

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 44830.1, 44830.2, 45125, 45125.01, and 45125.2; Statutes 1998, Chapter 594; Statutes 1998, Chapter 840; Statutes 1999, Chapter 78; Penal Code Sections 11077 and 11105.02; Statutes 1972, Chapter 1437; Statutes 1992, Chapter 1026; California Code of Regulations, Title 11, Sections 700-708.

Filed on December 15, 2000,

By Napa County Office of Education,
Claimant.

No. 00-TC-05

Criminal Background Checks II

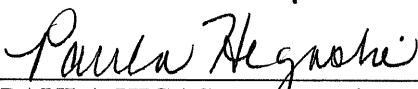
STATEMENT OF DECISION PURSUANT
TO GOVERNMENT CODE SECTION 17500
ET SEQ.; CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION 2,
CHAPTER 2.5, ARTICLE 7.

(Adopted on February 27, 2003)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on March 5, 2003.



PAULA HIGASHI, Executive Director

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STATEMENT OF DECISION

The Commission heard and decided this test claim on January 23, 2003, during a regularly scheduled hearing. Mr. David Scribner appeared for claimant, Napa County Office of Education. Ms. Cheryl Black, Ms. Susan Geanacou, and Mr. Blake Johnson appeared on behalf of the Department of Finance.

At the hearing, testimony was given, the test claim was submitted, and the vote was taken.

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

The Commission approved this test claim by a 5-0 vote.

BACKGROUND

Under the California Constitution, students and staff at public primary, elementary, and junior and senior high schools have the right to attend campuses that are safe and secure.¹

Criminal Background Checks I Test Claim: In 1997, the Legislature enacted the Michelle Montoya School Safety Act that requires school districts to obtain criminal background checks of specified types of school district employees. School districts must also obtain criminal background checks of employees of entities that contract with the districts. The act also prohibits districts from employing or retaining temporary, substitute or probationary employees who have been convicted of a serious or violent felony.

¹ Article I, section 28, subdivision (c).

The Lake Tahoe Unified School District and the Irvine Unified School District filed a test claim (97-TC-16) asserting that the legislation imposed a reimbursable state-mandated program on school districts. On March 25, 1999, the Commission adopted a Statement of Decision finding that the Michelle Montoya School Safety Act (Stats. 1997, ch. 588; Stats. 1997, ch. 589) imposes a reimbursable state-mandated program on school districts under article XIII B, section 6 of the California Constitution and Government Code section 175 14.

Criminal Background Checks I Parameters and Guidelines: The parameters and guidelines (97-TC-16) adopted on October 28, 1999, authorize reimbursement for the certain activities. These parameters and guidelines read in pertinent part as follows:

- Criminal Background Checks for Previously Exempted, Non-Certificated Employees Hired After September 30, 1997: Obtaining fingerprints and the required processing fee from applicants selected for all non-certificated employee positions (school districts with an ADA of 400,000 or more and school districts wholly within a city and county only) or for temporary and substitute non-certificated employees employed for less than the school year (all other school districts); processing the fingerprints and any required forms, sending the fingerprints and required forms to the DOJ, resolving problems with the DOJ; and reviewing the criminal background checks and other correspondence from DOJ to determine whether the applicant was arrested or convicted of a violent or serious felony. Secondary school pupils employed in a temporary part-time position at the school they attend are exempt from these requirements.
- Criminal Background Checks for Non-Certificated Employees Hired Before September 30, 1997: The one-time activity of reviewing employment records to determine which of the school district's non-certificated employees with a hire date before September 30, 1997, except for pupils that are employed at the school they attend, have not had a criminal background check completed; forwarding the request to the DOJ indicating the number of non-certificated employees for whom a criminal background check has not been completed; obtaining fingerprints from each non-certificated employee for whom a criminal background check has not been completed, processing the fingerprints and any required forms, sending the fingerprints and any required forms to the DOJ, and resolving problems with the DOJ; and reviewing the criminal background checks and other correspondence from DOJ to determine whether the employee was convicted of a violent or serious felony. The fees school districts pay to the DOJ for processing the criminal background checks for existing employees are reimbursable under this component.
- Criminal Background Checks for Certificated Employees Hired After September 30, 1997: Obtaining fingerprints and the required processing fee from applicants selected for all certificated employee positions; processing the required fingerprints and any required forms, sending the fingerprints and required forms to the Department of Justice, resolving problems with the DOJ; and reviewing the criminal background checks and other correspondence from DOJ to determine whether the applicant has been convicted of a serious or violent felony.
- Criminal Background Checks for Certificated Employees Hired Before September 30, 1997: The one-time activity of reviewing employment records to determine whether any certificated employee hired before September 30, 1997 has been convicted of a violent or serious felony (other than a sex or narcotics offense); obtaining fingerprints from certificated employees hired prior to September 30, 1997 for whom a criminal background check has not

been completed, processing the fingerprints and any required forms, sending the fingerprints and any required forms to DOJ, and resolving any problems with the DOJ; and reviewing the criminal background checks and other correspondence from DOJ to determine whether the employee has been convicted of a serious or violent felony. The fees school districts pay to the DOJ for processing the criminal background checks for existing employees are reimbursable under this component.

- Criminal Background Checks for Certificated Employees Applying for a Temporary Certificate or Temporary Certificate of Clearance: Obtaining fingerprints and the required fee for processing the fingerprints and obtaining a criminal record summary from applicants for certificated positions prior to employing such applicants based upon a temporary certificate (county offices of education) or a temporary certificate of clearance (school districts); processing fingerprints, any required forms, and fees, sending the fingerprints, any required forms, and fees to the DOJ for processing, and resolving problems with the DOJ; reviewing the criminal background checks and other correspondence from DOJ to determine whether the applicant was arrested or convicted of a violent or serious felony; and notifying an applicant whether the county office of education or school district will issue a temporary certificate or temporary certificate of clearance.
- ⌘ Reimbursement for the costs of obtaining a criminal record summary on employees currently and continuously employed by a school district within the county who serve under a valid credential and who have applied for a renewal of that credential or for an additional credential is limited to the period from September 30, 1997 until September 25, 1998.²
- Criminal Background Checks for Contractor Employees: Drafting and revising contracts, bid documents, requests for proposal, and other contract documents to include provisions relating to the duties of entities contracting with school districts to provide janitorial, administrative, landscape, transportation, or food-related services to comply with Education Code section 45 125.1; determining whether the employees of entities contracting with school districts to provide janitorial, administrative, landscape, transportation, or food-related service will have limited contact with pupils; taking appropriate steps to protect the safety of the pupils that may come into contact with those contractor employees who will have limited contact with pupils; assuring that the contracting entity provides a certification to the school district that none of its employees have been convicted of a felony and a list of employees who may come into contact with pupils; distributing the lists of contractor employees to the appropriate school or schools.
- ⌘ Electronic Fingerprinting Equipment: Costs of electronic fingerprinting system equipment and other equipment used to obtain criminal background checks, including service and system connection costs, are reimbursable to the extent that the purchase is cost-effective for the school district. Factors in determining if purchasing electronic fingerprinting system equipment is cost-effective include, but are not limited to, staffing needs and the availability

² Education Code section 44332.6 was amended by Statutes of 1998, Chapter 840. Statutes of 1998, Chapter 840 added subdivisions (f)(l) and (2) to provide that “a county or city and county board of education may issue a temporary certificate or temporary certificate of clearance to employees currently and continuously employed by a school district within the county who is serving under a valid credential and has applied for a renewal of that credential or for an additional credential without obtaining a criminal record summary for that employee.” This amendment became effective on September 25, 1998.

of electronic fingerprinting system equipment in other jurisdictions within the community of the school district.

