

## ITEM 8

### RECONSIDERATION OF PRIOR STATEMENT OF DECISION REVISED FINAL STAFF ANALYSIS

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)

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#### EXECUTIVE SUMMARY

Reconsideration of the Prior Statement of Decision on the STAR test claim was first heard at the May 26, 2005 hearing. The Commission on State Mandates (Commission) continued the hearing to allow additional evidence to be filed by the Department of Finance and California Department of Education as to whether the federal No Child Left Behind Act (NCLB)<sup>1</sup> is a federal mandate. After review of new documentation and comments filed by Finance and Education, staff issued a revised staff analysis. The interested parties and state agencies filed comments on the revised analysis that were also reviewed by staff. As a result, this Revised Final Staff Analysis substantially departs from the staff analysis before the Commission at the May 26, 2005 hearing.

**Background:** In Statutes 2004, chapter 216, section 34, and Statutes 2004, chapter 895, section 19, the Legislature directed the Commission on State Mandates (Commission) to reconsider its prior final decision and parameters and guidelines for the *Standardized Testing and Reporting (STAR)* test claim (97-TC-23). The 1997 STAR legislation requires annual testing of pupils in grades 2-11 in mathematics and language arts (currently the California Achievement Tests, Sixth Edition Survey, or CAT/6), and testing English-learner pupils (currently the Spanish Assessment of Basic Education, Second Edition, or SABE/2). Later amendments to the STAR program reduced administrations of the CAT/6 to grades 3 and 7,<sup>2</sup> and added other exams (the California Standards Tests and the California Alternate Performance Assessment). The only two exams over which the Commission has jurisdiction in this reconsideration, however, are the CAT/6 and the SABE/2 (because they were in the original test claim statute: Statutes 1997, chapter 828).

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<sup>1</sup> In some cases, No Child Left Behind Act of 2002 is referred to NCLBA. Reference herein is to NCLB.

<sup>2</sup> Education Code section 60640, subdivision (b). This section was amended to grades 3 and 8 by Statutes 2003, chapter 773, and to grades 3 and 7 by Statutes 2004, chapter 233.

On August 24, 2000, the Commission found that the STAR program imposes a reimbursable mandate on school districts, for the activities listed in the Statement of Decision. Parameters and guidelines, adopted in January 2002, specified the reimbursable activities.

**Initial comments:** The Department of Finance and the Legislative Analyst's Office argue that STAR is a federal mandate under the Improving America's Schools Act of 1994 (IASA), and its successor, the No Child Left Behind Act of 2002. They also assert that if the Commission finds otherwise, various state budget and federal funds (including Title I funds) should be considered offsets to the STAR program, or that offsetting activities should not be limited to those in the parameters and guidelines. The San Diego Unified School District argues that the STAR program is reimbursable, and that federal law does not require testing pupils with the SABE/2.

**May 2005 hearing:** At the Commission hearing on May 26, 2005, the California Department of Education, along with the Department of Finance and the Legislative Analyst's Office, argued that NCLB is a federal mandate, or that federal Title I and Title VI funds should offset the costs of the STAR program. Finance and the Legislative Analyst also argued that the Commission's decision should be retroactive so it would apply before the 2004 reconsideration statutes. At the hearing, the Departments of Education and Finance agreed to submit further evidence to support their assertion that NCLB is a federal mandate, and to specify the amount of federal funds the state receives for NCLB testing.

**New evidence:** Evidence was submitted in June 2005 by the California Department of Education and the Department of Finance. Education's evidence consisted of various documents to show that NCLB is a federal mandate. Finance's evidence also concerned NCLB, as well as including information regarding offsetting state and federal funds. Education submitted further information as to the amount of federal NCLB funds that may be used for state administration purposes.

**Revised analysis:** After examining the evidence, a revised staff analysis was issued on June 24, 2005. Staff found NCLB was a federal mandate based on substantial evidence that was submitted into the record. Staff also found, however, that the CAT/6 exam, a national norm-referenced test, is not required by NCLB because it is not aligned to state standards. Therefore, staff found that the CAT/6 is a reimbursable state mandate (this analysis retained the findings denying reimbursement for the language test, or SABE/2, and for accommodating disabled pupils because these are federal mandates).

**New comments:** On July 7 and 8, 2005, comments were submitted by the California Department of Education and Department of Finance, in addition to the San Diego Unified School District and Grant Joint Union School District. San Diego and Grant contend that NCLB is not a federal mandate, and that evidence submitted by Education is insufficient to find that it is. The Department of Education generally concurs with the revised staff analysis, but states that the findings on the CAT/6 have, "conceptual and technical difficulties because of the attempt to separate the STAR Program by examination and grade level." The Department of Finance argues that the Commission findings should be retroactive to the date of the original Commission decision, and that any offsets should also be retroactive. Finance also comments that designation of the STAR Program district and test site coordinators should be eliminated, or limited to the CAT/6 only.

**Findings:** This Revised Final Staff Analysis, like the prior revised analysis, finds that the CAT/6 is a reimbursable state mandate, since the CAT/6 is not required by NCLB. Staff makes no finding, however, as to whether NCLB constitutes a federal mandate because a finding on NCLB is unnecessary. Even if NCLB were a federal mandate, the CAT/6 is still required only by state law. This analysis substantially departs from the analysis before the Commission at the May 26, 2005 hearing.

Staff also finds that activities for disabled pupils are federal mandates under the federal Individuals with Disabilities Education Act (and that these activities are not a new program or higher level of service due to subsequent changes in law). Staff also finds that testing English-learner pupils (the SABE/2) is a federal mandate under the Equal Opportunities Education Act, as interpreted by federal case law. These findings are the same as in the analysis discussed on May 26, 2005. Other activities the Commission found reimbursable in the original August 2000 decision, but that are no longer required, staff finds are no longer reimbursable.

### **Conclusion**

Staff finds, effective July 1, 2004, that administering the CAT/6 exam in grades 3 and 7 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 those that are federally mandated, or no longer required, as listed in the conclusion at the end of this analysis (starting on p. SA-44).

Staff also finds, effective July 1, 2004, the following:

- All state funds appropriated for STAR must be used to offset all activities associated with administration of the CAT/6 exam; and that in any fiscal year in which school districts are legally required to, they must, “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them”<sup>3</sup> from appropriated state funds; and
- School districts are not required to use Title I funds to offset the activities in the STAR Statement of Decision (i.e., to administer the CAT/6); and
- All federal Title VI funds appropriated for STAR, in any fiscal year in which school districts are legally required to do so, must be used to offset all activities associated with administration of the CAT/6 exam, and that school districts must “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them”<sup>4</sup> from appropriated federal Title VI funds.

### **Recommendation**

Staff recommends that the Commission adopt this analysis to partially approve the original (August 2000) test claim decision.

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<sup>3</sup> Statutes 2004, chapter 208, Item 6110-113-0001, Schedule 3, Provision 8. Statutes 2005, chapter 38, Item 6110-113-0001, Schedule 2, Provision 8.

<sup>4</sup> Statutes 2004, chapter 208, Item 6110-113-0890, Schedule 2, Provision 11. Statutes 2005, chapter 38, Item 6110-113-0890, Schedules 4, 7 and 10, Provision 10.

