounded in constitutional principles of equal protection.[35] Congress included an obligation to address the problem of language barriers in the EEOA, and granted limited English speaking pupils a private right of action to enforce that

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[30] 20 United States Code section 1414 (d).

[31] Section 60640, subdivision (e), as originally enacted required reviewing the pupil's IEP to determine if it contains an express exemption from testing. This section was amended in 2002 (Stats. 2002, ch. 492) to include disabled pupils in testing and add a citation to IDEA. According to the legislative history of Statutes 2002, chapter 492, the purpose of the amendment was to conform the STAR program (and other Education Code provisions) to IDEA.

[32] *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1587.

[33] *Id.* at page 1592.

[34] *Id.* at page 1594.

[35] *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989, 999, 1001.

obligation in Title 20 United States Code section 1706.[36] Federal courts have interpreted section 1703 (f) of the EEOA to require testing students' English-language skills, as well as standardized testing.[37]

State Agency Positions

Department of Finance: The Department of Finance (DOF), in comments submitted in March 2005, argues that STAR is not a new program. According to DOF, the federal Title I program provisions under 1994's IASA required statewide assessment systems and accountability for schools and districts participating in the Title I program. DOF states that IASA's assessment requirements included,

> 1) the testing of all students in each of three grade spans (grades 3 through 5, 6 through 9, and 10 through 12); 2) the provision of reasonable adaptations and accommodations for students with special learning needs; and 3) that individual student assessment results be provided to parents.

DOF states that STAR was not a new program when it was enacted in 1997, and has most recently evolved to fulfill the NCLB mandates.

DOF notes that NCLB replaced IASA in 2002, and that NCLB requires states to develop a system of assessments that meet specific criteria. According to DOF, section 1111 of NCLB requires each state to implement a single, statewide accountability system to assess the yearly progress of "all public elementary and secondary school students." DOF states that NCLB requires annual testing specifically in mathematics and reading in grades 3 through 8, and once in grades 9 through 12, and that states must begin to assess students in science beginning in 2005-2006.[38] DOF asserts that, "Without such a system, a state would jeopardize the receipt of approximately $4.3 billion *annually* in federal NCLB funds. We therefore believe this program is a federal mandate, as defined in Government Code Section 17513 … and subsection (c) of Government Code Section 17556." In comments on the draft staff analysis, DOF stated that the state would jeopardize about $3 billion annually in NCLB funds.

DOF submits amounts (repeated below) from the General Fund and federal funds that have been appropriated to STAR in fiscal years 1998-1999 to 2004-2005. DOF argues that if the Commission disagrees that the program is federally mandated, "state funds provided for the program should first offset against any costs resulting from the activities found by the Commission to be state-mandated in excess of the federal statute."

DOF argues that the Commission's Statement of Decision on the original test claim makes no reference to IASA or NCLB, or how implementation of STAR interacts with federal law, so that "any STAR mandates should be adjusted to reflect federal testing requirements under IASA and NCLB." DOF further argues that IASA's assessment requirement was a mandate on local school

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[36] *Id.* at 999 and 1009.

[37] *Ibid;* and *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503.

[38] Science assessments are actually required starting in 2007-08 (20 U.S.C. § 6311 (b)(3)(A); 34 C.F.R. § 200.2 (a) (2002)), but developing academic standards for science is required by 2005-06 (34 C.F.R. § 200.1(a)(3) & (b)(3)).

districts, "the Title I assessment requirement could be satisfied through a system of local assessments that met federal standards. These local assessments would be developed or purchased by each district." DOF asserts that the state, by enacting STAR, actually reduced districts' costs, "by directly paying for Title I required assessments, achieving economies of scale, and providing apportionments to districts based on the number of students tested. … [T]he state relieved districts of the cost of purchasing or developing a qualifying local assessment."

DOF again asserts its belief that NCLB is a federal mandate, but if the Commission does not agree, DOF urges recognizing federal Title I funds as "offsetting revenue." According to DOF, "Without the state's action to identify an assessment that meets NCLB, no district in California would be eligible for Title I funds. As a result, we think the Commission has to either find that NCLB is a federal mandate *or* that Title I funds count as an offsetting revenue."

DOF's March 2005 comments do not include support by "documentary evidence … authenticated by declarations under penalty of perjury … ."[39] Nor are there citations to line-item budget appropriations. DOF's comments, however, are not relied on by the Commission, which reaches its own conclusions based on evidence in the record.

DOF's May 2005 comments (that do include a declaration) disagree with the findings in the draft staff analysis that (1) STAR is not a federal mandate and imposes reimbursable state-mandated activities;[40] (2) Federal funds provided under NCLB should not be counted as offsetting revenues;[41] and (3) the Commission's decision on this reconsideration should be effective July 1, 2004. These comments are addressed below.

Legislative Analyst's Office: The Legislative Analyst's Office (LAO), in its publication *New Mandates: Analysis of Measures Requiring Reimbursement* (December 2003),[42] reviews 23 Commission mandate decisions, including STAR. LAO asserts that the STAR statewide cost estimate was based on faulty district claims that were not subject to review or audit before developing the cost estimate. LAO states that based on its review, school districts often failed to recognize state apportionments for STAR as offsetting revenue. According to LAO:

> In part, this problem may have been caused by the commission's Ps&Gs, which, in our view, inappropriately narrow the activities against which state funds should apply as offsetting revenues. Most glaringly, the guidelines omit the cost of printing, shipping, and scoring the tests from the list of costs that districts must offset with state funds.[43]

The LAO also states that the STAR program was enacted, in part, to bring California into compliance with the Title I program of the Improving America's Schools Act of 1994 (IASA) in

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[39] California Code of Regulations, title 2, section 1183.02, subdivision (c)(1).

[40] To clarify, the finding is that there is insufficient evidence in the record to conclude NCLB or IASA are federal mandates.

[41] To clarify, the finding is that there is no requirement for using federal funds to offset STAR.

[42] See <http://www.lao.ca.gov/2003/state_mandates/state_mandates_1203.html> as of February 15, 2005.

[43] *Ibid.*

which the federal government requires statewide assessments and systems of accountability for participating schools and districts. The LAO points out that IASA requires tests in language arts and mathematics for all pupils in one grade in each of three grade spans (grades 3-5, 6-9, and 10-12). IASA also requires reasonable accommodations and adaptations for pupils with special learning needs, and special education pupils. Also, some Title I schools are required to provide individual test results to parents. IASA was replaced by the federal NCLB Act in 2002, which according to LAO requires annual testing in mathematics and reading in grades 3 through 8, and once in grades 9 through 12, and science assessments starting in 2005-06.[44]

The LAO asserts that the Commission's STAR decision does not mention the IASA testing requirements. As LAO argues:

> Our review suggests the federal assessment mandates contained in IASA and NCLB should render a significant portion of the STAR mandate costs ineligible for reimbursement. Because the three IASA-mandated tests constitute about one-third of the state-mandated STAR tests, mandated costs should fall by at least that proportion. We would expect the proportion to be higher than that, however, because a number of the activities identified as reimbursable must be done by local agencies regardless of the number of grades tested. For instance, each district would need a test coordinator regardless of whether three grades or ten grades were tested. Our review also indicates that some costs identified by the commission as state reimbursable, such as testing procedures for special education students and providing student test results to parents in certain Title I schools, are the result of federal requirements and therefore not state reimbursable. In addition, because NCLB testing mandates more closely mirror the STAR program, the number of reimbursable activities related to STAR mandates would be even fewer.

In its comments on the draft staff analysis, LAO asserts that (1) NCLB is a federal mandate, (2) that federal Title I funds should be used to offset the mandate, should the Commission find that the STAR program does not constitute a mandate under NCLB, and (3) that the effective date of the reconsideration decision should be apply to "past and future district claims on the mandate." LAO's comments are not supported by "documentary evidence … authenticated by declarations under penalty of perjury … ."[45] Nonetheless, they are addressed below.

No other state agency submitted comments on this reconsideration.

San Diego Unified School District Position

San Diego Unified School District (SDUSD), the original claimant in 97-TC-23, submitted comments on the reconsideration in February 2005. SDUSD states that school districts have and will incur costs for various activities as listed in the parameters and guidelines above. SDUSD also asserts that while state funds are appropriated for the STAR program, no funds were

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[44] Science assessments are actually required starting in 2007-08 (20 U.S.C. § 6311 (b)(3)(A); 34 C.F.R. § 200.2 (a) (2002)), but developing academic standards for science is required by 2005-06 (34 C.F.R. § 200.1(a)(3) & (b)(3)).

