November 18, 2005

Mr. Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

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

RE: Final Staff Analysis, Proposed Statement of Decision, and Hearing Date
Agency Fee Arrangements (00-TC-17, 01-TC-14)
Clovis Unified School District, Claimant
Statutes 1980, chapter 816; Statutes 2000, chapter 893; Statutes 2001, chapter 805
Government Code sections 3543, 3546, and 3546.3

Dear Mr. Petersen:

The final staff analysis and proposed statement of decision for this test claim are complete and enclosed for your review.

Hearing
The test claim and proposed statement of decision are set for hearing on **Friday, December 9, 2005, at 10:30 a.m.** in Room 126 of the State Capitol, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, or if other witnesses will appear.

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 Camille Shelton at (916) 323-3562 with any questions regarding the above.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Final Staff Analysis

Hearing Date: December 9, 2005
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ITEM 6

TEST CLAIM
FINAL STAFF ANALYSIS

Government Code Sections 3543, 3546, and 3546.3

Statutes 1980, Chapter 816
Statutes 2000, Chapter 893
Statutes 2001, Chapter 805

California Code of Regulations, Title 8, Sections 34030 and 34055

Agency Fee Arrangements (00-TC-17, 01-TC-14)

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

Background

This test claim addresses issues within the collective bargaining process of the Educational Employment Relations Act (EERA) and employee and employer relations in California's K-14 public school systems. Specifically, the test claim statutes require the payment of "fair share service fees" by non-union members to the exclusive representative organization. Under prior law, the payment of fair share service fees was the subject of the collective bargaining process. The test claim legislation created a statutory requirement for the payment of such fees, thus removing the basic issue from the collective bargaining process.

In addition, this test claim has been filed on regulations adopted by the Public Employment Relations Board (PERB). PERB is the state agency responsible for the administration of the EERA.

Conclusion

Staff concludes that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose new programs or higher levels of service for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a).)[1]

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[1] As added by Statutes 2000, chapter 893, operative January 1, 2002.

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)[2]
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)[3]

Staff concludes that Government Code sections 3543, 3546, subdivisions (b) through (e), and 3546.3, as added or amended by Statutes 1980, chapter 816, Statutes 2000, chapter 893, and Statutes 2001, chapter 805 are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and approve the test claim for the activities listed above.

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[2] As amended by Statutes 2001, chapter 805, operative January 1, 2002.

[3] As amended and operative on January 1, 2001.

STAFF ANALYSIS

Claimant

Clovis Unified School District

Chronology

06/27/01	Claimant files original test claim (00-TC-17) with the Commission
07/02/01	Commission staff issues completeness review letter
08/06/01	California Community Colleges Chancellor's Office files comments on the test claim
08/06/01	Department of Finance files comments on the test claim
09/10/01	Claimant files rebuttal to state agency comments
05/15/02	Claimant files test claim amendment (01-TC-14) with the Commission
05/20/02	Commission staff issues completeness review letter on test claim amendment
06/19/02	Department of Financerequests an extension of time to file comments on the amendment
06/20/02	Commission staff grants extension request
07/31/02	Department of Finance files comments on the amendment to the test claim
08/07/02	Claimant declines to file a rebuttal to Department of Finance's comments on the test claim amendment
08/12/02	Claimant representative files a declaration from the Vice Chancellor, Fiscal Services of the San Bernardino Community College District, alleging costs incurred pursuant to the test claim legislation
10/07/05	Commission staff issues the draft staff analysis
10/31/05	Claimant files comments on draft staff analysis
11/21/05	Commission staff issues final staff analysis

Background

The *Agency Fee Arrangements* test claim, filed by Clovis Unified School District, addresses issues within the collective bargaining process and employer-employee relations in California's K-14 public school systems. Specifically, the test claim legislation focuses on the payment of fees by non-union member (or "fair share") employees to exclusive representative organizations. In 1975, the Legislature enacted the Educational Employment Relations Act (EERA).[4] In doing

[4] Statutes 1975, chapter 961. Pursuant to Government Code section 3541.3, subdivision (g), the Public Employment Relations Board (PERB) is vested with the authority to "adopt... rules and regulations to carry out the provisions and effectuate the purposes and policies" of the EERA. (Government Code sections 3540 et seq.). Accordingly, in Code of Regulations, title 8, section 32001, subdivision (c), PERB has declared that "'[s]chool district' as used in the EERA means a school district of any kind or class, including any public community college district, within the

so, the Legislature sought to "promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California."[5] This policy aimed at furthering the public interest in "maintaining the continuity and quality of educational services."[6]

The EERA imposes on school districts the duty to "meet and negotiate" with an employee organization selected as the exclusive representative of an employee bargaining unit on matters within the scope of representation.[7] The scope of representation is limited to "matters relating to wages, hours of employment, and other terms and conditions of employment."[8] The EERA explicitly includes "organizational security" within the scope of representation.[9]

Government Code section 3540.1, subdivision (i), provides two definitions for "organizational security." The first describes organizational security as:

> [a]n arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement…

Thus, such an arrangement would provide that once an employee organization has been selected by an employee bargaining unit as exclusive representative, each employee has the option of either joining or not joining the employee organization.

Alternatively, the second definition describes organizational security as:

> [a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement…

This type of organizational security arrangement dictates that an employee in a bargaining unit for which an employee organization has been selected as exclusive representative *must* either (a) join the employee organization, or (b) pay such organization a service fee or agency fee arrangement. The EERA explicitly declares that the "employee organization recognized or

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state").

[5] Government Code section 3540.

[6] *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 11.

[7] Government Code section 3543.3.

[8] Government Code section 3543.2.

[9] Former Government Code section 3546 provided that "organizational security… shall be within the scope of representation." (Stats. 1975, ch. 961, § 2). In 2000, former Government Code section 3546 was repealed (Stats. 2000, ch. 893), but similar language was added via the same bill to Government Code section 3540.1, subdivision (i), which now provides that "'Organizational security' is within the scope of representation… ."

certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit."[10]

Under prior law, organizational security arrangements were subject to the collective bargaining process. Statutes 2000, chapter 893 created a statutory organizational security arrangement -- removing the basic issue from the bargaining process.

