BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 17608-17613, and 48980.3; Food and Agricultural Code Sections 13181-13188; Statutes 2000, Chapter 218; Filed on December 1, 2000, By Alum Rock Union Elementary School District, Claimant.	No. 00-TC-04 ***Healthy Schools Act of 2000*** 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 January 29, 2004)*

STATEMENT OF DECISION

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

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PAULA HIGASHI, Executive Director Date

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STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on January 29, 2004. David Scribner appeared on behalf of the claimant, Alum Rock Union Elementary School District. Susan Geanacou and Matt Aguilera appeared on behalf of the Department of Finance (DOF).

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

The Commission adopted the staff analysis at the hearing by a vote of 5-0.

BACKGROUND

This test claim addresses the Healthy Schools Act of 2000, which became effective on January 1, 2001. The test claim legislation does two things. First, the legislation codifies the Department of Pesticide Regulation's existing voluntary school integrated pest management program. It requires the Department to promote and facilitate the "voluntary adoption" of effective least toxic pest management programs, or "integrated pest management" programs, "for all school districts that voluntarily choose" to participate.[1] "Integrated pest management" is statutorily defined as a follows:

> [A] pest management strategy that focuses on long-term prevention or suppression of pest problems through a combination of techniques such as monitoring for pest presence and establishing treatment threshold levels, using nonchemical practices to make the habitat less conducive to pest development, improving sanitation, and employing mechanical and physical controls. Pesticides that pose the least possible hazard and are effective in a manner that minimizes risks to people, property, and the environment, are used only after

[1] Food and Agricultural Code section 13183.

> careful monitoring indicates they are needed according to preestablished guidelines and treatment thresholds. This definition shall apply only to integrated pest management at school facilities.[2]

Second, the test claim legislation requires school districts to provide notification, post warning signs, and maintain and make available records of pesticide use by school districts at all schoolsites used for public day care, kindergarten, elementary, or secondary school purposes. A schoolsite includes the buildings or structures, playgrounds, athletic fields, school vehicles, or any other area of school property visited or used by pupils.[3] To assist school districts in their compliance with the test claim legislation, the Department of Pesticide Regulation has posted sample notices and warnings on its website.[4]

The legislative policy of the test claim legislation is stated as follows:

> It is the policy of the state that effective least toxic pest management practices should be the preferred method of managing pests at schoolsites and that the state, in order to reduce children's exposure to toxic pesticides, shall take the necessary steps, pursuant to this article, to facilitate the adoption of effective least toxic pest management practices at schoolsites. It is the intent of the Legislature to encourage appropriate training to be provided to school personnel involved in the application of pesticide at a schoolsite.[5]

Summaries of the test claim legislation by the Department of Pesticide Regulation are found on their website at www.cdpr.ca.gov.[6]

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

- Annually notifying all staff and parents or guardians of pupils enrolled at the schoolsite in writing of the name of all pesticide products expected to be applied at the school facility during the upcoming year;
- Notifying registered persons at least 72 hours before the application of pesticides at the school facility;

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[2] Food and Agricultural Code section 13181.

[3] Education Code sections 17608, subdivision (e), 17611, 17612.

[4] See also, Food and Agricultural Code section 13184, subdivision (b), which expresses the legislative intent that the state, through the Department of Pesticide Regulation, shall assist school districts to ensure that compliance with Education Code section 17612 is simple and inexpensive.

[5] Food and Agricultural Code section 13182; Education Code section 17610.

[6] See also, Part 1 of the "School IPM [Integrated Pest Management] Model Program Guidebook," "Program Overview, California School IPM," "The Healthy Schools Act: What's Mandatory? What's Voluntary?," and the sample notifications and warning signs.

