

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 47602, 47604, 47605, 47605.5, 47607, 476 13 (formerly 476 13.7), 476 13.5, and 47614; Statutes 1998, Chapters 34 and 673; California Code of Regulations, Title 5, Sections 154 10- 15428; California Department of Education Memorandum dated April 28, 1999,

Filed on June 29, 1999,

By Los Angeles County Office of Education and San Diego Unified School District, Claimants.

No. 99-TC-03

Charter Schools II

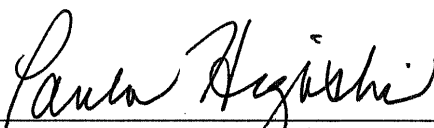
STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on November 21, 2002)

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 November 22, 2002.



PAULA HIGASHI, Executive Director

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Education Code Sections 47602, 47604, 47605, 47605.5, 47607, 476 13 (formerly 476 13.7), 47613.5, and 47614; Statutes 1998, Chapters 34 and 673; California Code of Regulations, Title 5, Sections 15410- 15428; California Department of Education Memorandum dated April 28, 1999,

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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 October 24, 2002. Art Palkowitz and Brian Bennett appeared on behalf of claimant San Diego Unified School District. Gayle Windom appeared on behalf of claimant Los Angeles County Office of Education. Dan Troy, Heather Carlson and Susan Geanacou appeared on behalf of the Department of Finance (DOF). 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 the staff analysis for the test claim presented by a 5-0 vote.

BACKGROUND

On August 24, 1999, claimants, Los Angeles County Office of Education and San Diego Unified School District, submitted a test claim alleging a reimbursable state mandate for county offices of education and school districts to provide supervisory oversight and reporting services to charter schools, and various other activities related to the establishment and fiscal management of charter schools.¹ The claim arises from enactments or amendments to Education Code sections 47602, 47604, 47605, 47605.5, 47607, 47613 (formerly 47613.7), 47613.5, and 47614 by Statutes 1998, chapters 34 and 673, and the adoption of California Code of Regulations, title 5, sections 15410 through 15428. Claimants also assert that California Department of Education

¹ The reimbursement period for this test claim begins no earlier than July 1, 1998. (Gov. Code, § 17557, subd. (c).)

(CDE) memorandum dated April 28, 1999 constitutes an executive order resulting in a reimbursable state mandate.

On May 26, 1994, the Commission heard and decided a related test claim, *Charter Schools*, CSM-4437.² The Commission found that Statutes 1992, chapter 78 1, by enacting Education Code sections 47605 and 47607, imposed a reimbursable state mandated program for school districts for new activities related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters. The claimants indicate intent to request a parameters and guidelines amendment to incorporate any new activities from the *Charter Schools II* claim into the existing *Charter Schools* parameters and guidelines.

Claimants' Position

Claimants allege reimbursable costs mandated by the state for test claim legislation requiring the following activities of school districts:

- (1) provide notice and an opportunity to cure to charter schools prior to any proposed revocation of the charter, (2) allow charter schools to use certain facilities free of charge, (3) respond to, prepare for, and participate in court proceedings challenging a decision to deny a charter, (4) evaluate petitions for renewals of charter school petitions originally granted by the State Board of Education and prepare for and conduct hearings related to proposed renewals of those charter petitions, (5) calculate, process, and advance payments of property taxes to charter schools, and (6) provide administrative services to charter schools without full reimbursement.

Claimants allege similar activities are newly required of county offices of education, and also that county offices of education are now required to evaluate certain charter school petitions and conduct some of the same activities found to be reimbursable for school districts in the original *Charter Schools* test claim.

Claimants conclude that none of the Government Code section 17556 exceptions to finding costs mandated by the state apply to this test claim. Claimants specifically assert that there are no other federal or state constitutional provisions, statutes or executive orders impacted, and that Statutes 1998, chapters 34 and 643 appropriated no funds for the reimbursable activities alleged.

State Agency Position

DOF's July 28, 2000 response to the test claim allegations states agreement in part with claimants on some of the identified new activities, however it argues that:

- ε Some of the claimed activities are discretionary or permissive;
- ε Some of the claimed activities are not new;
- ε Fee authority is given for the district to charge the charter school for expenses of supervisory oversight; or
- ε Other offsetting savings are established as part of the test claim legislation.

² **Charter Schools**, CSM-4437, Statement of Decision adopted on July 2 1, 1994; Parameters and Guidelines adopted October 18, 1994.

DOF agrees with claimants that Education Code sections 47605, subdivision (k), 47605.5, and 47607 include new activities or higher levels of service.

COMMISSION FINDINGS

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.³ 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. 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.⁴ To determine if the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must impose costs mandated by the state?