Claimant's Position

Claimant, Clovis Unified School District, filed a test claim on June 27, 2001,[11] alleging Government Code sections 3543 and 3546, as amended by Statutes 2000, chapter 893, impose reimbursable state-mandated activities on K-14 school districts for activities including establishing and implementing payroll procedures for collecting fair share service fees, and remitting the fees to the certified employee organization. Claimant alleges a new activity to: "Draft, approve and distribute an appropriate and neutral notice to existing non-member employees and new employees, which explains the additional payroll deduction for 'fair share services fees' for non-member employees of a certified employee organization."

Additionally, claimant alleges that Government Code section 3546.3 as added by Statutes 1980, chapter 816, requires school districts to "Establish and implement procedures to determine which employees claim a conscientious objection to the withholding of 'fair share services fees,'" and establish and implement payroll procedures to prevent automatic deductions from the wages of such conscientious objectors.

Claimant also alleges the California Code of Regulations, title 8, sections 34030 and 34055, requires K-14 school districts, within 20 days of a filed petition to rescind or reinstate the collective bargaining agreement, file with the regional office of the Public Employment Relations Board (PERB) an alphabetical list containing the names and job titles or classifications of the persons employed in the unit as of the last date of the payroll period immediately preceding the date the petition, and establish new payroll procedures, as needed.

On May 15, 2002,[12] claimant filed a test claim amendment alleging the following reimbursable state-mandated activities from amendments by Statutes 2001, chapter 805:

- Establish procedures and thereafter implement such procedures to verify, at least annually, that payments to nonreligious, nonlabor charitable organizations have been made by employees who have claimed conscientious objections pursuant to Government Code section 3546.3.
- Adjust payroll withholdings for rebates or withholding reductions for that portion of fair share service fees that are not germane to the employee organization function as the exclusive bargaining representative when so determined pursuant

[10] Government Code section 3544.9.

[11] Potential reimbursement period for this claim begins no earlier than July 1, 1999. (Gov. Code, § 17557, subd. (c).)

[12] Potential reimbursement period for any newly-alleged test claim legislation begins no earlier than January 1, 2002, the operative date of Statutes 2001, chapter 805.

to regulations adopted by PERB, pursuant to Government Code section 3546, subdivision (a).

- Take any and all necessary actions, when necessary, to recover reasonable legal fees, legal costs and settlement or judgment liabilities from the recognized employee organization, arising from any court or administrative action relating to the school district's compliance with the section pursuant to Government Code section 3546, subdivision (e);
- Provide the exclusive representative of a public school employee a list of home addresses for each employee of a bargaining unit, regardless of when the employees commenced employment, and periodically update and correct the list to reflect changes of address, additions for new employees and deletions of former employees, pursuant to Government Code section 3546, subdivision (f).

Claimant's complete, detailed allegations are found in the Amendment to the Test Claim Filing, pages five through nine, received May 15, 2002.

Claimant filed comments on the draft staff analysis on October 31, 2005. The substantive comments will be summarized in the analysis below.

Department of Finance's Position

Department of Finance filed comments on August 3, 2001, and July 30, 2002, addressing the allegations stated in the test claim and subsequent amendment. Regarding claimant's allegations that the test claim legislation mandates a variety of activities involving the establishment and maintenance of payroll procedures to account for deducting fair share service fees and transmitting those fees to the employee organization, Department of Finance contends that public school employers who did not negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are justified in claiming mandated costs. However, those employers who did negotiate and implement organizational security arrangements prior to the enactment of Statutes 2000, chapter 893 are not justified in making similar claims for reimbursement. Department of Finance argues that those employers who did negotiate and implement such arrangements prior to the 2000 amendments "would presumably have already established" such payroll procedures and those employers should not "be reimbursed for costs they voluntarily incurred."

Department of Finance has similar arguments regarding claimant's allegations on costs incurred in complying with PERB's regulations in the event a petition to rescind or reinstate an organizational security arrangement is filed.

Regarding claimant's allegation that it must draft notices explaining the fee deductions to employees paying fair share service fees, Department of Finance argues that no such mandate exists. Department of Finance relies on California Code of Regulations, title 8, section 32992 which provides that each employee "required to pay an agency fee shall receive written notice from the exclusive representative" regarding the fee deduction.

Likewise, responding to claimant's allegation that it must incur costs in taking the necessary actions in recovering legal fees from an exclusive representative under Government Code section 3546, subdivision (e), Department of Finance asserts that the subdivision, by its plain language, does not impose any duties on the public school employer.

Department of Finance's other comments and arguments will be addressed in the analysis below, where pertinent.[13]

California Community Colleges Chancellor's Office Position

The California Community Colleges Chancellor's Office ("Chancellor's Office") filed comments regarding this test claim on July 30, 2001. The Chancellor's Office begins by noting that community colleges are subject to PERB's jurisdiction. Secondly, looking to the statutes regarding organizational security, the Chancellor's Office believes that "the provisions of Government Code [sections] 3540.1 and 3546 and the related implementing regulations in the Code of Regulations impose a mandate of specific tasks for community college district staff."

The Chancellor's Office concludes by stating that no funds have been appropriated for costs incurred in performing these activities, and that none of the provisions of Government Code section 17556 apply to community colleges "complying with the mandate."

Discussion

The courts have found that article XIII B, section 6, of the California Constitution[14] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[15] "Its

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[13] Claimant argues that the Department of Finance's comments are "incompetent" and should be stricken from the record since they do not comply with section 1183.02, subdivision (d), of the Commission's regulations. That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief. The claimant contends that the Department of Finance's response "is signed without certification" and the declaration attached to the response "simply stipulate[s] to the accuracy of the citations of law in the test claim." (Claimant's comments to draft staff analysis, page 1-2.)