- Notifying all staff and parents or guardians of pupils at least 72 hours before the application of any pesticides applied at the schoolsite not included in the annual notification;
- Making every effort to comply with the notice requirements for emergency application of pesticides;
- Posting warnings signs in the area of the schoolsite where pesticides will be applied;
- Compiling and recording information on pesticides used on an annual basis;
- Developing annual and 72-hour pesticide notification letters;
- Developing policies and procedures for receiving and tracking registered persons;
- Training of school district staff regarding the new requirements; and
- Any additional activities identified as reimbursable during the Parameters and Guidelines phase.

Department of Finance's Position

In its comments of January 12, 2001, the Department of Finance states that the test claim is "generally accurate in identifying potential reimbursable state-mandated local programs." DOF specifically contends that the following requirements of the Healthy Schools Act of 2000 are likely reimbursable state-mandated costs:

- Annually notifying all staff and parents of pupils of all pesticides (and other specified information) to be applied at the school site during the upcoming year;
- Compiling and recording information on pesticides used annually;
- Notifying registered persons at least 72 hours prior to the application of pesticides at the schoolsite;
- Developing policies and procedures for receiving and tracking registered persons;
- Developing annual and 72 hour pesticide notification letters;
- Notifying all staff and parents at least 72 hours before applying any pesticide not included in the annual notification on the schoolsite;
- Posting public notices at schoolsites applying pesticides;
- Training school district staff regarding the aforementioned requirements.

The Department of Finance also contends that the voluntary adoption and implementation of integrated pest management programs by school districts are voluntary activities and, thus, are not reimbursable under article XIII B, section 6.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[7] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[8] "Its

[7] Article XIII B, section 6 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

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."[9] 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.[10] 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.[11]

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.[12] 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.[13] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[14]

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subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[8] Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727, 735.

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

[10] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.*, at p. 754.)

[11] Lucia Mar Unified School District v. Honig (1988) 44 Cal.3d 830, 835-836.

[12] County of Los Angeles v. State *of* California (1987) 43 Cal.3d 46, 56; Lucia Mar, supra, 44 Cal.3d 830, 835.

[13] *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[14] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[15] 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."[16]

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

Several code sections in the test claim legislation do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must require local agencies or school districts to perform an activity or task. If the statutory language does not mandate local agencies or school districts to perform a task, then compliance with the test claim statute is within the discretion of the local entity and a reimbursable state-mandated program does not exist.

Here, there are several code sections in the test claim legislation that are helpful in understanding the Healthy Schools Act. But, they do not impose any requirements on school districts.

For example, Education Code section 17608 and Food and Agricultural Code section 13180 simply name the article of legislation as the Healthy Schools Act of 2000. They do not mandate school districts to perform any activities.

Food and Agricultural Code sections 13183 and 13184 impose requirements on the Department of Pesticide Regulation to promote and facilitate the "voluntary" adoption of integrated pest management programs, as defined in section 13181, for school districts that voluntarily participate in the program. The Department is required to develop criteria for identifying least-hazardous pest control practices and a model program guidebook that prescribes essential program elements for a school district that has adopted an integrated pest management (IPM) program.[17] The Department is also required to establish and maintain a website as a directory of resources describing least-hazardous pest practices at schoolsites.

The plain language of Food and Agricultural Code sections 13181, 13183, and 13184 does not mandate school districts to perform any activities, including the adoption of an integrated pest management program. Moreover, the Department of Pesticide Regulation has interpreted the activity of adopting integrated pest management programs and effective least-toxic pest management practices by school districts under these statutes as voluntary activities.[18] The interpretation of these statutes by the Department of Pesticide Regulation, the agency charged with the administration of pest management programs, is entitled to great weight and the courts

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

[16] City of San Jose v. State of California (1996) 45 Cal.App.4th 1802, 1817; County of Sonoma, supra, 84 Cal.App.4th 1265, 1280.

[17] See, "School IPM Model Program Guidebook."

[18] Department of Pesticide Regulations' website publication entitled "The Healthy Schools Act: What's Mandatory? What's Voluntary?"

generally will not depart from such construction unless it is clearly erroneous or unauthorized.[19] Thus, the Commission finds that Food and Agricultural Code sections 13181, 13183, and 13184 do not impose any state-mandated requirements on school districts and, thus, are not subject to article XIII B, section 6.