Test Claim Executive Orders: California Code of Regulations:

As part of the test claim filings, claimants allege, “The State Board of Education adopted title 5, California Code of Regulations section 15410 et seq. as emergency regulations to implement Education Code section 47613.5.” Claimants’ test claim Exhibit C is identified as including “Title 5 California Code of Regulations §§ 1541 O-1 5428,” however, the exhibit is a printout from the California Department of Education’s (CDE’s) website and does not provide any indication of an operative date. The regulations are not in the current version of *Barclays Official California Code of Regulations*, and there are no historical notes indicating that any regulations were ever filed or operative for those section numbers!

As noted below, Education Code section 47613.5 was repealed by Statutes 1999, chapter 78, effective July 7, 1999. Claimants’ exhibit from the CDE website may be of proposed regulations that were never published or operative prior to the repeal of the implementing Education Code section. Without evidence presented of the operative dates of the claimed regulations, the Commission finds that the claimed regulations are not properly included in this test claim. Any further references to “test claim legislation” do not include California Code of Regulations, title 5, sections 15410 through 15428.

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

⁴ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830,835.

⁵ Government Code section 175 14.

⁶ *Barclays Official California Code of Regulations* is certified by the Office of Administrative Law as the official regulation publication of the State of California for purposes of judicial notice. (Gov. Code, § 11344.6 and Cal. Code Regs., tit. 1, § 190.)

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?⁷

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.” In *County of Los Angeles v. State of California*, the California Supreme Court defined the word “program” within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.⁸ The court has held that only one of these findings is necessary.’

The Commission finds that the test claim legislation constitutes a program within the meaning of article XIII B, section 6 of the California Constitution under both tests. First, it constitutes a program that carries out the governmental function of providing a service to the public, to the extent the test claim legislation requires school districts and county offices of education to engage in supervisory, funding and reporting activities related to charter schools. The courts have held that education is a peculiarly governmental function administered by local agencies as a service to the public.¹⁰

The test claim legislation also satisfies the second test that triggers article XIII B, section 6, to the extent that the test claim legislation requires school districts and county offices of education to engage in charter school supervisory, funding and reporting activities solely applicable to public school administration. The test claim legislation imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Accordingly, the Commission finds that supervisory, funding and reporting activities related to charter schools constitute a “program” and, thus, are subject to article XIII B, section 6 of the California Constitution.

Issue 2: Does the test claim legislation impose a new program or higher level of service within an existing program upon school districts within the meaning of article XIII B, section 6 of the California Constitution by requiring new or additional activities related to charter school supervision and reporting?

The claimants contend that the test claim legislation imposes a new program or higher level of service upon school districts by requiring specific new activities related to charter school supervision and reporting. Under prior law, school districts were required to engage in activities

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

⁹ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

¹⁰ *Long Beach Unified School Dist., supra*, 225 Cal.App.3d at 172 states “although numerous private schools exist, education in our society is considered to be a peculiarly governmental function . . . administered by local agencies to provide service to the public.”

related to initial charter school petitions, and for monitoring and evaluating the performance of charter schools pertaining to the revision or renewal of approved charters.” The test claim legislation makes changes to some of the requirements as compared to prior law. The analysis for finding a new program or higher level of service must examine whether the test claim legislation requires a school district to engage in activities, and whether such activities constitute a new program or higher level of service when compared to prior law.

Test Claim Statutes :

Education Code section 47602.

This Education Code section, as added by Statutes 1992, chapter 78 1, and amended by Statutes 1993, chapter 589, Statutes 1996, chapter 849, Statutes 1998, chapter 34, and Statutes 1998, chapter 673 provides:

(a)(1) In the 1998-99 school year, the maximum total number of charter schools authorized to operate in this state shall be 250. In the 1999-2000 school year, and in each successive school year thereafter, an additional 100 charter schools are authorized to operate in this state each successive school year. For the purposes of implementing this section, the State Board of Education shall assign a number to each charter petition that it grants pursuant to subdivision (j) of Section 47605 and to each charter notice it receives pursuant to subdivision (i) and paragraph (5) of subdivision (j) of Section 47605, based on the chronological order in which the notice is received. The limits contained in this paragraph may not be waived pursuant to Section 33050 or any other provision of law.

(2) By July 1, 2003, the Legislative Analyst shall, pursuant to the criteria in Section 47616.5, report to the Legislature on the effectiveness of the charter school approach authorized under this part and recommend whether to expand or reduce the annual rate of growth of charter schools authorized pursuant to this section.

(b) No charter shall be granted under this part that authorizes the conversion of any private school to a charter school. No charter school shall receive any public funds for a pupil if the pupil also attends a private school that charges the pupil’s family for tuition. The State Board of Education shall adopt regulations to implement this section.

Claimants identify that Education Code section 47602, subdivision (a), as amended by Statutes 1998, chapter 673, “increases the number of charter schools that are authorized to operate in the state.” The statutory language is directed to the State Board of Education and the state Legislative Analyst’s Office, and claimants do not specifically identify any new reimbursable activities or duties imposed upon local educational agencies by this amended Education Code section. Therefore, the Commission finds that Education Code section 47602 does not impose a new program or higher level of service upon school districts or county offices of education.

