

**COMMISSION ON STATE MANDATES**

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September 13, 2012

Mr. Arthur Palkowitz  
Stutz Artiano Shinoff & Holtz  
2488 Historic Decatur Road, Suite 200  
San Diego, CA 92106

Ms. Candi Clark  
Castro Valley Unified School District  
4400 Alma Avenue  
Castro Valley, CA 94546

*And Interested Parties and Affected State Agencies (See Mailing List)*

Re: **Final Staff Analysis and Statement of Decision, and Notice of Hearing**  
*Instructional Materials Funding Requirements, 03-TC-07*  
Education Code Sections 60000 et al.  
Castro Valley Unified School District, Claimant

Dear Mr. Palkowitz and Ms. Clark:

The final staff analysis and proposed statement of decision for the above-named matter are enclosed.

**Hearing**

This matter is set for hearing on **Friday September 28, 2012**, at 9:30 a.m., in the State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01(c)(2) of the Commission's regulations.

**Special Accommodations**

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Heather Halsey".

Heather Halsey  
Executive Director

**ITEM 6**  
**TEST CLAIM**  
**FINAL STAFF ANALYSIS**  
**AND**  
**PROPOSED STATEMENT OF DECISION**

Education Code Sections 60000, 60002, 60045, 60048, 60119, 60200, 60242, 60242.5, 60248, 60252, 60421, 60422, 60423, 60424, 60501, 60510.5, 60521

Statutes 1976, Chapter 817; Statutes 1977, Chapter 36; Statutes 1979, Chapter 282; Statutes 1982, Chapter 1503; Statutes 1983, Chapter 498; Statutes 1985, Chapter 1440; Statutes 1985, Chapter 1470; Statutes 1985, Chapter 1546; Statutes 1985, Chapter 1597; Statutes 1986, Chapter 211; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 1181; Statutes 1991, Chapter 353; Statutes 1991, Chapter 529; Statutes 1991, Chapter 1028; Statutes 1993, Chapter 56; Statutes 1994, Chapter 927; Statutes 1995, Chapter 325; Statutes 1995, Chapter 413; Statutes 1995, Chapter 534; Statutes 1995, Chapter 764; Statutes 1996, Chapter 124; Statutes 1997, Chapter 251; Statutes 1999, Chapter 276; Statutes 1999, Chapter 646; Statutes 2000, Chapter 461; Statutes 2002, Chapter 802; and Statutes 2003, Chapter 4

California Code of Regulations, Title 5, Sections 9505, 9530, 9531, 9532 and 9535

Register 77, No. 39 (Sept. 23, 1977); Register 83, No 25 (June 17, 1983); Register 95, No. 3, (Dec. 30, 1994); Register 97, No. 31 (July 31, 1997); and Register 2003, No. 3 (Jan. 16, 2003)

*Standards for Evaluating Instructional Materials for Social Content* (2000 ed.)

*Instructional Materials Funding Requirements*  
03-TC-07

Castro Valley Unified School District, Claimant

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**EXECUTIVE SUMMARY**

Attached is the proposed statement of decision for this matter. This executive summary and the proposed statement of decision also function as the final staff analysis, as required by section 1183.07 of the Commission's regulations.

Staff has considered the comments filed by the Department of Finance (DOF) on the draft staff analysis. After reevaluation of the issues identified by DOF, staff recommends that the Commission deny this test claim.

**Background**

This test claim requests reimbursement for activities performed by K-12 school districts to review, select, order, and dispose of textbooks and instructional materials, as well as activities related to the categorical funding programs for the purchase of these materials. The test claim statutes, regulations, and alleged executive order were enacted between 1976 and 2003.

The State Board of Education (SBE) has the constitutional and statutory duty to adopt instructional materials for kindergarten and grades 1 through 8 (K-8).<sup>1</sup> The state's adoption

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<sup>1</sup> Article IX, section 7.5 of the California Constitution; Education Code section 60200.

process for these materials is complex and involves evaluation criteria, various expert panels, curriculum committees, a Curriculum Commission, advocates, and the general public. Generally, however, the SBE adopts at least five sets of basic instructional materials at each K-8 grade level in reading/language arts, mathematics, history-social science, science, visual/performing arts, foreign language, and health education. There are exceptions, however, if fewer than five sets of materials are submitted or if the SBE finds that fewer than five submittals meet the evaluation criteria. Instructional materials are adopted “not less than two times every six years” for the four core curriculum areas of reading/language arts, mathematics, history-social science, and science and “not less than two times every eight years” in other subjects.

Before adoption, the SBE is generally required to determine if the materials for grades K-8:

- Are consistent with criteria and standards of quality prescribed in the adopted curriculum framework;
- Are factually accurate and incorporate principles of instruction reflective of current and confirmed research;
- Do not contain materials, including illustrations, that provide unnecessary exposure to commercial brand name, product, or corporate or company logo. Instructional materials containing commercial brand names, products, or logos may only be adopted if the SBE determines that the brand names, products, or logos are necessary for an educational purpose, or is incidental to the general nature of an illustration; and
- Meet the content requirements established in Education Code sections 60040 et seq., and the social content requirements outlined in the SBE guidelines (entitled “*Standards for Evaluating Instructional Materials for Social Content, 2000 Edition*”).

Publishers of instructional materials must also meet cost, format, and delivery requirements in order to be considered for adoption.

After determining the submissions it will adopt, that SBE provides school districts with a menu of instructional programs for each subject area and grade level. Local school districts then use their own criteria to determine which of the approved materials offer features that best meet the needs of their K-8 school population. If a school district establishes to the satisfaction of the SBE that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning in the district, the state board shall authorize the school district to use state funding allowances for materials to purchase other materials in accordance with the standards and procedures established by the state board.

There are no state-adopted instructional materials for high school. The adoption of instructional materials for grades 9-12 is the responsibility of local school districts. Generally, the same content standards and publisher requirements imposed on state-adopted materials are also imposed on locally-adopted instructional materials.

In 1972, the state established the State Instructional Materials Fund (SIMF), a categorical block grant, as a means of annually funding the acquisition of instructional materials. In 1994, the Legislature enacted the Pupil Textbook and Instructional Materials Incentive program to provide supplemental funds to ensure that every pupil has adequate textbooks and instructional materials.

In 2002, the Instructional Materials Funding Realignment program (IMFRP) was enacted to consolidate existing instructional materials funding programs, including the SIMF, and their requirements into a single block grant for the costs of standards-aligned textbooks and instructional materials in the four core curriculum areas of English-language arts, mathematics, history-social science, and science. Remaining funds under the IMFRP can be used for other classes, in-service training regarding the adoption and purchase of textbooks and instructional materials, and classroom library materials.

Each fiscal year since 2002, between \$175 and \$419 million has been appropriated for school districts to purchase standards-aligned instructional materials. Between \$416 and \$419 million has been appropriated annually since fiscal year 2007-08 to purchase the materials.<sup>2</sup> In addition, for the costs of instructional materials incurred beginning in fiscal year 1998-1999, school districts receive fifty percent of an increase in lottery revenues allocated to the district based on an equal amount per unit of average daily attendance (ADA).<sup>3</sup> Additional funds for the purchase of instructional materials may be received from the school district's sale of obsolete textbooks and instructional materials.<sup>4</sup>

### **Procedural History**

The test claim was filed by the Castro Valley Unified School District on September 22, 2003. The California Department of Education (CDE) filed comments on November 3, 2003 and the Department of Finance (DOF) filed comments on February 13, 2004. Claimant filed rebuttal comments on December 5, 2003 and March 23, 2004. A draft staff analysis was issued on August 8, 2012. DOF filed comments on the draft staff analysis on August 31, 2012. No comments on the draft staff analysis have been filed by the claimant or CDE.

### **Positions of Parties and Interested Parties**

#### Claimant's Position

The claimant alleges that the test claim statutes, regulations, and alleged executive order impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 to review, select, order, and dispose instructional materials, as well activities related to funding under the state's categorical funding programs for instructional materials. The specific activities pled by claimant are in the analysis below.

#### California Department of Education's Position

CDE contends that because the categorical funding program (IMFRP) and other test claim statutes are voluntary, any requirements connected to them are ultimately discretionary and not reimbursable under article XIII B, section 6 of the California Constitution.

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<sup>2</sup> State Budget Acts for fiscal years 2007-2012, Item 6110-189-0001. (Stats. 2007, chs. 171 and 172; Stats. 2008, chs. 268 and 269; Stats. 2009, ch. 1 (4th Ex. Sess.); Stats. 2010, ch. 712; Stats. 2011, ch. 33.)

<sup>3</sup> Government Code section 8880.4(a)(2)(B), as added by Proposition 20, The Cardenas Textbook Act of 2000 (March 7, 2000 election).

<sup>4</sup> Education Code section 60521.

## Department of Finance’s Position

DOF states that between \$184 million and \$1.024 billion in annual funding has been appropriated between 1999-2000 and 2003-2004 for purchasing instructional materials, which it asserts “is more than sufficient to offset any marginal administrative costs.” DOF also states that districts are expected to use general purpose funds to supplement categorical funding. According to DOF, categorical funding programs are optional, so downstream requirements resulting from receipt of those funds are not mandated by the state.

In comments on the draft staff analysis, DOF agrees with the portion of the analysis that denies reimbursement, but disagrees with the portion of the analysis that found that Education Code sections 60045(b) and 60048(b) (Stats. 1999, ch. 276) constitute a reimbursable state-mandated program to review all instructional materials, except trade materials and literature, for grades 9 to 12, inclusive, to determine if the materials use proper grammar and spelling before adoption, and to review all instructional materials for grades 9 to 12, inclusive, to determine if they contain a commercial brand name, product, or corporate or company logo, before the materials are adopted. DOF argues that Education Code sections 60045(b) and 60048(b) do not impose any duties on school districts, but require publishers and manufacturers to demonstrate compliance. Any activity undertaken by a school district in accordance with these code sections is discretionary. Moreover, DOF argues that sufficient revenue has been appropriated to offset any costs incurred by a school district to review instructional materials pursuant to Education Code sections 60045(b) and 60048(b).

## **Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local agencies or school districts to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.

## **Claims**

The following chart summarizes the claims and issues raised by the claimant and staff’s recommendation.

<b><u>Claim</u></b>	<b><u>Description</u></b>	<b><u>Recommendation</u></b>
Legislative intent and policies and procedures (Ed Code, § 60000)	Section 60000 states legislative intent for “a need to establish broad minimum standards and general educational guidelines for the	<i>Denied.</i> The statement of legislative intent does not impose any state-mandated activities on school

	selection of instructional materials.”	districts.
SBE review of content and adoption of instructional materials for K-8 students (Ed. Code, § 60200)	This code section prohibits adopted instructional materials from providing unnecessary exposure to a commercial brand name, product, or corporate or company logo unless the SBE makes specified findings. It also allows the SBE to authorize districts to use non-adopted instructional materials if the district establishes to the SBE’s satisfaction that state-adopted materials do not promote the maximum efficiency of pupil learning in the district.	<u>Denied.</u> This code section imposes requirements on the SBE, but does not impose any state-mandated activities on local school districts.
School districts’ review and adoption of instructional materials for grades 9-12 (Ed. Code, §§ 60045 and 60048, and <i>Standards for Evaluation of Instructional Materials for Social Content</i> (2000 ed.))	These code sections require adopted instructional materials to be accurate, objective, and current, and to use proper grammar and spelling, and further require instructional materials to be legally and socially compliant, as specified, and prohibits adoption of materials that contain commercial brand names, products, or logos.  The Standards document provides guidance to the SBE when evaluating instructional materials for compliance with the social content statutes.	<u>Denied.</u> These statutes and the standards document do not impose a state-mandated new program or higher level of service on school districts. Publishers are required by law to ensure their materials are legally and socially compliant and are consistent with the requirements of Education Code sections 60040 et seq., and the <i>Standards for Evaluation of Instructional Materials for Social Content</i> . School districts have long been required to adopt only those materials that comply with these requirements. If a school district wishes to review the materials before adoption, it is authorized to so pursuant to Education Code section 60046.
Teacher and parent involvement when selecting instructional materials (Ed. Code, §60002)	This code section requires school districts to provide for substantial teacher and public involvement in the selection of instructional materials.	<u>Denied.</u> This requirement is not new. Therefore this code section does not impose a new program or higher level of service.
Ordering instructional materials directly from the publisher (Cal. Code Regs., tit. 5, former § 9530)	This regulation requires school districts to “purchase adopted instructional materials directly from publishers and manufacturers” and comply with specified requirements.	<u>Denied.</u> The activity of ordering instructional materials is not new and ordering them from the publisher does not impose a higher level of service. Therefore, this regulation does not impose a new program or higher level of service.
Requesting authorization to use non-adopted	This regulation authorizes school districts to request authorization	<u>Denied.</u> Because the activities required by this regulation are

<p>instructional reading materials for grades K-3 (Cal. Code Regs., tit. 5, § 9535)</p>	<p>from the SBE to purchase non-adopted instructional materials for the district's core reading program for K-3 students under specified circumstances. Certain requirements are imposed on a district seeking such authorization.</p>	<p>triggered by a district's underlying discretionary decision to seek authorization to purchase non-adopted materials, this regulation does not impose a state-mandated program.</p>
<p>Disposing of instructional materials (Ed. Code, §§ 60501, 60510.5, 60521)</p>	<p>These code sections authorize districts to review instructional materials to determine when they are obsolete, encourage the district to provide notice before disposing of instructional materials, and restrict the use of proceeds from the sale of instructional materials.</p>	<p><u>Denied.</u> These provisions do not impose state mandates because they do not require school districts to perform any activities.</p> <p>As to using the proceeds from the sale of instructional materials, this is a restriction on funds, but does not require a district activity.</p>
<p>Instructional Materials Funding Realignment Program (Ed. Code, §§ 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424; Cal. Code Regs., tit. 5, §§ 9505, 9531, 9532)</p>	<p>These statutes and regulations govern the state's categorical funding program for the purchase of textbooks and instructional materials. School districts must comply with several requirements, including holding an annual hearing to determine if sufficient textbooks and instructional materials have been provided to students, in order to receive funding.</p>	<p><u>Denied.</u> Because these requirements are triggered by a district's discretionary decision to take part in the IMFRP, these statutes and regulations do not impose a state-mandated program on school districts.</p>
<p>Pupil Textbook and Instructional Materials Incentive Account (Ed. Code, § 60252)</p>	<p>This program provided supplemental funding to school districts for textbooks and instructional materials, and remained operative until January 1, 2003. The money in the account was allocated to school districts that complied with the requirements to provide assurance to the Superintendent of Public Instruction (SPI) that the district has held an annual public hearing to determine whether students have sufficient textbooks, and that ensure the money will be used for the public hearing and to supplement the purchase of textbooks or instructional materials.</p>	<p><u>Denied.</u> This code section does not impose a state-mandated program because its requirements are triggered by a district's discretionary decision to receive funds from the Pupil Textbook and Instructional Materials Incentive Account.</p>

## Staff Analysis

### I. Do the test claim statutes, regulations, and alleged executive order impose a state-mandated new program or higher level of service?