In addition, Food and Agricultural Code section 13185 requires the Department of Pesticide Regulation to establish training programs for school districts in order to facilitate the adoption of a model integrated pest management program and least-hazardous pest control practices. Food and Agricultural Code section 13182 and Education Code section 17610 also state the legislative intent "to encourage appropriate training to be provided to school personnel involved in the application of pesticide at a schoolsite." But, these statutes do not require school districts to receive or provide training to their employees. Moreover, since the participation in the integrated pest management program is voluntary, the corresponding training is also voluntary. In a 2003 California Supreme Court mandates decision, the court found (affirming the holding in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777), "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate."[20] The court further stated, on page 731 of the decision, that:

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

The Department of Pesticide Regulation also interprets the activity of training as a voluntary activity.[21] Thus, the activity of providing or receiving training on integrated pest management programs and least-hazardous pest control practices, pursuant to Food and Agricultural Code sections 13182 and 13185, and Education Code section 17610, is not a mandated activity and, thus, is not subject to article XIII B, section 6.

Furthermore, Food and Agricultural Code sections 13186 and 13187 require the Department of Pesticide Regulation to prepare a school pesticide use form to be used by licensed and certified pest control operators when they apply pesticides at a schoolsite. Licensed pest control operators are required to submit the form to the state on an annual basis. Food and Agricultural Code sections 13186 and 13187 do not, however, mandate school districts to perform any activities.

Finally, Food and Agricultural Code section 13188 authorizes the Department of Pesticide Regulation to adopt regulations to implement the test claim legislation. Section 13188 does not mandate school districts to perform any activities.

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[19] Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640, 647.

[20] Department of Finance v. Commission on State Mandates, supra, 30 Cal.4th at page 743.

[21] See footnote 16, *ante*.

Accordingly, the Commission finds that Food and Agricultural Code sections 13180 through 13188, and Education Code sections 17608 and 17610 are not subject to article XIII B, section 6 of the California Constitution.

The remaining Education Code sections, which impose notice, warning, and record-keeping requirements on school districts once they decide to use a pesticide, are not mandated activities within the meaning of article XIII B, section 6

The remaining Education Code sections included in this test claim require school districts, when they decide to use a pesticide, to provide notification, post warning signs, and maintain and make available records of pesticide use at all schoolsites. (Ed. Code, §§ 17609, 17610.5, 17611, 17612, 17613, 48980.3.) The notice and warning requirements are specified below:

- Annual Notice of Pesticide Use. Education Code section 17612, subdivisions (a) and (b), and Education Code section 48980.3, require the school district to annually provide to all staff and parents or guardians of pupils enrolled at a schoolsite, as part of the annual parent notification issued at the beginning of each regular school year, a written notification of the name of all pesticide products expected to be applied at the school facility during the upcoming year. The annual notification shall identify the active ingredient or ingredients in each pesticide product. The notice shall also contain the Internet address used to access information on pesticides and pesticide use reduction developed by the Department of Pesticide Regulation. Education Code section 17612, subdivision (a)(1), also requires school districts to provide the opportunity in the annual notification for recipients to register with the school district if they wish to receive notification of individual pesticide applications at the school facility during the course of the year.

- Notice of Individual Pesticide Applications to Staff, Parents and Guardians that Register. Education Code section 17612, subdivision (a)(1), requires school districts to provide notification of individual pesticide applications, at least 72 hours before application, to persons who register with the district. The notice shall include the product name, the active ingredient or ingredients in the product, and the intended date of application.

- Notice of Pesticide Products Not Included in the Annual Notification. Education Code section 17612, subdivision (a)(2), states the "[i]f a pesticide product not included in the annual notification is subsequently intended for use at the schoolsite, the school district designee shall, consistent with this subdivision and at least 72 hours prior to application, provide written notification of its intended use."