¹¹ Statutes 1992, chapter 781, enacting Education Code sections 47605 and 47607. See previously approved test claim ***Charter Schools, CSM-4437.***

Education Code section 4 7604.

This Education Code section, as added by Statutes 1998, chapter 34, provides:

(a) Charter schools may elect to operate as, or be operated by, a nonprofit public benefit corporation, formed and organized pursuant to the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5 110) of Division 2 of Title 1) of the Corporations Code).

(b) The governing board of a school district that grants a charter for the establishment of a charter school formed and organized pursuant to this section shall be entitled to a single representative on the board of directors of the nonprofit public benefit corporation.

(c) It is the intent of the Legislature that an authority that grants a charter to a charter school to be operated by, or as, a nonprofit public benefit corporation shall not be liable for the debts or obligations of the charter school.

Claimants allege that, 'despite the language of subdivision (c), the' school district or county office of education granting a charter,

may be liable for the acts or obligations of the charter school due to the granting authority's statutory oversight responsibilities or because the nonprofit corporation laws may shield the charter school, but not the granting authority, from liability. County offices of education and school districts must determine the impact of section 47604 on self-provided or purchased insurance. Further, county offices of education and school districts may incur additional costs for such insurance as the result of the election of a charter school to operate as or by a nonprofit public benefit corporation.

Claimants have not offered legal support for this contention. Alternatively, DOF, in its response of July 28, 2000, argues:

Districts have a choice as to whether or not to buy more liability insurance. Further, the law makes the districts and county offices better off than before by specifying in statute that they should have no liability. Indeed, the district's need for such coverage would seem to decrease, as they are now responsible for fewer students. The Department of Education's legal opinion, [test claim Attachment 1, dated June 12, 1997], similarly concludes the chartering agency has no liability for charter school activities.

The CDE's June 12, 1997 legal opinion, *Charter School Liability and Accountability*, provides extensive statutory and case law analysis on public sector imputed and vicarious liability law, and concludes, "Given the purpose of the enabling legislation, we believe the better view is that chartering entities are completely immune from liability incurred by charter schools under existing law." Following this opinion, the Legislature enacted Education Code section 47604, subdivision (c), to confirm that chartering entities, including school districts and county offices of education, are not to be liable for the debts or obligations of a charter school, when operated as, or by, a non-profit.

In claimant San Diego Unified School District's September 30, 2002 comments on the draft staff analysis, the claimant expresses agreement "with staffs recommendation regarding the purchase

of insurance for charter schools established as nonprofit public benefit corporation[s].” Claimant then goes on to argue that:

However, charter schools not operating as a nonprofit corporation have been the sponsoring entity’s responsibility for acts or obligations.

DOF contends under Education Code section 47604 “districts have a choice as to whether or not to buy more liability insurance.” Given that school districts *shall* purchase insurance in accordance with Education Code section 35208 (a)¹² there is no reasonable alternative for the sponsoring district of a charter but to purchase insurance for charter schools that are not a nonprofit public benefit corporation.

Education Code section 47604 for the first time determined the responsibility of sponsoring districts with charter schools not operating as nonprofit corporations. Therefore, in accordance with Education Code section 35208 (a) purchasing insurance for the charter school is mandatory as it would be for other school sites.

It is unclear about how this new argument connects with the test claim legislation. First, Education Code section 35208, subdivision (a), which requires school districts to carry liability insurance, was not pled as part of the test claim allegations. Second, even if the section was properly pled and before the Commission now, it does not fall within the jurisdiction of the Commission under article XIII B, section 6, subdivision (c) of the California Constitution, because Education Code section 35208 was enacted prior to 1975.¹³ Claimant raises a new argument for reimbursement of a chartering entity’s costs of purchasing liability insurance to cover a charter school not run as a non-profit. The Commission finds no connection from the test claim legislation pled, namely Education Code section 47604, to this newly asserted expense. Education Code section 47604, as cited in its entirety above, simply allows a charter school to operate as a non-profit. It has nothing to do with purchasing liability insurance, or for determining “the responsibility of sponsoring districts with charter schools *not operating* as nonprofit corporations.” [Emphasis added.]

The Commission finds that Education Code section 47604 does not require any new activities on the part of school districts or county offices of education. As discussed in *Long Beach*, “mandates” is to be understood “in the ordinary sense of ‘orders’ or ‘commands.’”¹⁴ The state, by permitting charter schools to operate as a nonprofit public benefit corporation, in no way is ordering school districts to purchase additional insurance, therefore the statute does not impose a new program or higher level of service upon school districts or county offices of education for the alleged costs and activities.

¹² Claimant’s footnote contains complete text of the cited code section.

¹³ Former Education Code of 1959, section 1017 was renumbered by Statutes 1976, chapter 1010 as section 35208.

¹⁴ ***Long Beach Unified School Dist. v. State of California***, *supra*, 225 Cal.App.3d at 174.

Education Code section 4 7605.