## STAFF ANALYSIS

### Chronology

- 03/23/98 Test Claim filed by San Diego Unified School District (claimant)
- 08/24/00 Commission adopts Statement of Decision
- 08/31/00 Claimant submits proposed parameters and guidelines
- 01/24/02 Commission adopts STAR parameters and guidelines
- 10/24/02 Commission adopts statewide cost estimate
- 12/31/03 Legislative Analyst's Office (LAO) issues AB 3000 report, *New Mandates: Analysis of Measures Requiring Reimbursement*
- 08/11/04 Legislature enacts Senate Bill 1108, an urgency statute requiring the Commission to reconsider the STAR decision (effective 8/11/04)
- 09/29/04 Legislature enacts Assembly Bill 2855, a non-urgency statute requiring the Commission to reconsider the STAR decision (effective 1/1/05)
- 02/25/05 San Diego Unified School District submits comments on the reconsideration
- 03/04/05 DOF submits comments on the reconsideration
- 03/22/05 San Diego Unified School District submits a declaration in support of its comments
- 04/25/05 Commission issues draft staff analysis on the reconsideration
- 05/09/05 LAO submits comments on the draft staff analysis
- 05/09/05 San Diego Unified School Districts submits comments on the draft staff analysis
- 05/10/05 DOF submits comments on the draft staff analysis
- 05/16/05 Commission issues final staff analysis and Proposed Statement of Decision
- 05/26/05 Commission hears the reconsideration but postpones adopting the Statement of Decision to await further evidence from the California Department of Education and Department of Finance
- 05/27/05 Commission issues Notice of Request for Submission of Additional Evidence from the Department of Education and the Department of Finance and Revised Schedule
- 06/09/05 California Department of Education submits evidence and a declaration
- 06/09/05 Department of Finance submits further evidence
- 06/15/05 Commission issues Notice of Supplemental Request for Submission of Additional Evidence from the Department of Education and Revised Schedule
- 06/20/05 Department of Education submits a declaration regarding funds for state administration under NCLB
- 06/24/05 Commission issues a revised staff analysis

07/07/05 Grant Joint Union School District submits comments on the revised staff analysis  
07/07/05 California Department of Education submits comments on the revised staff analysis  
07/08/05 Department of Finance submits comments on the revised staff analysis  
07/08/05 San Diego Unified School District submits comments on the revised staff analysis  
07/15/05 Commission issues revised final staff analysis and Proposed 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<sup>5</sup> 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.<sup>6</sup>

## 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)).<sup>7</sup> Former section 60640,<sup>8</sup> the Pupil Testing

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<sup>5</sup> The only STAR statute on which Commission issued a Statement of Decision is Statutes 1997, chapter 828.

<sup>6</sup> In Assembly Bill 2855, section 19, the order of subdivisions (c) and (d) is reversed.

<sup>7</sup> 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

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 within the scope of 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 Individualized Education Plans<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

In 2000, the Legislature enacted changes to the STAR 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

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Program, but regulations were never adopted and the program was discontinued by Statutes 2000, chapter 576.

<sup>8</sup> All statutory references are to the Education Code unless otherwise indicated.

<sup>9</sup> 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)).

<sup>10</sup> See <[http://star.cde.ca.gov/star2004/aboutSTAR\\_programbg.asp](http://star.cde.ca.gov/star2004/aboutSTAR_programbg.asp)> as of February 15, 2005.

<sup>11</sup> *Ibid.*

elementary school and once in middle or junior high school (Ed. Code, § 60642.5). The Commission's original STAR Statement of Decision did not address this standards-based achievement test (currently known as the California Standards Tests).

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.<sup>12</sup> 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<sup>13</sup> is to determine pupil achievement of the California Academic Content Standards for each grade or course. Pupils' scores are compared to preset criteria to 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.<sup>14</sup>

In 2002, the SBE selected the California Achievement Tests, Sixth Edition Survey (hereafter the CAT/6 or CAT/6 exam)<sup>15</sup> 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.<sup>16</sup> Thus, the Commission's jurisdiction is limited to the CAT/6 exam, and the SABE/2 Spanish language examination.

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<sup>12</sup> It was extended to January 1, 2011 by Statutes 2004, chapter 233.

<sup>13</sup> 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](http://star.cde.ca.gov/star2004/aboutSTAR_gradesandsubjects.asp)> as of February 15, 2005.

<sup>14</sup> See <[http://star.cde.ca.gov/star2004/aboutSTAR\\_programbg.asp](http://star.cde.ca.gov/star2004/aboutSTAR_programbg.asp)> as of February 15, 2005.

<sup>15</sup> References to the CAT/6 in this analysis would include a successor national norm-referenced test adopted by the SBE.

<sup>16</sup> According to the adopted STAR parameters and guidelines (Exhibit A, p. 750), "Only the designated achievement and primary language tests enacted by Statutes of 1997, chapter 828 are reimbursable, pursuant to these parameters and guidelines." (See Exhibit A, p. 751, fn. 3).

In 2003, the Legislature reduced the administrations of the CAT/6 exam, starting in the 2004-05 school year, to only grades 3 and 8.<sup>17</sup> This provision was amended in 2004 to administer the CAT/6 only to grades 3 and 7.<sup>18</sup>

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).<sup>19</sup>

### 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 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.<sup>20</sup>

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

### Commission Parameters and Guidelines

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<sup>17</sup> Statutes 2003, chapter 773.

<sup>18</sup> Statutes 2004 chapter 233. See Education Code section 60640, subdivision (b).

<sup>19</sup> See <[http://star.cde.ca.gov/star2004/aboutSTAR\\_programbg.asp](http://star.cde.ca.gov/star2004/aboutSTAR_programbg.asp)> as of February 15, 2005.

<sup>20</sup> Commission on State Mandates, STAR Statement of Decision, pages 3-4 (Exhibit A, p. 383). Findings are based on Education Code sections 60607, 60615, 60630, 60640, 60641, 60643, and California Code of Regulations, title 5, sections 851-853, 855-860, 865, 867-869, 871, 873.



The Commission adopted parameters and guidelines (Ps&Gs) for the test claim statute in January 2002.<sup>21</sup> 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*)<sup>[22]</sup>

[¶]...[¶] [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).)

Reviewing the Individualized Education Program (IEP) of children with disabilities to determine if the IEP contains an express exemption from testing.<sup>[23]</sup> (Ed. Code, § 60640, subs. (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),<sup>24</sup> & 882, subd (c).)

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<sup>21</sup> Exhibit A, page 750.

<sup>22</sup> California Code of Regulations, title 5, sections 856, 869, and 871 were repealed effective December 16, 1999.

<sup>23</sup> 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.

<sup>24</sup> 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

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.)

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.)

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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 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.)

#### STAR Program Test Site Coordinator

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 raise issues related to federal law, warranting a summary of 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,<sup>25</sup> and science assessments are required starting in the 2007-2008 school year.<sup>26</sup> 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....”<sup>27</sup> 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 proficiency.”<sup>28</sup> The assessment system, like all the NCLB requirements, is a condition on grant funds.<sup>29</sup> The act’s “penalty” for noncompliance is withholding federal funds.<sup>30</sup>

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<sup>25</sup> 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)).

<sup>26</sup> Title 20 United States Code section 6311 (b)(3)(A); 34 Code of Federal Regulations part 200.2 (a) (2002).

<sup>27</sup> Title 20 United States Code section 6311 (b)(7).

<sup>28</sup> 34 Code of Federal Regulations part 200.2 (b)(2) (2002).

<sup>29</sup> Title 20 United States Code section 6311 (a)(1). 20 United States

<sup>30</sup> Title 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.

**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 ...<sup>31</sup>

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.”<sup>32</sup> Assistance is available to states<sup>33</sup> and local educational agencies<sup>34</sup> that meet specified criteria.<sup>35</sup> IDEA requires that disabled children be “included in general State and district-wide assessment programs, with appropriate accommodations, where necessary”<sup>36</sup> 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 services to be provided to the child.<sup>37</sup> The STAR statutes and regulations generally conform to IDEA’s statewide assessment, accommodations, and IEP requirements.<sup>38</sup>

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

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<sup>31</sup> Title 20 United States Code section 1400 (d).

<sup>32</sup> *Ibid.*

<sup>33</sup> Title 20 United States Code sections 1411 and 1412.

<sup>34</sup> Title 20 United States Code section 1413.

<sup>35</sup> 34 Code of Federal Regulations part 300.110 (1999).

<sup>36</sup> Title 20 United States Code section 1412 (a)(17); 34 Code of Federal Regulations part 300.138 (1999).

<sup>37</sup> Title 20 United States Code section 1414 (d).

<sup>38</sup> 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.

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.]<sup>39</sup>

In *Hayes v. Commission on State Mandates*, the court held that the Education of the Handicapped Act is a federal mandate.<sup>40</sup> *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.<sup>41</sup>

**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.<sup>42</sup> 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 Title 20 United States Code section 1706.<sup>43</sup> Federal courts have interpreted section 1703 (f) of the EEOA to require testing students’ English-language skills, as well as standardized testing.<sup>44</sup>

### 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.<sup>45</sup> According to DOF, the federal Title I

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<sup>39</sup> *Hayes v. Commission on State Mandates* (1992) 11 Cal. App. 4th 1564, 1587.

<sup>40</sup> *Id.* at page 1592.

<sup>41</sup> *Id.* at page 1594.