- ⌘ Reporting to the DOJ: The one-time cost of compiling and preparing a report to the DOJ by September 30, 1998, listing all of the district's employees for the prior school year and indicating whether or not a criminal background check has been completed on each employee.
- ⌘ Terminating, Suspending and Reinstating Employees: The one-time activity of reviewing school district records to determine whether any certificated temporary, substitute or probationary employee hired prior to September 30, 1997 and serving before March 15 of their second probationary year has been convicted of a violent or serious felony (other than a sex or narcotics offense); terminating such employees. The one-time activity of reviewing school district records to determine whether any non-certificated temporary, substitute or probationary employee hired prior to September 30, 1997 has been convicted of a violent or serious felony (other than a sex or narcotics offense); terminating such employees. Immediately suspending any certificated temporary, substitute or probationary employees serving before March 15 of their second probationary year or any temporary, substitute, or probationary non-certificated employee upon telephonic notice from DOJ that such employee has been convicted of a violent or serious felony. Immediately terminating any certificated temporary, substitute or probationary employees serving before March 15 of their second probationary year or any temporary, substitute, or probationary non-certificated employee upon written notification from DOJ that the employee has been convicted of a violent or serious felony. Reinstating any employee that was suspended or terminated based upon notice from the DOJ in the event that DOJ withdraws its conviction notification in writing, including, without limitation, all salary, benefits, and other compensation paid to or on behalf of the employee upon reinstatement.
- ⌘ Costs of recruiting persons to replace a suspended or terminated employee are reimbursable under this component. The difference in costs between the salary and benefits of the suspended or terminated employee and the salary and benefits of the replacement person are also reimbursable under this component, if there are increased costs.

Criminal Background Checks II Test Claim

In 1998 and 1999, the Legislature enacted the test claim legislation, which added or amended Education and Penal Code sections (including regulations incorporated by reference) relating to the following: criminal background checks of district employees, monitoring or separation of employees of construction contractors who work on school grounds, sending fingerprints to the Federal Bureau of Investigation, requesting from DOJ reports of subsequent arrest for employees, and storage and destruction of criminal record summaries.

The test claim legislation also authorizes school districts that are within a county or contiguous counties to designate a school district or county office of education ("designated district") to perform specified activities, such as: sending fingerprints to the DOJ; receiving reports of convictions of serious and violent felonies; receiving or reviewing criminal history records and reports of subsequent arrests from the DOJ; maintaining common lists of persons eligible for employment; notifying other school districts if a prospective or current employee has been convicted of a serious or violent felony; providing written notification to superintendents of other school districts that criminal history records or reports of subsequent arrest are available for

inspection; maintaining a record of all persons to whom a criminal history record or a report of subsequent arrest has been shown; and submitting an interagency agreement to the DOJ to establish authorization to submit and receive criminal history and subsequent arrest information.

Claimant's Position

Claimant, Napa County Office of Education, submitted a test claim alleging that the test claim legislation constitutes a reimbursable state mandate pursuant to article XIII B, section 6 of the California Constitution and Government Code section 175 14. Claimant seeks reimbursement for the costs of:

- (1) Maintaining the criminal histories of prospective and current employees, and volunteers, in locked filing cabinets separate from other files;
- (2) Complying with the DOJ's destruction and training requirements;
- (3) Promulgating rules to assure the security of criminal histories;
- (4) Continually training school district personnel in the handling and dissemination of criminal history information;
- (5) Obtaining from the DOJ the criminal histories of prospective concessionaires and their associates;
- (6) Following the DOJ criminal history retention and destruction schedule;
- (7) Installing physical barriers, providing continual supervision, or monitoring all contractor employees to ensure there is only limited contact between the contractor employee and pupils;
- (8) Training staff regarding the test claim activities;
- (9) Drafting or modifying policies and procedures to reflect the test claim activities; and
- (10) Any additional activities identified as reimbursable during the parameters and guidelines phase.

Department of Finance's Position

In its comments of February 23, 2001, Finance states that no provisions in the test claim are reimbursable. Specifically, Finance contends that the requirements of Statutes 1998, chapter 840 and Statutes 1999, chapter 78 regarding the claimed activities are not reimbursable because private schools are also required under Education Code sections 44237 and 33 193 (Stats. 1998, ch. 840) to engage in the same activities:

- (1) Maintaining prospective and current employee and volunteer criminal histories obtained from the DOJ in locked filing cabinets separate from other files;
- (2) Complying with the DOJ's destruction and training requirements;
- (3) Obtaining the criminal histories (or subsequent arrest service) of prospective concessionaires and their affiliates or associates from the DOJ;
- (4) Installing physical barriers, providing continual supervision, or monitoring all contractor employees to ensure there is only limited contact between the contractor employee and pupils.

In addition, Finance asserts that the following requirements of Penal Code sections 11077 and 11105.02 are generally applicable laws: (1) establishing continuing training of personnel in the handling and dissemination of such information; and (2) following the DOJ criminal history retention and destruction schedule. Further, Finance contends that promulgating rules to assure the security of criminal histories is not an activity specified in the test claim legislation. Also training district staff regarding the test claim activities, and drafting or modifying policies and procedures to reflect the test claim activities are issues to be dealt with, if at all, in the parameters and guidelines phase. Finally, Finance argues that activities identified as reimbursable during the Parameters and Guidelines phase is inappropriate because reimbursable activities are identified only during the test claim phase.

COMMISSION FINDINGS

In order for the test claim legislation to impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 175 14, the statutory language must mandate a new program or create an increased or higher level of service over the former required level of service. “Mandates” as used in article XIII B, section 6, is defined to mean “orders” or “commands.”³ The California Supreme Court has defined “program” subject to article XIII B, section 6 of the California Constitution as a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.⁴ To determine if the “program” is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation? Finally, the new program or increased level of service must impose “costs mandated by the state?”

This test claim presents the following issues:

- ⌘ Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- ⌘ Does the test claim legislation impose a new program or higher level of service on local entities within the meaning of article XIII B, section 6 of the California Constitution?
- ⌘ Does the test claim legislation impose “costs mandated by the state” within the meaning of Government Code sections 175 14 and 17556?

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

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a “program.” As mentioned above, this means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not

³ *Long Beach Unified School District* (1990) 225 Cal.App.3d 155, 174.

⁴ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

⁵ *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

⁶ Government Code section 17514.

apply generally to all residents and entities in the state.⁷ Only one of these findings is necessary to trigger article XIII B, section 6.⁸

A. Activities Not Subject to Article XIII B, Section 6

The following statutes or activities were pled by claimant.

Attorney General activities: Claimant pled Penal Code section 11077 (Stats 1972, ch. 1437), requiring the Attorney General to establish regulations to, among other things, assure the security of criminal offender record information. Government Code section 175 14 defines “costs mandated by the state” as a local agency’s or school district’s increased costs as a result of a statute enacted on or after January 1, 1975. Penal Code section 11077 was enacted in 1972. Because it falls outside of the Government Code definition of “costs mandated by the state” that implements article XIII B, section 6,⁹ the Commission finds that Penal Code section 11077 is not subject to article XIII B, section 6.