[45] California Code of Regulations, title 2, section 1183.02, subdivision (c)(1).

appropriated by the test claim statute for reimbursement of mandated cost claims in excess of the amount provided by the state. "The state funds currently appropriated fall dramatically short in relation to the costs incurred by school districts throughout the state." SDUSD asserts that the period of reimbursement for the Commission's decision "shall be prospectively from the date of the statement of decision."

In its rebuttal brief, SDUSD argues that California freely chose to impose new programs or higher levels of service upon local districts subjecting those costs to subvention requirements. SDUSD cites the rule in *Hayes v. Commission on State Mandates*[46] that if the state freely chooses to impose costs as a means of implementing a federal program then the costs are reimbursable. According to SDUSD, the *Hayes* court dismissed the federal mandate argument raised by DOF, stating, "The state could not avoid its subvention responsibility by pleading 'federal mandate' because the federal statute does not require the state to impose the costs of such hearings upon local agencies. Thus, the burden is imposed by a state rather than federal mandate." (Citation omitted.) SDUSD also states that "the fact that NCLB extends to all schools and is not limited to the former IASA Title I sites [demonstrates that it] is a requirement of the state not the local districts." SDUSD calls the General Fund appropriation for STAR "a setoff for districts filing reimbursement claims." SDUSD states there is no basis to the argument that Title I funds be considered as offsetting revenue.

A declaration from SDUSD's Program Manager of the Testing Unit disagrees with the LAO's position that "the three IASA-mandated tests constitute about one-third of the state-mandated STAR test" and that "mandated costs should fall by at least that proportion." SDUSD argues that LAO is only considering the number of grades that must be tested (3 for IASA versus 10 for STAR), but does not consider the number of tests required for each grade level. According to SDUSD, IASA only required a standardized test in mathematics and reading/language arts. STAR requires CSTs in Science, Writing, and History-Social Science, and the CAT/6. SDUSD asserts that there are 59 grade/subject tests required by the STAR mandate, only one-sixth of which are federally mandated under the IASA. Thus, SDUSD concludes that LAO's estimate of one-third is too high, and should be closer to 10 percent (6/59). SDUSD also notes the requirement of the SABE/2 test (Spanish language) for all English learners in grades 2 through 11. SDUSD states that in Spring 2004, about 5000 of its 102,000 pupils took the SABE/2. As to NCLB, SDUSD asserts that of the 59 grade/subject tests required by the STAR mandate, only fourteen are federally mandated under NCLB. Thus, the SDUSD estimate for possible offsets to STAR is only 24 percent (14/59) starting in 2002, and less when the SABE/2 is factored in.

Commenting on the draft staff analysis, SDUSD disagrees with the analysis that EEOA is a federal mandate for testing English-learner pupils. These comments are addressed below.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[47] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[48] "Its

[46] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564.

[47] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides:

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."[49] 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.[50]

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.[51]

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.[52] 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.[53] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[54]

> (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

[51] *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*).

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

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

[54] *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.[55]

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.[56] 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."[57]

Issue 1: What is the scope of the Commission's jurisdiction directed by Senate Bill 1108 and Assembly Bill 2855?

Statutes reconsidered

Statutes 2004, chapter 216, section 34 (Sen. Bill No. 1108, eff. Aug. 11, 2004), and Statutes 2004, chapter 895, section 19 (Assem. Bill No. 2855, eff. Jan. 1, 2005), hereafter referred to as "the reconsideration statutes," require the Commission on State Mandates, "notwithstanding any other provision of law" to "reconsider its decision in 97-TC-23 … pursuant to Section 6 of Article XIII B of the California Constitution *for each of the following statutes* in light of federal statutes enacted and state court decisions rendered since these statutes were enacted: (a) Chapter 975 of the Statutes of 1995. (b) Chapter 828 of the Statutes of 1997. (c) Chapter 576 of the Statutes of 2000. (d) Chapter 722 of the Statutes of 2001."[58] [Emphasis added.]

There is only one Commission decision on STAR, 97-TC-23, which is limited to Statutes 1997, chapter 828. The issue, therefore, is whether the reconsideration statutes expand the Commission's jurisdiction to the other statutes listed (Stats. 1995, ch. 975, Stats. 2000, ch. 576, and Stats. 2001, ch. 722).

Administrative agencies, such as the Commission, are entities of limited jurisdiction that have only the powers that have been conferred on them, expressly or by implication, by statute or constitution.[59] An administrative agency may not substitute its judgment for that of the Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.[60]

Government Code section 17559 grants the Commission authority to reconsider its prior final decisions only within 30 days after the Statement of Decision is issued. But in this case, the

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[55] *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.

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

[57] *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.

[58] In Assembly Bill 2855, section 19, the order of subdivisions (c) and (d) are reversed.

[59] *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.

[60] *Ibid.*

Commission's jurisdiction is based solely on the reconsideration statutes. Absent those, the Commission would have no jurisdiction to reconsider its decision relating to the STAR program.

The Government Code gives the Commission jurisdiction only over those statutes and/or executive orders pled by the claimant in the test claim.[61] The Commission does not have the authority to approve or deny a claim for reimbursement on statutes or executive orders that have not been pled by the claimant. The language of the reconsideration statutes, Senate Bill 1108 and Assembly Bill 2855, does not change this.

The reconsideration statutes reference test claim 97-TC-23, the STAR decision. The STAR decision in 97-TC-23 only concerns Statutes 1997, chapter 828. The reconsideration statutes cannot be read to expand the STAR test claim because there are no Commission decisions or parameters and guidelines for the other statutes named: Statutes 1995, chapter 975, Statutes 2000, chapter 576, or Statutes 2001, chapter 722. The Commission cannot "reconsider" parameters and guidelines for statutes it has never considered and for which it never issued parameters and guidelines. Therefore, this analysis does not apply to amendments to the STAR test claim statutes before or after Statutes 1997, chapter 828. Rather, the Commission finds that its jurisdiction is limited to Statutes 1997, chapter 828, the original test claim statute.

Regulations reconsidered

Although the reconsideration statutes make no mention of the STAR regulations, the original STAR test claim statute, to which this reconsideration is directed, referred to regulations.[62] Therefore, the Commission finds that it has jurisdiction to reconsider the regulations to the STAR program that were originally included in the STAR decision and parameters and guidelines (97-TC-23).[63]

The Commission does not have jurisdiction over regulations enacted since adoption of the Statement of Decision or parameters and guidelines, or which the Commission never considered, such as: California Code of Regulations, title 5, sections 853.5 (Use of Variations, Accommodations, and Modifications for the Standards-Based Achievement Test and the California Alternative Performance Assessment), 864.5 (Test Order Information), 867.5 (Retrieval of Materials by Publisher), 894 (Test Order Information), and 898 (Retrieval of Materials by Publisher).

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[61] The Commission's powers are statutorily limited. Government Code section 17551 requires the Commission to hear and decide on a claim by a local agency or school district that the local agency or school district is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Section 17521 defines test claim as "the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state."

[62] Education Code sections 60608 and 60605 subdivision (f).

[63] In addition to the STAR statutes, the Statement of Decision was based on California Code of Regulations, Title 5, sections 850-874. In the parameters and guidelines, the Commission found that the regulations for the primary language test were renumbered to sections 880-904, but the change was not substantive. Thus, the regulations reconsidered are sections 850-904.

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Effective date of reconsideration

The parameters and guidelines for the STAR program were adopted in January 2002, with a reimbursement period beginning October 10, 1997 (the effective date of the test claim statute). Neither of the two reconsideration statutes, however, specifies the period of reimbursement for the Commission's decision on reconsideration.[64] Moreover, the two reconsideration statutes have different effective dates. Senate Bill 1108, a budget trailer bill, was effective August 11, 2004, and Assembly Bill 2855 (chaptered Sept. 29, 2004) was effective January 1, 2005. Thus, the first issue is which of these reconsideration statutes takes precedence, since one that prevails controls the effective date of this reconsideration.

The Commission finds that Senate Bill 1108, section 34 takes precedence over Assembly Bill 2855, section 19. Government Code section 9605 states that provisions of an amended statute that are left unchanged, "are to be considered as having been the law from the time when they were enacted." Thus, Senate Bill 1108 is considered to be the law from August 11, 2004 (its effective date) since section 34 of Senate Bill 1108 was left unchanged by Assembly Bill 2855 (chaptered on Sept. 29, 2004). Although Government Code section 9605 also states that, where two statutes are enacted during the same session, the statute with the higher chapter number will prevail, this rule only applies where the statutes are in conflict.[65] Therefore, since the two reconsideration statutes do not conflict, Senate Bill 1108, the urgency statute effective August 11, 2004, prevails over Assembly Bill 2855, the non-urgency statute effective January 1, 2005, even though Assembly Bill 2855 was enacted seven weeks later and had a higher chapter number.