This Education Code section, as added by Statutes 1992, chapter 78 1, and amended by Statutes 1993, chapter 589, Statutes 1996, chapter 786, Statutes 1998, chapters 34 and 673,¹⁵ provides the standards and instructions for filing and reviewing a petition to establish a charter school. This code section, as added by Statutes 1992, chapter 781, was the subject of the prior test claim, *Charter Schools*, and was found to impose a reimbursable state mandate for school districts for new activities related to processing initial charter school petitions. Claimants allege new reimbursable state mandates are imposed by amended subdivision (j) and new subdivision (k). Each subdivision will be analyzed individually below. Amended subdivision (j)(1) provides:

(j)(1) If the governing board of a school district denies a petition, the petitioner may elect to submit the petition for the establishment of a charter school to either the county board of education or directly to the State Board of Education. The county board of education or the State Board of Education, as the case may be, shall review the petition pursuant to subdivision (b). If the petitioner elects to submit a petition for establishment of a charter school to the county board of education and the county board of education denies the petition, the petitioner may file a petition for establishment of a charter school with the State Board of Education.

Claimants allege “subdivision (j) now allows a charter petitioner to submit a charter petition directly with the county board of education . . . whenever a school district denies a charter petition.” By replacing subdivision (j), the Legislature eliminated the previously approved mandate activities for county superintendents to convene a review panel to evaluate a denied charter petition and substituted a new review procedure.

Claimants indicate intent to request a parameters and guidelines amendment to incorporate any new activities into the existing *Charter Schools* parameters and guidelines. The reimbursable activities of former subdivision (j), as added by Statutes 1992, chapter 78 1, should be eliminated from the *Charter Schools* parameters and guidelines, effective January 1, 1999, and replaced with the new requirements of subdivision (j)(1). The Commission finds that Education Code section 47605, subdivision (j)(1), as amended by Statutes 1998, chapter 673, imposes a new program or higher level of service upon county offices of education for the following activity:

- After the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education, the county board of education shall review the petition pursuant to Education Code section 47605, subdivision (b).

Claimants also allege that Statutes 1998, chapter 673 further amended

subdivision (j) to allow a charter petitioner to file a judicial action challenging a school district’s denial of the petition if the county board of education or the State Board of Education fails to act on a direct petition within 120 days. Thus, school districts must respond to, prepare for, and participate in a judicial proceeding,

¹⁵This statute has been further amended by Statutes 1999, chapter 828, Statutes 2000, chapter 580, and Statutes 2001, chapter 344, none of which are included or amended into the present test claim allegations. Nor did claimants include the amendments made by Statutes 1993, chapter 589, or Statutes 1996, chapter 786 in the test claim allegations.

rather than a county board of education review, if the charter petitioner challenges a decision by a school district to deny a charter petition.

Claimants refer to subdivision (j)(3):

If either the county board of education or the State Board of Education fails to act on a petition within 120 days of receipt, the decision of the governing board of the school district to deny a petition shall, thereafter, be subject to judicial review.

DOF argues, “No new mandate is established as charters always had a right to file a judicial action. The Education Code is permissive; as long as an action is not prohibited, it is permitted.” In addition, the Commission notes that response to judicial review is not imposed by state action, but by the action of a member of the public filing a lawsuit. Subdivision (j)(3) merely sets a time period after which the charter petitioner can demonstrate to a court that they have exhausted all statutory administrative remedies. Therefore, the Commission finds that Education Code section 47605, subdivision (j)(3), as amended by Statutes 1998, chapter 673, does not impose a new program or higher level of service upon school districts.

Finally, claimants allege a reimbursable state mandate is imposed by Education Code section 47605, subdivision (k)(3), in pertinent part:

A charter school that has been granted its charter by the State Board of Education and elects to seek renewal of its charter shall, prior to expiration of the charter, submit its petition for renewal to the governing board of the school district that initially denied the charter.

DOF’s response “concur[s] that the law imposes new duties on the agency that previously denied a charter.” The Commission agrees, and finds that Education Code section 47605, subdivision (k)(3), as added by Statutes 1998, chapter 673, imposes a new program or higher level of service upon school districts for the following activity:

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education.

Education Code section 4 7605.5.

This Education Code section, as added by Statutes 1998, chapter 34, provides:

A petition may be submitted directly to a county board of education in the same manner as set forth in Section 47605 for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. Any denial of a petition shall be subject to the same process for any other county board of education denial of a charter school petition pursuant to this part.

Claimants allege that this code section imposes “new requirements for responding to information requests, evaluating charter school petitions, conducting public hearings, monitoring charter school performance, and responding to appeals of decisions with respect to charter school petitions made directly to the county board of education.”

Prior law of Education Code section 47605, as added by Statutes 1992, chapter 78 1, only permitted proponents of a charter school to apply to a county office of education for review when

the governing board of a school district denied a petition. New Education Code section 47605.5 sets up a requirement for county boards of education to review submitted charter school petitions under the criteria of section 47605, if the proposed charter school is designed to “serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services.” This requires county boards of education to incur expenses for activities previously found reimbursable to school districts under the *Charter Schools* parameters and guidelines. The Commission finds that Education Code section 47605.5, as added by Statutes 1998, chapter 34, imposes a new program or higher level of service upon county offices of education for the following new activity:

- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services.