Training: Statutes 1998, chapter 840, added or amended Education Code sections 44830.1, subdivision (n)(4), and 45 125 subdivision (k)(4). These test claim statutes require school districts to ensure “compliance with destruction, storage, dissemination, auditing, backgrounding, and *training* requirements as set forth in Sections 700 through 708 inclusive, of Title 11 of the California Code of Regulations and Section 11077 of the Penal Code.” (Emphasis added.)

However, California Code of Regulations, title 11, sections 700-708, authorized by Penal Code section 11077 discussed above, do not contain a provision for training. Section 7 10 is labeled “Training,” but the claimant did not plead section 710, and the test claim statutes do not cite section 7 10. Even if they did, section 7 10 was repealed effective June 16, 1985, before the test claim legislation was enacted. Therefore, the Commission finds there are no training requirements (as cited in Education Code sections 44830.1, subdivision (n)(4) and 45 125 subdivision (k)(4)) imposed on school districts by the test claim legislation. Therefore, training in this test claim is not subject to article XIII B, section 6.

Concessionaire activities: Claimant contends that Education Code section 45 125, subdivision (j), that references Penal Code section 11105.2, requires school districts to request subsequent arrest service for concessionaires. Penal Code section 11105.02 merely authorizes the DOJ to give out this information for concessionaries. In fact, the last sentence of section 11105.02 reads, “Nothing in this section shall be construed as imposing any duty upon a local government, or any officer or official thereof, to request state summary criminal history information on any current or prospective concessionaire or the affiliates or associates of that concessionaire.”

There is nothing in the test claim legislation that requires districts to request subsequent arrest information for concessionaires.¹⁰ Claimant’s pleading appears to confuse Penal Code section 11105.2 (as referenced in Ed. Code, §§ 45 125 (j) and 44830.1 (i), discussed below) with Penal

⁷ *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

⁸ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal. App.3d 521, 537.

⁹ Article XIII B, section 6, subdivision (c) states that the state need not pay pre-1975 mandates.

¹⁰ Mandates for contracts for food-related services are already being reimbursed under the parameters and guidelines for the original Criminal Background Checks test claim.

Code section 11105.02. But there is no requirement in the test claim legislation to implement Penal Code section 11105.02. Therefore, the Commission finds that Penal Code section 11105.02 (requesting information for concessionaires) is not subject to article XIII B, section 6.

B. The Remaining Test Claim Statutes Qualify as a “Program”

Finance argues that the test claim legislation is not a “program” because Education Code sections 44237 and 33193 (Stats. 1998, ch. 840) require private schools to also engage in the same activities contained in the test claim legislation.

The Commission disagrees. The test claim legislation relates to campus safety. As such, it concerns public safety and education, both of which are programs that carry out governmental functions of providing services to the public.

Moreover, the test claim legislation implements a state policy and imposes unique requirements on school districts and does not apply generally to all residents and entities statewide. In *Long Beach Unified School District v. State of California*,¹¹ the court held,

. . . although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. Further, public education is administered by local agencies to provide service to the public. Thus, public education constitutes a “program” within the meaning of Section 6.

Therefore, except as discussed above, the test claim legislation is both a program that carries out the governmental function of providing public safety in an educational setting, and a law which, to implement state policy, imposes unique requirements on school districts or county offices of education and does not apply generally to all residents and entities in the state. As such, the Commission finds that the remaining test claim legislation constitutes a program within the meaning of article XIII B, section 6.

Issue 2: Does the test claim legislation impose a new program or higher level of service on local entities within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution provides, “whenever the Legislature or any state agency *mandates* a new program or higher level of service on any local government, the state shall provide a subvention of funds.” (Emphasis added.) This provision was specifically intended to prevent the state from forcing programs on local governments that require them to spend their tax revenues.¹² To implement article XIII B, section 6, the Legislature enacted Government Code section 17500 et seq. Government Code section 17514 defines “costs mandated by the state” as “any increased costs which a local agency or school district is *required* to incur . . . as a result of any statute. . . which *mandates* a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.” (Emphasis added.) “Mandates” as used in article XIII B, section 6, is defined to mean “orders” or “commands.”¹³

¹¹ *Long Beach Unified School Dist.*, *supra*, 225 Cal.App.3d 155, 172.

¹² *County of Fresno v. State of California* (1991) 53 Cal.3d 482,487; *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284.

¹³ *Long Beach Unified School District*, *supra*, 225 Cal.App.3d 155, 174.

For the test claim legislation to be subject to article XIII B, section 6, it must order or command the school district to perform an activity or task. If the test claim legislation does not mandate the school district to perform a task, then compliance is within the discretion of the school district and a state-mandated program does not exist. The state has no duty under article XIII B, section 6 to reimburse the school district for costs of programs or services incurred as a result of the exercise of local discretion or choice.¹⁴

To determine if the “program” is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately before enactment of the test claim legislation.¹⁵

Safe schools: Since 1982, the California constitution has declared that students and staff of public, K-12 schools have a right to safe schools.¹⁶ A threshold issue, therefore, is whether the test claim legislation is actually a “new” program or higher level of service, or merely implements the existing constitutional provision.

The test claim statutes require school districts to take specific actions, such as: requesting the DOJ to send copies of fingerprint cards to the Federal Bureau of Investigation; requesting from the DOJ reports of subsequent arrests of employees; storing criminal record summaries in a locked file separate from other files; requiring the destruction of a prospective employees’ criminal record summaries after a hiring determination has been made; and installing a physical barrier at construction worksites at school facilities, or having a contractor employee continually supervise and monitor employees of the contractor, or conducting surveillance of employees of the contractor.

When a statute or executive order goes beyond constitutional requirements to require specific activities, those activities become a higher level of service as defined under article XIII B, section 6.¹⁷ Here, the test claim legislation requires the specific procedures named above for achieving the goal of safe public schools. Because these requirements are more specific and rigorous than the constitutional declaration of a right to “safe schools,” they exceed requirements in existing law and warrant further analysis.

A. Activities of All School Districts

The following activities in the test claim legislation apply to all school districts.

Submittal of fingerprints, description, and fee to DOJ: Education Code section 44830.1, subdivision (d), as added by Statutes 1998, chapter 840, states:

When the governing board of any school district requests a criminal record summary of a temporary, substitute, or probationary certificated employee, two fingerprint cards, bearing the legible rolled and flat impressions of the person’s fingerprints together with a personal description and the fee, *shall* be submitted, by any means authorized by the Department of Justice, to the Department of Justice. (Emphasis added.)

¹⁴ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777,783.

¹⁵ *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 835.

¹⁶ Article I, section 28, subdivision (c).

¹⁷ *Long Beach Unified School District, supra*, 225 Cal.App.3d 155, 173.

This statute applies to temporary, substitute or probationary certificated employees.