The second issue is whether the Legislature intended to apply the Commission's STAR reconsideration decision retroactively back to the original reimbursement period of October 10, 1997 (i.e., to reimbursement claims that have already been filed and have been paid or audited), or to prospective claims filed in the current and future budget years. If the Commission's reconsideration decision is applied retroactively, the decision may impose new liability on the state or change the legal consequences of these past events.

The LAO, in comments on the draft staff analysis, argues that the Legislature intended that changes to the Commission's previous findings on STAR should affect past and future district claims on the mandate. LAO states that the Legislature directed the LAO to evaluate newly completed mandate claims, which culminated in the 2003 report *New Mandates: Analysis of Measures Requiring Reimbursement.* LAO argues that by the Legislature approving LAO's recommendation for the Commission to reconsider the STAR decision, the Legislature, "signaled that it has not formally approved the commission's past work on the STAR mandate and, therefore, does not recognize the validity of the Parameters and Guidelines developed for the mandate."[66] Thus, LAO believes the Legislature intends that changes to the Commission's

[64] In this respect, the reconsideration statutes differ from another recent statute directing the Commission to reconsider a prior final decision. Statutes 2004, chapter 227, directs the Commission to reconsider Board of Control test claims relating to regional housing. Section 109 of the bill states "[a]ny changes by the commission shall be deemed effective July 1, 2004."

[65] *In re Thierry S.* (1977) 19 Cal. 3d 727, 745.

[66] Legislative Analyst's Office, comments submitted May 9, 2005.

previous findings apply prospectively and retroactively. DOF's comments on the draft staff analysis echo this assertion.

The Commission disagrees. For the reasons below, the Commission finds the Legislature intended for the Commission's decision on reconsideration to apply prospectively, to the current and future budget years only.

A statute may be applied retroactively only if the statute contains "express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application."[67] In *McClung v. Employment Development Department*, the California Supreme court explained this rule as follows:

> "Generally, statutes operate prospectively only." [Citation omitted.] "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly … For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'" [Citation omitted.] "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." [Citation omitted.]
>
> This is not to say that a statute may never apply retroactively. "A statute's retroactivity is, *in the first instance, a policy determination for the Legislature* and one to which courts defer absent 'some constitutional objection' to retroactivity." [Citation omitted.] But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." [Citation omitted.] "*A statute may be applied retroactively only if it contains express language of retroactively [sic] or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application*." [Citation omitted.] [Emphasis added.][68]

There is nothing in the plain language of the reconsideration statutes or their legislative histories to indicate that the Legislature intended to apply the Commission's reconsideration of the STAR decision retroactively. Section 42 of Senate Bill 1108 states that the act was necessary to implement the Budget Act of 2004. This supports the conclusion that the statute was intended to apply prospectively to the current and future budget years. Similarly, the legislative history contained in the analysis of the Senate Rules Committee supports the conclusion that the statute applies to current and future budget years only. Page one of the analysis states, "This bill makes

[67] *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475.

[68] *Ibid.*

changes to a variety of education-related statutes *in order to effectuate the changes included as part of the proposed 2004-05 Budget Act.*"[69] [Emphasis added.]

Based on the *McClung* case cited above, had the Legislature intended to apply the Commission's reconsideration decision retroactively, the Legislature would have included retroactive language in the bill, or indicated such intent in the legislative history or other sources. The Commission finds no support in the record nor in the reconsideration statutes for LAO's and DOF's contention that the Legislature intended the reconsideration decision to apply to past and future district claims.

Absent any evidence of legislative intent, the Commission finds that the period of reimbursement for the Commission's STAR reconsideration decision begins July 1, 2004 (i.e., it applies to reimbursement claims filed for the 2004-05 fiscal year).

Issue 2: Is the STAR program subject to article XIII B, section 6 of the California Constitution?

A. Is IASA or NCLB a federal mandate?

The issue, raised by DOF and LAO, is whether IASA[70] or NCLB is a federal mandate. If a program is a federal mandate on school districts, subvention under article XIII B, section 6 is not required because the mandate's costs are exempt from the school district's taxing and spending limitations.[71] The Commission finds, for the reasons indicated below, that there is insufficient evidence in this record to determine whether NCLB is a federal mandate on states. No state agency has demonstrated that the penalty for not complying with the federal program, the alleged loss of federal funds, is "certain and severe"[72] so as to constitute federal compulsion.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A imposes a limit on the power of state and local governments to adopt and levy taxes. In 1979, the voters added article XIII B to the Constitution, which "imposes a complementary limit on the rate of growth in government spending."[73] The spending limit in article XIII B is accomplished by limiting the "total annual appropriations subject to limitation" so that "a government entity may not spend more in one year on a program funded with the proceeds of taxes than it did in the prior year."[74] Articles XIII A and XIII B work in tandem, restricting California governments' power both to levy and to spend for public purposes. Their goals are to "protect residents from excessive taxation and government spending."[75] The

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[69] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 1108 (2003-2004 Reg. Sess.) as amended July 27, 2004, page 1.

[70] This discussion on NCLB also applies to IASA because the statutory schemes are similar. Thus, future reference is primarily to NCLB.

[71] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593.

[72] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 74.

[73] *County of San Diego, supra,* 15 Cal.4th at page 81.

[74] *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 107.

[75] *Ibid*.

purpose of section 6 is to preclude the state from shifting financial responsibility for governmental functions to local agencies, which are ill equipped to undertake increased financial responsibilities *because they are subject to taxing and spending limitations under articles XIII A and XIII B.*[76]

Article XIII B, section 9 (b) of the California Constitution excludes from either the state or local spending limit any "[a]ppropriations required for purposes of complying with mandates of … the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the providing of existing services more costly."

As to federal mandates, in *Hayes v. Commission on State Mandates*,[77] the court stated:

> A central purpose of the principle of state subvention is to prevent the state from shifting the cost of government from itself to local agencies. [Citation omitted.] Nothing in the statutory or constitutional subvention provisions would suggest that the state is free to shift state costs to local agencies without subvention merely because those costs were imposed upon the state by the federal government. In our view the determination whether certain costs were imposed upon a local agency by a federal mandate must focus upon the local agency which is ultimately forced to bear the costs and how those costs came to be imposed upon that agency. If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[78]

The California Supreme Court discussed the issue of what constitutes a federal mandate under article XIII B in *State of California v. City of Sacramento.*[79] The issue in that case was whether the state statute extending mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations constituted a state mandate. The court noted that states that failed to alter their unemployment compensation laws to include employees of public agencies faced loss of the federal tax credit and administrative subsidy.[80]

The court held that the federal unemployment insurance law implemented by the test claim statute was not a state mandate because it was not unique to local government. The court went on, however, to discuss whether the test claim statute constituted a federal mandate. The city and county argued that the federal mandate language of article XIII B, section 9, required clear legal compulsion in the federal statute. The state, on the other hand, argued that, "the consequences of California's failure to comply with the federal 'carrot and stick' scheme were so

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[76] *County of San Diego, supra,* 15 Cal. 4th at page 81; *see also, Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980-981, 985; and *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280-281.

[77] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App. 4th 1564.

[78] *Id.* at pages 1593-1594.

[79] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51.

[80] *Id.* at page 58.

substantial that the state had no realistic 'discretion' to refuse."[81] The court agreed with the state's argument, noting that,

> [T]he vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct compulsion. That remains so to this day. Thus, if article XIII B's reference to 'federal mandates' were limited to strict legal compulsion by the federal government, it would have been largely superfluous. … As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense.[82]

The court went on to provide five factors as to whether a test claim statute qualifies as a federal mandate on the states:

> [W]e here attempt no final test for "mandatory" versus "optional" compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.[83]

These factors from *City of Sacramento* are consistent with the statutory scheme, including Government Code section 17513.[84] The court also stressed the penalties for not implementing the test claim statute by finding: (1) California businesses would face full, double unemployment taxation by the state and federal governments; (2) an intolerable expense against the state's economy on its face; and (3) placing California employers at a serious competitive disadvantage against those in other states.[85] The court held that these penalties were "certain and severe"[86] so

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[81] *Id.* at page 71.

[82] *Id.* at pages 73-74.

[83] *Id.* at page 76.

[84] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 75-76; Government Code section 17513 defines costs mandated by the federal government to include, "costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements imposed upon the state would result in substantial monetary penalties or loss of funds to public or private persons in the state whether the federal law was enacted before or after the enactment of the state law, regulation, or executive order. "Costs mandated by the federal government" does not include costs which are specifically reimbursed or funded by the federal government or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[85] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 74.