  Thus, under Education Code section 17612, subdivision (a)(2), the school district is required to provide *all* parents, guardians and staff notification that a pesticide product that was not listed in the annual notification is intended to be used at the schoolsite at least 72 hours before application. Since the notice must be "consistent with this subdivision," the notice is required to contain the product name, the active ingredient or ingredients in the product, and the date of application.

- Notification of Pesticide Use During Emergency Conditions. Pursuant to Education Code section 17612, subdivision (c), the requirement to provide notice of pesticide use at least 72 hours before application to parents, guardians, and staff does not apply during emergency conditions. "Emergency conditions" is defined as "any circumstances in

which the school district designee deems that the immediate use of a pesticide is necessary to protect the health and safety of pupils, staff, or other persons, or the schoolsite." (Ed. Code, § 17609, subd. (c).) Under such emergency conditions, the school district designee "shall make every effort to provide the required notification for an application of a pesticide." Thus, under section 17612, subdivision (c), the school district designee "shall make every effort" to provide notification that contains the product name, the active ingredient or ingredients in the product, and the date of application.

- Posting Warning Signs. Education Code section 17612, subdivision (d), requires the school district to post a warning sign at each area of the schoolsite where pesticides will be applied. The warning sign shall prominently display the term "Warning/Pesticide Treated Area" and shall include the product name, manufacturer's name, the United States Environmental Protection Agency's product registration number, intended date and areas of application, and reason for the pesticide application. The warning sign shall be visible to all persons entering the treated area and shall be posted 24 hours prior to the application and remain posted until 72 hours after the application. In case of a pest control emergency, the warning sign shall be posted immediately upon application and shall remain posted until 72 hours after the application.

The notice and warning requirements do not apply to the following pesticide products: pesticide products deployed in the form of a self-contained bait or trap, gel or paste deployed as crack and crevice treatment[22], pesticides exempted from regulation by the United States Environmental Protection Agency pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C., § 25, subd. (b)), or to antimicrobial pesticides[23], including sanitizers and disinfectants. (Ed. Code, § 17610.5.)

In addition, the notice and warning requirements do not apply for (1) activities undertaken at a school that participates in the state program of agricultural vocation education, pursuant to Education Code section 52450 et seq. if the activities are necessary to meet the curriculum requirements prescribed in section 52454; or for (2) any agency signatory to a cooperative agreement with the State Department of Health Services pursuant to Health and Safety Code section 116180.[24] (Ed. Code, § 17613.)

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[22] Education Code section 17609, subdivision (b), defines "crack and crevice treatment" as the application of small quantities of a pesticide consistent with labeling instructions in a building into openings such as those commonly found at expansion joints, between levels of construction and between equipment and floors.

[23] Education Code section 17609, subdivision (a), defines "antimicrobial" as those pesticides defined by the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C., § 136, subd. (mm).)

[24] Health and Safety Code section 116180 states the following: "(a) the department [Health Services] may enter into cooperative agreements with any local district or other public agency engaged in the work of controlling mosquitoes, gnats, flies, other insects, rodents, or other vectors and pests of public health importance, in areas and under terms, conditions, and specifications as the director may prescribe. (b) The agreement may provide for financial assistance on behalf of the state and for the doing of all or any portion of the necessary work by

The test claim legislation also requires school districts to maintain and make available to the public records of pesticide use as follows:

- Maintain and Make Available Records of Pesticide Use. Education Code section 17611 requires each schoolsite to maintain records of all pesticide use at the schoolsite for a period of four years, and to make the information available to the public pursuant to the California Public Records Act. A schoolsite may meet the requirements of section 17611 by retaining a copy of the warning sign posted for each application required pursuant to section 17612 and recording on that copy the amount of the pesticide used.