In the existing parameters and guidelines for the *Criminal Background Checks I* test claim (97-TC- 16), the activity of submitting fingerprint cards, bearing the legible rolled and flat impressions of the person's fingerprints, together with a personal description (or DOJ forms) and the fee, is already being reimbursed. The existing parameters and guidelines already reimburse this activity for *all* certificated employees hired after September 30, 1997, and the one-time cost of this activity for certificated employees hired before September 30, 1997, and for employees applying for a temporary certificate or temporary certificate of clearance. The test claim legislation merely clarifies that this is to be done for temporary, substitute, or probationary certificated employees.

In its December 30, 2002 comments, claimant argues that the *Criminal Background Checks I* parameters and guidelines only partially recognize that fees paid to the DOJ are reimbursable. Claimant says Component C, for certificated employees hired after September 30, 1997, lists "obtaining the processing fee from the applicant" as a reimbursable activity but does not list the actual fee payable to DOJ as a reimbursable cost. By contrast, Component D, for certificated employees hired before September 30, 1997, provides that the "fees paid to the DOJ for processing the criminal background checks for existing certificated employees are reimbursable under the component ." Claimant notes that school districts have fee authority for non-certificated applicants under Education Code section 45 125, subdivision (f), but do not have fee authority for certificated employees. According to claimant, school districts must bear the DOJ processing fees to comply with the test claim legislation. Therefore, claimant requests that the conclusion be modified to recognize that processing fees paid to DOJ for criminal background checks for certificated employees is a new program or higher level of service. Claimant also recommends providing a statement that school districts do not have authority to charge a processing fee to certificated applicants so claimant can clearly list the reimbursable costs and fee authority limitation in Component C.

The Commission disagrees. The parameters and guidelines for the *Criminal Background Checks I* test claim provide that the fees paid to DOJ for processing criminal background checks are reimbursable for non-certificated employees hired before September 30, 1997 (section B), and for certificated employees hired before September 30, 1997 (section D). In both cases, fees for existing employees (hired before September 30, 1997) were the only reimbursable fees. The test claim legislation does not change that. It merely requires that for temporary, substitute, or probationary certificated employees, two fingerprint cards with a personal description and the fee, be submitted to DOJ. The decision to revise the parameters and guidelines to include reimbursement of the DOJ fee for certificated employees hired after September 30, 1997 would be inappropriate because the test claim legislation does not require it.

The Commission finds that it has already determined, in the *Criminal Background Checks I* parameters and guidelines, that fingerprint cards, a personal description (or DOJ forms) and the fee to DOJ must be submitted for all certificated employees. Therefore, the Commission finds that Education Code section 44830.1, subdivision (d), as added by Statutes 1998, chapter 840, requiring submission of fingerprints for temporary, substitute, or probationary certificated employees, does not constitute a new program or higher level of service.

Communication with DOJ: Education Code sections 44830.1, subdivision (i) and 45 125, subdivision (j), as added by Statutes 1998, chapter 840 requires school districts to "request

subsequent arrest service from the Department of Justice as provided under Section 11105.2 of the Penal Code.” Thus, the requirements of Penal Code section 11105.2 (Stats. 198 1, ch. 269) become part of the test claim legislation by incorporation even though they were not pled by claimant.

Penal Code section 11 105.2,¹⁸ subdivision (b) requires school districts to enter into contracts with DOJ in order to receive notification of subsequent arrests. Subdivision (c) requires districts that submit fingerprints for employment to notify DOJ immediately “when the employment of the applicant is terminated, when the applicant’s license or certificate is revoked, or when the applicant may no longer renew or reinstate the license or certificate.” Subdivision (d) requires districts receiving notification of subsequent arrest “for a person unknown to the agency, or for a person no longer employed by the agency, or no longer eligible to renew the certificate or license for which subsequent arrest notification service was established” to immediately return the subsequent arrest notification to DOJ, informing DOJ that the agency is no longer interested in the applicant. The district is forbidden to retain or record the subsequent arrest information. Finally, subdivision (e) states that a district that “submits the fingerprints.. . for the purpose of establishing a record at the department to receive notification of subsequent arrest shall immediately notify the department if the applicant is denied licensing or certification.”

Before enactment of Education Code sections 44830.1, subdivision (i) and 45 125, subdivision (j), school districts were not required to comply with the contract and notification activities listed in Penal Code section 11105.2 (Stats. 198 1, ch. 269). Therefore, because they are new, the Commission finds that the following activities constitute a new program or higher level of service: (1) entering into contracts with DOJ in order to receive notification of subsequent arrests; (2) notifying the DOJ when the employment of the applicant is terminated, when the applicant’s certificate is revoked, or when the applicant may no longer renew or reinstate the certificate; (3) immediately returning the subsequent arrest notification to the DOJ and informing the DOJ that the district is no longer interested in the applicant for a person unknown to the district, or for a person no longer employed by the district, or no longer eligible to renew the certificate or license for which subsequent arrest notification service was established; and (4) immediately notifying the DOJ if the applicant is denied licensing or certification.

Storage of DOJ documents: According to Education Code sections 44830.1, subdivision (n)(2), and 45 125, subdivision (k)(2), added or amended by the test claim legislation, school districts are required to store documents received from the DOJ (i.e., the criminal history information of volunteers and current and prospective employees) in a locked file accessible only to the custodian of records separate from other files.

Under prior law, school districts were not required to store documents received from the DOJ in a locked file separate from other files.

Therefore, the Commission finds that the activity of storing DOJ records in a locked file (accessible only to the custodian of records separate from other files) constitutes a new program or higher level of service on school districts.

Destruction of DOJ information: Statutes 1998, chapter 840, added or amended Education Code sections 44830.1, subdivision (n)(3), and 45 125, subdivision (k)(3), that state school

¹⁸ This analysis does not include amendments to Penal Code section 11105.2 made by Statutes 2001, chapter 653, as this amendment occurred after the test claim legislation and was not pled by claimant.

districts “**shall** ensure . . . [i]nformation received from the Department of Justice [i.e., criminal history information] **shall** be destroyed upon the hiring determination [regarding a prospective school district employee] in accordance with subdivision (a) of Section 708 of Title 11 of the California Code of Regulations.”¹⁹ (Emphasis added.) Section 708 requires that destruction of criminal offender record information be carried out so the identity of the subject can no longer reasonably be ascertained, and requires a witness from the authorized agency²⁰ (i.e., school district) when records are destroyed outside the authorized agency.

Because document destruction in accordance with the Title 11 regulations, including section 708, was not previously required, the Commission finds that the requirement for school districts to destroy information received from the DOJ upon the hiring determination so the identity of the subject can no longer reasonably be ascertained (and providing a district witness if the record is destroyed outside the district) is a new program or higher level of service.

Fingerprint card requests to FBI: Education Code section 45 125, subdivision (b)(3), as amended by Statutes 1998, chapter 840, states that a “school district **shall** request the Department of Justice to forward one copy of the fingerprint cards to the Federal Bureau of Investigation for the purpose of obtaining any record of previous convictions of applicants for positions not requiring certification qualifications.” (Emphasis added.) Hence, the onus is on the school district to initiate the process of forwarding a copy of the non-certificated employee’s fingerprint cards to the Federal Bureau of Investigation.²¹

Under prior law, DOJ had the discretion to submit a copy of the fingerprint cards to another bureau of investigation.²²

Thus, because school districts are now required to request that the DOJ forward copies of non-certificated employee’s fingerprint cards to the Federal Bureau of Investigation, the Commission finds that this request constitutes a new program or higher level of service within the meaning of article XIII B, section 6.