#### A. School district review, selection, ordering, and disposal of instructional materials

##### 1. Legislative Intent and Developing Policies and Procedures (Ed. Code, § 60000)

Education Code section 60000 provides a statement of legislative intent recognizing a need to establish broad minimum standards and general educational guidelines for the selection of instructional materials and that local school districts need to make specific choices about the instructional materials they select for their students. The claimant alleges that this statute requires school districts to establish broad minimum standards and general educational guidelines for the selection of instructional materials.

Staff finds that Education Code section 60000 does not impose any requirements on school districts and has been in statute since 1972. Thus, section 60000 does not constitute a state-mandated new program or higher level of service.

##### 2. State Board of Education (SBE) Review of Content and Adoption of Instructional Materials for Grades K-8 (Ed. Code, § 60200)

The California Constitution requires the SBE to adopt instructional materials for K-8 students. Education Code section 60200 establishes criteria that the SBE must use when adopting the materials. Subdivision (c) requires the SBE to determine that the use of commercial brand names, products, corporate or company logos in the materials is appropriate prior to adoption. If a school district board establishes to the satisfaction of the SBE that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning, then the SBE is required by subdivision (g) to authorize the school district to use its instructional materials allowances to purchase non-adopted materials.

Staff finds that requirements of Education Code section 60200 are imposed on the SBE and that no requirements are imposed on school districts. Thus, section 60200 does not mandate a new program or higher level of service.

##### 3. School Districts' Adoption of Instructional Materials for Grades 9-12 (Ed. Code, §§ 60045, 60048; *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.))

Existing law requires school districts to adopt instructional materials for the high schools under their control. The law further requires that only those materials that comply with the criteria in Education Code sections 60040, et seq., may be adopted by the district.

Staff finds that Education Code sections 60045 and 60048, as added or amended by Statutes 1999, chapter 276, do not impose a state-mandated new program or higher level of service.

Education Code section 60045(a), which requires adopted instructional materials to be accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels, does not impose a new program or higher level of service. Since 1972, adopted materials had to comply with these requirements. Education Code section 60045(b), which requires adopted instructional materials to use proper grammar and spelling, is a requirement



imposed on publishers and manufacturers, but does not impose a state-mandated duty on school districts. Education Code section 60060 clarifies that “every publisher or manufacturer of instructional materials offered for adoption or sale in California shall comply with all of the requirements and provisions of this part,” which includes Education Code section 60045. Furthermore, Education Code section 60400 has long required school districts to adopt instructional materials and textbooks, and states that “only instruction materials of those publishers who comply with the requirements of Article 3 (commencing with Section 60040) ... may be adopted by the district board.” If a district governing board wants to review the materials to ensure compliance, it has the authority to do so pursuant to Education Code section 60046. That section authorizes any governing board to conduct an investigation of compliance of any instructional materials which it adopts with the requirements of the Education Code.

Education Code section 60048(a) requires adopting instructional materials that are legally and socially compliant, as specified. This provision has been required since at least 1972 and thus is not a new program or higher level of service. Education Code section 60048(b) prohibits the adoption of instructional materials that contain a commercial brand name, product, or corporate or company logo unless the governing board makes a specified finding. Staff finds that Education Code section 60048 does not impose a state-mandated new program or higher level of service on school districts. Publishers are required by section 60060 to comply with provisions of section 60048 to ensure that their materials, including illustrations that provide any exposure to a commercial brand name, product, or corporate or company logo, are legally and socially compliant and are consistent with guidelines or frameworks adopted by the SBE. Education Code section 60400 has long required school districts to adopt instructional materials and textbooks, and states that “only instruction materials of those publishers who comply with the requirements of Article 3 (commencing with Section 60040) ... may be adopted by the district board.” Section 60048 is in Article 3. Moreover, the plain language of section 60048 does not impose any new mandated duties on school districts; it simply prohibits the adoption of materials offered by publishers that do not comply with the guidelines prescribed by SBE. If a school district determines that the use of a commercial brand name, product, or corporate or company logo in the instructional materials it is considering is appropriate, pursuant to the standards identified, then the district is authorized to adopt those materials. That decision, however, is a decision left to the school district and is not mandated by the state.

Staff further finds that the SBE publication, entitled *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.), does not impose any mandated activities on school districts. The document itself states that it is “exemplary” and “encourages” districts to comply with its provisions. The mandatory provisions in the document pertain to the SBE’s review of materials for K-8 pupils, but are not expressly binding on school districts.

#### 4. Teacher and Parent Involvement when Selecting Instructional Materials (Ed. Code, § 60002)

School district governing boards are required by Education Code section 60002 to “provide for substantial teacher involvement in the selection of instructional materials” and are required to “promote the involvement of parents and other members of the community in the selection of instructional materials.”

In 1972, former Education Code section 9462 required district boards to “provide for substantial teacher involvement and shall promote the involvement of parents and other members of the community in selecting instructional materials.” This section was renumbered to section 60262 in 1976, and was the law at the time of the 1995 test claim statute, which repealed and replaced it with the current version of section 60002.

Staff finds that section 60002 does not impose a new program or higher level of service.

5. Ordering Instructional Materials Directly from the Publisher (Former Cal. Code Regs., tit. 5, § 9530)

This regulation (repealed and replaced in 2008) governed the ordering of instructional materials. As amended in 1995, the regulation required the district to order materials directly from the publisher, rather than ordering them through CDE. Staff finds that the activity of ordering instructional materials is not new and ordering directly from the publisher, rather than from CDE, does not impose a higher level of service. The claimant also seeks reimbursement to notify and make demands on publishers when orders are not correctly provided. These activities, however, are not mandated by the regulation. The regulation, instead, imposes requirements on publishers and manufacturers, and does not require school districts to perform any activities.

Staff finds that former section 9530 of the title 5 regulations does not mandate a new program or higher level of service.

6. Requesting Authorization to Use Non-Adopted Instructional Reading Materials for Grades K-3 (Cal. Code Regs., tit. 5, § 9535)

Section 9535 of the regulations authorizes school districts to request authorization from the SBE to purchase non-adopted instructional materials for the district’s core reading program in grades K-3 if the school district believes that none of the core reading materials adopted by the SBE promotes the maximum efficiency of pupil learning. If the district decides to seek authorization to purchase non-adopted reading materials for these grades, the district is required to perform specified activities.

Staff finds that section 9535 of the regulations does not impose a state-mandated program on school districts. School districts are not legally compelled by the state to purchase non-adopted reading materials, and there is no evidence in the record that the claimant, or any other school district, has been practically compelled by state law to comply with section 9535.

7. Disposing of Instructional Materials (Ed. Code, §§ 60501, 60510.5, 60521)

Education Code section 60501 authorizes a school district to review instructional materials to determine when those materials are obsolete pursuant to rules and procedures districts had to adopt under prior law. If a district disposes of obsolete instructional materials, section 60510.5 encourages the district to notify and permit members of the public to address the local district governing board. Education Code section 60521 was amended by the 1995 test claim statute to restrict the use of funds received by a district from the sale of instructional materials so the funds could only be used to purchase instructional materials.

Because review and disposal of instructional materials is discretionary, and the restriction on the use of the funds from such disposal does not impose an activity, staff finds that these statutes do not impose any state-mandated activities on school districts.

## **B. Categorical funding programs for the purchase of textbooks and instructional materials**

The claimant has pled the statutes and regulations that implement the State Instructional Materials Fund (SIMF), the State Instructional Materials Fund Incentive Program that provided supplemental funding under the SIMF account, and the Instructional Materials Funding Realignment Program (IMFRP), as they were enacted from 1982 through 2002. These statutes and regulations provide categorical funding for the purchase of textbooks and other instructional materials for K-12 pupils.

The SIMF was the first program adopted by the Legislature in 1972 to help fund the purchase of textbooks and instructional materials, and its statutes have been amended many times. In 2002, the Legislature enacted the IMFRP, which, for purposes of funding, took effect at the beginning of the 2002-2003 fiscal year.<sup>5</sup> The IMFRP was part of the Governor's proposal to consolidate the categorical funds and the requirements from the SIMF program into one categorical program.

Since the period of reimbursement for this claim begins in fiscal year 2002-2003, the analysis of the activities required by the IMFRP in the period of reimbursement is provided below. In addition, the State Instructional Materials Fund Incentive Account was in effect until it was made inoperative on January 1, 2003 (six months after the start of the period of reimbursement for this claim) and, thus, that program is analyzed below for that limited time period.

### 1. Instructional Materials Funding Realignment Program<sup>6</sup>

In 2002, the Legislature enacted the IMFRP (Ed. Code, §§ 60420-60424) to provide a source of funding for the purchase of standards-aligned materials in the core subject areas of reading-language arts, mathematics, history-social science, and science.

The IMFRP requires CDE to apportion funds appropriated for purposes of the chapter to school districts on the basis of an equal amount per pupil enrolled in grades K-12 in the prior year. Enrollment is certified by the Superintendent of Public Instruction (SPI) and is based on the data reported by the California Basic Education Data System (CBEDS) count. Schools in their first year of operation and those that have expanded grade levels are eligible for the funding based on enrollment estimates provided by the school district to CDE, "as a condition of receipt of funding."

The Legislature directs the Controller to transfer from the General Fund to the State Instructional Materials Fund for instructional materials for kindergarten and grades 1 to 8, and for grades 9 to 12, the amount to be allocated under the IMFRP. Education Code section 60248 restricts the use of the funding apportioned for instructional materials for grades 9 to 12 "solely for the purchase of instructional materials for pupils in grades 9 to 12, inclusive."

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<sup>5</sup> Education Code section 60424 (Stats. 2002, ch. 802).

<sup>6</sup> Education Code sections 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424 (Stats. 1982, ch. 1503; Stats. 1983, ch. 498; Stats. 1985, chs. 1440, 1470, 1546; Stats. 1987, ch. 1452; Stats. 1999, ch. 646; Stats. 2002, ch. 802); California Code of Regulations, title 5, sections 9505, 9531, and 9532.

School districts must meet the IMFRP requirements “in order to continue to receive IMFRP funding.”<sup>7</sup> Education Code section 60422(a) and (b) lay out the requirements of the program. School districts must (1) comply with Education Code section 60119, and (2) certify that IMFRP funds have been used by the district to provide standards-aligned instructional materials in the core curriculum areas of reading/language arts, mathematics, science, and history-social sciences for all students. School districts may spend any remaining funds from the program for other approved purposes outlined in Education Code sections 60242 and pursuant to 60242.5.

Pursuant to Education Code section 60119, in order to receive instructional materials funding from any state source, school districts are required to hold an annual public hearing and adopt a resolution stating whether each pupil in the district has sufficient textbooks or instructional materials in years when the SPI determines that the base revenue limit for each school district will increase by at least one percent per unit of ADA from the prior fiscal year. Section 60119 requires the following:

- Hold an annual public hearing or hearings at which the governing board shall encourage participation by parents, teachers, members of the community interested in the affairs of the school district, and bargaining unit leaders, and shall make a determination, through a resolution, as to whether each pupil in each school in the district has, or will have prior to the end of that fiscal year, sufficient textbooks or instructional materials, or both, in each subject that are consistent with the content and cycles of the curriculum framework adopted by the state board.
- Notice of the hearing must be provided ten days before the hearing. The notice shall contain the time, place, and purpose of the hearing and shall be posted in three public places in the school district.
- If the governing board determines that there are insufficient textbooks or instructional materials, or both, the governing board shall (1) provide information to classroom teachers and to the public setting forth the reasons that each pupil does not have sufficient textbooks or instructional materials, or both, and (2) take any action, except an action that would require reimbursement by the Commission on State Mandates, to ensure that each pupil has sufficient textbooks or instructional materials, or both, within a two-year period from the date of the determination.

School districts may use any funds available for textbooks and instructional materials to ensure that each pupil has sufficient textbooks or instructional materials within a two-year period from the date the governing board determines there are insufficient materials. Funding sources include categorical programs appropriated in the budget, funds in excess of the amount needed during the prior fiscal year to purchase textbooks or instructional materials, and any other funds available to the school district for textbooks and instructional materials.

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<sup>7</sup> CDE, “Instructional Materials FAQ, Instructional Materials Funding Realignment Program (IMFRP) and Williams Case FAQ and Answers,” as of July 18, 2012.