[86] *Ibid*.

the state statute was adopted "under federal coercion tantamount to compulsion."[87] Thus, as a federal mandate, the state statute was excluded from the spending limits in article XIII B.

Before analyzing the *City of Sacramento* factors, it is necessary to address LAO's argument, in commenting on the draft staff analysis, that NCLB amounts to direct compulsion on states for an assessment and accountability system. According to LAO, "NCLB requires states to establish a single statewide assessment and accountability system for all public school students – regardless of whether the students, schools or districts participate in the federal program."[88] In support, LAO cites section 1111 (b)(2)(A) and (b)(2)(A)(i) of NCLB that require states to develop academic standards and academic assessments.[89] LAO also cites section 1111 (b)(3)(A) that requires states to implement annual academic assessments in English, mathematics, and science, and section 1111(b)(3)(C)(i) that directs states to ensure the assessments are "used to measure the achievement of all children."[90] LAO states, "thus, the federal law is clear that the state must create an assessment and accountability system that includes all students, schools, and public

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[87] *Id.* at page 57.

[88] Legislative Analyst's Office, comments submitted May 9, 2005.

[89] Currently codified as Title 20 United States Code section 6311(b)(2)(A) and 6311(b)(2)(A)(i). These sections read:

> (A) Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools made adequate yearly progress as defined under this paragraph. Each State Accountability system shall –
> (i) be based on the academic standards and academic assessments adopted under paragraphs (1) and (3), and other academic indicators consistent with subparagraph (C)(vi) and (vii), and shall take into account the achievement of all public elementary school and secondary school students;

[90] Currently codified as Title 20 United States Code section 6311(b)(3)(A) and 6311(b)(3)(C)(i). Subdivision (b)(3)(A) reads:

> Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007-2008 school year.

Subdivision (b)(3)(C) states: "Such assessments shall – (i) be the same academic assessments used to measure the achievement of all children;"

education agencies."[91] LAO goes on to state that since the state cannot test pupils directly, it falls to schools and districts to do so.

The Commission disagrees. LAO takes NCLB requirements out of context. The section LAO cites, as currently codified, begins, "For any State desiring to receive a grant under this part, the State education agency shall submit to the Secretary a plan … that satisfies the requirements of this section …."[92] The plain language of this section indicates that the federal "requirements" cited by LAO are actually conditions on funding. In NCLB, as in most federal statutes, the, "federal influence on government at the state and local levels [is] by inducement or incentive rather than direct compulsion."[93]

Thus, in the absence of direct compulsion, the task is to apply the factors from the *City of Sacramento* case to determine whether NCLB constitutes a federal mandate on the state to test pupils.

Nature and purpose: As to the first factor, the nature and purpose of NCLB, it was enacted pursuant to Congress' spending power.[94] Under this power in Article I, section 8 of the U.S. Constitution, "Congress may condition the receipt of funds, by states or others, on compliance with federal directives."[95] NCLB's stated purpose is to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."[96] It is unclear, however, whether STAR was enacted as California's answer to NCLB. The legislative history of STAR is silent as to whether its purpose was to implement federal law (although it notes that the tests would allow for national comparison).[97] STAR's stated purpose, however, is coextensive with NCLB: to assist "teachers, administrators, pupils, and their parents, to improve teaching and learning."[98]

LAO and DOF, in comments on the draft staff analysis, argue that the legislative history of STAR is irrelevant. According to LAO, federal law requires states to create assessments so that if STAR had not existed in 2002, the Legislature would have had to authorize the creation of

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[91] Legislative Analyst's Office, comments submitted May 9, 2005.

[92] Title 20 United States Code section 6311 (a)(1).

[93] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 73.

[94] *Associates of Community Organizations for Reform Now v. New York City Department of Education, supra,* 269 F. Supp. 2d 338, 341.

[95] *Nevada v. Skinner* (1989) 884 F.2d 445, 447.

[96] 20 United States Code section 6301.

[97] Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 376 (1997-1998 Reg. Sess.) as amended by Conference Report No. 1, September 11, 1997, page 1.

[98] Education Code section 60602, subdivision (a). This legislative provision was enacted in Statutes 1995, chapter 975, before the test claim statute, but the Legislature retained this intent language for the chapter, indicating it applies to STAR.

similar tests. LAO and DOF also note that Government Code section 17513 specifies that the federal mandate could be enacted before or after the state law that satisfies the mandate.

The Commission disagrees as to the legislative history of STAR, which is relevant to determining the nature and purpose of the STAR program under the first factor in *City of Sacramento*. Regarding section 17513, there has been no finding that NCLB or IASA are not federal mandates based on the dates they were enacted, or based on STAR's date of enactment, so the section 17513 arguments are not relevant to this analysis.

Intent to coerce: The second factor is whether the design of the federal program suggests an intent to coerce. NCLB, by its own terms, does not suggest the intent to coerce.

First, NCLB itself provides that it is not mandatory on the states:

> Nothing in this subchapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.[99]

In addition, NCLB includes the following provision:

> Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of state or local resources, or mandate a State or any subdivision thereof *to spend any funds or incur any costs not paid for under this chapter*.[100]

Thus, NCLB states that its purpose is not to mandate, direct or control a state or local education agency, and not to require states to incur costs that NCLB does not cover.[101] Withholding state administration funds is the sole consequence of noncompliance mentioned in NCLB.[102]

LAO states that the first section quoted above (20 U.S.C. § 6575) declares the federal government's intent not to dictate specific state polices on education, assessment or curriculum.

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[99] 20 United States Code sections 6575 and 7371.

[100] 20 United States Code section 7907 (a).

[101] Other states have disputed that NCLB is fully funded. For example, the Wisconsin Attorney General has opined that 20 United State Code section 7907 (a) has been violated because NCLB is not fully funded. See <http://www.thompson.com/risserletter.> as of April 15, 2005.

[102] 20 United States Code section 6311 (g)(2) calls for withholding state administration funds "under this part" (or Part A). Other federal statutes, however, may add consequences for noncompliance. "In addition to these provisions contained in the NCLBA, there are remedies available to the Secretary of Education to take action against a federal funds recipient who fails to comply with legal requirements imposed by a federal education statute, including withholding of funds and conducting proceedings for the recovery of funds and the issuance of cease and desist orders. *See* 20 U.S.C. §§ 1234 (a)-(i)." *Associates of Community Organizations for Reform Now v. New York City Department of Education, supra,* 269 F. Supp. 2d 338, 342. The other statutes cited (20 U.S.C. § 1234), however, are not within the design of NCLB.

But LAO argues that the federal law clearly requires states to establish assessment and accountability systems. As to the second section quoted above (20 U.S.C. § 7907 (a)), LAO interprets it as the federal government's intent to pay for both the state and local costs of its mandate.

LAO also states, "The problem is that the act does not anticipate laws such as California's constitutional mandate reimbursement requirement, and therefore, does not clearly identify the level of government (state or district) responsible for bearing the programmatic costs."[103] LAO argues that under Title VI (section 6111), under which California receives about $31 million, the enumerated allowable activities does not include reimbursing districts for their assessment-related costs. Thus, LAO argues that NCLB, by implication, assumes districts will absorb the assessment costs with a portion of the federal funds provided to the districts. According to LAO, NCLB (1) requires state-developed assessment and accountability systems – the state has no choice about the mandate, and (2) effectively requires districts to test all students as a condition of funding.

The Commission disagrees with LAO because NCLB must be read in its entirety, and because its plain meaning prevails. Thus, as stated above, the Commission finds the testing provisions of NCLB are a condition on funding rather than activities the state has no choice but to implement. Moreover, the Commission disagrees with LAO's interpretation of Title VI. The current provision (section 6111 of NCLB) leaves states great latitude in spending Title VI funds:

> The Secretary shall make grants to States to enable the States – … (2) if a State has developed the assessments and standards required … [under] this title, *to administer those assessments* or to carry out other activities … related to ensuring that the State's schools and local educational agencies are held accountable for results, such as …[enumerated activities].[104] [Emphasis added]

The language does not prohibit states from using federal funds for testing costs. Rather, the grants are designed at least in part, "to administer those assessments." Thus, using federal grant money for assessments is not prohibited by NCLB.

When state participation began: The third factor is when state and/or local participation began. In the *City of Sacramento* case, the court said that the state had afforded unemployment insurance protection to its private sector workers for over 40 years before the test claim statute was adopted.[105] In the case of STAR, the program was enacted in October 1997 (Stats. 1997, ch. 828, Sen. Bill No. 376), about three years after the Improving America's Schools Act of 1994 (and five years before NCLB).