<sup>42</sup> *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989, 999, 1001.

<sup>43</sup> *Id.* at 999 and 1009.

<sup>44</sup> *Ibid.*; and *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503.

<sup>45</sup> DOF’s March 2005 comments do not include support by “documentary evidence ... authenticated by declarations under penalty of perjury ... .” (Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1)). Nor are there citations to line-item budget appropriations. DOF’s comments, however, are not relied on by staff, which reaches conclusions based on evidence in the record.

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.<sup>46</sup> 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 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 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

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<sup>46</sup> 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)).



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 May 2005 written comments disagree with the findings in the draft staff analysis that (1) STAR is not a federal mandate and imposes reimbursable state-mandated activities;<sup>47</sup> (2) Federal funds provided under NCLB should not be counted as offsetting revenues;<sup>48</sup> and (3) the Commission’s decision on this reconsideration should be effective July 1, 2004. DOF repeated these arguments at the May 26, 2005 STAR hearing.<sup>49</sup>

DOF submitted comments on June 9, 2005, concluding that Title I funds are provided for school districts to utilize for the STAR program, the central element of the state’s assessment and accountability system. According to DOF, without STAR, California would be out of compliance with NCLB and would jeopardize its receipt of federal Title I funds. DOF also argues that funds under Title VI of NCLB (that provides grants for state assessments and standards) are provided for the STAR program. DOF points to language in the 2004 State Budget Act (Stats. 2004, ch. 208), under the appropriation of Title VI funds to “local assistance,” that requires school districts to use the money “to reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them from these schedules.”<sup>50</sup>

DOF’s June 2005 comments also include amounts of state budgeted funds for STAR from 1997-2005. Further, DOF submitted information on how the U.S. Department of Education (USDE) had penalized Minnesota and Texas for not complying with provisions of NCLB.

In comments submitted in July 2005 on the revised staff analysis, DOF repeats its belief that the Legislature intended for the Commission’s reconsideration decision to be retroactive (“to apply to all district claims, regardless of timing”), as indicated by the fact that no funds were appropriated for STAR. As to Title VI offsets discussed below, DOF suggests that the offsets apply retroactively to all previously submitted claims. According to DOF, apportionment amounts from 1997 to 2005 must be considered as offsetting revenues. Finally, DOF disagrees that designation of a STAR Program district or test site coordinator should remain a reimbursable activity.

**Legislative Analyst’s Office:** The Legislative Analyst’s Office (LAO), in its publication *New Mandates: Analysis of Measures Requiring Reimbursement* (December 2003),<sup>51</sup> reviews 23

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<sup>47</sup> To clarify, the finding in the draft staff analysis was that there was insufficient evidence in the record to conclude NCLB or IASA are federal mandates.

<sup>48</sup> To clarify, the finding is that there is no requirement for using federal funds to offset STAR.

<sup>49</sup> Commission on State Mandates, Public Hearing, Transcript of Proceedings, May 26, 2005, pages 32-34.

<sup>50</sup> Statutes 2004, chapter 208, Item 6110-113-0890, Schedule 2, Provision 11. DOF states that Item 6110-113-0001 of the 2004 budget act, containing the General Fund local assistance appropriations, includes an identical provision that also applies to STAR (Stats. 2004, ch. 208, Item 6110-113-0001, Schedule 3, Provision 8).

<sup>51</sup> See <[http://www.lao.ca.gov/2003/state\\_mandates/state\\_mandates\\_1203.html](http://www.lao.ca.gov/2003/state_mandates/state_mandates_1203.html)> as of February 15, 2005.

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.<sup>52</sup>

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 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.<sup>53</sup>

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.

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<sup>52</sup> *Ibid.*

<sup>53</sup> 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)).

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.”<sup>54</sup>

**California Department of Education:** The California Department of Education (CDE), in testimony at the May 26, 2005 hearing, asserted that NCLB and its predecessors (IASA or the Elementary and Secondary Education Act (ESEA)) are federal mandates because CDE does not feel it has a choice in whether or not to meet the NCLB requirements. CDE testified that STAR has evolved from a system that was initially set up to meet the requirements of IASA or ESEA, which had less stringent requirements than NCLB. This means that additional activities and tests have been added. CDE states that it has evolved the STAR system to meet the minimum requirements of NCLB. According to CDE, it operates in an environment of compulsion and coercion from the federal government, as demonstrated by recent discussions between CDE and the USDE over a “fairly minor definitional issue related to categorizing schools as program-improvement schools under NCLB.” CDE testified that the USDE told the state, “If you don’t change this definition, you will lose, initially, 25 percent -- up to 25 percent of your administrative funds under NCLB, and you will be at risk of losing the entire federal grant.” CDE further testified that federal grants under NCLB total \$3 billion, or close to eight percent of total state educational funding, which in CDE’s opinion represents significant coercion.<sup>55</sup>

In follow-up correspondence dated June 9, 2005, CDE submits a declaration that NCLB imposes a federal mandate on California, that the USDE uses sanctions, fines, and penalties (or the threat thereof) to compel and coerce states into full compliance with the requirements of NCLB, including the testing requirements of California’s STAR program. CDE states that in order to receive the more than \$3 billion in federal funds under NCLB, California is required to implement a statewide accountability system, of which STAR is the primary component, that is effective in every district and that ensures all public elementary and secondary schools make adequate yearly progress in meeting academic goals as defined by NCLB. CDE states that noncompliance with NCLB leads to fiscal penalties imposed or threatened by the USDE, ranging from fines taken against state administrative funding to the full loss of NCLB grant funding. CDE includes correspondence from USDE to Minnesota and Texas regarding withholding of Title I, Part A state administrative funds (10% for MN, 4% for TX) for failure to implement aspects of NCLB. CDE also includes a report and letter from USDE regarding CDE’s implementation of various NCLB programs, that included a statement that USDE reserves its option to withhold funds for failure to comply. CDE further attaches correspondence from CDE to USDE requesting a waiver for testing English-learner pupil’s reading and writing skills in kindergarten and first grade, and USDE’s denial of the waiver request.

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<sup>54</sup> LAO’s comments do not include support by “documentary evidence ... authenticated by declarations under penalty of perjury ... .” (Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1)).

<sup>55</sup> Commission on State Mandates, Public Hearing, Transcript of Proceedings, May 26, 2005, pages 30-32.

CDE's June 9, 2005 filing also includes a letter from USDE to all Chief State School Officers, stating that if the state's system of standards and assessment is not approved, USDE can choose from any one or more of three remedies: withholding state funds pursuant to section 1111 (g)(2) of NCLB, a compliance agreement, and/or mandatory oversight status. In the same letter, USDE also states, "Further, if a State's standards and assessment system does not have *Full Approval* or *Full Approval with Recommendations* by July 1, 2006, we will place conditions on the receipt of fiscal year 2006 Title I funding. These condition will continue until *Full Approval* or *Full Approval with Recommendation* is attained."

As a result of a Commission request for further information, CDE submits the following in a declaration on June 20, 2005:

Of the \$3.012 billion in state level NCLB grants allocated to California for fiscal year 2004-05, \$109 million is allowable for State Administration purposes. These State Administration funds are allowed to ensure that California meets the requirements of NCLB and fully administers the NCLB programs funded by the remaining \$2.9 billion in the state's NCLB grants.

In comments submitted in July 2005 on the revised staff analysis, CDE generally concurs with the determination that NCLB imposes a federal mandate, but asks that clarifying information be included. CDE states that the conclusion in the revised staff analysis "holds both conceptual and technical difficulties" because it separates "the STAR Program by examination and grade level." CDE's accompanying declaration specifies, for the most part, activities for the CAT/6 exam that require no activities beyond what school districts already do for the rest of the STAR Program.

### **School District Positions**

**San Diego Unified School District:** San Diego Unified School District (SDUSD), the original claimant of 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 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*<sup>56</sup> 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

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<sup>56</sup> *Hayes v. Commission on State Mandates, supra*, 11 Cal. App. 4th 1564.

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, and in testimony at the May 26, 2005 Commission hearing, SDUSD disagrees with the analysis that EEOA is a federal mandate for testing English-learner pupils. These comments are addressed below.