  The Public Records Act is provided in Government Code section 6250 and following. Under the Public Records Act, local agencies, which are defined to include school districts, are required to keep public records open to inspection at all times during the office hours of the school district for public inspection. In addition, the school district is required to make public records promptly available upon request by any person upon payment of fees covering the direct costs of duplication. (Gov. Code, §§ 6252, 6253.)

  The requirements of Education Code section 17611 do not apply to activities undertaken at a school by participants in the state program of agricultural vocational education, pursuant to Education Code section 52450 et seq., if the activities are necessary to meet the curriculum requirements prescribed in section 52454. (Ed. Code, § 17612, subd. (f).)

These activities required by the Education Code apply only when a school district makes a local decision to use a pesticide. As more fully described below, state law does not require school districts to use pesticides.

First, the plain language of the test claim legislation does not require school districts to use pesticides. Education Code section 17610 states that the legislative intent for the test claim legislation is to promote the policy that school districts use the least toxic pest management practices in order to reduce children's exposure to toxic pesticides. Food and Agricultural Code section 13181 defines "integrated pest management" as a strategy that focuses on *non-chemical* alternatives to pest control. Thus, the plain language of the test claim legislation does not require school districts to use pesticides.

In addition, prior state law does not require school districts to use pesticides. Prior law simply requires school districts, as an operator of public property and as an employer, to provide notice and post warnings on property treated with pesticide. (Food and Agr. Code, § 12978; Cal. Code Regs., tit. 3, §§ 6702, 6618, subd. (c).)

The legislative history of the test claim legislation further supports the conclusion that state law does not require school districts to use pesticides. The last Senate Floor Analysis for the test claim legislation, dated September 19, 2000, states that school districts are required to maintain records, provide notice, and post warnings *when* they use a pesticide. The Senate Floor Analysis includes arguments in support of the test claim legislation and states that several school districts use non-chemical methods of pest control: "Already several school districts, including Los

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either of the contracting parties, except that in no event shall the department agree that the state's contribution shall exceed 50 percent of the total cost of any acceptable plan. (c) The agreement may provide for contributions by the local district or other public agency to the Mosquitoborne Disease Surveillance Account."

Angeles Unified, San Francisco Unified, and Placer Hill Union, have adopted least-toxic pest management policies that avoid or minimize the use of highly toxic pesticides and instead rely on other techniques like improved sanitation, screens, caulking, inspections, and traps and bait stations."

Finally, the School IPM Guidebook published by the Department of Pesticide Regulation further supports the finding that the state does not require school districts to use pesticides. Page 41 of the Guidebook provides a list of examples of action levels of pest control. At the bottom of the page is the following statement:

> The specific action levels mentioned in this table are offered as examples only. They are not required by regulation or law. Each school using action thresholds should develop action levels of their own, suited to specific conditions at the school.

Page 49 of the Guidebook also states that a school's pest management program must always look for alternatives first and use pesticides only as a last resort. Non-pesticide treatments are listed on pages 45-50 of the Guidebook.

Thus, school districts have several options available for pest control, many of which are non-chemical and do not require the use of pesticides. The decision to use pesticides is made at the local level and is not required by the state. Once the school district elects to use a pesticide, the downstream activities of providing notice, posting warnings, and maintaining and making available records of pesticide use are then statutorily required to be performed by the school district.

However, based on the Supreme Court's recent interpretation of the meaning of "state mandate" in the *Department of Finance v. Commission on State Mandates* case[25], the Commission finds that the test claim activities, although statutorily required, do not require reimbursement under article XIII B, section 6.

In the *Department of Finance* case, the Supreme Court reviewed test claim legislation that required school site councils to post a notice and an agenda of their meetings. The court determined that school districts were not legally compelled to establish eight of the nine school site councils and, thus, school districts were not mandated by the state to comply with the notice and agenda requirements for these school site councils.[26] The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[27] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[28]

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[25] Department of Finance, supra, 30 Cal.4th 727.

[26] *Id.* at page 731.

[27] *Id.* at page 737.

[28] Ibid.