Education Code section 47607,

This Education Code section, as added by Statutes 1992, chapter 78 1, and amended by Statutes 1998, chapter 34, provides,

(a)(1) A charter may be granted pursuant to Sections 47605, 47605.5, and 47606 for a period not to exceed five years. A charter granted by a school district governing board, a county board of education or the State Board of Education, may be granted one or more subsequent renewals by that entity. Each renewal shall be for a period of five years. A material revision of the provisions of a charter petition may be made only with the approval of the authority that granted the charter. The authority that granted the charter may inspect or observe any part of the charter school at any time.

(2) Renewals and material revisions of charters shall be governed by the standards and criteria in Section 47605.

(b) A charter may be revoked by the authority that granted the charter under this chapter if the authority finds that the charter school did any of the following:

(1) Committed a material violation of any of the conditions, standards, or procedures set forth in the charter.

(2) Failed to meet or pursue any of the pupil outcomes identified in the charter.

(3) Failed to meet generally accepted accounting principles, or engaged in fiscal mismanagement.

(4) Violated any provision of law.

(c) Prior to revocation, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

This statute was included in the original *Charter Schools* test claim filed on the enactment of Statutes 1992, chapter 78 1. The primary amendment by Statutes 1998, chapter 34 was the addition of subdivision (c).

Claimants allege that Education Code section 47607, as amended, requires the school district or county office of education granting a charter school petition to “provide notice to that charter school prior to any proposed charter revocation . . . and also requires the charter granting authority to give the charter school a reasonable opportunity to cure” violations that do not pose a threat to health and safety. DOF agrees “that the cost of preparing a written notification is new.” Claimants acknowledge that other activities required by Education Code section 47607 are already reimbursable through the original *Charter Schools* claims process.

Under the provisions of Education Code section 47605, subdivision (b), school districts, and county offices of education required to review charter school petitions, “shall grant a charter for the operation of a school under this part if it is satisfied that the charter is consistent with sound educational practice.” Under the statute, local educational agencies must cite facts and make specific written findings in order to reject a charter application; the rejection cannot be arbitrary. Thus, acceptance and approval of a complete charter petition is not a discretionary act on the part of school districts and county offices of education.

Once a charter school petition is approved the chartering agency maintains some oversight responsibilities. For example, Education Code section 476 13 states, “a chartering agency may charge for the actual costs of supervisory oversight of a charter school.” If in the course of that oversight, the school district or county office of education determines that the standards or criteria of the approved charter are not being met, the chartering agency has a duty to revoke the charter by following the mandatory procedure described in Education Code section 47607, subdivision (c). Therefore, the Commission finds that Education Code section 47607, as amended by Statutes 1998, chapter 34, imposes a new program or higher level of service upon school districts and county offices of education for the following new activity:

- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils.

Education Code section 4 7613 (formerly 47613.7).

When the test claim was filed, the test claim statute was Education Code section 47613.7, as added by Statutes 1998, chapter 34. The section was renumbered Education Code section 47613 by Statutes 1999, chapter 78, effective July 7, 1999. No amendments were made to the statutory language.

(a) Except as set forth in subdivision (b), a chartering agency may charge for the actual costs of supervisory oversight of a charter school not to exceed 1 percent of the revenue of the charter school.

(b) A chartering agency may charge for the actual costs of supervisory oversight of a charter school not to exceed 3 percent of the revenue of the charter school if the charter school is able to obtain substantially rent free facilities from the chartering agency.

(c) A local agency that is given the responsibility for supervisory oversight of a charter school, pursuant to paragraph (1) of subdivision (k) of Section 47605, may charge for the costs of supervisory oversight, and administrative costs necessary to secure charter school funding, not to exceed 3 percent of the revenue of the charter school. A charter school that is charged for costs under this subdivision shall not be charged pursuant to subdivision (a) or (b).

(d) This section shall not prevent the charter school from separately purchasing administrative or other services from the chartering agency or any other source.

(e) For the purposes of this section, a chartering agency means a school district, county department of education, or the State Board of Education, that granted the charter to the charter school.

Claimants allege that although the code section allows school districts to charge a charter school for the actual costs of supervisory oversight, the maximum charge of one percent (or three percent if the school district provides substantially rent-free facilities to the charter school) of charter school revenue, is insufficient to pay for the oversight costs.

DOF argues “that if the Legislature had intended that chartering agencies’ requirements should be more costly, they would not have imposed a limit on the reimbursements. On the contrary, we believe this limitation was in keeping with the intent of the Charter law that oversight be just that and was intended to discourage micromanagement.”