LAO asserts that state participation in the Elementary and Secondary Education Act (ESEA) goes back more than 30 years, and that IASA and NCLB are simply new versions of the ESEA, which is reauthorized about every five years. According to LAO, "the assessment and accountability requirements in the federal law should be viewed as an outgrowth of the

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[103] Legislative Analyst's Office, comments submitted May 9, 2005.

[104] Title 20 United States Code section 7301 (2).

[105] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 74.

program's history."[106] LAO admits that IASA introduced test-based accountability into the ESEA program, which were extended by NCLB.

The Commission disagrees as to the relevancy of ESEA. This test claim is about the STAR testing program, which has not been linked to any federal enactments prior to IASA or NCLB. Earlier federal law that is unrelated to the test-claim activities is irrelevant.

Penalties for withdrawal: The fourth factor is penalties for withdrawal or refusal to participate or comply. As stated, a possible consequence of not assessing pupils in NCLB is loss of federal education funding. According to the National Conference on State Legislatures, "Since the law's enactment, 31 states have considered measures to either ask for more federal funding or flexibility, or to opt out of NCLB."[107] The state of Utah recently enacted a bill to put state education goals ahead of the NCLB, jeopardizing its receipt of federal education funds.[108] The U.S. Department of Education has threatened loss of other funds against Utah if it opts out of NCLB, but it is speculative whether the U.S. Department of Education would withhold the funds, and if so, whether a court would uphold its decision.[109]

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[106] Legislative Analyst's Office, comments submitted May 9, 2005.

[107] <http://www.ncsl.org/programs/press/2004/ backgrounderNCLB.htm> as of April 7, 2005.

[108] See "Spellings warns Utah in battle over federal act" <http://www.washingtontimes.com/ national/20050420-124447-2227r.htm> as of April 20, 2005. Secretary of Education Spellings has warned that $76 million in federal funding for Utah may be cut this year.

[109] According to a report by the National Conference of State Legislatures, "On February 6, 2004, the deputy secretary of education, in response to a request from Utah Superintendent Steven Laing, outlined the consequences to the state of Utah of refusing the allocation of its Title I funds—the quid that holds the quo of the contract between NCLB and the states. 'The rejection of state Title I money would result in serious consequences to other programs.' The letter went on to specify that such unrelated programs as technology, safe and drug-free schools, after school programs, literacy programs for parents, and comprehensive school reform 'would be negatively affected.' The net effect of Utah's interest in trying to maintain the integrity of its accountability and standards system would be to lose $43 million in Title I funds and to forfeit nearly twice that amount in other formula and categorical funds. Title I is based on a specific funding formula. Conceptually, not participating in the Title I program results in states not having a formula to serve as the basis for programs tied to the Title I formula. Thus, the U.S. Department of Education contends that states would lose all funding that uses the Title I formula as the basis for additional financial allocations. … In an analysis of the Utah decision, the Council of Chief State School Officers … offered the following: 'This broad reading of NCLB's integrated requirements is questionable, and ED likely could have reached other reasonable interpretations that would be more supportive of state opt-out authority.'" National Conference of State Legislatures, Task Force on No Child Left Behind Final Report (February 2005) page 49.

Withholding funds not directly attributed to NCLB, however, may violate the principle against unambiguously conditioning federal funds on state action. In *Pennhurst State School and Hospital v. Halderman,*[110] the U.S. Supreme Court stated:

> [Federal] legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." [Citations omitted.] There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [Citations omitted.] *By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.*[111] [Emphasis added.]

Congress stated that the "penalty" for not participating in NCLB is the loss of "funds for State administration under this part [Part A of Subchapter I of NCLB]."[112] Funds "under this part" include section 6111 grants for state assessments, and section 6112 grants for enhanced assessment instruments program.[113] There is no evidence in the record on the amounts California receives in these programs, or the amount for "state administration."

Funds not at risk for nonparticipation in NCLB include those under Part B1 – Student Reading Skills Improvement Grants; Part B2 – Early Reading First; Part B3 – Even Start Family Literacy Programs; Part F –Comprehensive School Reform, and Part H – School Dropout Prevention; and in Subchapter IV, Part A – Safe and Drug-Free Schools and Communities.

If funds other than those in Part A were at risk, Congress needed to make that clear in NCLB according to the U.S. Supreme Court's rule in *Pennhurst.* There is nothing in NCLB stating that all Title I funding would be at risk for failure to comply with NCLB, so the penalties under NCLB have not been shown to be certain or severe.[114]

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[110] *Pennhurst State School and Hospital v. Halderman* (1981) 451 U.S. 1.

[111] *Id.* at page 17.

[112] 20 United States Code section 6311 (g)(2). Other federal statutes, however, may add consequences for noncompliance. "In addition to these provisions contained in the NCLBA, there are remedies available to the Secretary of Education to take action against a federal funds recipient who fails to comply with legal requirements imposed by a federal education statute, including withholding of funds and conducting proceedings for the recovery of funds and the issuance of cease and desist orders. *See* 20 U.S.C. §§ 1234 (a)-(i)." *Associates of Community Organizations for Reform Now v. New York City Department of Education, supra,* 269 F. Supp. 2d 338, 342. The statutes cited (20 U.S.C. § 1234), however, are not within the design of NCLB.

[113] 20 United States Code sections 6111 and 6112.

[114] In fact, 34 Code of Federal Regulations part 81.30 et seq. outlines a procedure for adjudicating hearings for recovery of funds for grants made by the U.S. Department of Education.

DOF asserts, in comments on the draft staff analysis, that without assessments that meet NCLB requirements, no district in California would be eligible for Title I funds, and that an estimated $3 billion in NCLB funds would be jeopardized.[115] As with DOF's original comments, it is not clear how the $3 billion figure was arrived at, the federal program(s) to which it pertains, or how much is for state administration.

DOF originally commented that the federal government provided the following for STAR:

Fiscal Year	General Fund (in millions)	Federal Funds (in millions)
2002-03	$60.836	$6.569
2003-04	$60.336	$7.443
2004-05	$57.528	$13.384

The figures in the state budget,[116] however, differ from those provided by DOF, as follows.

Fiscal Year	General Fund (in millions)	Federal Funds (in millions)
2003-04 [117]	$60.836	$5.119
2004-05 [118]	$53.8	$8.459

According to DOF's comments on the draft staff analysis, its figures are different from the budgeted figures because DOF considered budget revisions made subsequent to the Budget Act. On this record, however, DOF has still not demonstrated that the alleged loss of funds "for state administration" is so substantial as to constitute "certain and severe federal penalties."[119] There is no evidence in the record of loss of other program funds, or of the certainty or severity of the loss of Title I funds.

LAO, in comments on the draft staff analysis, argues that the conclusion discounts information cited in the analysis that the federal government has threatened states with loss of their federal funds for failure to implement the assessment and accountability provisions of NCLB. LAO argues that the assessment in the draft staff analysis that "it is speculative whether the federal

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[115] Originally, DOF stated the state would jeopardize $4.3 billion annually, but these comments were without citation to authority and without a supporting declaration under penalty of perjury. (Cal. Code Regs., tit. 2, § 1183.02 (c)(1) and (d)).

[116] The Commission's statewide cost estimate for STAR was about $30.8 million for 2002-03, and $31.8 million for 2003-04. However, this estimate is only for the CAT/6 and SABE/2 tests.

[117] See Statutes 2003, chapter 157, Item 6110-113-0890, Schedule (2). Another $6.88 million was budgeted for development of a longitudinal database for NCLB from the federal trust fund: see Statutes 2003, chapter 157, Item 6110-113-0890, Schedule (5).

[118] See Statutes 2004, chapter 208, Item 6110-113-0890, Schedule (2). Another $2.993 million was budgeted for development of a longitudinal database for NCLB from the federal trust fund: see Statutes 2004, chapter 208, Item 6110-113-0890, Schedule (4), Provision (4).

[119] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 74.

government would actually withhold funds" is a not a reasonable criterion for evaluating whether state compliance was actually required. According to LAO,

> It seems unreasonable to expect the state to refuse to implement every federal program requirement that appears to create a local mandate until the state is forced to do so. Indeed, this interpretation would seem to suggest that state implementation decisions regarding virtually every federal program could constitute a state-mandated local program. We believe the key issue is whether the state had real discretion in determining whether or not to impose state assessments as part of NCLB. Given the amount of funds at stake for school districts, we think the answer is "no."[120]

DOF also stated that it seems unreasonable to expect the state to refuse to implement federal program requirements until it is forced to do so, and therefore it would be inappropriate to use this as a factor in determining whether NCLB is a federal mandate.