Education Code section 60242(a) specifies the priority use of IMFRP funds. The first priority is the purchase of standards-aligned textbooks or basic instructional materials in reading/language arts, mathematics, history-social science, and science. If the district can certify that every pupil will be provided with these materials in the four core curriculum areas with the IMFRP funds, as required by section 60422, then the district may use the remaining funds “for the visual and performing arts, foreign language, health, or other curricular area if those materials are adopted by the state board pursuant to section 60200 for kindergarten and grades 1 to 8, inclusive, or by the governing board pursuant to section 60400 for grades 9 to 12, inclusive.” If funds still remain, the school district may use the funds as follows:

- To purchase, at the discretion of the district, supplementary instructional materials and technology-based materials;
- To purchase tests;
- To bind basic textbooks;
- To fund in-service training related to instructional materials; and
- To purchase classroom library materials for kindergarten and grades 1 to 4.

If a school district uses the funds to purchase in-service training related to instructional materials, section 9505 of CDE regulations restricts the use of the money by stating the following: “No cash allotment authorized by Education Code Section 60242(b) for purchase of in-service training shall be expended for salaries or for travel or for per diem expenses of district employees during or attendant to participation in such in-service training.”

If a school district uses the funds to purchase classroom library materials, it is required to comply with the following requirements in section 60242(d):

(d) (1) A school district that purchases classroom library materials, shall, *as a condition of receiving funding under this article*, develop a districtwide classroom library plan for kindergarten and grades 1 to 4, inclusive, and shall receive certification of the plan from the governing board of the school district. A school district shall include in the plan a means of preventing loss, damage, or destruction of the materials.

(2) In developing the plan required by paragraph (1), a school district is encouraged to consult with school library media teachers and primary grade teachers and to consider selections included in the list of recommended books established pursuant to Section 19336. If a school library media teacher is not employed by the school district, the district is encouraged to consult with a school library media teacher employed by the local county office of education in developing the plan. A charter school may apply for funding on its own behalf or through its chartering entity. Notwithstanding Section 47610, a charter school applying on its own behalf is required to develop and certify approval of a classroom library plan.

Education Code section 60242.5 requires school districts to deposit allowances received from the IMFRP in a separate account. The allowances may only be used for the purchase of the instructional materials outlined in section 60242. Section 60242.5 further requires the school

district superintendent to provide written assurance that all purchases of instructional materials made with IMFRP funds conform to law. The SPI may withhold the funding allowance for any district that fails to file a written assurance. Section 60242 states the following:

All purchases of instructional materials made with funds from this account shall conform to law and the applicable rules and regulations adopted by the state board, *and the district superintendent shall provide written assurance of conformance to the Superintendent of Public Instruction.* The Superintendent of Public Instruction may withhold the allowance established pursuant to Section 60242 for any district which has failed to file a written assurance for the prior fiscal year. The Superintendent of Public Instruction may restore the amount withheld once the district provides the written assurance.

These requirements are subject to the Controller’s audit and review, which may be appealed to the Education Audit Appeals Panel.<sup>8</sup> Substantial “compliance with all legal requirements is a condition to the state’s obligation to make apportionments” of these funds.<sup>9</sup>

The claimant seeks reimbursement for the activities described above. Pursuant to the California Supreme Court’s decision in *Kern High School Dist.*, staff finds that these activities are not mandated by the state, but are required as a condition of receiving funds.<sup>10</sup>

In 2003, the California Supreme Court decided *Kern High School Dist.* and considered the meaning of the term “state mandate” as it appears in article XIII B, section 6 of the California Constitution. In *Kern High School Dist.*, the court reviewed and affirmed a prior court holding determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant’s participation in the underlying program is voluntary or legally compelled.

Here, school districts are not legally compelled by the state to comply with the requirements of the IMFRP. Rather, school districts make a local decision to perform the activities in order to receive funding. A local decision requiring a school district to incur costs does not constitute a state mandate.<sup>11</sup> The plain language of Education Code section 60421 states that the requirements are imposed as a condition of receipt of funding. Section 60422 authorizes the use of the funds, which the district “may use” to purchase instructional materials in the core curriculum subjects and, any remaining funds may be used for in-service training on instructional materials and classroom library materials. Education Code section 60119 also states that “in order to be eligible to receive funds,” the governing board of a school district must comply with the textbook sufficiency hearing. Audits are performed on a district’s use of the funding and compliance with the requirements. Substantial compliance with all legal requirements is “a condition” to the state’s obligation to make apportionments of the funds. Moreover, CDE

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<sup>8</sup> Education Code sections 14502.1, 41020, 41344.1; California Code of Regulations, Title 5, sections 19828 et seq. (dealing with instructional materials).

<sup>9</sup> Education Code section 41344.1(c).

<sup>10</sup> *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727.

<sup>11</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 880.

interprets the IMFRP as imposing requirements “in order to continue to receive IMFRP funding.” The construction given to a statute by the administrative officials charged with its enforcement or implementation is entitled to great weight.<sup>12</sup>

Moreover, there is no evidence that school districts are practically compelled by the state to comply with these funding requirements. The *Kern High School Dist.* court did not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds. However, to make such a finding, evidence in the record is required that shows that a school district that elects to discontinue participation in the educational funding program will face “certain and severe” penalties such as “double ... taxation” or other “draconian” consequences.

Here, if a school district decides not to participate in the IMFRP, or elects to discontinue participation in the program, there is no evidence in the record that the district will face “certain and severe penalties” such as “double taxation” or other “draconian measures.” It simply loses its right to continue to receive funding to assist the school district in paying for textbook and instructional material costs.

The claimant argues that compliance with the IMFRP is required. The claimant notes that a pupil’s constitutional right to an equal educational opportunity may be impaired if every pupil does not have access to textbooks or instructional materials in each subject area and that the compliance with the IMFRP is required in order to carry out the preexisting constitutional and statutory requirement to provide students with textbooks or instructional materials at no cost to the student. There is no evidence in the record, however, to support a finding that a pupil’s constitutional right to education is impaired if a school district does not comply with the IMFRP and receive that additional funding. School districts also receive revenue limit apportionments based on ADA that can be used to purchase textbooks and instructional materials. Lottery funds and proceeds from the sale of textbooks and materials are also available for the purchase of textbooks and instructional materials. There is no evidence in the record these existing sources of funding fail to provide sufficient funds to purchase textbooks and instructional materials, or that participation in the IMFRP is the *only* reasonable means of carrying out the core mandatory function of providing sufficient textbooks and instructional materials to each pupil.<sup>13</sup> No evidence has been filed by the claimants on this point, and thus, a finding that school districts are practically compelled by the state to comply with the IMFRP would be based on pure speculation.

Accordingly, staff finds that Education Code sections 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424 (as added and amended by the test claim statutes), and California Code of Regulations, title 5, sections 9505, 9531, and 9532 do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

2. Pupil Textbook and Instructional Materials Incentive Account (Ed. Code, § 60252; Stats. 1994, ch. 927; Stats. 2002, ch. 802.)

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<sup>12</sup> *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

<sup>13</sup> *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368.

In 1994, the Legislature created the Pupil Textbook and Instructional Materials Incentive Account within the SIMF, to provide supplemental funding to school districts for textbooks and instructional materials, by adding Education Code section 60252. That statute was in effect until the 2002 test claim statute, which made section 60252 inoperative on January 1, 2003 (six months after the start of the period of reimbursement for this claim.)<sup>14</sup> The money in the account is allocated to kindergarten through grade 12 school districts that “satisfy each of the following criteria:”

- (1) A school district shall provide assurance to the Superintendent of Public Instruction that the district has complied with Section 60119 [as described above].
- (2) A school district shall ensure that the money will be used to carry out its compliance with Section 60119 and shall supplement any state and local money that is expended on textbooks or instructional materials, or both.

Compliance with section 60119 is required to receive the supplemental funding under this program. School districts are not legally compelled to comply. Moreover, as described in the analysis above, there is no evidence in the record that school districts are practically compelled by the state to comply with sections 60252 and 60119 and seek supplemental funding to provide sufficient textbooks and instructional materials to their pupils. Accordingly, staff finds that Education Code section 60252, as added and amended by the test claim statutes, does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

### **Conclusion**

Staff concludes that the test claim statutes, regulations, and the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.), do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 on school districts.

### **Staff Recommendation**

Staff recommends that the Commission adopt this analysis as its statement of decision to deny the test claim.

Minor changes, including those to reflect the hearing testimony and the vote count will be included when issuing the final statement of decision.

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<sup>14</sup> Statutes 2002, chapter 803 added subdivision (d) to section 60252, which stated: “This section shall become inoperative on January 1, 2003, and, as of January 1, 2007, is repealed, unless a later enacted statute that becomes operative on or before January 1, 2007 deletes or extends the dates on which it becomes inoperative and is repealed.” In 2004, the Legislature deleted subdivision (d), making the statute operative again (Stats. 2004, ch. 900, S.B. 550). The 2004 statute, however, is not pled in this test claim and no findings on Education Code section 60252, as amended by the 2004 statute, are made in this analysis. The 2004 statute is included in the *Williams Case Implementation I* test claim (05-TC-04) and will not be analyzed there.



However, if the Commission's vote on this item modifies the proposed statement of decision, staff recommends that the motion to adopt the proposed statement of decision reflect those changes, which would be made before issuing the final statement of decision. In the alternative, if the changes are significant, staff recommends that the Commission postpone this item to the next Commission hearing.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 60000, 60002, 60045, 60048, 60119, 60200, 60242, 60242.5, 60248, 60252, 60421, 60422, 60423, 60424, 60501, 60510.5, 60521

Statutes 1976, Chapter 817; Statutes 1977, Chapter 36; Statutes 1979, Chapter 282; Statutes 1982, Chapter 1503; Statutes 1983, Chapter 498; Statutes 1985, Chapter 1440; Statutes 1985, Chapter 1470; Statutes 1985, Chapter 1546; Statutes 1985, Chapter 1597; Statutes 1986, Chapter 211; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 1181; Statutes 1991, Chapter 353; Statutes 1991, Chapter 529; Statutes 1991, Chapter 1028; Statutes 1993, Chapter 56; Statutes 1994, Chapter 927; Statutes 1995, Chapter 325; Statutes 1995, Chapter 413; Statutes 1995, Chapter 534; Statutes 1995, Chapter 764; Statutes 1996, Chapter 124; Statutes 1997, Chapter 251; Statutes 1999, Chapter 276; Statutes 1999, Chapter 646; Statutes 2000, Chapter 461; Statutes 2002, Chapter 802; and Statutes 2003, Chapter 4

California Code of Regulations, Title 5, Sections 9505, 9530, 9531, 9532 and 9535

Register 77, No. 39 (Sept. 23, 1977); Register 83, No 25 (June 17, 1983); Register 95, No. 3, (Dec. 30, 1994); Register 97, No. 31 (July 31, 1997); and Register 2003, No. 3 (Jan. 16, 2003)

*Standards for Evaluating Instructional Materials for Social Content* (2000 ed.)

Filed on September 22, 2003 by

Castro Valley Unified School District, Claimant.

Case No.: 03-TC-07

*Instructional Materials Funding Requirements*

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

*(Proposed for Adoption: September 28, 2012)*

**STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 28, 2012. [Witness list will be included in the final statement of decision.]

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

The Commission [adopted/modified] the staff analysis to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

### **Summary of Findings**

This test claim requests reimbursement for activities performed by K-12 school districts to review, select, order, and dispose of textbooks and instructional materials, as well as activities related to the categorical funding programs for purchasing these materials. The test claim statutes, regulations, and alleged executive order were enacted between 1976 and 2003. Some of the statutes pled in this claim were amended after 2003 as a result of the state’s settlement agreement with plaintiffs in the *Williams v. State of California* case. These later-enacted statutes have not been pled in this claim and will not be analyzed in this test claim.

For the reasons provided in this decision, the Commission finds that the test claim statutes, regulations, and the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.) do not impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. Thus, the Commission denied the test claim.

## **COMMISSION FINDINGS**

### **Chronology**

09/22/03	Claimant, Castro Valley Unified School District, filed test claim with the Commission <sup>15</sup>
11/03/03	California Department of Education (CDE) filed comments on the test claim
12/05/03	Claimant filed rebuttal to CDE comments
02/13/04	California Department of Finance (DOF) filed comments on the test claim
03/23/04	Claimant filed rebuttal to Finance’s comments
08/08/12	Commission staff issued the draft staff analysis
08/31/12	DOF filed comments on the draft staff analysis
09/28/12	Commission hearing on test claim

### **I. Background**

The SBE has the constitutional and statutory duty to adopt instructional materials for kindergarten and grades 1 through 8.<sup>16</sup> “Instructional materials” includes the following:

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<sup>15</sup> Based on this filing date, the period of reimbursement for this claim begins July 1, 2002. (Gov. Code, § 17557.)

<sup>16</sup> Article IX, section 7.5 of the California Constitution; Education Code section 60200.