The Commission notes that this statute alone does not impose a new program or higher level of service, but instead establishes a fee system for which the chartering agency can impose a maximum charge of one or three percent of the charter school revenue for the actual costs of supervisory oversight. Supervisory oversight is a reimbursable activity in the original *Charter Schools Parameters and Guidelines*, as follows:

4. Monitoring the charter

Subsequent administrative review, analysis, and reporting on the charter school’s performance for purposes of charter reconsideration, renewal, revision, evaluation, or revocation by the governing body.

In comments on the draft staff analysis, claimant San Diego Unified School District states that they are “unable to locate in the Parameters and Guidelines or in the Claiming Instructions the term ‘Supervisory oversight.’” The Commission agrees that this is not the exact language utilized, however, claimant has not cited any other definition of “supervisory oversight” in the Education Code indicating that the term should not be read as comparable to the “Monitoring the charter” activity allowed for in *Charter Schools Parameters and Guidelines*.

Claimant argues that “the supervisory oversight activities are a new program or higher level of service that is required to be performed by the sponsoring entity and must be a reimbursable [sic] for any amounts exceeding 1% or 3%.” Again, supervisory oversight is not a *new activity* required by the law claimed in the present test claim allegations. Claimant cannot make a successful claim for subvention for the costs of supervisory oversight without first pleading and establishing that a new law or executive order imposed a new program or higher level of service upon school districts or county offices of education. The laws relating to supervisory oversight as *an activity* were pled in the original *Charter Schools* test claim based upon the enactment of Statutes 1992, chapter 78 1, and have already been found by the Commission to impose certain

reimbursable costs mandated by the state. The Commission finds that Education Code section 476 13 does not require any new activities, but rather establishes a fee authority to be used by a school district or county office of education to offset any costs of charter school supervisory oversight.¹⁶

The Commission finds that Education Code section 47613, as added by Statutes 1998, chapter 34, renumbered by Statutes 1999, chapter 78, does not impose a new program or higher level of service upon school districts or county offices of education.

Education Code section 4 7613.5.

Education Code section 47613.5, as added by Statutes 1998, chapter 34, effective January 1, 1999, and repealed by Statutes 1999, chapter 78, effective July 7, 1999, follows, in pertinent part:

(a) Notwithstanding Sections 476 12 and 47613, commencing with the 1999-2000 school year and only upon adoption of regulations pursuant to subdivision (b), charter school operational funding shall be equal to the total funding that would be available to a similar school district serving a similar pupil population, provided that a charter school shall not be funded as a necessary small school or a necessary small high school, nor receive revenue limit funding that exceeds the statewide average for a school district of a similar type.

(b) The State Department of Education shall propose, and the State Board of Education may adopt, regulations to implement subdivision (a) and, to the extent possible and consistent with federal law, provide for simple and, at the option of the charter school, local or direct allocation of funding to charter schools.

Claimants allege that “Education Code section 476 13.5 required the State Department of Education to propose, and the State Board of Education to adopt, regulations that provide for these alternative methods of funding.” The statutory language is directed exclusively to the CDE and the State Board of Education and does not impose any activities or duties upon school districts.

In addition, as discussed above, it appears that the proposed regulations were never published or operative prior to the repeal of this implementing Education Code section, effective July 9, 1999. Any potential activities for local educational agencies would have resulted from the implementation of the regulations originally required by this statute, not from the statute alone. Therefore, the Commission finds that Education Code section 476 13.5 did not impose a new program or higher level of service upon school districts or county offices of education.

Education Code section 4 7614.

This Education Code section was added by Statutes 1998, chapter 34, operative January 1, 1999.

A school district in which a charter school operates shall permit a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for

¹⁶ Government Code section 175 14 defines “costs mandated by the state” as increased costs a district is “required to incur,” therefore any costs that are recoverable through sources other than district tax revenues are not reimbursable costs mandated by the state.

rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities.

Education Code section 476 14 was replaced by language from Initiative Measure, Proposition 39, section 6, effective November 8, 2000, as follows in part:

The intent of the people in amending Section 476 14 is that public school facilities should be shared fairly among all public school pupils, including those in charter schools.

Each school district shall make available, to each charter school operating in the school district, facilities sufficient for the charter school to accommodate all of the charter school's in-district students in conditions reasonably equivalent to those in which the students would be accommodated if they were attending other public schools of the district. Facilities provided shall be contiguous, furnished, and equipped, and shall remain the property of the school district. The school district shall make reasonable efforts to provide the charter school with facilities near to where the charter school wishes to locate, and shall not move the charter school unnecessarily.

The statutory language of Education Code section 47614, as added by Statutes 1998, chapter 34 was replaced by vote of the people upon the approval of Proposition 39, and thus is no longer subject to article XIII B, section 6 of the California Constitution, which only requires subvention when "the Legislature or any state agency mandates a new program or higher level of service." Therefore, the Commission finds that any potential reimbursement period for Education Code section 47614 begins on January 1, 1999, and concludes on November 8, 2000.

Claimants allege that Education Code section 476 14 imposes a reimbursable state mandate, including "the fair rental value of the facility as determined by the school district governing board plus other direct and indirect costs associated with the charter school's use of the facility."