In comments submitted in July 2005 on the revised staff analysis, SDUSD states that documents submitted by CDE are unsuccessful in proving whether NCLB constitutes a federal mandate based on the threat of certain and severe penalties. SDUSD argues that the documents show that only two states (of fifty) received nominal fines for noncompliance, and that CDE’s declaration “fails to identify specifically the severe and certain penalties directly related to the USDE’s recommendation and findings to the state of California.” SDUSD asserts that the fines on Minnesota and Texas are not severe and certain penalties, and that the fines fail to meet the criteria set by the courts of an intent to coerce. SDUSD also points out that CDE staff was complimented by USDE on efforts to implement NCLB, indicating the lack of the threat of severe and certain penalties. Based on these arguments, SDUSD concludes that staff erred in concluding NCLB is a federal mandate.

**Grant Joint Union High School District:** Grant Joint Union High School District (GJUHSD), in its July 7, 2005 rebuttal to the revised staff analysis, disputes the application of several of CDE’s documents. GJUHSD argues that the conclusion regarding implementation of NCLB is irrelevant to the first factor in *City of Sacramento* because the factor only addresses an intent to coerce, not implementation of the federal statute. GJUHSD goes on to argue that the portions of NCLB to which staff cites indicate no intent to coerce. GJUHSD refutes the CDE-submitted letter to the Minnesota Department of Education, arguing that because the penalty was based on failure to use academic assessments as the primary determinants of adequate yearly progress, it is impossible to determine, without further evidence, if the situation faced by Minnesota would be the same in California for failure to administer the STAR test. As to the CDE-submitted letter to Texas, GJUHSD also argues that the penalty on Texas is irrelevant without more evidence, and

urges that the documents to Texas and Minnesota not be considered by staff in the reconsideration. As to the report and letter from USDE regarding implementation of NCLB, GJUHSD urges citations to the record to justify the conclusions,<sup>57</sup> but argues that any information in the USDE letter and report are irrelevant anyway because CDE's response is not in the record. CDE's response is necessary, according to GJUHSD, because the focus is on a tangible, real penalty. GJUHSD contends that the USDE report, which indicated 27 findings of California's noncompliance with NCLB and that made recommendations, does not indicate any penalties were applied. GJUHSD argues that the state has been given ample opportunity to comply with NCLB and USDE has yet to threaten a single sanction or penalty. As to the CDE-submitted letter in which USDE denied the state a waiver of for testing English-learner pupils' reading and writing skills in kindergarten and first grade, GJUHSD asserts that the existence of a waiver process belies the existence of certain and severe penalties. GJUHSD also argues that simply having a penalty available does not make imposing the penalty certain and severe.

GJUHSD further comments on the January 15, 2005 letter from USDE to all Chief State School Officers, and that the USDE penalty for not assessing pupils amounts to \$109 million of funds for state administration. According to GJUHSD, there is no evidence in the record that supports that the financial penalty would be assessed over non-financial penalties, as California has yet to experience penalties. GJUHSD contends that California is currently not in compliance with the NCLB and has not been threatened with any sort of penalty from USDE, so a finding of a certain or severe penalty is not supported in the record.

As to the loss of state administrative funds, GJUHSD argues that the loss does not rise to the level of severe because at \$109 million, it amounts to only 3.6 percent of federal funds received under Title I, meaning that California would still receive 96.4 percent of its Title I funds, or \$2.9 billion. GJUHSD also asserts that placing conditions on receipt of federal NCLB funds is irrelevant as to the certainty and severity of the penalty. And GJUHSD states that the fact that the USDE letter states it "may" put conditions on Title I funds makes the conditions far from certain. As to the penalty on Minnesota, GJUHSD asserts that there is nothing in the record that the situation that applied in Minnesota applies in California, and that the penalty Minnesota received, 10 percent of its state administrative funds, would amount to only \$10.9 million in California. GJUHSD also assaults CDE's declaration and hearing testimony, asserting that it is irrelevant and does not go to the ultimate issue – whether there is a penalty for withdrawal or noncompliance. GJUHSD also argues that "other documents and testimony" upon which staff relies are not specified in the record.

As to the final *City of Sacramento* factor of other consequences for noncompliance, GJUHSD requests an affirmative statement as to whether other consequences exist.

As to the analysis of the *Hayes* decision, GJUHSD argues that the state has a true choice concerning the imposition of the STAR program on school districts. GJUHSD also criticizes the

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<sup>57</sup> The revised staff analysis noted in the USDE letter the following, "Moreover, ED reserves its option to take further administrative actions, including the withholding of funds." (Exhibit F, p. 1237). The context was CDE's alleged failure to identify a school district for improvement if the district failed to make adequate yearly progress for two consecutive years.

analysis for being incomplete because it only concerns the CAT/6 exam and not the remainder of the STAR program.

## Discussion

The courts have found that article XIII B, section 6 of the California Constitution<sup>58</sup> recognizes the state constitutional restrictions on the powers of local government to tax and spend.<sup>59</sup> “Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup>

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.<sup>63</sup> To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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<sup>58</sup> Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides:

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

<sup>59</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

<sup>60</sup> *County of San Diego v. State of California (County of San Diego)*(1997) 15 Cal.4th 68, 81.

<sup>61</sup> *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

<sup>62</sup> *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*).

<sup>63</sup> *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.)

legislation.<sup>64</sup> A “higher level of service” occurs when the new “requirements were intended to provide an enhanced service to the public.”<sup>65</sup>

Finally, the newly required activity or increased level of service must impose costs mandated by the state.<sup>66</sup>

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.<sup>67</sup> 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.”<sup>68</sup>

### **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.”<sup>69</sup> [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.<sup>70</sup> An administrative agency may not substitute its judgment for that of the

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<sup>64</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878; *Lucia Mar*, *supra*, 44 Cal.3d 830, 835.

<sup>65</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 878.

<sup>66</sup> *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.

<sup>67</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>68</sup> *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.

<sup>69</sup> In Assembly Bill 2855, section 19, the order of subdivisions (c) and (d) are reversed.

<sup>70</sup> *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 103-104.



Legislature. When an administrative agency acts in excess of the powers conferred upon it by statute or constitution, its action is void.<sup>71</sup>

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 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.<sup>72</sup> 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 addresses Statutes 1997, chapter 828 (consisting of the national norm reference test, or CAT/6 and the language test, or SABE/2). 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, staff finds that the Commission's jurisdiction is limited to Statutes 1997, chapter 828, the original test claim statute. In other words, the Commission's jurisdiction does not go beyond the national norm reference test, or CAT/6 and the language test, or SABE/2, effected by Statutes 1997, chapter 828.

Also, 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. And even though claimant did not plead Statutes 1995, chapter 975 in the test claim, claimant did plead section 60615. Therefore, staff finds that the Commission properly took jurisdiction over section 60615.

#### 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.<sup>73</sup>

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<sup>71</sup> *Ibid.*

<sup>72</sup> 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."

<sup>73</sup> Education Code sections 60608 and 60605 subdivision (f).

Therefore, staff finds that the Commission 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).<sup>74</sup>

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).

#### 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. 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.

Staff 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.<sup>75</sup> 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.

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

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<sup>74</sup> 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.

<sup>75</sup> *In re Thierry S.* (1977) 19 Cal. 3d 727, 745.

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."<sup>76</sup> Thus, LAO believes the Legislature intends that changes to the Commission's previous findings apply prospectively and retroactively. DOF's comments on the draft staff analysis and at the May 26, 2005 hearing echo this assertion.

Staff disagrees. For the reasons below, staff finds the Legislature intended that the Commission's decision on reconsideration 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."<sup>77</sup> 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.]<sup>78</sup>

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

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<sup>76</sup> Legislative Analyst's Office, comments submitted May 9, 2005 (Exhibit D).

<sup>77</sup> *McClung v. Employment Development Department* (2004) 34 Cal.4th 467, 475.

<sup>78</sup> *Ibid.*

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 changes to a variety of education-related statutes *in order to effectuate the changes included as part of the proposed 2004-05 Budget Act.*”<sup>79</sup> [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. Staff 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.