The Commission disagrees with LAO that the speculative nature of the penalty is not a reasonable criterion for evaluating a federal mandate. LAO advocates a standard that is inconsistent with the California Supreme Court's standard of penalties that are "certain and severe."[121] The Commission is required, however, to follow the Supreme Court in making mandate determinations. Also, the question is not whether the state has real discretion in imposing the STAR requirement to implement NCLB, as LAO asserts. That question arises only after a federal mandate on California is found.[122] The Commission also disagrees as to the weight of the evidence in the record. There has been insufficient evidence submitted to make a finding as to how much federal funding California would lose for failure to implement STAR testing.

Other consequences: The final factor from *City of Sacramento* is "any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." The only consequence, as stated, is loss of federal funds. As to legal consequences, courts have held that pupils do not have a private right of action under NCLB,[123] so it is unlikely that states and school districts would be ordered, as a result of litigation, to implement the act.

Accordingly, the Commission finds that there is insufficient evidence in the record to find a federal mandate on the state.

In *Hayes v. Commission on State Mandates,* the court cited the *City of Sacramento* analysis for determining whether there is a federal mandate on the state, but stated further analysis is required

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[120] Legislative Analyst's Office, comments submitted May 9, 2005.

[121] *State of California v. City of Sacramento, supra,* 50 Cal.3d 51, 74.

[122] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593.

[123] *Associates of Community Organizations for Reform Now v. New York City Department of Education, supra,* 269 F. Supp. 2d 338, 342, 343.

to determine a state mandate on the local agencies.[124] Thus, assuming for argument's sake that NCLB imposes a federal mandate on California, further analysis would be required to determine whether California's implementation of NCLB (or IASA, its predecessor) via the STAR program constitutes a mandate on school districts.

The *Hayes* court[125] held that the federal Education of the Handicapped Act (now Individuals with Disabilities Education Act, or IDEA) was a federal mandate. In doing so, the court laid out the following test:

> *If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program* then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[126] [Emphasis added.]

Hayes stated that the federal statutory scheme in IDEA is grounded in constitutional principles of equal protection.[127] The *Hayes* court found that states could implement the federal statute, or face a "barrage of litigation" that would require them to implement it.[128] The court held, "To the extent the state implemented the act [IDEA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention."[129] The court concluded, however, that the state had "no true choice" in whether or not to implement the federal statute.

In this case, unlike *Hayes,* the federal scheme for assessments in NCLB is not grounded in constitutional doctrines of equal protection like the Education of the Handicapped Act statute at issue in *Hayes.* Rather, NCLB is grounded in the federal spending power.[130] At least some of NCLB's provisions do not create individual rights that are enforceable under 42 United States Code section 1983,[131] a statute for seeking redress for deprivation of constitutional rights.[132]

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[124] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593. We assume, for purposes of this analysis, that the reference to local agencies includes school districts, which are treated the same under the statutory scheme (Gov. Code, § 17500 et seq.).

[125] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564.

[126] *Id.* at pages 1593-1594.

[127] *Id.* at pages 1587 and 1588.

[128] *Id.* at page 1592.

[129] *Id.* at page 1594.

[130] *Association of Community Organizations for Reform v. New York City Department of Education, supra,* 269 Fed. Supp. 2d 338, 341.

[131] 42 United State Code section 1983 reads, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer

DOF argues that the federal Title I program provisions under the Improving America's Schools Act (IASA, the predecessor to NCLB) required statewide assessment systems and accountability for schools and districts participating in the Title I program. According to DOF, IASA's assessment requirement was a mandate on local school districts, "the Title I assessment requirement could be satisfied through a system of local assessments that met federal standards. These local assessments would be developed or purchased by each district." LAO also states that the STAR program was enacted, in part, to comply with IASA.

These arguments ignore *Hayes.* California freely chose to enact the STAR program that complies with IASA. Moreover, the STAR program goes beyond IASA by (1) testing all pupils in grades 2-11, not only pupils in Title I schools; (2) testing second graders, not required by IASA; (3) testing all pupils annually in mathematics or reading/language arts, while IASA required testing pupils once in grades 3-5, grades 6-9, and grades 10-12. Thus, in enacting STAR, California exercised a true choice to comply with IASA by going beyond IASA requirements. The same is true for NCLB. STAR requirements also exceed those of NCLB because the STAR program: (1) tests second graders (NCLB testing starts in third grade); (2) tests high school pupils annually (NCLB requires testing once during grades 9-11). Thus, the STAR program goes beyond federal requirements, indicating true choice in implementation of IASA and NCLB.

DOF, in comments on the draft staff analysis, states that the fact that STAR may exceed federal requirements should not preclude components of the program from being considered federal mandates if they are used to implement federal requirements. In LAO's comments on the draft staff analysis, it also states that only those parts of the STAR program that can be reasonably construed to implement the federal requirements should be considered a federal mandate. LAO argues that NCLB implicitly assumes that states pay for the development of the mandated assessments and districts bear the costs of administering the test to students. LAO states that to the extent the state's choices created costs for districts that exceed the minimum needed to implement the federal law, the state should pay for those costs.

The Commission disagrees because the standard of what constitutes a federal mandate is not what could be reasonably construed to implement federal requirements. Rather, the standard is the factors in the *City of Sacramento* case, as described above, applied to evidence in the record. The Commission also disagrees with LAO's assessment that NCLB implicitly assumes that states pay for the development of the mandated assessments and districts pay for administering the tests. NCLB states, "The Secretary shall make grants to States to enable the States – … if a State has developed the assessments and standards required … [under] this title, *to administer those assessments* or to carry out other activities … related to ensuring that the State's schools and local educational agencies are held accountable for results … "[133] NCLB was drafted to

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for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. …"

[132] *Association of Community Organizations for Reform v. New York City Department of Education, supra,* 269 Fed. Supp. 2d 338, 343.

[133] Title 20 United States Code section 7301 (2).

allow federal grants to be used to administer assessments, regardless of whether the state or school district carries out the testing.

DOF comments that any components of STAR that exceed federal mandates may be considered de minimis in light of the federal requirements, referring to the ruling in the *San Diego Unified* case that, "[C]hallenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate."[134] The Commission disagrees. There is insufficient evidence in the record to find that STAR is "part and parcel" of NCLB, or that the cost of statewide testing for all second grade or high school pupils is de minimus within the meaning of *San Diego Unified*.

In summary, the Commission finds that this record does not support a finding that STAR is a federal mandate under IASA or NCLB because the penalties have not been shown to be certain or severe, and because California exercised true choice in implementing the federal programs as evidenced by the STAR program requirements that exceed those in IASA or NCLB.

B. Are STAR activities that comply with the federal Individuals with Disabilities Education Act (IDEA) federally mandated?

There are three activities required in the STAR Statement of Decision that are targeted toward special education pupils or pupils with disabilities.[135] These are:

- Exemption from testing for pupils if the pupil's individualized education program has an exemption provision. (Ed. Code, § 60640, subd. (e), and former subd. (j); Cal. Code Regs., tit. 5, § 852, subd. (b) & § 881, subd. (b).)
- Determination of the appropriate grade level test for each pupil in a special education program. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)
- Provision of appropriate testing adaptation or accommodations to pupils in special education programs. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)

The issue is whether these activities are federally mandated under IDEA.

As stated above, the court in *Hayes* stated that the federal Education of the Handicapped Act (the predecessor to IDEA) is a federal mandate. Since the *Hayes* court concluded that the state had "no true choice" in whether or not to implement the federal statute, the only question is whether California has a choice. The Commission finds that it does not. IDEA requires that pupils with disabilities be included in state-wide and district-wide assessments, "with appropriate accommodations where necessary."[136] IDEA also requires school districts to have IEPs in effect for pupils with disabilities.[137]

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[134] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 890.

[135] Commission on State Mandates, STAR Statement of Decision, page 7.

[136] 20 United States Code section 1412 (a)(17); 34 Code of Federal Regulations part 300.138 (2002).

[137] 20 United States Code section (d)(2)(A).

Education Code section 60640, subdivision (e) (and originally subd. (j)), and the corresponding regulations[138] (the STAR regulations on IEPs and on testing adaptations and accommodations) merely implement the IDEA (an amendment/successor to the federal Education of the Handicapped Act), and IDEA's regulations[139] in administering STAR. Therefore, the Commission finds that section 60640, subdivision (e) and its corresponding regulations are not state mandates subject to article XIII B, section 6, because they were inserted into the STAR provisions to implement a federal law or regulation.[140]

C. Are STAR activities that comply with federal Equal Educational Opportunities Act (EEOA) federally mandated?

The STAR Statement of Decision included the following activity:

- Administration of an additional test to pupils of limited English proficiency who are enrolled in grades 2 through 11 if the pupil was initially enrolled in any school district less than 12 months before the date that the English language STAR Program test was given. Only reimbursable to the extent such tests are available. (Ed. Code, § 60640, subd. (g); Cal. Code Regs., tit. 5, § 851, subd. (a).)[141]

The issue is whether this activity is federally mandated under EEOA.