DOF's July 28, 2000 response to the test claim allegations concludes:

The law specifically states that the district must provide facilities only if they are excess facilities or are not already being rented. As such, there is no loss of rent to the district, as the "fair rental value" of an unrented property is zero. However, there could be minor, one-time administrative costs in establishing a free use agreement with the charter. Additionally, even if there were a revenue loss, it would not appear to constitute a reimbursable new program nor higher level of service within the meaning of the mandate law. Finally, the law also provides offsetting savings, because the law requires that any facilities provided for use by the charter be maintained by the charter, thus relieving the chartering agency from the costs of maintenance on the surplus facility.

The Commission also disagrees with the claim for state subvention for any lost rental value of a facility utilized by a charter school under this section as it contradicts the court's holding in *County of Sonoma v. Commission on State Mandates*. In *County of Sonoma*, the court concluded that lost revenue is not reimbursable under article XIII B, section 6 of the California Constitution.¹⁷

¹⁷ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1285.

In *County of Sonoma*, the counties contended that reduced allocation of tax revenues was a reimbursable cost under article XIII B, section 6. The court disagreed. After analyzing Supreme Court cases on mandates, reviewing Government Code section 17500 et seq. and other Constitutional provisions differentiating “costs” from “lost revenue,” the court came to the following conclusions:

[I]t is the expenditure of tax revenues of local governments that is the appropriate focus of section 6 (*County of Fresno v. State of California* [citation omitted]) [stating that section 6 was “designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.”] ¹⁸

No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes.¹⁹

The obvious view of the Legislature is that reimbursement is intended to replace actual costs incurred, not as compensation for revenue that was never received.²⁰

The presence of these references to reimbursement for lost revenue in article XIII supports a conclusion that by using the word “cost” in section 6 the voters meant the common meaning of cost as an expenditure or expense actually incurred.²¹

And finally, the court held that “we cannot extend the provisions of section 6 to include concepts such as lost revenue.”²² Accordingly, the Commission finds that the claim for the lost fair rental value is not subject to article XIII B, section 6, because lost revenue, such as rental income, does not constitute a cost.

As for associated “direct and indirect costs” of providing property to charter schools, Statutes 1998, chapter 34 only required that school districts provide property if it was not being currently used for instructional or administrative purposes, *and*, if it had not been historically rented. In other words, the statute only required school districts to provide truly vacant, unutilized property. There was no state requirement to evict current tenants, establish a lease agreement, or prepare property for a charter school in any way. In return for use of the unutilized property, charter schools “shall be responsible for reasonable maintenance of those facilities,” thus, providing a potential benefit to school districts, not a cost.

However, any potential offsetting savings does not preclude finding that a new program or higher level of service was imposed upon school districts for the administrative expenses resulting directly from the statutory requirement to permit charter schools to utilize unused district facilities, such as “one-time administrative costs in establishing a free use agreement with the charter,” as proposed by DOF.

¹⁸ *Id.* at 1283.

¹⁹ *Id.* at 1284.

²⁰ *Ibid.*

²¹ *Id.* at 1285.

²² *Ibid.*

Thus, the Commission finds that Education Code section 47614, as added by Statutes 1998, chapter 34, imposes a new program or higher level of service upon school districts from January 1, 1999 to November 8, 2000, for the following new activity:

- Permitting a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.)

Test Claim Executive Orders: California Department of Education Memorandum:

Implementation of New Charter School Funding Model, dated April 28, 1999.

Claimants allege the memorandum is an executive order imposing a reimbursable state mandated program for the processing of payments of property tax from school districts to charter schools. The April 28, 1999 document is a letter “intended to help charter schools make” decisions on the new funding model options described in Education Code section 47613.5. The memorandum discusses the plan for implementation of Education Code section 476 13.5, however the code section was repealed on July 7, 1999, and thus the memorandum was no longer of use.

Under Government Code section 175 16, an “executive order” may include “any order, plan, requirement, rule, or regulation issued by . . . any agency, department, board, or commission of state government.” For the period of time the memorandum applied, it was informational regarding the new charter school funding model, however, the Commission finds that the memorandum did not meet the definition of an executive order for school districts and county offices of education, as it did not issue any directives or require any activities on the part of such local educational agencies. The Commission finds that the CDE memorandum dated April 28, 1999, did not impose a new program or higher level of service upon school districts or county offices of education.

Issue 3: Does the test claim legislation found to contain a new program or higher level of service also impose “costs mandated by the state” within the meaning of Government Code sections 17514 and 17556?

Reimbursement under article XIII B, section 6 is required only if any new program or higher-level of service is also found to impose “costs mandated by the state.” Government Code section 175 14 defines “costs mandated by the state” as any *increased* cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service.