¹⁹ School districts must destroy information received from the Department of Justice once a hiring determination has been made regarding the following types of employees:

- prospective certificated employees (Ed. Code, § 44830.1 (i));
- prospective supervisors of prospective employees (Ibid.);
- prospective certificated employee in multiple school districts (Ed. Code, § 44830.2);
- prospective non-certificated employees (except secondary pupils employed in a temporary or part-time position by the governing boards of the school district having jurisdiction over the school attended by the pupil) (Ed. Code, § 45125, subd. (j));
- prospective non-certificated employee in multiple school districts (Ed. Code, § 45 125.01).

²⁰ “Authorized person or Agency” means any person or agency authorized by court order, statute, or decisional law to receive criminal offender record information. (Cal. Code Regs., tit. 11, § 701, subd. (b).)

²¹ This requirement pertains to convictions records of two types of non-certificated applicants. First, it pertains to the conviction records of a prospective employee who has not resided in the State of California for at least one year immediately preceding his or her application for employment (Stats. 1998, ch. 840; Ed. Code, § 45 125, subd. (b)(3)(A)). Second, the requirement pertains to the conviction records of a prospective employee who has resided for more than one year, but less than seven years, in the State of California and the DOJ has ascertained that the person was convicted of a sex offense where the victim was a minor or a drug offense where an element of the offense is either the distribution to, or the use of a controlled substance by, a minor (Stats. 1998, ch. 840; Ed. Code, § 45125, subd. (b)(3)(B)).

²² See Statutes 1997, chapter 588 (former Ed. Code, § 45125, subd. (b)(2)).

Maintaining a list of the number of current employees: Statutes 1998, chapter 840 amended Education Code section 45 125, subdivision (d), which states in relevant part:

The governing board of each district shall *maintain a list* indicating the number of current employees, except secondary school pupils employed in a temporary or part-time position by the governing board of the school district having jurisdiction over the school they attend, who have not completed the requirements of this section . . . School districts that have previously submitted identification cards for current employees to either the Department of Justice or the Federal Bureau of Investigation shall not be required to further implement the provisions of this section as it applies to those employees.²³ (Emphasis added.)

Prior law stated in relevant part:

The governing board of each school district shall forward a request [to process fingerprints] to the Department of Justice indicating the number of current employees, except pupils employed at the school they attend, who have not completed the requirements of this section . . . School districts that have previously submitted identification cards for current employees to either the Department of Justice or the Federal Bureau of Investigation shall not be required to further implement the provisions of this section as it applies to those employees.²⁴ . . .

The governing board of each school district shall annually on September 30 submit to the Department of Justice a list of all its employees for the prior school year and shall indicate whether or not a criminal background check pursuant to this section has been completed on each employee.²⁵

Thus, prior law required districts to forward a list of employees who have not completed the section 45 125 requirements, including obtaining the fingerprints and criminal background checks of every employee applicant, except secondary school pupils employed in a temporary part-time position at their school, before hiring a non-certificated employee. Prior law also required districts to submit a report to DOJ regarding whether its employees have been through a criminal background check.

On page 6 of the Statement of Decision for the *Criminal Background Checks I* test claim (97-TC-16), the Commission found that school districts are required, by September 30th of each year, to submit to the DOJ a list of all employees for the prior school year and to indicate whether or not a criminal background check has been completed on each one.

In its comments of December 30, 2002, claimant argues that the list maintenance requirement constitutes a new program or higher level of service because (1) it has not been cited as reimbursable under the current parameters and guidelines; (2) the test claim legislation now specifically requires it, which prior law did not; (3) different state and local entities will interpret the language from their perspective. Therefore, including the list maintenance requirement will eliminate the chance for interpretational audit disputes.

²³ Statutes 1998, chapter 840 (Ed. Code, § 45125, subd. (d).)

²⁴ Statutes 1997, chapter 588 (former Ed. Code, § 45125, subd. (d).)

²⁵ Statutes 1997, chapter 588 (Ed. Code, § 45125, subd. (h).)

The Commission agrees. Maintaining a list is different from compiling and submitting an annual list to DOJ. “Maintain” means “to carry on; continue; keep in desirable condition.”²⁶ Therefore, the Commission finds that maintaining a list indicating the current number of employees who have not completed the requirements of section 45 125 (except for pupils employed in a temporary or part-time position in the school they attend) does impose a new program or higher level of service on school districts.

Subsequent arrest service request: According to Education Code section 45 125, subdivision (j) (Stats. 1998, ch. 840), a “school district *shall* request subsequent arrest service²⁷ from the DOJ as provided under section 11105.2 of the Penal Code.”²⁸ (Emphasis added.) Statutes 1998, chapter

²⁶ Webster’s II New Riverside Dictionary (Revised ed., 1996) page 414.

²⁷ Penal Code section 11105.2, subdivision (a), states:

The Department of Justice may provide subsequent arrest notification to any agency authorized by Section 11105 to receive state summary criminal history information to assist in fulfilling employment, licensing, or certification duties upon the arrest of any person whose fingerprints are maintained on file at the Department of Justice as the result of an application for licensing, employment or certification. The notification shall consist of a current copy of the person’s state summary criminal history transcript.

Penal Code section 11105, subdivision (b) states in relevant part:

The Attorney General shall furnish state summary criminal history information to any of the following, if needed in the course of their duties, provided that when information is furnished to assist an agency, officer, or official of . . . local government, or any entity, in fulfilling employment, certification or licensing duties [¶] . . . [¶]

- (10) Any city or county, or city and county, or district, or any other officer, or official thereof. . .
- if access is need in order to assist that agency, officer, or official fulfilling employment, certification, or licensing duties, and if the access is specifically authorized by the city council, board of supervisors, or governing board of the city, county, or district.
 - if the criminal history information is required to implement a statute, ordinance, or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements of exclusions, or both, expressly based upon the specified criminal conduct.

[¶] . . . [¶]

- (12) Any person or when access is expressly authorized by statute if the criminal history information is required to implement a statute or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements or exclusions, or both, expressly based upon that specified criminal conduct.

Penal Code section 11105 subdivision (a), states in relevant part:

- (2) As used in this section:

- i. ‘State summary criminal history information’ means the master record of information compiled by the Attorney General pertaining to the identification and criminal history of any person, such as name, date or birth, physical description, fingerprints, photographs, date of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data about the person.
- ii. ‘State summary criminal history information’ does not refer to records and data compiled by criminal justice agencies other than the Attorney General, nor does it refer to records of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice.

²⁸ School districts must request subsequent arrest service regarding the following types of employees:

- prospective certificated employees;

840 also added section 44830.1, subdivision (i), that says “an employer *shall* request subsequent arrest service from the Department of Justice as provided under Section 11105.2 of the Penal Code.” (Emphasis added.) Subsequent arrest service is “a current copy of the person’s state summary criminal history transcript.”²⁹

Under prior law, school districts were not required to request subsequent arrest service information (i.e., criminal histories) regarding applicants and employees. Therefore, the Commission finds that the requirement for districts to request subsequent arrest service for certificated and non-certificated positions, as specified in Education Code sections 45 125, subdivision (j), and 44830.1, subdivision (i) constitutes a new program or higher level of service for school districts.