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of Jose, supra*, 45 Cal.App.4th at p. 1817; *County of San Diego, supra*, 15 Cal.4th at p. 109). Thus, any factual allegations raised by a party, including the Department of Finance, regarding how a program is implemented is not relied upon by staff at the test claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The Department's response contains comments on whether the Commission should approve this test claim and is, therefore, not stricken from the administrative record.

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

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

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[16] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[17] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[18]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[19] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[20] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[21]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[22]

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.[23] 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."[24]

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

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

[18] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

[19] *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; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

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

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

[22] *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.

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

[24] *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 (*City of San Jose*).

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

Government Code Section 3543:

Government Code section 3543 was rewritten by Statutes 2000, chapter 893. Statutes of 2001, chapter 805 amended one sentence, as indicated by underline below:

> (a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. If the exclusive representative of a unit provides notification, as specified by subdivision (a) of Section 3546, public school employees who are in a unit for which an exclusive representative has been selected, shall be required, as a condition of continued employment, to join the recognized employee organization or to pay the organization a fair share services fee, as required by Section 3546. If a majority of the members of a bargaining unit rescind that arrangement, either of the following options shall be applicable:
>
> (1) The recognized employee organization may petition for the reinstatement of the arrangement described in subdivision (a) of Section 3546 pursuant to the procedures in paragraph (2) of subdivision (d) of Section 3546.
>
> (2) The employees may negotiate either of the two forms of organizational security described in subdivision (i) of Section 3540.1.
>
> (b) Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Before the amendment in 2000, prior law provided: "Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer." Current subdivision (b) is identical to prior law.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[25] Courts

[25] *Kern High School Dist., supra,* 30 Cal.4th 727, 740.

have adopted a "strict construction" interpretation of article XIII B, section 6.[26] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[27] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and "where the language is clear there is no room for interpretation."[28] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[29] The courts have noted that "[w]e cannot… read a mandate into language which is plainly discretionary."[30]

Beginning with the plain language of section 3543, subdivision (a), there is no activity imposed on the public school *employer*. While public school *employees* "shall be required" to either join the employee organization selected by the unit as exclusive representative or to pay such organization a service fee, there is nothing in the language of section 3543, subdivision (a), imposing upon the public school employer the obligation to perform any activities.

Government Code section 3543, subdivision (a), by its plain language, fails to impose any activities on school districts. Section 3543, subdivision (b), contains the same language found in former section 3543 and therefore is not new, nor does the plain language of subdivision (b) impose any duties upon school districts. Accordingly, staff finds that Government Code section 3543 is not subject to article XIII B, section 6, of the California Constitution.

Government Code Section 3546.3:

Government Code section 3546.3 was added by Statutes 1980, chapter 816, as follows:

> Notwithstanding subdivision (i) of Section 3540.1, Section 3546, or any other provision of this chapter, any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support any employee organization as a condition of employment; except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious, nonlabor organization, charitable fund exempt from taxation under Section 501(c) (3) of Title 26 of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in the organizational security arrangement, or if the arrangement fails to designate such funds, then to any such fund chosen by the employee. Either the employee organization or the public school employer may

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[26] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816-17.

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

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

[29] *Whitcomb Hotel, Inc. v. California Employment Commission* (1944) 24 Cal.App.2d 753, 757.

[30] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

> require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections pursuant to this section requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure.

Claimant asserts that section 3546.3 requires school districts to establish and maintain procedures for determining which employees may claim a conscientious objection, establish procedures to ensure that fair share service fee deductions are not made from the wages of those employees claiming such objections, and to establish procedures to ensure, at least annually, that those employees are making payments to charitable organizations in lieu of service fee deductions. Claimant asserts that if section 3546.3 was determined to not impose any state-mandated activities on school districts, then it must also be interpreted that "there is no requirement for religious objectors to pay any sum of money to either their employee organization or the specified alternative approved organizations."[31]

Department of Finance, in its August 3, 2001 comments, argues that school districts that negotiated and implemented organizational security arrangements prior to the enactment of the 2000 amendments are not justified in claiming mandated costs, but that school districts that did not negotiate such arrangements are justified in claiming mandated costs. Department of Finance's position is grounded in the discretionary nature of the collective bargaining process, and that employers who negotiated organizational security arrangements prior to the enactment of the 2000 amendments should not "be reimbursed for costs they voluntarily incurred."[32]

For the reasons below, staff finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution because section 3546.3 does not impose any state-mandated activities on school districts.

In order to be subject to article XIII B, section 6, of the California Constitution, the test claim legislation must impose a state-mandated activity on a local agency or school district.[33] Courts have adopted a "strict construction" interpretation of article XIII B, section 6.[34] Consistent with this narrow interpretation, the term "mandate" has been construed according to its commonly understood meaning as an "order" or "command."[35] Thus, the test claim legislation must require a local government entity to perform an activity in order to fall within the scope of article XIII B, section 6.

According to the well-settled rules of statutory construction, an examination of a statute claimed to constitute a reimbursable state mandate begins with the plain language of the statute, and

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[31] Claimant's comments to draft staff analysis, page 3.

[32] Department of Finance, August 3, 2001 Comments, page 3.

[33] *Kern High School Dist., supra*, 30 Cal.4th 727, 740.

[34] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816-17.

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

"where the language is clear there is no room for interpretation."[36] Where the Legislature has not found it appropriate to include express requirements in a statute, it is inappropriate for a court to write such requirements into the statute.[37] The courts have noted that "[w]e cannot… read a mandate into language which is plainly discretionary."[38]

Just as discussed above regarding Government Code section 3543, the plain language of Government Code section 3546.3 is also discretionary. Section 3546.3 states only that an employee holding a conscientious objection to joining or financially supporting an employee organization "*may* be required" to make payments to a nonreligious, nonlabor, charitable organization in lieu of paying a fair share service fee to such organization. (Emphasis added).

Section 3546.3 does not impose any obligation on school districts. Section 3546.3 provides that "*[e]ither* the employee organization *or* the public school employer *may* require that proof of such payments be made on an annual basis." (Emphasis added). Section 3546.3, by its plain meaning, does not require or command school districts to perform an activity. Accordingly, staff finds that Government Code section 3546.3 is not subject to article XIII B, section 6, of the California Constitution.