At the hearing on May 26, 2005, DOF inquired as to whether the fact that the Legislature and the Administration has never provided funding to implement the previous STAR mandate decision has any bearing on whether or not the reimbursement period should be applied retroactively.<sup>80</sup> LAO also stated that this lack of appropriation for STAR should indicate legislative intent.<sup>81</sup>

Lack of funding, however, is not an indication of legislative intent. SDUSD pointed out at the May 26, 2005 hearing that many mandates have not been funded, but this was not evidence that a reconsideration of them should apply retroactively. Moreover, another reconsideration statute, Statutes 2004, chapter 227, did indicate an effective date for the reconsideration. That statute, which directs the Commission to reconsider Board of Control decisions on regional housing mandates, states “[a]ny changes by the commission shall be deemed effective July 1, 2004.”<sup>82</sup> In contrast, the fact that no effective date was expressed in the reconsideration statutes for STAR means there is no legislative intent for the reconsideration to apply retroactively.<sup>83</sup> In addition, the California Supreme Court addressed the issue of whether the Legislature, by inaction, approved court decisions invalidating apportioning attorney fees for injured workers between the worker and the employer. In commenting on the irrelevance of legislative inaction (stating that it presented no obstacles to resolution of the dispute), the court declared that for purposes of determining legislative intent, “[L]egislative inaction is indeed a slim reed upon which to lean.”<sup>84</sup> Like the court, staff does not rely on legislative inaction, such as lack of appropriations in this case, as evidence of legislative intent.

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<sup>79</sup> Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Senate Bill 1108 (2003-2004 Reg. Sess.) as amended July 27, 2004, page 1.

<sup>80</sup> Commission on State Mandates, Public Hearing, Transcript of Proceedings, May 26, 2005, page 54.

<sup>81</sup> *Id.* at pages 65-66.

<sup>82</sup> Statutes 2004, chapter 227, Section 109.

<sup>83</sup> Commission on State Mandates, Public Hearing, Transcript of Proceedings, May 26, 2005, pages 67.

<sup>84</sup> *Quinn v. State of California* (1975) 15 Cal. 3d 162, 175.

Thus, absent evidence of legislative intent, staff 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 the STAR National Norm-Referenced Test federally mandated?**

The issue, raised by DOF and LAO, is whether IASA<sup>85</sup> 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.<sup>86</sup> Staff finds, for the reasons indicated below, that it is not relevant whether IASA or NCLB are federal mandates because even if they were found to be, the CAT/6, (or any national norm-referenced exam) is not required by NCLB. Therefore, finding that NCLB is a federal mandate is unnecessary because the national norm-referenced exam is required only under California law.

As noted above, the original test claim only analyzed the CAT/6 and SABE/2 exams in the STAR program (the SABE/2 is discussed later). As to the CAT/6, starting in the 2004-2005 school year, it is only administered in grades 3 and 7.<sup>87</sup> Although California uses other exams that are administered in grades 2-11 to comply with NCLB,<sup>88</sup> those tests were not part of the original Statement of Decision and therefore are not part of this reconsideration.

NCLB requires a test once during grades 3 through 5, 6 through 9, and 10 through 12, and expands testing starting in the 2005-2006 school year.<sup>89</sup> The 2005-2006 and future tests must "measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts."<sup>90</sup> NCLB also requires one test in grades 10-12.<sup>91</sup> Because the

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<sup>85</sup> This discussion on NCLB also applies to IASA because the statutory schemes are similar. Thus, further reference is primarily to NCLB.

<sup>86</sup> *Hayes v. Commission on State Mandates*, *supra*, 11 Cal. App. 4th 1564, 1593.

<sup>87</sup> Education Code section 60640, subdivision (b). Formerly, the CAT/6 was administered in grades 2-11, inclusive (see former Ed. Code, § 60640, subd. (b)), but it was amended to grades 3 and 8 by Statutes 2003, chapter 773, and to grades 3 and 7 by Statutes 2004, chapter 233.

<sup>88</sup> For example, the California Standards Tests (Ed. Code, §§ 60640, subd. (b) & 60642.5), and the California Alternate Performance Assessment.

<sup>89</sup> Title 20 United States Code section 6311 (b)(3)(C)(v)-(vii).

<sup>90</sup> Title 20 United States Code section 6311 (b)(3)(C)(v)-(vii), which states, "Such assessments shall – [¶]...[¶] (v)(I) except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during—(aa) grades 3 through 5; (bb) grades 6 through 9; and (cc) grades 10 through 12; (II) beginning not later than school year 2007-2008, measure the proficiency of all students in science and be administered not less than one time during – (aa) grades 3 through 5; (bb) grades 6 through 9; and (cc) grades 10 through 12; [¶]...[¶] (vii)

tests must be based on state academic content and student academic achievement standards,<sup>92</sup> the state uses the California Standards Tests to comply with NCLB.

In contrast, the CAT/6<sup>93</sup> is a national norm-referenced test.<sup>94</sup> The CAT/6 cannot be used to comply with NCLB because it is not aligned to state standards. Federal NCLB regulations allow (but do not require) states to use “criterion-referenced assessments” and “assessments that yield national norms” so long as they are augmented with items to measure the State’s academic content standards, and express results in terms of the standards.<sup>95</sup>

The NCLB and CAT/6 assessment requirements are compared in the chart below:

	2004-2005 school year	2005-2006 and beyond
NCLB requirement	Requires one test in each of grades 3-5, 6-9 and 10-12 (or 3 tests total) in mathematics, and reading or language arts, that <b>must be aligned to state standards</b>	Requires a test in each of grades 3-8, inclusive, and once in grades 10-12, in math and reading or language arts, <b>that must be aligned to state standards</b>  (Science test required starting in 2007-2008 once in each of grades 3-5, 6-9 and 10-12)
State CAT/6 test	Requires testing in grades 3 and 7, <b>not aligned to state standards</b> , in mathematics and reading/language arts.	Requires testing in grades 3 and 7, <b>not aligned to state standards</b> , in mathematics and reading/language arts.

Neither the CAT/6, nor any other national norm-referenced test, is required by NCLB or any federal law. Therefore, staff makes no finding as to whether NCLB or IASA are federal

beginning not later than school year 2005-2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, ...”

<sup>91</sup> *Ibid.*

<sup>92</sup> Title 20 United States Code section 6311 (b)(3)(C)(ii). “‘Content standards,’ means the specific academic knowledge, skills, and abilities that all public schools in this state are expected to teach and all pupils expected to learn in each of the core curriculum areas, at each grade level tested.” (Ed. Code, § 60603, subd. (a)(4)).

<sup>93</sup> The CAT/6 should not be confused with the State National Assessment of Educational Progress (NAEP), a test required under NCLB. There is no indication that the NAEP is related to the CAT/6 because state participation in the NAEP is required only biennially, and the NAEP is given to fourth and eighth graders. (34 C.F.R., § 200.11 (2003)).

<sup>94</sup> Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill 1485 (2003-2004 Reg. Sess.) as amended September 8, 2003, page 3.

<sup>95</sup> 34 Code of Federal Regulations, part 200.3 (a)(2) (2002).

mandates. Rather, staff finds that the CAT/6 is mandated by the state, and is therefore subject to article XIII B, section 6 of the California Constitution (the SABE/2 exam will be addressed below).

In its July 2005 comments, CDE states that the conclusion (that administering the CAT/6 exam in grades 3 and 7 imposes a reimbursable mandate) “holds both conceptual and technical difficulties because of the attempt to separate the STAR Program by examination and grade level.” CDE’s attached declaration addresses whether various activities for the CAT/6 impose additional activities beyond those necessary for the rest of the STAR program. CDE also opines that training requirements for administration of the CAT/6 would be minimal.

CDE’s comments are not relevant to whether the CAT/6 imposes a mandate, which is the primary issue in this analysis. Although the comments may be helpful in drafting the Ps&Gs (should the Commission adopt this analysis), they are not instructive to the issue at hand.

As to submitting a STAR report to the Superintendent of Public Instruction, CDE states that as of the 2004-2005 school year, the testing contractor fulfills this activity and not the school district. The law cited by CDE is Education Code section 60640, subdivision (j) and California Code of Regulations, Title 5, section 862. Staff notes that the plain language of Education Code section 60640, subdivision (j), states that this is a school district requirement, “As a condition of receiving an apportionment pursuant to subdivision (h), a school district shall report to the superintendent all of the following: ...” This requirement on school districts is also in California Code of Regulations, Title 5, section 862. Except for its declaration, CDE submitted no documentation to the contrary. Therefore, staff finds that based on the plain language of the statute and the regulation, this reporting is required of school districts. However, to the extent that school districts do not incur increased costs mandated by the state, reimbursement would not be required.