[A]ll materials that are designed for use by pupils and their teachers as a learning resource and help pupils to acquire facts, skills, or opinions or to develop cognitive processes. Instructional materials may be printed or nonprinted, and may include textbooks, technology-based materials, other educational materials, and tests.<sup>17</sup>

The state’s adoption process is complex and involves evaluation criteria, various expert panels, curriculum committees, a Curriculum Commission, advocates, and the general public.<sup>18</sup> Generally, however, the SBE adopts at least five sets of basic instructional materials at each grade level (K-8) in reading/language arts, mathematics, history-social science, science, visual/performing arts, foreign language, and health education. There are exceptions, however, if fewer than five sets of materials are submitted or if the SBE finds that fewer than five submittals meet the evaluation criteria. Instructional materials are adopted “not less than two times every six years” for the four core curriculum areas of reading/language arts, mathematics, history–social science, and science and “not less than two times every eight years” in other subjects.<sup>19</sup>

Before adoption, the SBE is generally required to determine if the materials:

- Are consistent with criteria and standards of quality prescribed in the adopted curriculum framework;<sup>20</sup>
- Are factually accurate and incorporate principles of instruction reflective of current and confirmed research;
- Do not contain materials, including illustrations, that provide unnecessary exposure to commercial brand name, product, or corporate or company logo. Instructional materials containing commercial brand names, products, or logos may only be adopted if the SBE determines that the brand names, products, or logos are necessary for an educational purpose, or is incidental to the general nature of an illustration; and
- Meet the content requirements established in Education Code sections 60040 et seq., and the social content requirements outlined in the SBE guidelines (entitled “*Standards for Evaluating Instructional Materials for Social Content, 2000 Edition*”).

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<sup>17</sup> Education Code section 60010(h). “Basic instructional materials” is defined as “instructional materials that are designed for use by pupils as a principal learning resource and that meet in organization and content the basic requirements of the intended course.” (Ed. Code, § 60010(a).)

<sup>18</sup> See, for example, Office of the Legislative Analyst, “Reforming California’s Instructional Material Adoption Process,” May 2007.

<sup>19</sup> Education Code section 60200(b)(1). A 2009 statute, however, delays all instructional materials adoptions and developing curriculum frameworks and evaluation criteria until the 2013-2014 school year. (Ed. Code, § 60200.7, eff. July 28, 2009.)

<sup>20</sup> “Curriculum framework” is defined as “an outline of the components of a given course of study designed to provide state direction to school districts in the provision of instructional programs.” (Ed. Code, § 60010(c).)

Publishers of instructional materials must also meet cost, format, and delivery requirements in order to be considered for adoption.<sup>21</sup>

After determining the submissions it will adopt, the SBE provides school districts with a menu of instructional programs for each subject area and grade level.<sup>22</sup> Local school districts then use their own criteria to determine which of the approved materials offer features that best meet the needs of their kindergarten through grade 8 (K-8) school population. If a school district establishes to the satisfaction of the SBE that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning in the district, the state board shall authorize the school district to use state funding allowances for materials to purchase other materials in accordance with the standards and procedures established by the state board.<sup>23</sup>

There are no state-adopted instructional materials for high school. The adoption of instructional materials for grades 9-12 is the responsibility of local school districts. Generally, the same content standards and publisher requirements imposed on state-adopted materials are also imposed on locally-adopted instructional materials.<sup>24</sup>

In 1972, the state established the State Instructional Materials Fund (SIMF) as a means of annually funding the acquisition of instructional materials. In 1994, the Legislature enacted the Pupil Textbook and Instructional Materials Incentive program to provide supplemental funds to ensure that every pupil has adequate textbooks and instructional materials. In 2002, the Instructional Materials Funding Realignment program (IMFRP) was enacted to consolidate existing instructional materials programs, including the SIMF, into a single block grant for the costs of standards-aligned textbooks and instructional materials in the four core curriculum areas of English-language arts, mathematics, history-social science, and science. Remaining funds under the IMFRP can be used for other classes, in-service training regarding the adoption and purchase of textbooks and instructional materials, and classroom library materials.

Each fiscal year since 2002, between \$175 and \$419 million has been appropriated for school districts to purchase standards-aligned instructional materials. Between \$416 and \$419 million has been appropriated annually since fiscal year 2007-08 to purchase the materials.<sup>25</sup> In addition, for the costs of instructional materials incurred beginning in fiscal year 1998-1999, school districts receive fifty percent of an increase in lottery revenues allocated to the district based on

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<sup>21</sup> Education Code sections 60060 et seq.

<sup>22</sup> Education Code section 60200(i).

<sup>23</sup> Education Code section 60200(g).

<sup>24</sup> Education Code section 60400.

<sup>25</sup> Item 6110-189-001 in Statutes 2002, chapter 379; Statutes 2003, chapter 157; Statutes 2004, chapter 208; Statutes 2005, chapters 38 and 39; Statutes 2006, chapters 47 and 48; Statutes 2007, chapters 171 and 172; Statutes 2008, chapters 268 and 269; Statutes 2009, chapter 1 (4th Ex. Sess.); Statutes 2010, chapter 712; Statutes 2011, chapter 33.

an equal amount per unit of average daily attendance (ADA).<sup>26</sup> Additional funds may be received from the school district's sale of obsolete textbooks and instructional materials.<sup>27</sup>

### The Test Claim Statutes

This test claim pleads statutes and regulations enacted between 1976 and 2003. Some of the statutes pled in this claim were amended after 2003 as a result of the state's settlement agreement with plaintiffs in the *Williams v. State of California* case. These later-enacted statutes have not been pled in this claim and will not be analyzed in this test claim.<sup>28</sup> The statutes, regulations, and alleged executive order pled in this claim address the following:

- Establish legislative intent for “a need to establish broad minimum standards and general educational guidelines for the selection of instructional materials.”<sup>29</sup>
- Include criteria that the SBE and publishers must address when adopting instructional materials for use in grades K-8. For example, the instructional material cannot provide exposure to a commercial brand name, product, or corporate or company logo unless the SBE makes specified findings.<sup>30</sup>
- Authorize the purchase of non-adopted materials if the district establishes to the satisfaction of the SBE that the state-adopted instructional materials do not promote maximum efficiency of pupil learning in the district.<sup>31</sup>
- Require school districts to adopt instructional materials that are accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels. Except for literature and tradebooks, all instructional materials adopted by any governing board must use proper grammar and spelling.<sup>32</sup> School districts are prohibited from adopting instructional materials that provide exposure to a commercial brand name, product, or corporate or company logo in a manner that is inconsistent with SBE guidelines or frameworks, unless the district makes a finding with specified contents.<sup>33</sup> In addition, SBE-adopted instructional materials are encouraged to comply with the *Standards for Evaluating Instructional Materials for Social Content* (2000 Edition).

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<sup>26</sup> Government Code section 8880.4(a)(2)(B), as added by Proposition 20, The Cardenas Textbook Act of 2000 (March 7, 2000 election).

<sup>27</sup> Education Code section 60521.

<sup>28</sup> The *Williams Case Implementation* statutes are the subject of three other test claims (05-TC-04, 07-TC-06 and 08-TC-01) pending before the Commission which are tentatively set for the December 2012 hearing.

<sup>29</sup> Education Code section 60000.

<sup>30</sup> Education Code section 60200(c).

<sup>31</sup> Education Code section 60200(g).

<sup>32</sup> Education Code section 60045.

<sup>33</sup> Education Code section 60048(b).

- Require districts to ensure that the selection of instructional materials complies with various requirements, such as teacher, parental and community involvement.<sup>34</sup>
- Govern the ordering of instructional materials. At the time the test claim was filed, former section 9530 of the title 5 regulations required school districts to buy adopted instructional materials directly from publishers and manufacturers and to comply with specified requirements.
- Authorize school districts to use non-adopted instructional materials for the district’s core reading program in kindergarten to grade 3 if the school district believes that none of the core reading materials adopted by the SBE in 1996 promote the maximum efficiency of pupil learning.<sup>35</sup>
- Authorize school districts to review instructional materials to determine when they are obsolete pursuant to previously adopted rules, regulations, and procedures. Districts are authorized to report the results of their reviews and staff recommendations at public meetings of their governing boards,<sup>36</sup> and are also encouraged to take specified steps before disposing of any instructional materials, such as notifying the public no later than 60 days before the disposition, and permitting specified entities and the public to address the governing board regarding the disposition.<sup>37</sup> Districts must use proceeds from selling instructional materials to purchase instructional materials.<sup>38</sup>
- Govern the state’s categorical funding programs for textbooks and instructional materials, including the SIMF, the Pupil Textbook and Instructional Materials Incentive Program, and IMFRP. The IMFRP, which was enacted in 2002, consolidates existing block grants within the SIMF account for standards-aligned instructional materials into an ongoing block grant and requires school districts to perform a number of activities in order to receive funding.<sup>39</sup>

## **II. Positions of the Parties and Interested Parties**

### **A. Claimant’s Position**

The claimant alleges that the test claim statutes, regulations, and alleged executive order impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 to review, select, order, and dispose instructional materials, as well activities related to funding under the state’s categorical funding programs for instructional materials. The specific activities pled by claimant are in the analysis below.

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<sup>34</sup> Education Code section 60002.

<sup>35</sup> California Code of Regulations, title 5, section 9535.

<sup>36</sup> Education Code section 60501.

<sup>37</sup> Education Code section 60510.5.

<sup>38</sup> Education Code section 60521.

<sup>39</sup> Education Code sections 60119, 60242, 60242.5, 60248, 60252, 60421, 60422, 60423, and 60424; California Code of Regulations, title 5, sections 9505, 9531, and 9532.

The claimant disagrees with the comments submitted by DOF and CDE. Claimant argues that the activities in the test claim statutes and regulations are mandatory and not optional, that legal compulsion is not necessary to find a reimbursable state mandate, and that the state's position denies pupils equal protection of the laws.<sup>40</sup>

## B. State Agencies' Positions

### 1. Department of Finance's Position

DOF contends that this test claim should be denied. Its February 2004 comments state that between \$184 million and \$1.024 billion in annual categorical funding has been appropriated to school districts between 1999-2000 and 2003-2004 for purchasing instructional materials. DOF asserts that this funding "is more than sufficient to offset any marginal administrative costs." The DOF also states that districts are expected to use general purpose funds to supplement categorical funding. According to DOF, categorical programs, such as the SIMF and IMFRP are optional, so conditions on receipt of those funds are downstream requirements resulting from the district's decision to receive those funds. The conditions are not state mandates.

In comments on the draft staff analysis, DOF agrees with the portion of the analysis that denies reimbursement, but disagrees with the portion of the analysis that found that Education Code sections 60045(b) and 60048(b) (Stats. 1999, ch. 276) constitute a reimbursable state-mandated program to determine if the materials use proper grammar and spelling before adoption, and to review all instructional materials for grades 9 to 12, inclusive, to determine if they contain a commercial brand name, product, or corporate or company logo, before the materials are adopted. DOF argues that Education Code sections 60045(b) and 60048(b) do not impose any duties on school districts, but require publishers and manufacturers to demonstrate compliance. Any activity undertaken by a school district in accordance with these code sections is discretionary. Moreover, DOF argues that sufficient revenue has been appropriated to offset any costs incurred by a school district to review instructional materials pursuant to Education Code sections 60045(b) and 60048(b).

### 2. California Department of Education's Position

CDE, in its November 2003 comments, contends that the requested activities do not constitute state-mandated new programs or higher levels of service. Specifically, CDE states that because the categorical funding program (IMFRP) and other test claim statutes are voluntary, any

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<sup>40</sup> In its December 2003 rebuttal to CDE and March 2004 rebuttal to DOF, claimant asserts that these state agency comments are incompetent and should be excluded from the record because they are not signed under penalty of perjury "with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief." (Cal. Code Regs., tit. 2, § 1183.02 (c)). While the claimant correctly states the Commission's regulation, the Commission disagrees with the request to exclude the comments from the official record. Most of the state agency comments argue an interpretation of the law, rather than make a representation of fact. If the Commission's decision were to be challenged in court, the court would not require sworn testimony for argument on the law. The ultimate determination of a reimbursable state-mandated program is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.)



requirements connected to them are ultimately discretionary and not reimbursable under article XIII B, section 6 of the California Constitution.

### III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>41</sup> Thus, the subvention requirement of section 6 is “directed to state mandated increases in the services provided by [local government] ...”<sup>42</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>43</sup>
2. The mandated activity either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>44</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>45</sup>
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>46</sup>

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<sup>41</sup> *County of San Diego, supra*, 15 Cal.4th 68, 81.

<sup>42</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>43</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>44</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>45</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>46</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; Government Code sections 17514 and 17556.

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.<sup>47</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>48</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>49</sup>

**Issue 1: Do the test claim statutes, regulations, and alleged executive order impose a state-mandated new program or higher level of service?**

**A. School district review, selection, ordering and disposal of instructional materials**

1. Legislative Intent and Policies and Procedures (Ed. Code, § 60000)<sup>50</sup>

Education Code section 60000 is a statement of legislative intent regarding Part 33 of the Education Code, governing instructional materials and testing. As amended in 1995, section 60000 provides the following:

- (a) It is the intent and purpose of the Legislature in enacting this part to provide for the adoption and selection of quality instructional materials for use in the elementary and secondary schools.
- (b) The Legislature hereby recognizes that, because of the common needs and interests of the citizens of this state and the nation, there is a need to establish broad minimum standards and general educational guidelines for the selection of instructional materials for the public schools, but that because of economic, geographic, physical, political, educational, and social diversity, specific choices about instructional materials need to be made at the local level.
- (c) The Legislature further recognizes that the governing boards of school district have the responsibility to establish courses of study and that they must have the ability to choose instructional materials that are appropriate to their courses of study.

Claimant alleges that, based on this provision, it must: “establish broad minimum standards and general educational guidelines for the selection of instructional materials for the district’s schools.”

The Commission finds that section 60000 does not impose a state-mandated new program or higher level of service. This statute provides a statement of what the Legislature recognizes, but it imposes no requirements on school districts.

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<sup>47</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>48</sup> *County of San Diego, supra*, 15 Cal.4th 68, 109.

<sup>49</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>50</sup> The claimant pled the statute as amended by Statutes 1995, chapter 413.