Remaining Test Claim Legislation:

In order for the remaining test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." Government Code section 3546 provides, in part, that "the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization," and that "[t]he employer of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit… ." California Code of Regulations, title 8, sections 34030 and 34055 require that a school district employer file an alphabetical list containing the names and job titles or classifications of the persons employed in the unit within 20 days after a petition is filed to rescind or reinstate an organizational security arrangement.

In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[39] The court has held that only one of these findings is necessary.[40]

Department of Finance asserts that Government Code section 3546, subdivision (a), as it relates to rebates and reductions to the fair share service fee do not constitute a program because it neither provides a service to the public nor qualifies as a function unique to governmental

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[36] *City of Merced, supra*, 153 Cal.App.3d 777.

[37] *Whitcomb Hotel, Inc., supra*, 24 Cal.App.2d 753, 757.

[38] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1816.

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

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

entities. Department of Finance claims that the United States Supreme Court's holding in *Communication Workers v. Beck* (1988) 487 U.S. 735, which addresses fair share service fees, applies to both private and public employees. The Court in *Beck* interpreted and applied the provisions of the National Labor Relations Act (NLRA). However, the NLRA by its own terms expressly excludes public employees from its coverage. Section 2, subdivision (2), of the NLRA (29 U.S.C. § 152(2)) provides, in pertinent part, that "[t]he term 'employer' … shall not include… any State or political subdivision thereof…" Furthermore, section 2, subdivision (3), of the NLRA (29 U.S.C. § 152(3)) provides that "[t]he term 'employee' … shall not include any individual employed… by any… person who is not an employer as herein defined."[41]

Staff finds that Government Code section 3546 and California Code of Regulations, title 8, sections 34030 and 34055, impose a program within the meaning of article XIII B, section 6 of the California Constitution under the second test, to the extent the test claim legislation requires school districts to engage in administrative activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state.

Accordingly, staff finds that the remaining test claim legislation constitutes a "program" and, thus, may be subject to subvention pursuant to article XIII B, section 6 of the California Constitution if the legislation also imposes a new program or higher level of service, and costs mandated by the state.

Issue 2: Does the remaining test claim legislation impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Test claim legislation imposes a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required.[42] The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[43] A statute or executive order imposes a reimbursable "higher level of service" when the statute or executive order, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, increases the actual level of governmental service provided in the existing program.[44]

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[41] See *Carmen v. San Francisco Unified School District* (1997) 982 F.Supp. 1396, 1409 (concluding that "school districts are considered 'political subdivisions' of the State of California within the meaning of 29 U.S.C. § 152(2), and therefore are exempt from coverage under the NLRA").

[42] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

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

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

Government Code Section 3546:

Government Code section 3546, as enacted by Statutes 2000, chapter 893, and amended by Statutes 2001, chapter 805,[45] follows:

> (a) Notwithstanding any other provision of law, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, *the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.* Thereafter, the employee shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers shall have the right, pursuant to regulations adopted by the Public Employment Relations Board, to receive a rebate or fee reduction upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.
>
> (b) The costs covered by the fee under this section may include, but shall not necessarily be limited to, the cost of lobbying activities designed to foster collective bargaining negotiations and contract administration, or to secure for the represented employees advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and negotiating with the employer.
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> (c) The arrangement described in subdivision (a) shall remain in effect unless it is rescinded pursuant to subdivision (d). The employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board.
>
> (d)(1) The arrangement described in subdivision (a) may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit, the signatures are obtained in one academic year. There shall not be more than one vote taken during the term of any collective bargaining agreement in effect on or after January 1, 2001.
>
> (2) If the arrangement described in subdivision (a) is rescinded pursuant to paragraph (1), a majority of all employees in the negotiating unit may request that the arrangement be reinstated. That request shall be submitted to the board along with a petition containing the signatures of at least 30 percent of the employees in the negotiating unit. The vote shall be conducted at the worksite by secret ballot,

[45] Reworded subdivision (a), and added subdivisions (e) and (f).

and shall be conducted no sooner than one year after the rescission of the arrangement under this subdivision.

(3) If the board determines that the appropriate number of signatures have been collected, it shall conduct the vote to rescind or reinstate in a manner that it shall prescribe in accordance with this subdivision.

(4) The cost of conducting an election under this subdivision to reinstate the organizational security arrangement shall be borne by the petitioning party and the cost of conducting an election to rescind the arrangement shall be borne by the board.

(e) The recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section. The recognized employee organization shall have the exclusive right to determine whether any such action or proceeding shall or shall not be compromised, resisted, defended, tried, or appealed. This indemnification and hold harmless duty shall not apply to actions related to compliance with this section brought by the exclusive representative of district employees against the public school employer.

(f) *The employer of a public school employee shall* provide the exclusive representative of a public employee with the home address of each member of a bargaining unit, regardless of when that employee commences employment, so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232. (Emphasis added.)

The test claim allegations regarding Government Code section 3546 will be analyzed in order of subdivision below.

Government Code Section 3546, Subdivision (a):

Claimant alleges that subdivision (a) of Government Code section 3546 constitutes a reimbursable state mandate in two respects by requiring school districts to (1) establish, implement, maintain and update payroll procedures to determine those employees from whose paychecks service fees must be deducted, and to make such deductions and transmit those fees to the employee organization; (2) "adjust payroll withholdings for rebates or withholding reductions" pursuant to the rebate or fee reduction provision of subdivision (a); and (3) provide notice to employees explaining the payroll deduction for the fair share service fees.

Department of Finance agrees that subdivision (a) requires school districts to deduct service fees from the wages of its employees, and then transmit those fees to the employee organization. However, Department of Finance also argues that those school districts that did establish organizational security arrangements prior to the enactment of the test claim legislation are not justified in claiming any mandated costs because those districts voluntarily chose to incur such costs, and so nothing new is mandated upon them by the test claim legislation. Staff disagrees. Government Code section 17565 clearly provides that: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall

reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

Department of Finance also argues that the rebate and fee reduction provision imposes no activities on school districts. Department of Finance asserts that PERB's regulations squarely place the burden of issuing fee rebates to employees on the employee organization.