#### **B. Are STAR activities for disabled or special education pupils federally mandated?**

There are three activities required in the STAR Statement of Decision that are targeted toward special education pupils or pupils with disabilities.<sup>96</sup> 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 the Individuals with Disabilities Education Act (IDEA), or under NCLB.

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

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<sup>96</sup> Commission on State Mandates, STAR Statement of Decision (Exhibit A, p. 391).

California has a choice. Staff 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.”<sup>97</sup> IDEA also requires school districts to have IEPs in effect for pupils with disabilities.<sup>98</sup>

Education Code section 60640, subdivision (e) (and originally subd. (j)), and the corresponding regulations<sup>99</sup> (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.<sup>100</sup> Therefore, staff finds that section 60640, subdivision (e) and its corresponding regulations are not state mandates subject to article XIII B, section 6, because they implement a federal law or regulation.<sup>101</sup>

### **C. Is the STAR foreign-language test 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

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<sup>97</sup> Title 20 United States Code section 1412 (a)(17); 34 Code of Federal Regulations part 300.138 (2002).

<sup>98</sup> Title 20 United States Code section (d)(2)(A).

<sup>99</sup> 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).

<sup>100</sup> 34 Code of Federal Regulations part 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...”

<sup>101</sup> 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 state regulation was also amended). Since disabled pupils are now tested, 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, staff 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.



given. Only reimbursable to the extent such tests are available. (Ed. Code, § 60640, subd. (g); Cal. Code Regs., tit. 5, § 851, subd. (a).)<sup>102</sup>

The issue is whether this activity (currently the SABE/2 test in California) is federally mandated under the Equal Education Opportunities Act (EEOA), or under NCLB.

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.<sup>103</sup>

According to *Castaneda v. Pickard*,<sup>104</sup> a case cited by the California Department of Education as authority for some of its regulations,<sup>105</sup> the federal statutory scheme (EEOA) is grounded in constitutional principles of equal protection.<sup>106</sup>

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 Title 20 United States Code section 1706.<sup>107</sup>

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.<sup>108</sup> [Emphasis added.] *Id.* at page 1011.

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

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<sup>102</sup> Commission on State Mandates, STAR Statement of Decision (Exhibit A, p. 391). Additional authority for this activity is in California Code of Regulations, title 5, section 880, subdivision (a).

<sup>103</sup> Title 20 United States Code section 1703 (f), hereafter referred to as section 1703 (f).

<sup>104</sup> *Castaneda v. Pickard* (5th Cir. 1981) 648 F. 2d 989.

<sup>105</sup> For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

<sup>106</sup> *Castaneda v. Pickard, supra*, 648 F. 2d 989, 999 and 1001.

<sup>107</sup> *Id.* at page 999.

<sup>108</sup> *Id.* at page 1011.

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 remediation program can it be determined that such irremediable deficiencies are not being incurred.<sup>109</sup> [Emphasis added.]

In *Keyes v. School Dist. No. 1*,<sup>110</sup> another case cited by the California Department of Education in its regulations,<sup>111</sup> 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."<sup>112</sup>

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 staff's reliance on *Castaneda*, concluding that *Castaneda* provides no guidance on whether the EEOA is a federal mandate regarding STAR activities. Staff 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.<sup>113</sup> SDUSD also ignores other cases that support standardized testing in foreign languages,<sup>114</sup> 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

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<sup>109</sup> *Id.* at page 1014.

<sup>110</sup> *Keyes v. School Dist. No. 1* (D. Colo. 1983) 576 F. Supp. 1503

<sup>111</sup> For example, see "authority cited" for California Code of Regulations, title 5, sections 11302, 11304 and 11305.

<sup>112</sup> *Keyes v. School Dist. No. 1, supra*, 576 F. Supp. 1503, 1518.

<sup>113</sup> *Castaneda v. Pickard, supra*, 648 F. 2d 989, 1014.

<sup>114</sup> *Keyes v. School Dist. No. 1, supra*, 576 F. Supp. 1503, 1518.

satisfactory results?<sup>115</sup> 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 Title 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.

In testimony at the May 26, 2005 hearing, SDUSD asserts that no federal statute requires testing English learners, and reiterated its argument that the *Castaneda* case is not on point. SDUSD also introduced testimony on the activities it performs related to testing English-learner pupils. Staff responded that although the federal EEOA itself does not require testing English-learner pupils, the *Castaneda* case that interprets the EEOA does require testing these pupils, making the testing activity federally mandated.

Therefore, staff 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 implement a federal law or regulation.

#### **D. Are some STAR activities no longer state mandated?**

There are some activities in the STAR Statement of Decision that, although previously required, have been repealed since the original decision was adopted. These concern the school districts' contracts with the test publisher, which is now a state function. The activities in question are bulleted (as designated in the original decision) as follows:

- Contracting with a test publisher selected by the State Board of Education using an agreement approved by the State Board of Education. (Ed. Code, § 60643, subds. (a)(2) and (c); Cal. Code Regs., tit. 5, §§ 860, 873.) This activity is limited to completing the agreement approved by the State Board of Education. Modification of the approved agreement by school districts to include any additional materials or services pursuant to Education Code section 60643, subdivision (e)(12) is not reimbursable.

The statutory requirement for school districts to contract with a test publisher was repealed by Statutes 1999, chapter 735. The regulations that were the basis for this activity were repealed December 16, 1999.

- Payment of sales tax to the publisher. (Cal. Code Regs., tit. 5, § 856.)

The regulation that required this activity was repealed December 16, 1999.

- Completion of delivery schedule and order form. (Cal. Code Regs., tit. 5, § 874.)

The regulation that required this activity was repealed October 26, 1998.

- Provision to the test publisher of enrollment and test order data by grade level. (Cal. Code Regs., tit. 5, § 874.)

The regulation that required this activity was repealed October 26, 1998.

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<sup>115</sup> *Castaneda v. Pickard*, *supra*, 648 F. 2d 989, 1009-1010.

- Administration of the standard agreement pursuant to the State Department of Education’s regulations. (Cal. Code Regs., tit. 5, §§ 856, 869, subd. (b), and 871.)

The regulations that required this activity were repealed December 16, 1999.

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.<sup>116</sup>

Staff disagrees this omission is improper. 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).<sup>117</sup> The current statutes and regulations do not require the school district to print, ship or score tests, or to pay for doing so. Therefore, staff finds that this activity is not mandated by the state.

Therefore, as activities that are no longer mandated, staff finds that the activities listed above are not subject to article XIII B, section 6.

DOF, in its July 2005 comments on the revised staff analysis, states that it is unclear why the activities of designating STAR program district and test site coordinators were not struck out or amended to replace the “STAR program” with “CAT/6” (to which the remainder of this analysis applies). DOF asserts that these activities are required by NCLB to administer the STAR program and therefore should not be reimbursable.

Staff disagrees. Designating a “STAR Program District Coordinator” and “STAR Test Site Coordinator” is required of school districts under California’s regulations.<sup>118</sup> Thus, a reference to a CAT/6 coordinator would not make sense and, as explained above, the CAT/6 is not required by NCLB. Thus, the conclusion retains the STAR coordinator titles for those activities, which would only be reimbursable to the extent they apply to the CAT/6.

**E. Do the remaining STAR statutes and executive orders constitute 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 (see Exhibit A, pages 391-392) except for the following that were discussed above as being federal mandates (nos.1-4 below), or no longer required (nos. 5-9 below):

1. 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).)
2. 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).)
3. Provision of appropriate testing adaptation or accommodations to pupils in special education programs. (Cal. Code Regs., tit. 5, § 853, subd. (c) & § 882, subd. (c).)

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<sup>116</sup> See <[http://www.lao.ca.gov/2003/state\\_mandates/state\\_mandates\\_1203.html](http://www.lao.ca.gov/2003/state_mandates/state_mandates_1203.html)> as of February 15, 2005.

<sup>117</sup> California Code of Regulations, title 5, section 857, subdivision (c).

<sup>118</sup> California Code of Regulations, Title 5, sections 857 and 858.