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[138] The regulations on the IEP are in California Code of Regulations, title 5, sections 852, subdivision (b), and 881, subdivision. (b). The regulations on testing adaptations and accommodations are in California Code of Regulations, title 5, sections 853, subdivision (c), and 882, subdivision (c).

[139] 34 C.F.R. section 300.138 provides, "The State must have on file with the Secretary [of Education] information to demonstrate that-- (a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary…"

[140] As an alternative ground for denial, the requirement to review "the IEP of children with disabilities to determine if the IEP contains an express exemption from testing" was repealed by Statutes 2002, chapter 492, and amended so that the statute now includes disabled pupils in testing and cites to IDEA (the regulation was also amended). Since disabled pupils are included in testing, this activity is no longer required and thus, not subject to article XIII B, section 6.

As to determining the appropriate grade level and providing testing adaptations and accommodations, those activities are also no longer required. California Code of Regulations, title 5, section 853, subdivision (c) was amended in February 2004 to allow testing IEP pupils below grade level for the 2003-04 school year only, and to prohibit doing so beginning in the 2004-05 school year. Moreover, there is a now separate test for special education pupils (the CAPA, not covered by the original test claim). This reconsideration decision is effective July 1, 2004, and this activity is no longer required after the 2003-04 school year. Therefore, as an alternative ground for denial, the Commission finds that these activities are no longer required for pupils who take the CAT/6, and therefore is not subject to article XIII B, section 6.

[141] Commission on State Mandates, STAR Statement of Decision, page 7. Additional authority for this activity is in California Code of Regulations, title 5, section 880, subdivision (a).

Title VI of the Civil Rights Act (42 U.S.C. § 2000d) prohibits discrimination under any program or activity receiving federal financial assistance. The Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. § 1701 et seq.) recognizes the state's role in assuring equal educational opportunity for national origin minority students. It states:

> No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.[142]

According to *Castaneda v. Pickard,*[143] a case cited by the California Department of Education in its regulations,[144] the federal statutory scheme (EEOA) is grounded in constitutional principles of equal protection.[145]

Congress included an obligation to address the problem of language barriers in the EEOA, and granted limited English speaking pupils a private right of action to enforce that obligation in 20 United States Code section 1706.[146]

Federal cases have interpreted section 1703 (f) to require testing students' English-language skills, as well as to require standardized testing. In *Castaneda v. Pickard*, the court stated,

> We understand s 1703 (f) [sic] to impose on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students *with assistance in other areas of the curriculum* where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program.[147] [Emphasis added.] *Id.* at page 1011.

The *Castaneda* court went on to state the importance of testing,

> Valid testing of students' progress in these areas [other than English language literacy skills] is, we believe, essential to measure the adequacy of a language remediation program. The progress of limited English speaking students in these other areas of the curriculum must be measured by means of a *standardized test in their own language* because no other device is adequate to determine their progress vis-à-vis that of their English speaking counterparts. … Only by measuring the actual progress of students in these areas during the language

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[142] Title 20 United States Code section 1703 (f), hereafter referred to as section 1703 (f).

[143] *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989.

[144] For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

[145] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 999 and 1001.

[146] *Id.* at page 999.

[147] *Id.* at page 1011.

> remediation program can it be determined that such irremediable deficiencies are not being incurred.[148] [Emphasis added.]

In *Keyes v. School Dist. No. 1,*[149] another case cited by the California Department of Education in its regulations,[150] the court found violations by a Denver school district of section 1703 (f) of the EEOA. The court held the school district's bilingual program was "flawed by the failure to adopt adequate tests to measure the results of what the district is doing. … The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy."[151]

There is no indication in these or other cases that compliance with section 1703 (f) of the EEOA is limited to testing English or language skills. Rather, section 1703 (f) expressly promotes the broader goal of "equal participation by … [English-learner] students in … instructional programs."

In comments on the draft staff analysis, SDUSD disagrees with the reliance on *Castaneda,* concluding that *Castaneda* provides no guidance on whether the EEOA is a federal mandate regarding STAR activities. The Commission agrees that schools are free to determine appropriate programs for English learners under section 1703 (f) and applicable case law. However, SDUSD ignores portions of *Castaneda* that describe the "essential" nature of testing pupils in their own language.[152] SDUSD also ignores other cases that support standardized testing in foreign languages,[153] and the California Department of Education's reliance on these cases in support of its regulations.

One of the reasons *Castaneda* is a leading case in interpreting section 1703 (f) is because the court devised a three part test to determine the sufficiency of the "appropriate action" under section 1703 (f). The test is first, whether the program is based on an educational theory recognized as sound or at least as a legitimate experimental strategy by some of the experts in the field. Second, is the program reasonably calculated to implement that theory? And third, after being used for a time sufficient to afford it a legitimate trial, has the program produced satisfactory results?[154] Thus, school districts must, under section 1703 (f) as interpreted by *Castaneda,* effect standardized testing or assessment to implement at least the third part of this test. Moreover, because Congress granted English–learner pupils a private right of action to enforce the section 1703 (f) obligation in 20 United States Code section 1706, California could be forced by litigation to offer the STAR test in Spanish if it did not already do so.

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[148] *Id.* at page 1014.

[149] *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503

[150] For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

[151] *Keyes v. School Dist. No. 1, supra*, 576 F. Supp. 1503, 1518.

[152] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 1014.

[153] *Keyes v. School Dist. No. 1, supra,* 576 F. Supp. 1503, 1518.

[154] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 1009-1010.

Therefore, the Commission finds that section 60640, subdivision (g) and its regulations (Cal. Code Regs., tit. 5, § 880, subd. (a)) do not constitute a state mandate subject to article XIII B, section 6, because they were inserted into the STAR provisions to implement a federal law or regulation.

D. Is the remaining STAR legislation a program under article XIII B, section 6?

For purposes of this analysis, the STAR activities at issue are all those in the Statement of Decision except for those discussed above as being federal mandates:

- Exemption from testing for pupils if the pupil's individualized education program has an exemption provision. (Ed. Code, § 60640, subd. (e), and former subd. (j); Cal. Code Regs., tit. 5, § 852, subd. (b) & § 881, subd. (b).)
- Determination of the appropriate grade level test for each pupil in a special education program. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)
- Provision of appropriate testing adaptation or accommodations to pupils in special education programs. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)
- Administration of an additional test to pupils of limited English proficiency who are enrolled in grades 2 through 11 if the pupil was initially enrolled in any school district less than 12 months before the date that the English language STAR Program test was given. Only reimbursable to the extent such tests are available. (Ed. Code, § 60640, subd. (g); Cal. Code Regs., tit. 5, § 851, subd. (a).)[155]

In order for the STAR program to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." This means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[156] Only one of these findings is necessary to trigger article XIII B, section 6.[157]

The STAR program consists of educational testing as a means to measure pupil achievement and school accountability. These activities are within the purview of public education, a program that carries out a governmental function of providing a service to the public.[158] Moreover, the STAR program imposes unique requirements on school districts that do not apply generally to all residents and entities of the state.

Therefore, the STAR program is a program that carries out the governmental function of educational testing, and a law which, to implement state policy, imposes unique requirements on school districts and does not apply generally to all residents and entities in the state. As such, the

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[155] Commission on State Mandates, STAR Statement of Decision, page 7. Additional authority for the language test is in California Code of Regulations, title 5, section 880, subdivision (a).

[156] *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, 56.

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

[158] "Education in our society is …a peculiarly governmental function." *Long Beach Unified School District v. State of California, supra,* 225 Cal.App.3d 155, 172.

Commission finds that the STAR program constitutes a program within the meaning of article XIII B, section 6.

Issue 3: Does the STAR program impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6?

The Commission determined, on August 24, 2000, that the STAR program constitutes a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution. There has been no evidence or comments submitted that questions this determination. Thus, absent anything in the record to the contrary, the Commission finds that the activities in the Statement of Decision (except for the activities that are federal mandates discussed above) constitute a new program or higher level of service within the meaning of article XIII B, section 6.