Moreover, the statements of legislative intent are not new. Since 1972, the Legislature has recognized the same needs in identical language.<sup>51</sup> These provisions were carried forward into the 1976 Education Code,<sup>52</sup> and amended into their current form in 1995.

Thus, Education Code section 60000 (Stats. 1995, ch. 413) does not impose a state-mandated new program or higher level of service.<sup>53</sup>

2. SBE Review of Content and Adoption of Instructional Materials (Ed. Code, § 60200)<sup>54</sup>

The SBE is required to adopt instructional materials for grades K-8. The Education Code establishes criteria that the SBE and publishers must address when adopting instructional materials for use in these grades. Claimant specifically alleges that Education Code section 60200(c)(5) and (g) impose reimbursable state-mandated activities on school districts. These subdivisions state the following:

The state board shall adopt basic instructional materials for use in kindergarten and grades 1 to 8, inclusive, for governing boards, subject to the following provisions:

[¶] . . . [¶]

(c) In reviewing and adopting or recommending for adoption submitted basic instructional materials, the state board shall use the following criteria, and ensure that, in its judgment, the submitted basic instructional materials meet all of the following criteria:

[¶] . . . [¶]

(5) Do not contain materials, including illustrations, that provide unnecessary exposure to a commercial brand name, product, or corporate or company logo. Materials, including illustrations, that contain a commercial brand name, product, or corporate or company logo may not be used unless the board determines that the use of the commercial brand name, product, or corporate or company logo is appropriate based on one of the following specific findings:

(A) If text, the use of the commercial brand name, product, or corporate or company logo in the instructional materials is necessary for an educational

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<sup>51</sup> See former Education Code sections 9200, 9202, and 9203 (Stats. 1972, ch. 929).

<sup>52</sup> See former Education Code sections 60000, 60002, and 60003 (Stats. 1976, ch. 1010).

<sup>53</sup> Claimant also generally alleges that Education Code sections 60000-60521 require school districts to: “Develop, adopt, and implement policies and procedures, and periodically update those policies and procedures, to ensure compliance with laws and regulations governing the selection, acquisition and use of instructional materials in public schools.”

The Commission finds that these activities are not mandated by the state because the plain language of the statutes and regulations in this test claim do not require school districts to develop, adopt, or implement policies and procedures.

<sup>54</sup> Claimant has pled the 1979, 1982, 1986, 1989, 1991, 1993, 1995, 1997, and 1999 statutory amendments to this code section.

purpose, as defined in the guidelines or frameworks adopted by the State Board of Education.

- (B) If an illustration, the appearance of a commercial brand name, product, or corporate or company logo in an illustration in instructional materials is incidental to the general nature of the illustration.

[¶]. . . . [¶]

(g) If a district board establishes to the satisfaction of the state board that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning in the district, the state board shall authorize that district governing board to use its instructional materials allowances to purchase materials as specified by the state board, in accordance with standards and procedures established by the state board.

Claimant alleges that it must make a determination that the use of a commercial brand name, product, corporate or company logo is appropriate based on the findings in section 60200(c) because school districts submit the materials for review and adoption and, thus, must meet the criteria used by the SBE.<sup>55</sup> Claimant also alleges that when requesting authorization for the district governing board to purchase non-adopted materials pursuant to section 60200(g), it is required to establish to the satisfaction of the SBE that the state-adopted instructional materials do not promote maximum efficiency of pupil learning in the district.

The Commission finds that the requirements in section 60200 are imposed on the SBE and that no requirements are imposed on local school districts. The plain language of the statute begins by stating that the “state board shall adopt basic instructional materials . . . subject to the . . . provisions [in sections (a) through (p)]. Moreover, claimant’s interpretation of subdivision (c) is wrong. Although claimant asserts that the basic instructional materials referenced in subdivision (c) are submitted by school districts, these materials are actually submitted by the publishers. Subdivision (m) of section 60200 makes this evident by stating: “The state board shall give publishers the opportunity to modify instructional materials, in a manner provided for in regulations adopted by the state board, if the state board finds that the instructional materials do not comply with paragraph (5) of subdivision (c).”

Therefore, the Commission finds that section 60200 does not impose a state-mandated program on school districts.<sup>56</sup>

3. School Districts’ Adoption of Instructional Materials for Grades 9-12 (Ed. Code, §§ 60045 & 60048; *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.)).

Education Code section 60400 requires school districts to adopt instructional materials for the high schools under their control. The statute further requires that only those materials that

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<sup>55</sup> Claimant comments dated March 19, 2004, Exhibit E.

<sup>56</sup> Statutes 1977, chapter 36; Statutes 1979, chapter 282; Statutes 1982, chapter 1503; Statutes 1986, chapter 211; Statutes 1989, chapter 1181; Statutes 1991, chapter 353; Statutes 1993, chapter 56, Statutes 1995, chapter 413; Statutes 1995, chapter 764; Statutes 1997, chapter 251; Statutes 1999, chapter 276.

comply with article 3, commencing with Education Code sections 60040, may be adopted. Claimant alleges that Education Code sections 60045 and 60048, and the SBE guidelines on adoption entitled *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.) result in a reimbursable state-mandated program to adopt instructional materials that comply with sections 60045, 60048 and the SBE guidelines.

For the reasons below, the Commission finds that Education Code sections 60045 and 60048, as added or amended by Statutes 1999, chapter 276, do not mandate a new program or higher level of service within the meaning of article XIII B, section 6. The Commission also finds that the SBE publication, *Standards for Evaluation of Instructional Materials for Social Content*, does not impose a state-mandated new program or higher level of service.

a. Education Code section 60045 (Stats. 1999, ch. 276)

As amended in 1999, Education Code section 60045 states in relevant part the following:

- (a) All instructional materials adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels.
- (b) With the exception of literature and tradebooks, all instructional materials adopted by any governing board for use in schools shall use proper grammar and spelling. . . .

Claimant seeks reimbursement to adopt instructional materials that are accurate, objective, current, and suited to the needs and comprehension of pupils at their respective grade levels and that use proper grammar and spelling.

The plain language of the statute, however, does not require school districts to adopt instructional materials. The requirement for school districts to adopt instructional materials is in Education Code section 60400, which originated in 1972 from former Education Code section 9600.<sup>57</sup> Moreover, since 1972, the Education Code has required that instructional materials “adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective and current and suited to the needs and comprehension of pupils at their respective grade levels.”<sup>58</sup> Thus, Education Code section 60045(a) does not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

Staff further finds that Education Code section 60045(b) does not impose a state-mandated program on school districts. That section states that all instructional materials adopted by the governing school district board shall use proper grammar and spelling. DOF argues that Education Code section 60045(b) is a requirement imposed on a publisher or manufacturer that produces and submits instructional materials to a school district for adoption, and that the publisher must demonstrate compliance with section 60045(b). Based on the plain language of section 60045(b) and the surrounding statutes, DOF is correct.

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<sup>58</sup> Former Education Code section 9244 (Stats. 1972, ch. 1233). Former Education Code section 60045 (Stats. 1976, ch. 1010).

Education Code section 60400 directs school districts to adopt instructional materials for use in the high schools. That statute states that “only instruction *materials of those publishers who comply with the requirements of Article 3 (commencing with Section 60040)* ... may be adopted by the district board.” (Emphasis added.) Education Code section 60045 is in Article 3 and, thus, the publisher must comply with the requirements of section 60045(b) to ensure that its materials contain proper grammar and spelling. Moreover, Education Code section 60060 requires that “every publisher or manufacturer of instructional materials offered for adoption or sale in California shall comply with all of the requirements and provisions of this part.” Education Code section 60045 is in the same part of the Education Code as section 60060.

Finally, the plain language of section 60045(b) does not direct the school district to review or take on any new duties. It simply states that the “materials adopted by any governing board for use in schools shall use proper grammar and spelling.” Education Code section 60046 goes on to authorize any governing board to conduct an investigation of the compliance of any instructional materials which it adopts with the requirements of Article 3.

Accordingly, the Commission finds that Education Code section 60045, as amended in 1999, does not mandate a new program or higher level of service on school districts.

b. Education Code section 60048 (Stats. 1999, ch. 276)

Education Code section 60048 was added in 1999, and generally prohibits school district governing boards from adopting instructional materials, including illustrations, that provide any exposure to a commercial brand name, product, or corporate or company logo in a manner that is inconsistent with guidelines or frameworks adopted by the SBE. If, however, the governing board makes a specific finding pursuant to the criteria in section 60200(c)(5) that the use of the commercial brand name, product, or corporate or company logo in the instructional materials is appropriate, it may adopt the materials. Section 60048 states, in relevant part, the following:

- (a) Basic instructional materials, and other instructional materials required to be legally and socially compliant pursuant to Sections 60040 to 60047, inclusive, including illustrations, that provide any exposure to a commercial brand name, product, or corporate or company logo in a manner that is inconsistent with guidelines or frameworks adopted by the State Board of Education may not be adopted by a school district governing board.
- (b) The governing board of a school district may not adopt basic instructional materials, and other instructional materials required to be legally and socially compliant pursuant to Sections 60040 to 60047, inclusive, including illustrations, that contain a commercial brand name, product, or corporate or company logo unless the governing board makes a specific finding pursuant to the criteria set forth in paragraph (5) of subdivision (c) of Section 60200 that the use of the commercial brand name, product, or corporate or company logo in the instructional materials is appropriate.
- (c) Nothing in this section shall be construed to prohibit the publisher of instructional materials to include whatever corporate name or logo on the instructional materials that is necessary to provide basic information about the publisher, or protect its copyright, or to identify third party sources of content.

The claimant requests reimbursement to adopt instructional materials that are legally and socially compliant pursuant to sections 60040 to 60047, and to delete illustrations that contain a commercial brand name, product, or corporate or company logo, unless the governing board makes the findings identified in section 60200(c)(5).<sup>59</sup>

DOF argues that Education Code section 60048 does not require reimbursement under article XIII B, section 6. DOF asserts that Education Code section 60048(b) prohibits a school district from adopting instructional materials that contain a commercial brand name, product, or company logo and that it is within the district's discretion to find that the use of the commercial brand name, product, or company logo is appropriate.

The Commission finds that Education Code section 60048 does not impose a state-mandated new program or higher level of service on school districts. As stated above, publishers are required by section 60060 to comply with provisions of section 60048 to ensure that their materials, including illustrations that provide any exposure to a commercial brand name, product, or corporate or company logo, are legally and socially compliant and are consistent with guidelines or frameworks adopted by the SBE. Education Code section 60400 has long required school districts to adopt instructional materials and textbooks, and states that "only instruction materials of those publishers who comply with the requirements of Article 3 (commencing with Section 60040) ... may be adopted by the district board." Section 60048 is in Article 3. Moreover, the plain language of section 60048 does not impose any new mandated duties on school districts; it simply prohibits the adoption of materials offered by publishers that do not comply with the guidelines prescribed by SBE. If a school district determines that the use of a commercial brand name, product, or corporate or company logo in the instructional materials it is considering is appropriate, pursuant to the standards identified in Education Code section 60200(c)(5), then the district is authorized to adopt those materials. That decision, however, is a decision left to the school district and is not mandated by the state.

Accordingly, the Commission finds that Education Code section 60048, as added in 1999, does not impose a state-mandated new program or higher level of service on school districts.

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<sup>59</sup> Education Code section 60200(c)(5) is referenced in section 60048(b) and states the following:

Materials, including illustrations, that contain a commercial brand name, product, or corporate or company logo may not be used unless the board determines that the use of the commercial brand name, product, or corporate or company logo is appropriate based on one of the following specific findings:

- (A) If text, the use of the commercial brand name, product, or corporate or company logo in the instructional materials is necessary for an educational purpose, as defined in the guidelines or frameworks adopted by the state board.
- (B) If an illustration, the appearance of a commercial brand name, product, corporate or company logo in an illustration in instructional materials is incidental to the general nature of the illustration.

c. SBE publication *Standards for Evaluation of Instructional Materials for Social Content* (2000 Ed.)

Claimant also pleads the SBE publication, “Standards for Evaluation of Instructional Materials for Social Content” (2000 ed.), which provides standards that the SBE must use when evaluating instructional materials for compliance with the social content statutes.<sup>60</sup> Claimant argues that the standards are also required to be used by local school district governing boards in their adoption of instructional materials for grades 9 to 12. Claimant cites passages from the publication that sound mandatory, such as:

There are standards pertaining to age, disability and nutrition that are not referenced in statute. These standards are based on policies adopted by the State Board of Education. As such, the standards regarding those areas must be considered by those who review for compliance (Page 1.)

Less than full compliance may be allowed under the following special circumstances. (Page 2.)

The standards regarding adverse reflection and equal portrayal [of male and female roles] must be applied in every instance. The other standards require compliance when appropriate. (Page 3.)

Claimant cites similar passages on pages 4, 5, 6, 7, 8, 9, 10, and 12, concluding that “the text of the document is replete with orders, plans requirements, rules and regulations.”

Both DOF and CDE argue that the SBE publication is not binding on school districts, and quote parts of it to that effect. CDE points out that on page iv of the forward it states “we encourage local educational agencies to review these standards carefully in their own selection of instructional materials.” The DOF points out that on page 2 it states:

The guidance in ‘Standards for Evaluating Instructional Materials for Social Content’ is not binding on local educational agencies or other entities. Except for statutes, regulations, and court decision that are references herein, the document is exemplary, and compliance with it is not mandatory. (See Education Code Section 33308.5.)

Education Code section 33308.5, the statute referenced in the SBE publication (and in the paragraph above) states in relevant part the following:

Program guidelines issued by the State Department of Education shall be designed to serve as a model or example, and shall not be prescriptive. Program guidelines issued by the department shall include written notification that the guidelines are merely exemplary, and that compliance with the guidelines is not mandatory.