Under prior law, a school district could voluntarily enter into organizational security arrangements with an employee organization. Organizational security has been within the scope of representation since the EERA's enactment.[46] This results in a duty upon the school district to meet and negotiate in good faith with the exclusive representative upon request.[47] Prior to the 2000 amendments, the EERA, while imposing a duty to bargain, did not compel the parties to reach agreement on organizational security. Thus, any agreement ultimately reached through the bargaining process was entered into voluntarily by both sides.

Government Code section 3546, subdivision (a), requires what was once voluntary. Section 3546, subdivision (a), bypasses the discretion of a school district, and instead compels the district to institute an organizational security arrangement "upon receiving notice from the exclusive representative." This new requirement that school districts shall implement organizational security arrangements requires school districts to make service fee deductions from the wages of employees, and consequently transmit those fees to the employee organization. Such fee deductions and payments to the employee organization were never required immediately preceding the enactment of the test claim legislation, and thus impose a new program or higher level of service on school districts.

In addition, under prior law, certificated and classified employees could pay the service fees directly to the certificated or recognized employee organization in lieu of having the school district deduct the service fees from the employee's salary or wage order.[48] Claimant argues that Government Code section 3546, subdivision (a), expressly states that its terms apply "notwithstanding any other provision of law." Thus, claimant argues that the employee's right to pay the service fee directly to the employee organization is "nullified." Claimant contends the school districts are now required to make the service fee deductions from the wages of all employees that work in a unit for which an exclusive representative has been selected and transmit those fees to the employee organization.[49]

Staff agrees with claimant. Government Code section 3546, subdivision (a), states the following:

> *Notwithstanding any other provision of law*, upon receiving notice from the exclusive representative of a public school employee who is in a unit for which an exclusive representative has been selected pursuant to this chapter, the employer shall deduct the amount of the fair share service fee authorized by this section

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[46] Former Government Code section 3546 (added by Stats. 1975, ch. 961, and repealed by Stats. 2000, ch. 893); Gov. Code, § 3540.1, subd. (i) (as amended by Stats. 2000, ch. 893).

[47] Government Code section 3543.3.

[48] Education Code sections 45061, 45168, 87834, and 88167.

[49] Claimant's response to draft staff analysis, page 4.

> from the wages and salary of the employee and pay that amount to the employee organization. (Emphasis added.)

The phrase "notwithstanding any other provision of law" has expressly been interpreted by the courts as "an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern."[50] Thus, any other provision of law that is contrary or inconsistent with the statute "is subordinated to the latter provision" containing the "notwithstanding" language.[51] In this case, the sections in the Education Code allowing the employee to directly pay the service fee to the employee organization is inconsistent with the test claim statute that requires, without exception, the employer to deduct the service fee from the wages of the employee that works in a unit for which an exclusive representative has been selected. Accordingly, staff finds that Government Code section 3456, subdivision (a), imposes a new program or higher level of service by requiring school districts to make service fee deductions from the wages of all certificated and classified employees that work in a unit for which an exclusive representative has been selected, and transmit those fees to the employee organization.

However, in order to be subject to the subvention requirement of article XIII B, section 6, of the California Constitution, the test claim legislation must also impose upon a local agency or school district "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district is required to incur…"

Government Code section 17556 lists several exceptions which preclude the Commission from finding costs mandated by the state. Specifically, "The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: … (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

Pursuant to Education Code sections 45061 and 87834, K-14 school districts retain the authority to levy the charges necessary to cover any costs incurred in making service fee deductions from the wages of certificated employees choosing not to join the employee organization. Education Code section 45061 applies to elementary and secondary districts, while Education Code section 87834 is for community colleges. Education Code section 45061 follows:

> The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or

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[50] *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785.

[51] *Id*. at page 786.

recognized employee organization in lieu of having such service fees deducted from the salary or wage order.

If the employees of a district do not authorize the board to make a deduction to pay their pro rata share of the costs of making deductions for the payment of service fees to the certified or recognized organization, the board shall deduct from the amount transmitted to the organization on whose account the payments were deducted the actual costs, if any, of making the deduction. No charge shall exceed the actual cost to the district of the deduction. These actual costs shall be determined by the board and shall include startup and ongoing costs.

Education Code section 87834 is nearly identical, the only difference being that section 87834 substitutes the words "community college district" for the words "school district" in the first sentence of section 45061. As is evident from the plain language of sections 45061 and 87834, school districts may deduct service fees from the wages of certificated employees "*with or without charge*." (Emphasis added).

The language of Government Code section 17556, subdivision (d), is clear and unambiguous. In *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, the court found that "the plain language of the statute precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program." In making such a determination, the court explicitly rejected the argument that the term "authority" should be construed as meaning "a practical ability in light of surrounding economic circumstances."[52] Accordingly, the focus is not whether a local agency or school district *chooses* to exercise an authority to levy service charges or fees, but rather whether such authority exists at all. Section 17556, subdivision (d), explicitly declares that if the local agency or school district "has the authority" to assess fees, then the commission shall be precluded from finding "costs mandated by the state." Here, school districts do possess such authority.

According to the Education Code sections, "No charge shall exceed the actual cost to the district of the deduction," but the costs for which the governing board is authorized to assess charges "shall be determined by the board and shall include startup and ongoing costs." Thus, the school district may assess charges for costs it must incur in establishing, maintaining, and adjusting its service fee deduction procedures, in addition to transmitting those fees to the employee organization.

Education Code sections 45061 and 87834 provide school districts with "the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program," within the meaning of Government Code section 17556, subdivision (d). Accordingly, staff finds that Government Code section 3546, subdivision (a), does not constitute a reimbursable state mandate because the test claim legislation does not impose "costs mandated by the state" as to activities regarding certificated employees.