4. 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).)<sup>119</sup>
5. Contracting with a test publisher selected by the State Board of Education using an agreement approved by the State Board of Education. (Ed. Code, § 60643, subds. (a)(2) and (c); Cal. Code Regs., tit. 5, §§ 860, 873.) This activity is limited to completing the agreement approved by the State Board of Education. Modification of the approved agreement by school districts to include any additional materials or services pursuant to Education Code section 60643, subdivision (e)(12) is not reimbursable.
6. Payment of sales tax to the publisher. (Cal. Code Regs., tit. 5, § 856.)
7. Completion of delivery schedule and order form. (Cal. Code Regs., tit. 5, § 874.)
8. Provision to the test publisher of enrollment and test order data by grade level. (Cal. Code Regs., tit. 5, § 874.)
9. Administration of the standard agreement pursuant to the State Department of Education's regulations. (Cal. Code Regs., tit. 5, §§ 856, 869, subd. (b), and 871.)

As noted above, the original Statement of Decision only included the SAT/9 (now the CAT/6) exam, and the language exam (the SABE/2, found to be federally mandated above). Therefore, the only exam remaining as a "program" in this analysis is the CAT/6. Since this exam is only a fraction of the STAR program, further reference will be to the CAT/6 rather than the STAR program.

In order for the CAT/6 exam to be subject to article XIII B, section 6 of the California Constitution, it 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.<sup>120</sup> Only one of these findings is necessary to trigger article XIII B, section 6.<sup>121</sup>

The CAT/6 constitutes educational testing as a means to measure pupil achievement or school or district accountability, or national pupil comparison. These activities are within the purview of public education, a program that carries out a governmental function of providing a service to the

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<sup>119</sup> Commission on State Mandates, STAR Statement of Decision (Exhibit A, p. 391). Additional authority for the language test is in California Code of Regulations, title 5, section 880, subdivision (a).

<sup>120</sup> *County of Los Angeles v. State of California*, supra, 43 Cal.3d 46, 56.

<sup>121</sup> *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

public.<sup>122</sup> Moreover, the CAT/6 exam imposes unique requirements on school districts that do not apply generally to all residents and entities of the state.

Therefore, the CAT/6 exam is a program that carries out the governmental function of educational testing (or more specifically, national norm-referenced 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, staff finds that the CAT/6 exam constitutes a program within the meaning of article XIII B, section 6.

**Issue 3: Does the CAT/6 exam 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 (which at the time consisted only of the SAT/9 test, precursor to the CAT/6, and the SABE/2 language test) 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, staff finds that the activities in the Statement of Decision (except for the activities that are federal mandates or no longer required, as discussed above) constitute a new program or higher level of service within the meaning of article XIII B, section 6.

**Issue 4: Does the CAT/6 exam 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.<sup>123</sup> 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

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<sup>122</sup> “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.

<sup>123</sup> *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

agency or school district requesting the legislative authority. A resolution from 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.]

**Offsetting state funds:** The first issue is whether, pursuant to section 17556, subdivision (e), appropriations of state funds for the STAR Program (of which the CAT/6 exam is the only remaining state-mandated component) precludes reimbursement.

DOF and LAO raise the issue of offsetting revenue for the STAR program. 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.”

The Commission’s 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.<sup>124</sup>

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.

In fact, the 2004 State Budget Act contains the following provision after a \$53.8 million appropriation of state funds for the STAR program (in schedule 3):

Funds provided in Schedules (3), (4), and (5) *shall first be used to offset any state-mandated reimbursable costs that otherwise may be claimed through the state mandates reimbursement process for the Standardized Testing and Reporting Program, the California English Language Development Test, and the California High School Exit Exam, respectively.* Local education agencies accepting funding from these schedules shall reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them from these schedules. [Emphasis added.]<sup>125</sup>

Similar language for the appropriation of state funds for STAR appears in the 2005 State Budget Act.<sup>126</sup>

Therefore, staff finds that state funds appropriated for administering the STAR exam must first be used to offset the mandated CAT/6 activities, for years in which the Legislature requires it. In addition, staff finds that offsets apply to all CAT/6 activities and is not limited to those listed above (from the Ps&Gs).

**Offsetting federal Title I funds:** DOF urges recognizing federal Title I funds as offsetting revenue, and repeats this assertion in comments on the draft staff analysis.

Staff 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.”<sup>127</sup>

[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.<sup>128</sup>

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<sup>124</sup> Exhibit A, page 750.

<sup>125</sup> Statutes 2004, chapter 208, Item 6110-113-0001, Schedule 3, Provision 8.

<sup>126</sup> Statutes 2005, chapter 38, Item 6110-113-0001, Schedule 2, Provision 8.

<sup>127</sup> Education Code section 35160.

<sup>128</sup> Education Code section 35160.1, subdivision (a).



[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. ...<sup>129</sup>  
[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).

LAO, in comments on the draft staff analysis, argues that the decision in *Kern High School District*<sup>130</sup> 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 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.<sup>131</sup>

LAO's assessment is incorrect because *Kern* is distinguishable from the STAR program. First, under *Kern* the costs appeared "rather modest,"<sup>132</sup> 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.<sup>133</sup> In this case, there is no expressed legislative intent or requirement that school districts use Title I funds on STAR.

In comments at the May 26, 2005 Commission hearing, LAO opined that the districts should be required to use federal funds for requirements that arise under federal law, but not for those that go beyond federal law. At the same hearing, DOF stated that Title I funds are contingent on the state complying with federal NCLB requirements, so that the federal funds, which are dedicated to assessments and cannot be used for other purposes, should be considered as offsets.<sup>134</sup>

Staff disagrees. If the state receives Title I funds earmarked for testing, that would be considered an offset, but there is no evidence in the record of the amount of funds or any legal requirements on the funds. If schools were required to use Title I funds for STAR, as opposed to other uses

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<sup>129</sup> Education Code section 35160.1, subdivision (b).

<sup>130</sup> *Kern High School District, supra*, 30 Cal.4th 727.

<sup>131</sup> *Id.* at pages 746-747.

<sup>132</sup> *Id.* at page 747.

<sup>133</sup> *Ibid.*

<sup>134</sup> Commission on State Mandates, Public Hearing, Transcript of Proceedings, May 26, 2005, page 59.

for Title I funds, there must be legislative direction as to the requirement. DOF stated that it would submit further evidence of federal assessment funds that are available for local use.<sup>135</sup>

In comments submitted June 9, 2005, DOF quotes the following language from NCLB: “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 ....”<sup>136</sup> DOF states that this requires states to establish a single statewide assessment and accountability system for all public school pupils, and requires each state accountability system to be based on academic standards and academic assessments, and requires each state to demonstrate what constitutes adequate yearly progress based on the academic assessments.<sup>137</sup> DOF also points to the section of NCLB that appropriates funds “For the purpose of carrying out part A of this subchapter.”<sup>138</sup> Part A contains the requirements for standards and assessments. DOF concludes that “Title I funds are clearly provided of school districts to utilize for the STAR program, which is the central element of the state’s assessment and accountability system used to satisfy the federal requirements under NCLB.”

Although staff agrees that Title I funds are used for STAR, Title I funds are used by school districts for other purposes also. For example, Title I is used for NCLB’s academic standards and accountability provisions,<sup>139</sup> for programs to build parental involvement,<sup>140</sup> and for programs to support ongoing training and professional development for teachers.<sup>141</sup> Again, staff can find no requirement for Title I funds to be spent in academic assessments any more than in any of these other activities for which Title I funds are authorized. Thus, staff finds that Title I funds are not required to be used to offset administration of the CAT/6 exam.

**Offsetting federal Title VI funds:** DOF’s June 2005 comments cite Title VI of NCLB, which states in part:

The Secretary shall make grants to States to enable the States – ... (1) to pay the costs of the development of the additional State assessments and standards ... (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].<sup>142</sup> [Emphasis added]

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<sup>135</sup> *Ibid.*

<sup>136</sup> Title 20 United States Code section 6311 (a)(1).

<sup>137</sup> Title 20 United States Code section 6311.

<sup>138</sup> Title 20 United States Code section 6302 (a).

<sup>139</sup> Title 20 United States Code section 6311.

<sup>140</sup> Title 20 United States Code section 6318.

<sup>141</sup> Title 20 United States Code section 6319 (h).

<sup>142</sup> Title 20 United States Code section 7301 (2).

This language is broad enough (as to “other activities” related to accountability) to encompass the CAT/6 administration and make it eligible for Title VI funding, even though NCLB does not require the CAT/6 exam.