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<sup>60</sup> California Code of Regulations, title 5, section 9518 states that “The social content standards in the publication entitled *Standards for Evaluating Instructional Materials for Social Content*, 2000 Edition, approved by the SBE on January 13, 2000, and maintained on the CDE website . . . ., are incorporated in this section by reference and *apply to all SBE adoptions of instructional materials in all subjects.*” (Emphasis added.)



The Commission finds that the SBE publication does not impose a state-mandated program on school districts. The document itself states that it is “exemplary” and “encourages” districts to comply with its provisions (pages iv & 2.) The mandatory provisions in the document pertain to the SBE’s review, but are expressly not binding on school districts. Thus, the Commission finds that the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.) does not impose a state-mandated program on school districts.

4. Teacher and Parent Involvement when Selecting Instructional Materials (Ed. Code, § 60002)<sup>61</sup>

School district governing boards are required by Education Code section 60002 to “provide for substantial teacher involvement in the selection of instructional materials” and are required to “promote the involvement of parents and other members of the community in the selection of instructional materials.”

These requirements do not impose a new program or higher level of service. In 1972, former Education Code section 9462 (Stats. 1972, ch. 929) required district boards to “provide for substantial teacher involvement and shall promote the involvement of parents and other members of the community in selecting instructional materials.” This was renumbered to section 60262 by Statutes 1976, chapter 1010, and was the law at the time of the 1995 test claim statute, which repealed and replaced it with the current version of section 60002. Thus, the Commission finds that Education Code section 60002 (Stats. 1995, ch. 413) does not impose a new program or higher level of service.

5. Ordering Instructional Materials Directly from the Publisher (Former Cal. Code Regs., tit. 5, § 9530)<sup>62</sup>

Claimant seeks reimbursement for activities based on former section 9530 of the title 5 regulations, subdivisions (d) and (e). Section 9530 was repealed and replaced in 2008.<sup>63</sup> At the time of the 2003 test claim, the relevant provisions of section 9530 read as follows:

Each school district shall purchase adopted instructional materials directly from publishers and manufacturers. With respect to the purchase of instructional materials by a school district, the publisher or manufacturer shall comply with the following requirements:

[¶] . . . [¶]

(d) A discontinuation of an instructional material before its adoption expiration date, or before eight years, whichever is less, may cause a hardship on the school districts by limiting the reorder availability of components necessary for the use of instructional materials sets or programs. Should the publisher or manufacturer discontinue to supply an instructional material before its adoption expiration date or before eight years, whichever is less, without prior written approval from the

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<sup>61</sup> Statutes 1995, chapter 413.

<sup>62</sup> Register 95, No. 3, (Dec. 30, 1994).

<sup>63</sup> Register 2008, No. 10 (April 2, 2008). The Commission makes no findings on this 2008 version of section 9530 that is not part of the test claim.

district, upon receipt of written notice from the district, the publisher or manufacturer shall buy back, from all school districts having received the program, set, or system within the adoption period of the program, set, or system, all components of the instructional materials program, set, or system in which the discontinued item was designed to be used. The publisher shall buy back the instructional materials program, set, or system at the price in effect pursuant to the purchase order or agreement at the time the particular material from the program, set, or system is discontinued.

(e) The failure of the publisher or manufacturer to perform under the term of any purchase order or agreement by late or nondelivery of instructional materials, or the discontinuation to supply materials without prior approval by the Board and the delivery of unauthorized materials will disrupt and delay the intent of the school district's educational process, causing loss and damage to the school, its students, and the public interest. It is difficult to assess and fix the actual damages incurred due to the failure of the publisher or manufacturer to perform. Therefore, the publisher or manufacturer shall comply with any of the following requirements made by the school districts pursuant to this section as compensating or liquidating damages and not as penalties:

(1) For purposes of this subdivision, unauthorized instructional materials are those that do not appear in exact description and terms in the purchase order or agreement or are materials that have not been approved for delivery to California schools in written notice to the publisher or manufacturer from the Board or Department.

Should the publisher or manufacturer deliver unauthorized instructional materials to the school district, on written notice from the district, the publisher or manufacturer shall comply with the following requirements:

- (A) Withdraw the delivered unauthorized instructional materials from the school district.
- (B) Replace the unauthorized instructional materials with authorized materials that are comparable in subject matter, quality, quantity, and price in the California schools.
- (C) Incur all costs of transportation or any other costs involved to complete the transactions of withdrawing and replacing unauthorized materials.
- (D) Complete the transactions of withdrawing unauthorized instructional materials and replacing them in the school district with comparable authorized materials within 60 calendar days of the receipt of written notice from the district.

(2) Should the publisher or manufacturer fail to deliver instructional materials within 60 days of the receipt of a purchase order from the school district and the publisher or manufacturer had not received prior written approval from the district for such a delay in delivery, which approval shall not be unreasonably withheld, the school district may assess as damages an amount up to five hundred dollars (\$500) for each working day the order is delayed beyond sixty (60) calendar days. If late delivery results from circumstances beyond the control of the publisher or manufacturer, the publisher or manufacturer shall not be held liable. Pursuant to

this section, the maximum dollar amount that shall be assessed to the publisher or manufacturer by the school district from any individual purchase order shall be twenty thousand dollars (\$20,000.00). Should the district take such action, the district shall give the publisher or manufacturer written notification of the delivery delay and the date commencing the accrual of dollar amounts to be assessed to the publisher or manufacturer.

Claimant requests reimbursement for the following activities based on this regulation:

- Purchase adopted instructional materials directly from publishers and manufacturers.
- Provide notice to a publisher or manufacturer demanding that it buy back, from the district a program, set, or system within the adoption period of the program, set or system, all components of the instructional materials program, set, or system when the publisher or manufacturer discontinues the supply of instructional material before its adoption expiration date or before eight years, whichever is less.
- Demand that a publisher or manufacturer, who has failed to perform under the term of any purchase order or agreement, has failed to deliver instructional materials, has discontinued to supply materials without prior approval of the district, or has delivered unauthorized materials, comply with the following requirements:
  - 1) Should the publisher or manufacturer deliver unauthorized instructional materials to the school district, provide written notice to the publisher or manufacturer to comply with the requirements of section 9530(e)(1).
  - 2) Should the publisher or manufacturer fail to deliver instructional materials within 60 days of the receipt of a purchase order from the school district and the publisher or manufacturer had not received prior written approval from the district for such a delay in delivery, which approval shall not be unreasonably withheld, assess damages as provided in section 9530(e)(2).

CDE comments that districts have always been responsible for preparing their orders for instructional materials, although in the past, orders were sent to the state, which either printed the materials or forwarded the orders to publishers. The regulation simply directs districts to send their orders directly to publishers instead. According to CDE, the other provisions apply if a publisher has shipped incorrect materials, in which case the publisher is responsible for all retrieval and replacement costs. And the regulation provides for district assessments against the publisher if the publisher does not comply with specific shipping deadlines.

The Commission finds that ordering instructional materials is not a state-mandated new program or higher level of service because it is not a new activity. Former Education Code section 9463 (Stats. 1972, ch. 929) stated the following: “District board shall order state-adopted textbooks and instructional materials on forms prescribed by the Department of Education.” This provision was moved to section 60263 by Statutes 1976, chapter 1010, and was repealed by Statutes 1995, chapter 413, effective January 1, 1996. The test claim regulation (former § 9530) was adopted in December 1994, before the 1995 repeal of Education Code section 60263. Thus, since 1972 the law has continuously required school districts to order instructional materials. There is nothing in the law to indicate that ordering instructional materials directly from the publisher or manufacturer provides a higher level of service to the public than ordering them through CDE.

Thus, the Commission finds that requiring school districts to order instructional materials in former California Code of Regulations, title 5, section 9530 is not a state-mandated new program or higher level of service.

The remaining activities of notifying and making demands on publishers are not mandated by the state. Subdivision (d) and (e)(1) of former section 9530 imposes requirements on publishers and manufacturers “upon receipt of” and “on written notice from the school district.” These provisions do not, however, require school districts to provide the written notice unless the district makes the decision to invoke the remedies in the regulation, e.g., requiring the publisher to buy back instructional materials. Because providing the written notices would be based on a local decision of the school district, providing them is not a state mandate.<sup>64</sup>

Similarly, subdivision (e)(2) states that “the school district *may* assess as damages an amount up to five hundred dollars . . . . [and] *Should the district take such action*, the district shall give the publisher or manufacturer written notification of the delivery delay and the date commencing the accrual of dollar amounts to be assessed to the publisher or manufacturer.” [Emphasis added.] Use of the word “may” in the regulation is permissive,<sup>65</sup> so the activity is not mandated by the state.

Therefore, the Commission finds that former section 9530 of the title 5 regulations does not impose a state-mandated new program or higher level of service on school districts.

6. Requesting Authorization to Use Non-adopted Instructional Reading Materials for Grades K-3 (Cal. Code Regs., tit. 5, § 9535)<sup>66</sup>

Section 9535 of the title 5 regulations authorizes school districts to request authorization from the SBE to purchase non-adopted instructional materials for the district’s core reading program in grades K-3 if the school district believes that none of the core reading materials adopted by the SBE in 1996 promotes the maximum efficiency of pupil learning. If the district decides to seek authorization to purchase non-adopted reading materials, the district is required by section 9535 to comply with the following activities:

If, in the judgment of the governing board of a school district or a county office of education, none of the instructional materials adopted by the California State Board of Education in 1996 promotes the maximum efficiency of pupil learning in that local agency’s core reading program, and if that governing board desires to purchase non-adopted materials with the funds apportioned to it pursuant to Education Code section 60351, it shall request authorization to do so from the California State Board of Education. The request shall include all of the following:

- (a) An overview of the goals and objectives of the local educational agency’s core reading program for kindergarten and grades 1 to 3, inclusive, including a statement about how the goals and objectives were developed and a

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<sup>64</sup>San Diego Unified School Dist., *supra*, 33 Cal.4th 859, 880.

<sup>65</sup> Education Code section 75.

<sup>66</sup> Register 97, No. 31 (July 31, 1997).

- description of their consistency with “Teaching Reading: A Balanced, Comprehensive Approach to Teaching Reading in Prekindergarten through Grade Three” (Reading Program Advisory) jointly approved by the State Superintendent of Public Instruction, California State Board of Education, and the California Commission on Teacher Credentialing, and published by the California Department of Education in 1996.
- (b) A list of the core reading program instructional materials proposed to be purchased, including titles of individual curricular units, literature, and technology resources.
  - (c) An analysis of the proposed materials, describing the strengths and weaknesses of the materials, including the local educational agency’s rubrics, criteria, and standards used to evaluate the materials for consistency with the requirements of this section, including, in particular, subdivisions (j) and (k).
  - (d) A description of the process by which the proposed materials were evaluated and selected by the local educational agency.
  - (e) A description of the local educational agency’s plans for staff development for teachers regarding the use of the proposed materials.
  - (f) A description of how the proposed materials will be used by the local educational agency’s teachers.
  - (g) A description of the projected timeline for the purchase of the proposed materials.
  - (h) A description of the process used for public display of the proposed materials by the local educational agency, with a statement of assurance from the local educational agency that the materials have been or will be on public display for at least 30 days prior to their purchase, with all comments received during the display period being made part of the official records of the local educational agency’s governing board.
  - (i) A statement of assurance from the district that the proposed materials are for use in kindergarten or any of grades 1 to 3, inclusive.
  - (j) A statement of assurance from the district that the proposed materials are based on the fundamental skills required by reading, including, but not limited to, systematic, explicit phonics and spelling, within the meaning of Education Code section 60200.4.
  - (k) A statement of assurance from the district that the proposed materials include, but are not necessarily limited to, phonemic awareness, systematic explicit phonics, and spelling patterns, accompanied by reading materials that provide practice in the lesson being taught, within the meaning of Education Code section 60352 (d).
  - (l) Evidence that the local educational agency’s governing board:

- (1) Formally approved the authorization request at a properly noticed public meeting.
- (2) Supports the use of the specified funds for the purpose expressed in the request.
- (3) Verified that the local educational agency's considered the California State Board of Education adopted materials for its core reading program and considered the reasons given by the California State Board of Education for not adopting the materials proposed for purchase, if those materials were submitted for adoption in 1996.
- (4) Verified that the proposed materials comply with Education Code sections 60040, 60041, 60042, 60044, 60045, and 60046.
- (5) Verified that all statements of assurance included within the request for authorization are true and correct.

CDE asserts that this regulation is not a state mandate, but a voluntary option offered to school districts in order to provide some flexibility in their adoption of materials.

Claimant argues that school districts having the "option" and "flexibility" to purchase materials that do not offer the maximum efficiency for pupil learning, is not an option. Districts have the obligation to request the use of non-adopted materials when necessary to educate pupils.

The Commission finds that section 9535 of the title 5 regulations does not impose a state-mandated program on school districts. School districts are not legally compelled by the state to purchase non-adopted instructional reading materials, nor has claimant provided evidence in the record to indicate that school districts are practically compelled to use the option provided by section 9535.<sup>67</sup> Therefore, the Commission finds that section 9535 of the title 5 regulations does not impose a state-mandated new program or higher level of service.

7. Disposing of Instructional Materials (Ed. Code, §§ 60501, 60510.5, 60521)

Education Code section 60500 provides that school districts may dispose of obsolete instructional materials in accordance with the rules, regulations and procedures they were required to have previously adopted for determining when instructional materials are obsolete. The claimant pleads sections 60501, 60510.5 and 60521, which further implement the disposal of instructional materials.

a. Education Code section 60501 (Stats. 2000, ch. 461)

Education Code section 60501 was added by the Legislature in 2000 to provide the following:

A school district may review instructional materials to determine when those materials are obsolete pursuant to the rules, regulations, and procedures, adopted pursuant to Section 60500 and may report the results of its review and staff recommendations at a public meeting of the school district governing board.