Precautions dealing with construction contractors: Education Code section 45 125.2, subdivision (a), as amended by Statutes 1998, chapter 840, requires school districts to take precautions when contracting for construction, reconstruction, rehabilitation, or facility repair, where the employees of the entity will have contact, other than limited contact, with pupils. Districts must do one or more of the following to ensure the safety of pupils with regard to the contractors’ employees:

- (1) install a physical barrier at the worksites to limit contact with pupils;
- (2) have a contractor employee continually supervise and monitor all of the contractor’s employees who have not been convicted of a violent or serious felony;
- (3) have school personnel conduct surveillance of employees of the contractor.³⁰

Limited contact is determined by the district, which must consider the totality of the circumstances, including the following factors:

. . .the length of time the contractors will be on school grounds, whether pupils will be in proximity with the site where the contractors will be working, and whether the contractors will be working by themselves or with others.³¹

Preexisting law³² requires certain employees of entities having janitorial, administrative, grounds and landscape, transportation or food-related contracts with school districts to submit fingerprint

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- prospective non-certificated employees (except secondary pupils employed in a temporary or part-time position by the governing boards of the school district having jurisdiction over the school attended by the pupil);
 - prospective supervisors of prospective employees;
 - current certificated employees who are temporary employees;
 - substitute employees;
 - probationary employees serving before March 15 of his or her second probationary year. (Ed. Code, § 44830.1, subd. (i), and § 45 125, subd. (j).)

²⁹ Penal Code section 11105.2, subdivision (a). State summary criminal history information is defined as “the master record of information compiled by the Attorney general pertaining to the identification and criminal history of any person, . . .” (Pen. Code, § 11105, subd. (a)(2)(A).)

³⁰ Education Code section 45125.2, subdivision (a).

³¹ Education Code section 45125.1, subdivisions (c) and (d).

³² Education Code section 45 125.1.

cards to the DOJ to determine if the person has been arrested or convicted of any crime. This applies only to employees of contractors who have more than limited contact with the students. However, employees of an entity providing services to a school district in an emergency or in exceptional situations, such as when the student health or safety is endangered, or when repairs are needed to make school facilities safe and habitable, are exempt. Subdivision (f) of section 45 125.1 requires the entity having a service contract to provide the school district with a list of the names of its employees who may come into contact with the students and to certify in writing that none of them have been convicted of a felony. The school district is then required to provide the list of employee names to the appropriate schools within its jurisdiction.

The Commission finds that the monitoring or barrier installation activities listed above constitute a new program or higher level of service because school districts were not required to perform them prior to September 25, 1998 when Statutes 1998, chapter 840, became effective.

Another issue is the scope of this “new program,” i.e., how many of the three activities listed above must districts perform? The statute states that a district contracting for construction services “shall ensure the safety of the pupils by one or *more* of the following methods.” In construing this last phrase in quotation marks, we use the following rules. First, in interpreting a statute, the objective is to ascertain and effectuate legislative intent by first scrutinizing the plain meaning of the words.³³ Second, “shall” is mandatory.³⁴ Given these rules, the plain meaning of “one or more of the following” is that a district must do one of the three listed activities, but has discretion to do more than one. This interpretation of district discretion is supported by the legislative history, which describes this portion of the test claim legislation in the following “digest” format:

“Allows an entity who contracts with a school district for construction, rehabilitation or repair of a school facility to avoid having to obtain fingerprint checks on employees if the contractor does one of the following: (a) Installs a physical barrier between the worksite and pupils (b) Provides for continuous supervision of employees by a school employee, or another person who has been checked by the DOJ and found not to have committed any offense that would bar employment of a credentialed person.”³⁵ (Emphasis added.)

Based on this restatement of the provision, as well as on the plain meaning of the provision itself, the Commission finds the following constitutes a mandated new program or higher level of service: For school districts that contract with entities for construction, reconstruction, rehabilitation, or facility repair, where the employees of the entity will have contact, other than limited contact, with pupils, the district is required to comply with one of three activities: install a physical barrier at the worksites to limit contact with pupils; **or** have a contractor employee continually supervise and monitor all of the contractor’s employees who have not been convicted of a violent or serious felony; **or** have school personnel conduct surveillance of employees of the contractor. A district may, in its discretion, do more than one of these activities to ensure the safety of its pupils.

³³ *Snukal v. Flightways Mfg. Inc* (2000) 23 Cal.4th 754, 757.

³⁴ Education Code section 75.

³⁵ Senate Rules Committee, Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill No. 2102 (1997-1998 Reg. Sess.) as amended August 17, 1998, page 3.

The Commission also finds that the state has mandated a new program or higher level of service when a district engaged in construction, reconstruction, rehabilitation, or facility repair is required to determine whether a construction contractor would have more than “limited contact”³⁶ in determining whether to comply with this provision, i.e., districts must consider the length of time the contractors will be on school grounds, whether pupils will be in proximity with the site where the contractors will be working, and whether the contractors will be working by themselves or with others.³⁷

If the contractor would have only “limited contact” with pupils, the district need not engage in any of the three activities listed above, so they would not apply. In that case, the Commission finds that the new program or higher level of service would be limited to the district’s determination of the level of contact.

B. Activities of Designated Districts or County Offices of Education

Education Code sections 44830.2 and 45 125.0 1 provide an alternative method for implementing some aspects of the criminal background checks program. When a person is an applicant for employment, or is employed on a part-time or substitute basis in multiple school districts within a county or within contiguous counties, a school district may perform the required activities itself (a “non-participating” school district). Alternatively, a school district may coordinate the performance of some activities with other school districts (a “participating” school district). Specifically, a county superintendent can agree to act on behalf of participating school districts, or certain districts may designate a single school district (a “designated district”) to perform specified activities. The designated district must enter into an interagency agreement with the DOJ to submit and receive information.³⁸

Some activities that may be delegated to a designated district are already being reimbursed under the current parameters and guidelines, such as:

- Sending fingerprints to the DOJ;³⁹
- Receiving reports of convictions of serious and violent felonies from the DOJ;⁴⁰ and
- Reviewing or receiving criminal history records and reports of subsequent arrests from the DOJ.⁴¹

There are other activities that a designated district performs that are not reimbursed, such as:

- Maintaining common lists of persons eligible for employment,⁴²

³⁶ Education Code section 45 125.1, subdivision (c) lists the factors a district must consider in determining whether a contractor will have limited contact.

³⁷ Education Code section 45 125.1, subdivisions (c) and (d).

³⁸ Education Code sections 44830.2, subdivision (e) and 45125.01, subdivision (e).

³⁹ Education Code sections 44830.2, subdivision (a)(1), and 45 125.01, subdivision (a)(1).

⁴⁰ Education Code sections 44830.2, subdivision (a)(2), and 45125.01, subdivision (a)(2).

⁴¹ Education Code sections 44830.2, subdivision (a)(3), and 45125.01, subdivision (a)(2) authorizes a designated district to review criminal history records and reports of subsequent arrest from the DOJ for certificated employees. For non-certificated employees, the activity is “receiving” these criminal history records and reports of subsequent arrests.

⁴² Education Code sections 44830.2, subdivision (a)(4), and 45125.01, subdivision (a)(3).