The court also reviewed and affirmed the holding of the *City of Merced* case.[29, 30] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain- but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not require to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[31]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][32]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion—for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[33]

The decision of the California Supreme Court in *Department of Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that "the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves."[34] Thus, based on the Supreme Court's decision, the Commission is required to determine if the underlying program (in this case, the use of pesticides) is a voluntary decision at the local level or is legally compelled by the state. As indicated above, school districts are not legally compelled by state law to apply pesticides. The decision to use a pesticide is made at the local level and is within the discretion of the school district. Further, there is no evidence in the law or in the record that school districts are practically compelled by the state through the imposition of a substantial penalty to apply pesticides.

In comments to the draft staff analysis, the claimant argues that there are times when non-chemical methods of pest control are not effective and, thus, in those situations, school districts

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[29] *Id.* at page 743.

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

[31] Ibid.

[32] *Id.* at page 731.

[33] Ibid.

[34] *Id.* at page 743.

are "practically compelled," within the meaning of the *Department of Finance* case, to apply pesticides and comply with the test claim requirements. The claimant further contends that avoidance of the test claim legislation would in fact impose substantial penalties on school districts in the form of third party lawsuits. The claimant states the following:

> Regardless, avoidance of the test claim legislation would in fact impose substantial penalties upon a school district that failed to address and remedy a pest infestation if the school district's IPM failed and the district then did not apply pesticides to avoid the "downstream" mandated activities. It is easy to envision numerous lawsuits from public and private parties if a school site let its cafeteria become overrun by cockroaches, the playground infested with fleas or hornets, or lockers teeming with ants. If a district with an IPM that failed to address these issues simply threw up its hands and said, "pesticide use is not compelled here," the district would face severe consequences from numerous public and private sources.

In support of the claimant's position, a declaration from Bob Tarczy, Supervisor of Maintenance and Operations for the San Juan Unified School District (interested party) was filed that also alleges there are times when non-chemical approaches are not enough and, in those situations, the district is "compelled" to apply pesticides.

The Commission finds that the record in this case does not support the finding that school districts are practically compelled *by the state* to apply pesticides. The Commission further finds that the claimant misreads the *Department of Finance* case.

In *Department of Finance*, the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[35] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy.[36] The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[37] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. Thus, the state contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 9 does not require strict legal compulsion to apply.[38]

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[35] *Department of Finance, supra,* 30 Cal.4th at pages 749-751.

[36] *City of Sacramento, supra,* 50 Cal.3d at pages 57-58.

[37] *Id.* at page 71.

[38] Ibid.

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan.[39]

The California Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain and severe penalties" such as "double taxation" and other "draconian" consequences. The Court stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term "federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe … penalties" such as "double … taxation" and other "draconian" consequences . . .[40]

The Commission finds that there is no evidence of "certain and severe penalties" or other "draconian" consequences here. The risk of negligence damages, as alleged by claimant, falls equally on all property owners. As stated earlier in this decision, all owners of public property, including school districts, have a preexisting duty to provide notice and post warnings on property treated with pesticides. The potential and uncertain third party lawsuits raised by the claimant are not the kind of "certain and severe" consequences described by the California Supreme Court to constitute a state mandate. Thus, the Commission finds that school districts are not practically compelled by the state to apply pesticides. That decision is solely a local decision.

Therefore, the Commission finds that once the school district elects to use a pesticide, the downstream activities imposed by the Education Code to provide notice, post warnings, and to maintain and make available records of pesticide use, are also not state-mandated.

Accordingly, the Commission finds that Education Code sections 17609, 17610.5, 17611, 17612, 17613, 48980.3 are not subject to article XIII B, section 6 of the California Constitution.

CONCLUSION

The Commission concludes that the test claim legislation does not impose any state-mandated duties on school districts and, thus, is not subject to article XIII B, section 6 of the California Constitution.

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[39] *Id.* at pages 73-76.

[40] Department of Finance, supra, 30 Cal.4th at page 751.