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<sup>67</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 742; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1268.

Both CDE and DOF point out that this provision is not a state mandate because the language is permissive.

Claimant argues that “having been required to adopt rules, regulations and procedures for determining obsolescence [by Ed. Code, § 60500] it is not a valid argument to then say that abiding by rules, regulations and procedures is permissive.”

The Commission finds that section 60501 (Stats. 2000, ch. 461) does not impose a state-mandated activity on school districts. The plain language is permissive: “A school district *may* review instructional materials . . . and *may* report the results . . . .” The use of the word “may” in a statute is permissive.<sup>68</sup> Moreover, school districts would be required to comply with their own rules and regulations without the test claim statute.

This conclusion that the statute is permissive is bolstered by the statute’s legislative history. As introduced, the language stated that school districts “shall” review instructional materials. It was amended in the Senate on August 25, 2000 to the permissive “may.” When it was sent back to the Assembly for concurrence, the analysis stated:

The Senate amendments eliminate the appropriation from this bill. They also no longer "require" school districts to review instructional materials, but rather "permit" school districts to review the materials. The school districts "may" then report the results of their review and staff recommendations at a public meeting of the school district governing board.<sup>69</sup>

California courts have consistently held that “rejection of a specific provision contained in an act as originally introduced is ‘most persuasive’ that the act should not be interpreted to include what was left out.”<sup>70</sup> The mandatory “shall” in the original version of AB 2236 was rejected by the Legislature in favor of the permissive “may” in the final version, so the statute may not be interpreted as though it still contained a “shall.”

Thus, the Commission finds that Education Code section 60501 (Stats. 2000, ch. 461) does not impose a state-mandated program on school districts.

b. Education Code section 60510.5 (Stats. 1991, ch. 1028)

According to preexisting law, Education Code section 60510 gave school districts the discretion to dispose of surplus or undistributed obsolete instructional materials that are usable for educational purposes by either: (a) donation to any governing board, county free library, or other state institution; (b) donation to any public agency or institution of any territory or possession of the United States, or the government of any country that formerly was a territory or possession of the United States; (c) donation to any nonprofit charitable organization; (d) donation to children or adults in the State of California or foreign countries to increase the general literacy of the

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<sup>68</sup> Education Code section 75.

<sup>69</sup> Assembly Floor, Analysis of Assembly Bill No. 2236 (1999-2000 Reg. Sess.) as amended August 25, 2000, page 1.

<sup>70</sup> *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107.

people; or (e) sale to any organization that agrees to use the materials solely for educational purposes.<sup>71</sup>

If the school district exercises the discretion to dispose of the materials pursuant to section 60510, the test claim statute, Education Code section 60510.5 (Stats. 1991, ch. 1028) “encourages” the following activities:

- (a) Prior to the disposition by a school district of any instructional materials pursuant to Section 60510, the school district governing board is encouraged to do both of the following:
  - (1) No later than 60 days prior to that disposition, notify the public of its intention to dispose of those materials through a public service announcement on a television station in the county in which the district is located, a public notice in a newspaper of general circulation published in that county, or any other means that the governing board determines to reach most effectively the entities described in subdivisions (a) to (e), inclusive, of Section 60510.
  - (2) Permit representatives of the entities described in subdivisions (a) to (e), inclusive, of Section 60510 and members of the public to address the governing board regarding that disposition.
- (b) This section does not apply to any school district that, as of January 1, 1992, had in operation a procedure for the disposition of instructional materials pursuant to Section 60510.

Claimant requests reimbursement for the activities of providing notice and permitting the specified representatives to address the governing board as provided in this statute.

Both CDE and DOF argue that this provision is permissive and imposes no state mandate.

The Commission finds that section 60510.5 does not impose a state-mandated program on school districts. According to the statute’s plain language, school districts “*are encouraged*” to notify the public or permit the specified representatives and members of the public to address the governing board once the district decides to dispose of the materials, but are not required to do so. Therefore, the Commission finds that section 60510.5 (Stats. 1991, ch. 1028) does not impose a state-mandated new program or higher level of service.

c. Education Code section 60521 (amended by Stats. 1995, ch. 413)

Education Code section 60521 governs how school districts may use proceeds from the sale of instructional materials. The statute was originally derived from former Education Code section 9861, which was added by the Legislature in 1972 to provide the following:

Any money received by a district board from the sale of obsolete instructional materials pursuant to the provisions of this chapter shall be deposited in any such

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<sup>71</sup> Education Code section 60510 was derived from former Education Code section 9820 (Stats. 1972, ch. 929).



fund of the school district as the district board prescribes and shall be used for school district purposes.<sup>72</sup>

Former section 9861 was renumbered to section 60521 in 1976<sup>73</sup> and was substantively amended by the 1995 test claim statute as follows (the amendments are reflected in strikeout and underline):

Any money received by the governing board of a school district board from the sale of ~~obsolete~~ instructional materials pursuant to ~~the provisions of this chapter code~~ shall be deposited in any such fund of the school district as the district board prescribes and shall be used for school district purposes to purchase instructional materials.

Thus, under prior law, money received from the sale of instructional materials could be used for any school district purpose. The 1995 amendment to the statute restricts the use of the money and now allows it to be used only to purchase instructional materials.

Claimant requests reimbursement to use “any money received by the governing board of a school district from the sale of instructional materials to purchase instructional materials.” Claimant further argues that the Legislature’s redirection of revenue imposes a state requirement that is fully reimbursable because funds can no longer be used for any school district purpose.

The DOF states that the statute restricts the use of money received from the discretionary sale of instructional materials and therefore the statute does not impose a state-mandated activity.

The Commission finds that Education Code section 60521, as amended in 1995, does not impose a state- mandated new program or higher level of service. As indicated above, the sale of instructional materials is within the discretion of a school district. Section 60521 restricts the school district’s use of the money received from the sale, but it does not impose a state-mandated activity. Moreover, the courts have held that reallocating resources or losing flexibility in a program is not a reimbursable state mandate.<sup>74</sup>

Thus, the Commission finds that Education Code section 60521 (Stats. 1995, ch. 413) does not impose a state-mandated new program or higher level of service.

## **B. Categorical funding programs for the purchase of textbooks and instructional materials**

The statutes and regulations at issue in this part of the analysis provide categorical funding for the purchase of textbooks and other instructional materials for K-12 pupils. The claimant has pled the statutes and regulations as they were enacted from 1982 through 2002 that implement the SIMF, the State Instructional Materials Fund Incentive Program that provided supplemental funding under the SIMF account, and the IMFRP.

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<sup>72</sup> Statutes 1972, chapter 929.

<sup>73</sup> Statutes 1976, chapter 1010.

<sup>74</sup> *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.

## 1. Instructional Materials Funding Realignment Program<sup>75</sup>

In 2002, the Legislature enacted the IMFRP (Ed. Code, §§ 60420-60424), which, for purposes of funding, took effect at the beginning of the 2002-2003 fiscal year.<sup>76</sup> The program was part of the Governor's proposal to consolidate categorical funds from the SIMF into one categorical program. The main purpose of the IMFRP was to provide a source of funding for the purchase of standards-aligned materials in the core subject areas of English-language arts, mathematics, history-social science, and science.<sup>77</sup>

The IMFRP requires CDE to apportion funds appropriated for purposes of the chapter to school districts on the basis of an equal amount per pupil enrolled in grades K-12 in the prior year. Enrollment is certified by the SPI and is based on the data reported by the California Basic Education Data System (CBEDS) count. Schools in their first year of operation and those that have expanded grade levels are eligible for the funding based on enrollment estimates provided by the school district to CDE. "As a condition of receipt of funding" a school district in its first year of operation or of expanding grade levels at a schoolsite is required to provide enrollment estimates, as approved by the governing board of the school district. These estimates provided by the new school or school that expanded its grades, and the associated funding are then adjusted for actual enrollment as reported by the subsequent CBEDS report.<sup>78</sup>

The Legislature directed the Controller to transfer from the General Fund to the State Instructional Materials Fund for instructional materials for grades K to 8, and for grades 9 to 12, the amount to be allocated under the IMFRP.<sup>79</sup> Education Code section 60248 restricts the use of the funding apportioned for instructional materials for grades 9 to 12 "solely for the purchase of instructional materials for pupils in grades 9 to 12, inclusive."

School districts must meet the IMFRP requirements "in order to continue to receive IMFRP funding."<sup>80</sup> Education Code section 60422(a) and (b) lay out the requirements of the program. School districts must (1) comply with Education Code section 60119, and (2) certify that IMFRP funds have been used by the district to provide standards-aligned instructional materials in the core curriculum areas of reading/language arts, mathematics, science, and history-social sciences

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<sup>75</sup> Education Code sections 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424 (Stats. 1982, ch. 1503; Stats. 1983, ch. 498; Stats. 1985, chs. 1440, 1470, 1546; Stats. 1987, ch. 1452; Stats. 1999, ch. 646; Stats. 2002, ch. 802); California Code of Regulations, title 5, sections 9505, 9531, and 9532.

<sup>76</sup> Education Code section 60424 (Stats. 2002, ch. 802).

<sup>77</sup> Office of the Legislative Analyst, "Analysis of the 2003-2004 Budget Bill."

<sup>78</sup> Education Code section 60421; California Code of Regulations, Title 5, section 9532.

<sup>79</sup> Education Code sections 60246.5, 60247.5. (Stats. 2002, ch. 802.) Section 60247 apportions to each school district \$14.41 per pupil enrolled in grades 9 to 12 for the purpose of purchasing textbooks and instructional materials.

<sup>80</sup> CDE, "Instructional Materials FAQ, Instructional Materials Funding Realignment Program (IMFRP) and Williams Case FAQ and Answers," as of July 18, 2012.

for all students. School districts may spend any remaining funds from the program for other approved purposes outlined in Education Code sections 60242 and pursuant to 60242.5.<sup>81</sup>

Pursuant to Education Code section 60119, in order to receive instructional materials funding from any state source, school districts are required to hold an annual public hearing and adopt a resolution stating whether each pupil in the district has sufficient textbooks or instructional materials in years when the SPI determines that the base revenue limit for each school district will increase by at least one percent per unit of ADA from the prior fiscal year.<sup>82</sup> Section 60119 requires the following:

- Hold an annual public hearing or hearings at which the governing board shall encourage participation by parents, teachers, members of the community interested in the affairs of the school district, and bargaining unit leaders, and shall make a determination, through a resolution, as to whether each pupil in each school in the district has, or will have prior to the end of that fiscal year, sufficient textbooks or instructional materials, or both, in each subject that are consistent with the content and cycles of the curriculum framework adopted by the state board.
- Notice of the hearing must be provided ten days before the hearing. The notice shall contain the time, place, and purpose of the hearing and shall be posted in three public places in the school district.<sup>83</sup>
- If the governing board determines that there are insufficient textbooks or instructional materials, or both, the governing board shall (1) provide information to classroom teachers and to the public setting forth the reasons that each pupil

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<sup>81</sup> Education Code section 60422(a), as added by the 2002 test claim statute, requires school districts to use the funding received under the IMFRP to ensure that each pupil is provided with standards-aligned textbooks or basic instructional materials, as adopted by the State Board of Education, after the adoption of content standards, for grades 1 to 8 or as adopted by the local school district for grades 9 to 12. Pupils shall be provided with standards-aligned textbooks or basic instructional materials by the beginning of the first school term that commences no later than 24 months after the materials were adopted by the State Board of Education.

Education Code section 60422(b) requires that “once a governing board certifies compliance with subdivision (a) [that it used the money to provide each pupil with standards-aligned textbooks or basic instructional materials] in the core curriculum areas of reading/language arts, mathematics, science, and history-social sciences, and if the governing board of a school district has met the eligibility requirements of Section 60119, the remaining funds may only be used consistent with subdivision (a) of Section 60242 and pursuant to Section 60242.5.”

<sup>82</sup> The statutory language requiring school districts to hold a hearing only in years when the SPI determines that the base revenue limit for each school district will increase by at least one percent per unit of ADA from the prior fiscal year was removed in 2009. (Stats. 2009, 3d Ex Sess. ch. 12.) School districts are now required to hold a hearing each year. The 2009 statute has not been pled in this test claim and is not analyzed here.

<sup>83</sup> Education Code section 60119(b).

does not have sufficient textbooks or instructional materials, or both, and (2) take any action, except an action that would require reimbursement by the Commission on State Mandates, to ensure that each pupil has sufficient textbooks or instructional materials, or both, within a two-year period from the date of the determination.<sup>84, 85</sup>

School districts may use any funds available for textbooks and instructional materials from categorical programs appropriated in the budget, funds in excess of the amount needed during the prior fiscal year to purchase textbooks or instructional materials, and any other funds available to the school district for textbooks and instructional materials to ensure that each pupil has sufficient textbooks or instructional materials within a two-year period from the date the governing board determines there are insufficient materials.<sup>86</sup>

Education Code section 60242(a) specifies the priority use of IMFRP funds. The first priority is the purchase of standards-aligned textbook or basic instructional materials in reading/language arts, mathematics, history-social science, and science. If the district can certify that every pupil will be provided with these materials in the four core curriculum areas with the IMFRP funds, as is required by section 60422, then the district may use the remaining funds “for the visual and performing arts, foreign language, health, or other curricular area if those materials are adopted by the state board pursuant to Section 60200 for kindergarten and grades 1 to 8, inclusive, or by the governing board pursuant to Section 60400 for grades 9 to 12, inclusive.” If funds still remain, the school district may use the funds as follows:

- To purchase, at the discretion of the district, supplementary instructional materials and technology-based materials;
- To purchase tests;
- To bind basic textbooks;
- To fund in-service training related to instructional materials; and
- To purchase classroom library materials for kindergarten and grades 1 to 4.