- ⊘ Communication with participating districts upon receipt from DOJ of a serious or violent felony,⁴³
- ⊘ Providing written notice to the superintendent of a participating school district, upon receipt from the DOJ of a criminal history record or report of subsequent arrest for someone on a common employment eligibility list, that the criminal history record or the report of subsequent arrest is available for inspection,⁴⁴
- ⊘ Maintaining a record of persons to whom the criminal history record or report of subsequent arrest has been shown,⁴⁵ and
- ⊘ Submitting an interagency agreement to the DOJ to establish authorization to submit and receive information.⁴⁶

If a school district chooses the alternative method authorized by Education Code sections 44830.2 and 45 125.01, it becomes a participating school district and delegates the activities listed above to the designated school district.

The test claim legislation does not require designating a school district or county superintendent. According to the statutes:

“ . . .the districts may agree among themselves to designate a single district, or a county superintendent may agree to act on behalf of participating districts within the county or contiguous counties, for the purposes of performing the following functions:”⁴⁷

Both the plain language of the statute and the legislative history indicate this designation is not required. Use of the word “may” indicates a permissive activity.⁴⁸ The legislative history also recognizes that designating a district is merely authorized.⁴⁹ In summarizing supporting arguments for the this provision, the legislative history includes a quote from the Montebello Unified School District as follows; ““AB 2102 will allow school districts and county offices to share records to avoid a time-consuming process of each school district checking on the fingerprints of substitute teachers and of classified employees.”⁵⁰

In its comments of December 30, 2002, claimant states that these sections need to be analyzed in conjunction with the basic purpose of this mandate that is contained in Education Code sections 44830.1 and 45 122.1, which state that “[n]o person who has been convicted of a violent or serious felony shall be hired or employed by a school district.” Claimant states that use of the alternative method is cost effective for all entities involved, applicants, school districts, and the state. It saves processing time and reduces costs for local and state agencies through lower mandated cost reimbursement claims.

⁴³ Education Code sections 44830.2, subdivision (c), and 45125.01, subdivision (c).

⁴⁴ Education Code sections 44830.2, subdivision (d), and 45125.01, subdivision (d).

⁴⁵ Education Code sections 44830.2, subdivision (d), and 45125.01, subdivision (d).

⁴⁶ Education Code sections 44830.2, subdivision (e), and 45125.01, subdivision (e).

⁴⁷ Education Code sections 44830.2, subdivision (a), and 45125.01, subdivision (a).

⁴⁸ Education Code section 75.

⁴⁹ Assembly Committee on Public Safety, analysis of Assembly Bill No. 2102 (1997- 1998 Reg. Sess.) as amended April 13, 1998, page 1.

⁵⁰ *Id.* at page 8.

The parameters and guidelines typically include reimbursement for contracted activities that the Commission has found to be new programs or higher levels of service. Therefore, designated districts could be compensated pursuant to agreements with participating districts that file the reimbursement claims. This would not apply to activities that are not state-mandated reimbursable programs.

Nonetheless, the Commission finds that, because the activities of designated districts are merely authorized and not mandated, those activities specified in Education Code sections 44830.2 and 45 125.01, do not constitute a new program or higher level of service.

In summary, the Commission finds the following activities are new programs or higher levels of service within the meaning of article XIII B, section 6.

- **Communication with DOJ:** (1) Entering into a contract with DOJ in order to receive notification of subsequent arrests; (2) notifying the DOJ when the employment of the applicant is terminated, when the applicant's certificate is revoked, or when the applicant may no longer renew or reinstate the certificate; (3) immediately returning the subsequent arrest notification to the DOJ and informing the DOJ that the district is no longer interested in the applicant for a person unknown to the district, or for a person no longer employed by the district, or no longer eligible to renew the certificate or license for which subsequent arrest notification service was established; and (4) immediately notifying the DOJ if the applicant is denied licensing or certification. (Stats. 1998, ch. 840; Ed. Code §§ 44830.1, subd. (i) & 45 125, subd. (j)).
- **Storage of DOJ documents:** Storing criminal history records and reports of subsequent arrest received from the DOJ in a locked file separate from other files accessible only to the custodian of records (Stats. 1998, ch. 840, and Stats. 1999, ch. 78; Ed. Code, §§ 44830.1, subd. (n)(2), 44830.2, subd. (f)(2), 45125.01 subd. (f)(2), & 45125, subd.(k)(2)).
- **Destruction of DOJ information:** Destroying information received from the DOJ upon a hiring determination in accordance with subdivision (a) of Section 708 of Title 11 of the California Code of Regulations, requiring that destruction of criminal offender record information be carried out so the identity of the subject can no longer reasonably be ascertained, and requiring a witness from the school district when records are destroyed outside the district. (Stats. 1998, ch. 840, Ed. Code §§ 44830.1, subd. (n)(3), & 45125, subd. (k)(3)).
- **Fingerprint card request to FBI:** Requesting that the DOJ forward copies of non-certificated employees' fingerprint cards to the Federal Bureau of Investigation (Stats. 1998, ch. 840; Ed. Code, § 45 125, subd. (b)(3)).
- **Maintaining a list of the number of current employees:** Maintaining a list indicating the current number of employees who have not completed the requirements of section 45 125 (except for pupils employed in a temporary or part-time position in the school they attend) (Stats. 1998, ch. 840; Ed. Code, § 45125, subd. (d).)
- **Subsequent arrest service request:** Requesting subsequent arrest service from the DOJ for certificated and non-certificated positions (Stats. 1998, ch. 840; Ed. Code, §§ 44830.1, subd. (i), & 45125, subd. (j)).

- **Precautions dealing with construction contractors:** When contracting for construction, reconstruction, rehabilitation, or facility repair, determining whether the contractor will have “limited contact” with pupils, and if not, installing a physical barrier at construction worksites at school facilities, or having a contractor employee continually supervising and monitoring employees of construction contractors who have not been convicted of a violent or serious felony, or conducting surveillance of employees of construction contractors (Stats. 1998, ch. 840; Ed. Code, § 45 125.2, subd. (a)).

Issue 3: Does the test claim legislation impose “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to constitute a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state? Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 175 14 defines “costs mandated by the state” as follows:

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

Claimant submitted a declaration in support of the contention that the test claim legislation results in increased costs for school districts. The Director of Human Resources for the Napa County Office of Education declared on December 15, 2000, that the Napa County Office of Education is informed and believes that prior to enactment of the test claim legislation, the Napa County Office of Education was not required to engage in the test claim activities.⁵² Further, Napa County Office of Education estimates that the claimant has incurred, or will incur, costs significantly in excess of \$200.⁵³

Fee Authority: Prior law required the district to collect a fee, determined by DOJ, to be forwarded to the DOJ for processing a non-certificated applicant’s application.⁵⁴ The test claim legislation made this fee optional for the district, but kept the requirement for “the amount of the fee” be forwarded to the DOJ.⁵⁵ It also added DOJ fee authority to collect fees for certificated applicants, but did not include fee authority for school districts.⁵⁶

⁵¹ *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 835; Government Code section 17514.

⁵² Exhibit A, page 124.

⁵³ As of 1997 the Department of Justice charged the following amounts for processing fingerprints for criminal background checks: \$32 for credentialed teachers, \$42 for classified employees, and \$32 for contract employers for public schools (\$42 for expedited services). California Department of Justice, Applicant Fingerprint Clearance Fees (October 30, 1997) < <http://caag.state.ca.us/fingerprints/forms.htm> > [as of January 8, 2003].