DOF states that this Title VI language supports its assertion that school districts are provided federal Title VI funds for the STAR program. DOF also provides the following language from the 2004 State Budget Act that contains an \$8.5 million appropriation of federal Title VI funds for the STAR program (in schedule 2):

Funds provided in Schedules (2), (3), (5.5), and (7) shall *first be used to offset any state mandated reimbursable cost that otherwise may be claimed through the state mandates reimbursement process for the Standardized Testing and Reporting Program, the California High School Exit Exam, the California English Language Development Test, and the California Alternate Performance Assessment, respectively. Local education agencies accepting funding from these schedules shall reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them from these schedules.*<sup>143</sup> [Emphasis added.]

Similar language for the Title VI appropriation to STAR appears in the 2005 State Budget Act.<sup>144</sup>

Based on this language, staff finds that federal Title VI funds must be used as offsetting revenue for the CAT/6 exam for years in which the Legislature requires it.<sup>145</sup>

Therefore, staff finds that in fiscal years 2004-2005, and 2005-2006 (and any other fiscal year in which they are legally required to do so), school districts are required to “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them” from state and federal Title VI funding appropriated in the budget act.

DOF, in its July 2005 comments, argues that this conclusion should be retroactive to all previously submitted claims.

Staff disagrees, as there is nothing in the record to indicate legislative intent that federal Title VI funds or state funds are required to offset mandated activities for the STAR program from 1997 to 2003, as DOF urges. As indicated from the discussion above of the *McClung* case regarding whether the Commission’s decision should be retroactive, staff cannot retroactively apply budget act provisions without indication of legislative intent. As discussed above, lack of an appropriation (i.e., legislative inaction) is not evidence of this intent.<sup>146</sup> The Legislature would have to expressly intend for federal Title VI funds or state funds to be used for mandated STAR activities prior to July 1, 2004, especially since the annual nature of the budget act affords the regular opportunity to do so.

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<sup>143</sup> Statutes 2004, chapter 208, Item 6110-113-0890, Schedule 2, Provision 11.

<sup>144</sup> Statutes 2005, chapter 38, Item 6110-113-0890, Schedules 4, 7 and 10, Provision 10.

<sup>145</sup> Title 20 United States Code section 7301 (2) states that the Title VI grants are “to pay the costs of the development of additional State assessments and standards required by section 6311 (b) of this title ... and (2) ... to administer those assessments... .”

<sup>146</sup> *Quinn v. State of California, supra*, 15 Cal. 3d 162, 175.

However, because there is no information in the record as to the cost of administering the CAT/6 exam, staff makes no finding as to whether the Budget Act “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.*”<sup>147</sup> [Emphasis added.]

## CONCLUSION

Staff finds, effective July 1, 2004, that administering the CAT/6 exam in grades 3 and 7 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)<sup>148</sup> except for those that are federally-mandated (bullets 4-7) or no longer required (bullets 12-16). The changes to reimbursable activities from the Commission’s prior Statement of Decision are noted in ~~strikeout~~ and underline as follows:

1. Administration of the ~~STAR Program tests~~ CAT/6 (or a successor national norm-referenced test) to all pupils in grades ~~2 through 11, inclusive 3 and 7.~~ (Ed. Code, §§ 60640, subs. (b), (c), 60641, subd. (a); Cal. Code Regs., tit. 5, §§ 851, 852, subd. (b), 853, and 855.) Costs associated with teacher time to administer the test are not reimbursable.
2. Designation of a STAR Program district coordinator. (Cal. Code Regs., tit. 5, §§ 857-859, 865, 867, and 868.) This would only be reimbursable to the extent it applies to the CAT/6.
3. Designation of a STAR Program test site coordinator at each test site. (Cal. Code Regs., tit. 5, §§ 857-859, 865, 867, and 868.) This would only be reimbursable to the extent it applies to the CAT/6.
4. ~~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).) Costs associated with teacher time to administer the test are not reimbursable.~~
5. ~~Exemption from testing for pupils if the pupil’s individualized education program has an exemption provision. (Ed. Code, § 60640, subs. (e), (j); Cal. Code Regs., tit. 5, § 852, subd. (b).)~~
6. ~~Determination of the appropriate grade level test for each pupil in a special education program. (Cal. Code Regs., tit. 5, § 852, subd. (b).)~~
7. ~~Provision of appropriate testing adaptation or accommodations to pupils in special education programs. (Cal. Code Regs., tit. 5, § 852, subd. (b).)~~
8. Inclusion of ~~STAR Program~~ CAT/6 test results in each pupil’s record of accomplishment. (Ed. Code, §§ 60607, subd. (a), 60641, subd. (a).)

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<sup>147</sup> Government Code section 17556, subdivision (e).

<sup>148</sup> See Exhibit A, page 383.

9. Reporting of individual ~~STAR Program~~ CAT/6 (or successor national norm referenced test) test results in writing to each pupil's parent or guardian and to the pupil's school and teachers. (Ed. Code, § 60641, subds. (b) and (c); Cal. Code Regs., tit. 5, § 863.)<sup>149</sup>
10. Reporting of district-wide, school-level, and class-level CAT/6 test results to the school district's governing board or county office of education. (Ed. Code, § 60641, subd. (d);<sup>150</sup> Cal. Code Regs., tit. 5, § 864.)
11. Submission of a report on the ~~STAR Program~~ CAT/6 test to the Superintendent of Public Instruction. (Ed. Code, § 60640, subd. (j); Cal. Code Regs., tit. 5, § 862.)
- ~~12. Contracting with a test publisher selected by the State Board of Education using an agreement approved by the State Board of Education. (Ed. Code, § 60643, subds. (a)(2) and (c); Cal. Code Regs., tit. 5, §§ 860, 873.) This activity is limited to completing the agreement approved by the State Board of Education. Modification of the approved agreement by school districts to include any additional materials or services pursuant to Education Code section 60643, subdivision (e)(12) is not reimbursable.~~
- ~~13. Payment of sales tax to the publisher. (Cal. Code Regs., tit. 5, § 856.)~~
- ~~14. Completion of delivery schedule and order form. (Cal. Code Regs., tit. 5, § 874.)~~
- ~~15. Provision to the test publisher of enrollment and test order data by grade level. (Cal. Code Regs., tit. 5, § 874.)~~
- ~~16. Administration of the standard agreement pursuant to the State Department of Education's regulations. (Cal. Code Regs., tit. 5, §§ 856, 869, subd. (b), and 871.)~~
17. Exemption of pupils from the ~~STAR Program~~ tests CAT/6 test upon request of their parent or guardian. (Ed. Code, §§ 60615, 60640, subd. (j); Cal. Code Regs., tit. 5, § 852, subd. (a).)
18. Submission to the State 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~~ CAT/6 test. (Ed. Code, § 60630, subd. (b); Cal. Code Regs., tit. 5, § 861.)
19. Training and review of the ~~STAR Program~~ CAT/6 test requirements as outlined in the test claim legislation and regulations by school district staff.
20. Implementation of procedures relating the administration of the ~~STAR Program~~ CAT/6 test.

Staff also finds, effective July 1, 2004, the following:

- All state funds appropriated for STAR must be used to offset all activities associated with administration of the CAT/6 exam; and that in any fiscal year in which school districts are

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<sup>149</sup> Currently in Education Code section 60641, subdivision (a)(2).

<sup>150</sup> Currently in Education Code section 60641, subdivision (a)(3).

legally required to, they must, “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them”<sup>151</sup> from appropriated state funds; and

- School districts are not required to use Title I funds to offset the activities in the STAR Statement of Decision (i.e., to administer the CAT/6); and
- All federal Title VI funds appropriated for STAR, in any fiscal year in which school districts are legally required to do so, must be used to offset all activities associated with administration of the CAT/6 exam, and that school districts must “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them”<sup>152</sup> from appropriated federal Title VI funds.

### **Recommendation**

Staff recommends that the Commission adopt this analysis to partially approve the original (August 2000) test claim decision.

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<sup>151</sup> Statutes 2004, chapter 208, Item 6110-113-0001, Schedule 3, Provision 8. Statutes 2005, chapter 38, Item 6110-113-0001, Schedule 2, Provision 8.

<sup>152</sup> Statutes 2004, chapter 208, Item 6110-113-0890, Schedule 2, Provision 11. Statutes 2005, chapter 38, Item 6110-113-0890, Schedules 4, 7 and 10, Provision 10.