If a school district uses the funds to purchase in-service training related to instructional materials, section 9505 of CDE regulations restricts the use of the money by stating the following: “No cash allotment authorized by Education Code Section 60242(b) for purchase of in-service

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<sup>84</sup> Education Code section 60119(a).

<sup>85</sup> Section 9531 of the CDE regulations clarifies some of the statutory terms in Education Code sections 60422 and 60119, but does not, itself, impose any requirements. For example, section 9531(b) states that “for purposes of the hearing requirement specified by Education Code Section 60119, textbooks or instructional materials used in kindergarten and grades 1 to 8 shall be considered ‘consistent with the content and cycles of the curriculum framework adopted by the state board’ if students are provided textbooks or instructional materials from the most recent SBE adoption by the beginning of the first school term that commences no later than 24 months after those materials are adopted by the SBE pursuant to Education Code section 60422.”

<sup>86</sup> Education Code section 60119(a)(2)(B).

training shall be expended for salaries or for travel or for per diem expenses of district employees during or attendant to participation in such in-service training.”

If a school district uses the funds to purchase classroom library materials, it is required to comply with the following requirements in section 60242(d):

(d)(1) A school district that purchases classroom library materials, shall, *as a condition of receiving funding under this article*, develop a districtwide classroom library plan for kindergarten and grades 1 to 4, inclusive, and shall receive certification of the plan from the governing board of the school district. A school district shall include in the plan a means of preventing loss, damage, or destruction of the materials.

(2) In developing the plan required by paragraph (1), a school district is encouraged to consult with school library media teachers and primary grade teachers and to consider selections included in the list of recommended books established pursuant to Section 19336. If a school library media teacher is not employed by the school district, the district is encouraged to consult with a school library media teacher employed by the local county office of education in developing the plan. A charter school may apply for funding on its own behalf or through its chartering entity. Notwithstanding Section 47610, a charter school applying on its own behalf is required to develop and certify approval of a classroom library plan.

Education Code section 60242.5 requires school districts to deposit allowances received from the IMFRP in a separate account. The allowances may only be used for the purchase of the instructional materials outlined in section 60242. Section 60242.5 further requires the school district superintendent to provide written assurance that all purchases of instructional materials made with IMFRP funds conforms to law. The SPI may withhold the funding allowance for any district that fails to file a written assurance. Section 60242 states the following:

All purchases of instructional materials made with funds from this account shall conform to law and the applicable rules and regulations adopted by the state board, *and the district superintendent shall provide written assurance of conformance to the Superintendent of Public Instruction*. The Superintendent of Public Instruction may withhold the allowance established pursuant to Section 60242 for any district which has failed to file a written assurance for the prior fiscal year. The Superintendent of Public Instruction may restore the amount withheld once the district provides the written assurance.

These requirements are subject to the Controller’s audit and review, which may be appealed to the Education Audit Appeals panel.<sup>87</sup> Substantial “compliance with all legal requirements is a condition to the state’s obligation to make apportionments” of these funds.<sup>88</sup>

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<sup>87</sup> Education Code sections 14502.1, 41020, 41344.1; California Code of Regulations, Title 5, sections 19828 et seq. (dealing with instructional materials).

<sup>88</sup> Education Code section 41344.1(c).

The claimant seeks reimbursement for the activities described above. The Commission finds, however, that these activities are not mandated by the state, but are required as a condition of receiving funds.

In 2003, the California Supreme Court decided *Kern High School Dist.* and considered the meaning of the term “state mandate” as it appears in article XIII B, section 6 of the California Constitution.<sup>89</sup> In *Kern High School Dist.*, school districts participated in various education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and utilize school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.<sup>90</sup>

When analyzing the term “state mandate,” the court reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant’s participation in the underlying program is voluntary or legally compelled. The court stated the following:

In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district’s obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.<sup>91</sup>

Thus, the Supreme Court held as follows:

[W]e reject claimants’ assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant’s participation in the underlying program is voluntary or compelled.*<sup>92</sup>

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and

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<sup>89</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727.

<sup>90</sup> *Id.* at page 730.

<sup>91</sup> *Id.* at page 743. (Emphasis in original.)

<sup>92</sup> *Id.* at page 731. (Emphasis added.)

agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.<sup>93</sup>

Similarly here, school districts are not legally compelled by the state to comply with the requirements of the IMFRP. Rather, school districts make a local decision to perform the activities in order to receive funding. A local decision requiring a school district to incur costs does not constitute a state mandate.<sup>94</sup> The plain language of Education Code section 60421 states that the requirements are imposed as a condition of receipt of funding. Section 60422 authorizes the use of the funds, which the district “may use” to purchase instructional materials in the core curriculum subjects and, any remaining funds may be used for in-service training on instructional materials and classroom library materials.<sup>95</sup> Education Code section 60119 also states that “in order to be eligible to receive funds,” the governing board of a school district must comply with the textbook sufficiency hearing. Audits are performed on a district’s use of the funding and compliance with the requirements. Substantial compliance with all legal requirements is “a condition” to the state’s obligation to make apportionments of the funds. Moreover, CDE interprets the IMFRP as imposing requirements “in order to continue to receive IMFRP funding.”<sup>96</sup> The construction given to a statute by the administrative officials charged with its enforcement or implementation is entitled to great weight.<sup>97</sup>

Moreover, there is no evidence that school districts are practically compelled by the state to comply with these funding requirements. In *Kern High School Dist.*, the school districts urged the court to define “state mandate” broadly to include situations where participation in the program is practically compelled; where the absence of a reasonable alternative to participation creates a “de facto” mandate.<sup>98</sup> The court previously applied such a construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the court considered whether state statutes enacted as a result of various federal

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<sup>93</sup> *Id.* at pages 744-745.

<sup>94</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

<sup>95</sup> As indicated above, Education Code section 60242 requires school districts to develop a library plan before they use IMFRP funding for the purchase of classroom library materials. The development of a library plan pursuant to Education Code section 60242 does not mandate a new program or higher level of service. State law does not require school districts to purchase classroom library materials. Moreover, immediately before the enactment of the 2002 test claim statute, school districts were required by former Education Code section 18201 to develop a classroom library plan in order to apply for and receive state funding under the Classroom Library Materials Act of 1999. The Classroom Library Materials Act of 1999 was repealed by the 2002 test claim statute and its provisions moved to Education Code section 60242. (Senate Rules Committee, Office of Senate Floor Analyses, Analysis of AB 1781 (2001-2002 Reg. Sess.) amended August 27, 2002, page 1.)

<sup>96</sup> CDE, “Instructional Materials FAQ, Instructional Materials Funding Realignment Program (IMFRP) and Williams Case FAQ and Answers,” as of July 18, 2012.

<sup>97</sup> *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

<sup>98</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 748.

“incentives” for states to extend unemployment insurance coverage to public employees constituted a reimbursable state-mandated program under article XIII B, section 6. The court in *City of Sacramento* concluded that the costs resulted from a federal mandate because the financial consequences to the state and its residents of failing to participate in the federal plan (full, double unemployment taxation by both state and federal governments) were so onerous and punitive; amounting to “certain and severe federal penalties” including “double taxation” and “other “draconian” measures.”<sup>99</sup>

Although the court in *Kern High School Dist.* declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies – the court stated: “In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.”<sup>100</sup>

However, the court in *Kern High School Dist.* found that the facts before it failed to amount to such a “de facto” mandate since a school district that elects to discontinue participation in one of the educational funding programs at issue did not face “certain and severe” penalties such as “double ... taxation” or other “draconian” consequences, but simply must adjust to the loss of program funding. The court concluded that:

[T]he circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants’ phrasing, a “de facto” reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento* ... a claimant that elects to discontinue participation in one of the programs here at issue does not face “certain and severe ... penalties” such as “double ... taxation” or other “draconian” consequences ... but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of article XIII B, section 6.<sup>101</sup>

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

Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the

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<sup>99</sup> *City of Sacramento, supra*, 50 Cal.3d 51, 74; *Kern High School Dist., supra*, 30 Cal.4th 727, 750.

<sup>100</sup> *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

<sup>101</sup> *Id.* at page 754.



circumstances that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary.<sup>102</sup>

The court's reasoning applies here. If a school district decides not to participate in the IMFRP, or elects to discontinue participation in the program, there is no evidence in the record that the district will face "certain and severe penalties" such as "double taxation" or other "draconian measures." It simply loses its right to continue to receive funding to assist the school district in paying for textbook and instructional material costs.

The claimant, however, argues that compliance with the IMFRP is required. The claimant notes that a pupil's constitutional right to an equal educational opportunity may be impaired if every pupil does not have access to textbooks or instructional materials in each subject area and that the compliance with the IMFRP is required in order to carry out the preexisting constitutional and statutory requirement to provide students with textbooks or instructional materials at no cost to the student.<sup>103</sup>

There is no evidence in the record, however, to support a finding that a pupil's constitutional right to education is impaired if a school district does not comply with the IMFRP and receive that additional funding. School districts also receive revenue limit apportionments based on the average daily attendance of the students that can be used to purchase textbooks and instructional materials. Lottery funds<sup>104</sup> and revenues from the sale of obsolete materials<sup>105</sup> are also available for the purchase of textbooks and instructional materials. There is no evidence in the record that this existing funding fails to provide sufficient funds to purchase textbooks and instructional materials for students, or that participation in the IMFRP is the *only* reasonable means of carrying out the core mandatory function of providing sufficient textbooks and instructional materials to each pupil.<sup>106</sup>

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<sup>102</sup> *Id.* at pages 753-754.

<sup>103</sup> Article IX, section 7.5 of the California Constitution provides that "The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute." Education Code section 60411 governs instructional materials for high school students and similarly provides that the books be provided to pupils at no charge. The statute states that:

The district board of each high school district shall purchase textbooks and may purchase supplementary books for the use of pupils enrolled in the high schools of the district. The textbooks and supplementary books shall at all times remain the property of the district, and shall be supplied to pupils for use without charge.

<sup>104</sup> Government Code section 8880.4(a)(2)(B), as added by Proposition 20, The Cardenas Textbook Act of 2000 (March 7, 2000 election).

<sup>105</sup> Education Code section 60521.

<sup>106</sup> *Department of Finance v. Commission on State Mandates*, *supra*, 170 Cal.App.4th 1355, 1368.

Accordingly, the Commission finds that Education Code sections 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424<sup>107</sup>, and California Code of Regulations, title 5, sections 9505, 9531, and 9532 do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

## 2. Pupil Textbook and Instructional Materials Incentive Account<sup>108</sup>

In 1994, the Legislature created the Pupil Textbook and Instructional Materials Incentive Account within the SIMF to provide supplemental funding to school districts for textbooks and instructional materials, by adding Education Code section 60252.<sup>109</sup> That statute was in effect until the 2002 test claim statute, which made section 60252 inoperative on January 1, 2003 (six months after the start of the period of reimbursement for this claim).<sup>110</sup> The money in the account is allocated to K-12 school districts that “satisfy each of the following criteria:”

- (1) A school district shall provide assurance to the Superintendent of Public Instruction that the district has complied with Section 60119 [as described above].
- (2) A school district shall ensure that the money will be used to carry out its compliance with Section 60119 and shall supplement any state and local money that is expended on textbooks or instructional materials, or both.

Compliance with section 60119 is required to receive the supplemental funding under this program. School districts are not legally compelled to comply. Moreover, as described in the analysis above, there is no evidence in the record that school districts are practically compelled by the state to comply with sections 60252 and 60119 and seek supplemental funding to provide sufficient textbooks and instructional materials to their pupils. Accordingly, the Commission finds that Education Code section 60252<sup>111</sup> does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

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<sup>107</sup> Statutes 1982, chapter 1503, Statutes 1983, chapter 498, Statutes 1985, chapters 1440, 1470, and 1546, Statutes 1987, chapter 1452, Statutes 1999, chapter 646, Statutes 2002, chapter 802.

<sup>108</sup> Education Code section 60252 (Stats. 1994, ch. 927; Stats. 2002, ch. 802.)

<sup>109</sup> Statutes 1994, chapter 927.

<sup>110</sup> Statutes 2002, chapter 803 added subdivision (d) to section 60252, which stated: “This section shall become inoperative on January 1, 2003, and, as of January 1, 2007, is repealed, unless a later enacted statute that becomes operative on or before January 1, 2007 deletes or extends the dates on which it becomes inoperative and is repealed.” In 2004, the Legislature deleted subdivision (d), making the statute operative again (Stats. 2004, ch. 900, S.B. 550). The 2004 statute, however, is not pled in this test claim and no findings on Education Code section 60252, as amended by the 2004 statute, are made in this analysis. The 2004 statute is included in the *Williams Case Implementation I* test claim (05-TC-04) and will be analyzed there.

<sup>111</sup> Statute 1982, chapter 1503, Statutes 1983, chapter 498, Statutes 1985, chapters 1440, 1470, and 1546, Statutes 1987, chapter 1452, Statutes 1999, chapter 646, Statutes 2002, chapter 802.

#### **IV. Conclusion**

For the reasons discussed above, the Commission concludes that the test claim statutes, regulations, and the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.), do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

## Commission on State Mandates

Original List Date: 10/2/2003  
Last Updated: 9/10/2012  
List Print Date: 09/12/2012  
Claim Number: 03-TC-07  
Issue: Instructional Materials Funding Requirements

### Mailing List

#### TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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