In the original Statement of Decision and parameters and guidelines, the Commission found that Education Code section 60615 contained a reimbursable activity for: "Processing requests for exemption from testing filed by parents and guardians." Section 60615, however, was not added or amended by the test claim statute. Rather, it was added by Statutes 1995, chapter 975. However, even though claimant did not plead Statutes 1995, chapter 975 in the test claim, claimant did plead section 60615. Therefore, the Commission finds that it properly took jurisdiction over section 60615, and properly found that this section contains a new program or higher level of service that is reimbursable.

Issue 4: Does the STAR program impose "costs mandated by the state" on school districts within the meaning of article XIII B, section 6 of the California Constitution and section 17556 ?

In order for the test claim statute to impose a reimbursable state-mandated program under the California Constitution, the test claim legislation must impose costs mandated by the state.[159] In addition, no statutory exceptions listed in Government Code section 17556 can apply. Government Code section 17514 defines "cost mandated by the state" as follows:

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

Government Code section 17556, (as amended by Stats. 2004, ch. 895, Assem. Bill No. 2855), provides:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:
>
> (a) The claim is submitted by a local agency or school district that requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from

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

the governing body or a letter from a delegated representative of the governing body of a local agency or school district that requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.

(c) *The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.* This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

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

(f) The statute or executive order imposed duties that were expressly included in a ballot measure approved by the voters in a statewide or local election.

(g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction. [Emphasis added.]

The issue, therefore, is whether the STAR program invokes subdivision (c), i.e., "imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government."

Although as discussed above, NCLB is not a federal "mandate," since California could choose not to participate, the Commission also finds that that the STAR program "mandates costs that exceed the mandate in that federal law or regulation."[160] That is because under the STAR program, districts are required to test all pupils in mathematics and language arts in grades 2-11.[161]

NCLB, on the other hand, requires states to develop and begin administering tests in mathematics and reading/language arts to all students in grades 3–8[162] and once to all students in grades 9–12, beginning with the 2005-06 school year. It also requires administering science

[160] Government Code section 17556, subdivision (c).

[161] Education Code sections 60640, subdivisions (b) and (c), 60641 subdivision (a); California Code of Regulations, title 5, sections 851, 852, subdivision (b), 853, and 855.

[162] Title 20 United State Code section 6311 (b)(3)(C)(vii).

assessments to all pupils once in grades 3–5, 6–9 and 9–12, beginning with the 2007-08 school year. [163]

Thus, the STAR program exceeds NCLB by requiring testing for grade 2 pupils, and for each of grades 9-11 (instead of once in grades 9-12).

Therefore, the Commission finds that reimbursement for STAR is not precluded by Government Code section 17556, subdivision (c), and the remainder of section 17556 does not apply.

Offsets: DOF and LAO raise the issue of offsetting revenue for the STAR program. LAO criticizes the existing STAR parameters and guidelines for omitting the cost of printing, shipping, and scoring the tests from the list of costs that districts must offset with state funds.

The STAR parameters and guidelines provide for offsetting revenue as follows:

> Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.
>
> Specifically, reimbursement for: 1) designating site and district coordinators, 2) exempting pupils from STAR Program tests upon request of parents or guardians, 3) coordinating testing at the test site, and 4) reporting data to the school district governing board or county office of education and the Superintendent of Public Instruction, shall be offset by funding provided in the State Budget for the STAR Program.

There is no reason in the record for limiting offsetting revenue to the four activities listed in the parameters and guidelines, as this provision could be interpreted to mean. Therefore, the Commission finds that budgeted state funds for STAR should be used to offset all STAR activities, not only those listed above.

As to LAO's comment, the activities of printing, shipping, and scoring the tests (for the CAT/6 and SABE/2 exams) do not appear to be the responsibility of the school district (except for shipping the test back to the publisher).[164] The current statutes and regulations do not require the school district to print, ship or score tests, or to pay for doing so. Therefore, the Commission finds that this activity should not be included in the parameters and guidelines as a reimbursable activity.

DOF argues that, "state funds provided for the program should first offset against any costs resulting from the activities found by the Commission to be state-mandated in excess of the federal statute." DOF also urges recognizing federal Title I funds as offsetting revenue, and repeats these assertions in comments on the draft staff analysis.

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[163] Title 20 United States Code section 6311 (b)(3)(C)(v)(II), and the same for science beginning school year 2007-2008 (*Ibid.).*

[164] California Code of Regulations, title 5, section 857, subdivision (c).

The Commission can find no legal requirement for school districts to use Title I funds as offsetting revenue for the STAR mandate. According to the Education Code:

> [T]he governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established."[165]
>
> [S]chool districts … have diverse needs unique to their individual communities and programs. Moreover, in addressing their needs … school districts … should have the flexibility to create their own unique solutions.[166]
>
> [I]t is the intent of the Legislature to give school districts … broad authority to carry on activities and programs, *including the expenditure of funds for programs and activities which, in the determination of the governing board of the school district … are necessary or desirable in meeting their needs* and are not inconsistent with the purposes for which the funds were appropriated. …[167] [Emphasis added.]

Not only is there no requirement to use Title I funds to offset the STAR program costs (for only the CAT/6 test, according to the Statement of Decision and this reconsideration), but the Education Code indicates that school districts should have flexibility and broad authority in spending funds. In the absence of legislative direction, school districts have discretion in how to spend appropriated funds and are not required to spend it on the mandated exam(s) first (CAT/6).

In addition, NCLB states:

> A State educational agency or local educational agency shall use Federal funds received under this part [Part A, including the assessments] only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.[168]

LAO, in comments on the draft staff analysis, argues that the decision in *Kern High School District*[169] requires the Commission to find that Title I funds should offset the STAR program. In *Kern*, the court found that eight of the nine programs at issue were not state mandates, and

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[165] Education Code section 35160.

[166] Education Code section 35160.1, subdivision (a).

[167] Education Code section 35160.1, subdivision (b).

[168] 20 United States Code section 6321 (b). 20 United States Code section 7901 (a) provides, "A local educational agency may receive funds under a covered program for any fiscal year only if the State educational agency finds that either the combined fiscal effort per student or the aggregate expenditures of the agency and the State with respect to the provision of free public education by the agency for the preceding fiscal year was not less than 90 percent of the combined fiscal effort or aggregate expenditures for the second preceding fiscal year."

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

made no finding whether the ninth program was a mandate. As to the ninth program, the court found that the costs in complying with the notice and agenda requirements for the Chacon-Moscone Bilingual-Bicultural Education program did not entitle claimants to obtain reimbursement under article XIII B, section 6 because the state had already provided funds that could be used to cover the necessary notice and agenda related expenses.[170]

LAO's assessment of *Kern* is incorrect because it is distinguishable from the STAR program. First, under *Kern* the costs appeared "rather modest,"[171] which is not the case here. Second and most importantly, in *Kern,* the Legislature expressly authorized districts to use a portion of funds obtained from the state to pay the notice and agenda costs at issue.[172] In this case, there is no expressed legislative intent or requirement that school districts use Title I or Title VI funds (see discussion on p. 29) on the STAR program.

Therefore, the Commission finds that school districts are not required to use Title I or Title VI funds to offset the state-mandated provisions in the STAR Statement of Decision. If school districts voluntarily elect to do so, those funds would be considered as offsets in the parameters and guidelines.

CONCLUSION

The Commission finds, effective July 1, 2004, that the STAR program imposes a reimbursable state mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514, for all activities listed in the STAR Statement of Decision (97-TC-23) except the following:

- Exemption from testing for pupils if the pupil's individualized education program has an exemption provision. (Ed. Code, § 60640, subd. (e), and former subd. (j); Cal. Code Regs., tit. 5, § 852, subd. (b) & § 881, subd. (b).)
- Determination of the appropriate grade level test for each pupil in a special education program. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)
- Provision of appropriate testing adaptation or accommodations to pupils in special education programs. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)
- Administration of an additional test to pupils of limited English proficiency who are enrolled in grades 2 through 11 if the pupil was initially enrolled in any school district less than 12 months before the date that the English language STAR Program test was given. Only reimbursable to the extent such tests are available. (Ed. Code, § 60640, subd. (g); Cal. Code Regs., tit. 5, § 851, subd. (a).)[173]

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

[171] *Id.* at page 747.

[172] *Ibid.*

[173] Commission on State Mandates, STAR Statement of Decision. Additional authority for the language test is in California Code of Regulations, title 5, section 880, subdivision (a).

The Commission also finds that: (1) all state-budgeted funds for STAR should be used to offset all activities associated with the STAR program (but only for the CAT/6 exam, as provided for under the original Commission decision); and (2) school districts are not required to use Title I or other federal funds to offset the state-mandated provisions in the STAR Statement of Decision.