⁵⁴ Education Code section 45125, subdivision (f) as amended by Statutes 1997, chapter 588.

⁵⁵ Education Code section 45125, subdivision (f) as amended by Statutes 1998, chapter 840.

⁵⁶ Education Code section 44830.1, subdivision (e) as amended by Statutes 1998, chapter 840.

“Obtaining fingerprints and the required processing fee from applicants selected” is currently reimbursed under the *Criminal Background Checks I* parameters and guidelines for certificated and non-certificated applicants hired after September 30, 1997. For non-certificated and certificated employees hired before September 30, 1997, the “fee school districts pay to the DOJ for processing the criminal background checks for existing employees are reimbursable under this component.” Reimbursement for service fees collected is expressly deducted from the original test claim as an offset in the parameters and guidelines.

For non-certificated applicants, the school district has fee authority to charge

a fee determined by the Department of Justice to be sufficient to reimburse the department for the costs incurred in processing the application. The amount of the fee shall be forwarded to the Department of Justice with the required fee payable to the local public law enforcement agency taking the fingerprints and completing the data on the fingerprint cards. In no event shall the fee exceed the actual costs incurred by the agency.⁵⁷

Government Code section 17556, subdivision (d), precludes reimbursement for a local agency that has authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. *In Connell v. Santa Margarita Water District*,⁵⁸ the court found that a water district with authority to charge fees could not be reimbursed due to the fee authority, even though it was economically impractical to charge the full cost of service.

In this case, Education Code section 45 125, subdivision (f), quoted above, authorizes districts to charge a fee to non-certificated applicants for the costs incurred in processing the application. Because districts have this fee authority within the meaning of Government Code section 17556, subdivision (d), the Commission finds that processing applications for non-certificated applicants is not a reimbursable state-mandate. This would include any costs for FBI review of the fingerprints that are included in the DOJ fee.

The Commission finds that the test claim legislation imposes costs mandated by the state under Government Code section 175 14 and, except as noted above, none of the Government Code section 17556 exceptions apply.

CONCLUSION

Therefore, the Commission finds that the test claim legislation imposes a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 175 14 for the following activities:

- **Communication with DOJ:** (1) Entering into contracts with DOJ in order to receive notification of subsequent arrests; (2) notifying the DOJ when the employment of the applicant is terminated, when the applicant’s certificate is revoked, or when the applicant may no longer renew or reinstate the certificate; (3) immediately returning the subsequent arrest notification to the DOJ and informing the DOJ that the district is no longer interested in the applicant for a person unknown to the district, or for a person no longer

⁵⁷ Education Code section 45 125, subdivision (f). Subdivision (a)(2) of this section defines “local public law enforcement agency” to include any school district.

⁵⁸ *Connell v. Santa Margarita Water District* (1997) 59 Cal. App.4th 382, 401.

employed by the district, or no longer eligible to renew the certificate or license for which subsequent arrest notification service was established; and (4) immediately notifying the DOJ if the applicant is denied licensing or certification. (Stats. 1998, ch. 840; Ed. Code §§ 44830.1, subd. (i) & 45 125, subd. (j)).

- ⚡ **Storage of DOJ documents:** Storing criminal history records and reports of subsequent arrest received from the DOJ in a locked file separate from other files accessible only to the custodian of records (Stats. 1998, ch. 840, and Stats. 1999, ch. 78; Ed. Code, §§ 44830.1, subd. (n)(2), 44830.2, subd. (f)(2), 45 125.0 1 subd. (f)(2), & 45 125, subd.(k)(2)).
- ⚡ **Destruction of DOJ information:** Destroying information received from the DOJ upon a hiring determination in accordance with subdivision (a) of Section 708 of Title 11 of the California Code of Regulations, requiring that destruction of criminal offender record information be carried out so the identity of the subject can no longer reasonably be ascertained, and requiring a witness from the school district when records are destroyed outside the district. (Stats. 1998, ch. 840, Ed. Code §§ 44830.1, subd. (n)(3), & 45125, subd. (k)(3)).
- ⚡ **Fingerprint card request to FBI:** Requesting that the DOJ forward copies of non-certificated employees' fingerprint cards to the Federal Bureau of Investigation (Stats. 1998, ch. 840; Ed. Code, § 45125, subd. (b)(3)).
- ⚡ **Maintaining a list of the number of current employees:** Maintaining a list indicating the current number of employees who have not completed the requirements of Education Code section 45 125 (except for pupils employed in a temporary or part-time position in the school they attend) (Stats. 1998, ch. 840; Ed. Code, § 45 125, subd. (d).)
- ⚡ **Subsequent arrest service request:** Requesting subsequent arrest service from the DOJ for certificated and non-certificated positions (Stats. 1998, ch. 840; Ed. Code, §§ 44830.1, subd. (i), & 45 125, subd. (j)).
- ⚡ **Precautions dealing with construction contractors:** When contracting for construction, reconstruction, rehabilitation, or facility repair, determining whether the contractor will have "limited contact" with pupils, and if not, installing a physical barrier at construction worksites at school facilities, or having a contractor employee continually supervising and monitoring employees of construction contractors who have not been convicted of a violent or serious felony, or conducting surveillance of employees of construction contractors (Stats. 1998, ch. 840; Ed. Code, § 45 125.2, subd. (a)).

The Commission also finds that Penal Code section 11077 (Stats. 1972, ch. 1437), and Penal Code section 11105.02 (Stats. 1992, ch. 1026), and training requirements mentioned in Education Code sections 44830.1, subdivision (n)(4), and 45 125 subdivision (k)(4) are not subject to article XIII B, section 6.

The Commission further finds the following do not constitute new programs or higher levels of service within the meaning of article XIII B, section 6:

- ⚡ **Submittal of fingerprints, description and fee to DOJ:** Submitting fingerprints cards to DOJ by any means authorized by the DOJ, when a school district requests from the DOJ a criminal record summary of a temporary, substitute, or probationary certificated employee. (Stats. 1998, ch. 840; Ed. Code, § 44830.1, subd. (d).)

z **Designated districts:** Activities of designated districts stated in Education Code sections 44830.2 and 45 125.01.

The Commission also finds that processing applications for non-certificated applicants, including costs for FBI review of the fingerprints included in the DOJ fee, is not a reimbursable state-mandate because of the school districts' fee authority within the meaning of Government Code section 17556, subdivision (d). (Ed. Code, § 45125, subd. (f).)

The Commission finds that any other statutes or regulations pled by claimant are not reimbursable mandates subject to article XIII B, section 6.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 958 14.

March 5, 2003, I served the:

Adopted Statement of Decision

Criminal Background Checks II, 00-K-05

Napa County Office of Education, Claimant

Education Code sections 44830.1, 44830.2, 45125, 45125.01, and 45125.2; Penal Code sections 11077 and 11105.02; Statutes 1998, Chapter 594; Statutes 1998, Chapter 840; Statutes 1999, Chapter 78; Statutes 1972, Chapter 1437; Statutes 1992, Chapter 1026; California Code of Regulations, Title 11, Sections 700-708

by placing a true copy thereof in an envelope addressed to:

Mr. Paul C. Minney
Spector, Middleton, Young, & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 5, 2003, at Sacramento, California.



VICTORIA SORIANO