This same fee authority does not apply for classified employees. Subdivision (b) of both Education Code sections 45168 and 88167 (for K-12 districts and community college districts, respectively), provide:

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[52] *Ibid.*

> The governing board of each [ ] district, when drawing an order for the salary or wage payment due to a classified employee of the district may, *without charge*, reduce the order … for the payment of service fees to the certified or recognized organization as required in an organizational security arrangement between the exclusive representative and a [ ] district employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. [Emphasis added.]

Thus, staff finds that Government Code section 3546, subdivision (a) imposes a new program or higher level of service upon school districts within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514, for the following new activity:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization.

This activity does not apply for certificated employees; fee authority is available pursuant to Education Code sections 45061 and 87834.

Claimant further alleges that Government Code section 3546, subdivision (a), requires school districts to make payroll adjustments for service fee deductions to account for fee reductions or rebates to which the fee-paying employees may become entitled. Claimant alleges that this activity is mandated since school districts are required to report accurate payroll information to their employees and the state and federal governments.[53]

Government Code section 3546, subdivision (a), recognizes the right of employees paying fair share service fees "to receive a rebate or fee reduction upon request, of that portion of their fee" determined to be beyond the permissible scope of the employee organization's role as exclusive bargaining representative. To implement these provisions, PERB regulations require the exclusive representative to provide annual notice to nonmembers that are required to pay the fair share service fee of the amount of the service fee deduction and the calculation used to arrive at the amount of the fee.[54] If the employee disagrees with the amount of the service fee deduction, the employee may file an agency fee objection and the exclusive representative is required to administer an agency fee appeal procedure.[55] Staff finds that the requirement imposed by Government Code section 3546, subdivision (a), on school districts to deduct the correct amount from the wages of the employee after receiving notice from the exclusive representative of the amount, applies when the agency fee objection is resolved and it is determined that the employee is entitled to a reduction of future agency fee deductions.

But there is no mandate in the statutes or regulations plead by the claimant requiring the school district to make payroll adjustments for rebates. Rather, any rebates are paid by the exclusive

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[53] Claimant's response to draft staff analysis, page 5.

[54] California Code of Regulations, title 8, section 32992, subdivision (a).

[55] California Code of Regulations, title 8, section 32994.

representative. Under PERB regulations, once an agency fee objection is filed, the exclusive representative is required to hold any disputed agency fees in an escrow account for the duration of the dispute.[56] Escrowed agency fees that are being challenged shall not be released until after there is a mutual agreement between the agency fee objector and the exclusive representative, or an impartial decisionmaker has made a decision.[57] Interest at the prevailing rate shall be paid by the exclusive representative on all rebated fees.[58]

Finally, claimant requests reimbursement to "draft, approve, and distribute an appropriate and neutral notice to existing nonmember employees and new employees which explains the additional payroll deduction for 'fair share service fees' for nonmember employees of an employee organization." Claimant argues that these activities are "implicit in the legislation" and are necessary since the employer is responsible for changes to employee payroll amounts. Claimant asserts this activity is required since there is no statutory requirement for the exclusive representative to provide such notices to employees about these payroll adjustments.[59] Neither Government 3546, nor the PERB regulations, require school districts to provide notice to its employees regarding the service fee deduction. If this test claim is approved, however, the Commission can consider claimant's request at the parameters and guidelines stage and determine whether the requested activities are a reasonable method of complying with the mandate to deduct the fair share service fee in an amount authorized by Government Code section 3546.[60]

Government Code section 3546, subdivisions (b) through (e):

Government Code section 3546, subdivision (b), describes the permissible costs towards which an employee organization may apply the fair share service fees. Nothing in the language of subdivision (b), imposes any activities upon school districts.

Subdivision (c) provides that the "employer shall remain neutral, and shall not participate in any election conducted under this section unless required to do so by the board." Claimant alleges that subdivision (c) requires the public school employer to supply "administrative support" as required by PERB.[61] However, PERB has not enacted any rules or regulations requiring a school district's participation in an organizational security election.[62] Therefore, subdivision (c) does not impose any required activities on school districts.

Government Code section 3546, subdivision (d), contains four subparts. Subdivisions (d)(1) and (d)(2) describe the process by which employees in a bargaining unit may either rescind or reinstate, respectively, an organizational security arrangement. Such a process includes the

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[56] California Code of Regulations, title 8, section 32995, subdivision (a).

[57] California Code of Regulations, title 8, section 32995, subdivision (b).

[58] California Code of Regulations, title 8, section 32995, subdivision (c).

[59] Claimant's response to draft staff analysis, pages 5 and 6.

[60] California Code of Regulations, title 2, section 1183.1, subdivision (a)(4).

[61] First Amendment to the Test Claim, page 6; claimant's response to draft staff analysis, page 6.

[62] See California Code of Regulations, title 8, division 3, chapter 2, subchapter 2 for PERB's regulations governing organizational security arrangements under the EERA.

submission of a petition to PERB and a consequent election among the employees if the petition meets PERB's requirements as promulgated by its regulations. Claimant alleges that subdivisions (d)(1) and (d)(2) require school districts to adjust payroll procedures when the organizational security arrangement is rescinded or reinstated to comply with the requirement to deduct fair share service fees in the appropriate amount from the employee salaries. Government Code section 3546, subdivisions (d)(1) and (d)(2), however, do not impose any state-mandated activities on school districts and, therefore, reimbursement is not required to comply with these subdivisions.[63]

Subdivision (d)(3) provides that PERB shall conduct a vote to either rescind or reinstate an organizational security arrangement if the required number of employee signatures on a petition have been collected. Claimant alleges that subdivision (d)(3) requires school districts to "supply any required administrative support as may be required by PERB."[64] Claimant asserts that "it can be reasonably anticipated that if, for example, the Board determines that the appropriate number of signatures have not been collected, there may be some inquiry as to the content of the list of employees the school district is required to provide to PERB pursuant to Title 8, CCR, Sections 34030 and 34055."[65] Government Code section 3546, subdivision (d)(3), however, does not require anything of school districts, thus any mandated activities related to this subdivision would only arise from an executive order. No such executive order is included in this test claim, therefore no findings can be made that school districts have reimbursable state-mandated costs to supply administrative support to PERB.

Subdivision (d)(4) states that the costs of conducting an election to rescind an organizational security arrangement "shall be borne by the board," while the costs in an election to rescind "shall be borne by the petitioning party." Staff finds that nothing in the plain language of section 3546, subdivision (d)(4), requires school districts to perform any activities.

Finally, Government Code section 3546, subdivision (e), requires that the "recognized employee organization shall indemnify and hold the public school employer harmless against any reasonable legal fees, legal costs, and settlement or judgment liability arising from any court or administrative action relating to the school district's compliance with this section."

Claimant argues that subdivision (e) requires school districts to take any and all necessary actions... to recover reasonable legal fees... from the recognized employee organization."[66] Claimant also contends that "the right to indemnification stems from this subdivision and the cause of civil action which may result in the indemnification of the school district arises from

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[63] The requirement for school districts to deduct the fair share service fees from employee wages in the appropriate amount is mandated by Government Code section 3546, subdivision (a), and not subdivision (d). Thus, the requested activity to adjust payroll procedures to the reflect the amount required to be deducted from an employee's salary because of a rescission or reinstatement of the organizational security arrangement may be considered by the Commission as a reasonable method of complying with Government Code section 3546, subdivision (a), at the parameters and guidelines stage. (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(4).)

[64] First Amendment to the Test Claim, page 6.

[65] Claimant's response to draft staff analysis, page 6.

[66] First Amendment to the Test Claim, page 8.

this code section, thus making it s a source of costs mandated by the state."[67] Department of Finance rebuts this argument by asserting that the plain language of subdivision (e) does not impose any activities on school districts.

Staff finds that the plain language of subdivision (e) does not impose any duties on school districts. Rather, subdivision (e) imposes a requirement on the *employee organization* to indemnify and hold harmless a school district for any legal expenses incurred in complying with implementing an organizational security arrangement. If a school district asserts its legal right to indemnification, that action is a decision of the school district and not a mandate by the state.

Accordingly, staff finds that Government Code section 3546, subdivisions (b), (c), (d), and (e) do not mandate a program, or impose a new program or higher level of service upon school districts within the meaning of article XIII B, section 6, of the California Constitution.

Government Code Section 3546, Subdivision (f):

Statutes 2001, chapter 805 added subdivision (f) to Government Code section 3546 "so that the exclusive representative can comply with the notification requirements set forth by the United States Supreme Court in *Chicago Teachers Union v. Hudson* (1986) 89 L.Ed. 2d 232."

Claimant asserts that Government Code section 3546, subdivision (f) imposes a state-mandated activity on school districts for providing a list of employee home addresses to the exclusive representative. Department of Finance, on the other hand, claims that the activity "consists of producing a report which should readily be available through the school district's payroll system,"[68] and that any costs incurred by the claimant in providing such a list are *de minimis*, and should therefore not be reimbursable because claimant's costs would be unlikely to reach the threshold for a claim.

Government Code section 3546, subdivision (f) requires school districts to file a list of employee home addresses with an employee organization selected by an employee bargaining unit to act as exclusive representative. Prior to the enactment of Statutes 2001, chapter 805, no statutory or regulatory requirement obligated a school district to provide a list of home addresses to the exclusive representative. The requirements imposed upon school districts by Government Code section 3546, subdivision (f), impose a new program or higher level of service within the meaning of article XIII B, section 6, of the California Constitution for the following new activity:

- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit.

Government Code section 3546, subdivision (f), also imposes "costs mandated by the state" upon school districts as defined in Government Code section 17514. Government Code section 17556, states, in pertinent part:

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[67] Claimant's response to draft staff analysis, page 7.

[68] Department of Finance, July 30, 2002 Comments, page 3.

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that: …
>
> (b) The statute or executive order affirmed for the state a mandate that had been declared existing law or regulation by action of the courts.
>
> (c) [t]he statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation.

However, staff finds that Government Code section 17556, subdivisions (b) and (c) do not apply in this case.

In *Chicago Teachers Union v. Hudson*, *supra,* 475 U.S. 292, 305-07, the United States Supreme Court held that employee organizations must: (1) establish procedures prior to making agency fee deductions which will ensure that the funds from such fees are not used to finance ideological activities beyond the scope of collective bargaining; (2) provide agency fee payers with the methods used for calculating the amount of the agency fee; and (3) establish an appeals process to ensure that agency fee objections are addressed in a timely and fair manner by an impartial decision maker.

In order to facilitate the exclusive representative's responsibility to provide notice to nonmember employees regarding the service fee deductions and the methods used to calculate the amount of such fees, Government Code section 3546, subdivision (f) imposes upon school districts the obligation to provide a list of employee home addresses to the exclusive representative. Although subdivision (f) aims at imposing certain notification requirements upon the employee organization in order to comply with federal case law, the requirement that school districts provide the employee organization with a list of employee home addresses goes beyond mere compliance with federal case law.

In *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 817, the court found that Penal Code section 987.9, which requires counties to provide ancillary investigative services when providing defense services to indigent criminal defendants, constituted a federal mandate. The court determined that the right to counsel under the Sixth Amendment and the due process clause of the Fourteenth Amendment of the United States Constitution include "the right to reasonably necessary ancillary services."[69] Accordingly, Penal Code section 987.9 "merely codified these constitutional guarantees," and thus section 987.9 simply required local compliance with the federal mandate.[70]

In *San Diego Unified School District*, *supra*, 33 Cal.4th 859, 889, the California Supreme Court adopted the reasoning that procedural protections that are merely incidental to the codification of a federal right, and which add only a *de minimis* financial impact, constitute an implementation of federal law not reimbursable under article XIII B, section 6, of the California Constitution.

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[69] *County of Los Angeles*, *supra*, 32 Cal.App.4th 805, 815.

[70] *Ibid.*

Here, however, while the notification requirements imposed on the employee organization are mandated by the United States Supreme Court's holding in *Hudson*, nothing in the *Hudson* decision imposes any required activities on school districts. Thus, because Government Code section 3546, subdivision (f) imposes a new required activity on school districts beyond compliance with federal case law, Government Code section 17556, subdivisions (b) and (c) do not apply. Nor are any other provisions of Government Code section 17556 applicable here; therefore, staff finds that Government Code section 3546, subdivision (f) imposes costs mandated by the state pursuant to Government Code section 17514.

California Code of Regulations, Title 8, Sections 34030 and 34055:

PERB has enacted regulations implementing the procedures for filing petitions to either rescind or reinstate an organizational security arrangement. Title 8, section 34030, was added to the California Code of Regulations in 1980, and subsection (b) was added, operative January 1, 2001:

> (a) Within 20 days following the filing of the petition to rescind an organizational security arrangement, the employer shall file with the regional office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed, unless otherwise directed by the Board.
>
> (b) If after initial determination the proof of support is insufficient, the Board may allow up to 10 days to perfect the proof of support.
>
> (c) Upon completion of the review of the proof of support, the Board shall inform the parties in writing of the determination as to sufficiency or lack thereof regarding the proof of support.

Title 8, section 34055, was added to the California Code of Regulations, operative January 1, 2001, and is nearly identical in language to section 34030, except that it provides that the employer shall file the required list "Within 20 days following the filing of the petition *to reinstate* an organizational security provision …"

Claimant alleges that section 34030, subdivision (a), and section 34055, subdivision (a), impose state-mandated activities on school districts to file a list of employee names and job titles with PERB. Department of Finance, on the other hand, contends that only those districts that did not negotiate and implement organizational security arrangements prior to the 2000 amendments are justified in claiming mandated costs. Department of Finance alleges that districts that did negotiate organizational security arrangements prior to the 2000 amendments should not be reimbursed for voluntarily assumed costs.

California Code of Regulations, title 8, section 34030, subdivision (a), was enacted by PERB in 1980. Prior to the enactment of Statutes 2000, chapter 893, any organizational security arrangement entered into between a school district and employee organization was the product of a voluntary agreement resulting from the collective bargaining process. Statutes 2000, chapter 893, however, required the parties to implement an organizational security arrangement.

Under prior law, a school district retained discretion on entering into an organizational security arrangement with an employee organization. Thus, the provisions of section 34030, subdivision (a), requiring school districts to file a list of names and job titles to PERB upon the

submission of an employee petition to rescind an organizational security arrangement would not have been state-mandated or required. This conclusion flows from the fact that the decision to participate in the underlying program was within the school district's discretion, and thus any downstream requirements imposed within such a program were also voluntary.[71] Accordingly, if the district did enter into an organizational security arrangement, compliance with PERB's filing requirements in section 34030, subdivision (a), did not constitute a mandate by the state until January 1, 2001, the operative date of Statutes 2000, chapter 893.

Government Code section 3546, subdivision (d)(1), as added by Statutes 2000, chapter 893, recognizes the right of public school employees in a unit for which an employee organization has been selected as exclusive representative to rescind an organizational security arrangement. Subdivision (d)(1), states that the organizational security arrangement required by subdivision (a) of section 3546 "may be rescinded by a majority vote of all the employees in the negotiating unit subject to that arrangement, if a request for a vote is supported by a petition containing 30 percent of the employees in the negotiating unit." If the organizational security arrangement is rescinded pursuant to such a vote, subdivision (d)(2) allows that "a majority of all employees in the negotiating unit may request that the arrangement be reinstated."[72]

Sections 34030 and 34055 implement the provisions of Government Code section 3546, subdivision (d). California Code of Regulations, title 8, sections 34030 and 34055 require that within 20 days of the submission of a petition to either rescind or reinstate an organizational security arrangement, the public school "employer shall file with the regional [PERB] office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition." Staff finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution for the following new activity:

- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed.

None of the provisions of Government Code section 17556 are applicable; therefore, staff finds that California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a) impose costs mandated by the state pursuant to Government Code section 17514.

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[71] *Kern High School Dist., supra*, 30 Cal.4th 727, 742. The California Supreme Court addressed the issue whether legislation imposing certain notice and agenda requirements on school site councils administering various school-related educational programs constituted a reimbursable state mandate. The Court concluded that mandatory "downstream" requirements flowing from a local government entity's voluntary decision to participate in an underlying program do not constitute reimbursable state mandates.

[72] Government Code section 3546, subdivision (d)(2).

CONCLUSION

Staff concludes that Government Code section 3546, subdivisions (a) and (f), and California Code of Regulations, title 8, sections 34030, subdivision (a), and 34055, subdivision (a), impose new programs or higher levels of service for K-14 school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- Upon receiving notice from the exclusive representative of a classified public school employee who is in a unit for which an exclusive representative has been selected, the employer shall deduct the amount of the fair share service fee authorized by this section from the wages and salary of the employee and pay that amount to the employee organization. (Gov. Code, § 3546, subd. (a);)[73]
- School district employers of a public school employee shall provide the exclusive representative of a public employee with the home address of each member of a bargaining unit. (Gov. Code, § 3546, subd. (f).)[74]
- Within 20 days following the filing of the petition to rescind or reinstate an organizational security arrangement, the school district employer shall file with the regional office of PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed. (Cal. Code Regs., tit. 8, §§ 34030, subd. (a), and 34055, subd. (a).)[75]

Staff concludes that Government Code sections 3543, 3546, subdivisions (b) through (e), and 3546.3, as added or amended by Statutes 1980, chapter 816, Statutes 2000, chapter 893, and Statutes 2001, chapter 805 are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis and approve the test claim for the activities listed above.

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[73] As added by Statutes 2000, chapter 893, operative January 1, 2002.

[74] As amended by Statutes 2001, chapter 805, operative January 1, 2002.

[75] As amended and operative on January 1, 2001.