DOF makes an argument against subvention for the part of the test claim legislation, based upon the exception of Government Code section 17556, subdivision (e): that there are no costs mandated by the state if the statute or executive order provides *offsetting savings* to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

DOF contends that Statutes 1998, chapter 673, in amending Education Code section 47605, subdivision (j), the Legislature eliminated a mandate that county offices of education “convene a

review panel to determine if a district acted properly in denying a petition. However, it also: a) adds a requirement that county offices review petitions directly submitted to them; and b) allows charter schools to file judicial action against a district in the case of a denial if the entity fails to act on a petition within 120 days.”

DOF argues, “There would seem to be considerable offsetting savings resulting from the elimination of the earlier mandate. We believe these alternative activities to be comparable and therefore no reimbursable mandate exists.”

DOF’s analysis does not comport with the complete description of offsetting savings in the exception to reimbursement described in Government Code section 17556, subdivision (e). Because the prior requirements in Education Code section 47605 were found to constitute a reimbursable state mandated program as part of the original *Charter Schools* test claim, the elimination of part of the mandate and the substitution of other requirements does not provide *offsetting savings which result in no net costs* to the school district. Following the program evolution in a timeline: first, there is no program prior to the development of charter schools legislation; next, there is a new program in Statutes 1992, chapter 78 1, resulting in a reimbursable state mandate; finally, part of the new program activities are eliminated and substituted with alternative activities by Statutes 1998, chapter 673. But, under DOE’s argument, because the newest program is comparable, suddenly “no reimbursable mandate exists.” This does not follow – if the previous program activities were reimbursable, the substituted activities must be as well, unless another exception to subvention exists.

In addition, the test claim legislation does not include additional revenue that was specifically intended to fund the entire cost of the state mandate. Accordingly, the Commission finds that Government Code section 17556, subdivision (e), does not apply to deny a finding of costs mandated by the state for the activities identified as imposing a reimbursable state mandated program.

The Commission finds none of the other exceptions to finding a reimbursable state mandate under Government Code section 17556 apply here. Accordingly, the Commission finds that the activities identified in the conclusion, below, qualify for reimbursement because the activities impose costs mandated by the state within the meaning of Government Code section 175 14.

CONCLUSION

The Commission concludes that Education Code sections 47605, subdivision (j)(l) and (k)(3), 47605.5, 47607, and 47614 contain new programs or higher levels of service for school districts and/or county offices of education within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 175 14, for the following specific new activities:

School Districts:

- Review charter school petitions for renewal, when submitted directly to the governing board of the school district that initially denied the charter, prior to expiration of the charter granted by the State Board of Education.
(Ed. Code, § 47605, subd.(k)(3).)²³

²³ As amended by Statutes 1998, chapter 673, operative January 1, 1999.

- ✧ Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607.)²⁴
- ✧ Permitting a charter school to use, at no charge, facilities not currently being used by the school district for instructional or administrative purposes, or that have not been historically used for rental purposes, provided the charter school shall be responsible for reasonable maintenance of those facilities. (Reimbursement for this activity is limited to administrative expenses resulting directly from the requirement to permit charter schools to utilize unused district facilities. Rental value of the facility is specifically excluded as a reimbursable expense.) (Ed. Code, § 476 14.)²⁵

County Offices of Education:

- Review charter school petitions submitted directly to the county board of education, pursuant to Education Code section 47605, subdivision (b), when the governing board of a school district denies a charter school petition and the charter school petitioner submits the petition to the county board of education. (Ed. Code, § 47605, subd. (j)(1).)²⁶
- Review charter school petitions submitted directly to the county board of education, in the same manner as set forth in Education Code section 47605, for charter schools that will serve pupils for whom the county office of education would otherwise be responsible for providing direct education and related services. (Ed. Code, § 47605.5.)²⁷
- Prior to revocation of a charter, the authority that granted the charter shall notify the charter public school of any violation of this section and give the school a reasonable opportunity to cure the violation, unless the authority determines, in writing, that the violation constitutes a severe and imminent threat to the health or safety of the pupils. (Ed. Code, § 47607.)²⁸

The Commission finds that Education Code section 47613²⁹ establishes a fee authority that must be used by a school district or county office of education to offset any claimed reimbursement

²⁴ As amended by Statutes 1998, chapter 34, operative January 1, 1999.

²⁵ As added by Statutes 1998, chapter 34, operative January 1, 1999. Mandate eliminated 1999 by vote approval of Proposition 39, which replaced Education Code section 47614, operative November 8, 2000.

²⁶ As amended by Statutes 1998, chapter 673, operative January 1, 1999. This 1999 date replaces the previously approved mandate in *Charter Schools* for a review process for denied charter petitions. (Ed. Code, § 47605, subd. (j), as added by Stats. 1992, ch. 781; replaced by Stats. 1998, ch. 673.)

²⁷ As added by Statutes 1998, chapter 34, operative January 1, 1999.

²⁸ As amended by Statutes chapter 34, operative January 1, 1999.

²⁹ As added by Statutes 1998, chapter 34, operative January 1, 1999, and renumbered by Statutes 1999, chapter 78.

for the costs of charter school supervisorial oversight under the *Charter Schools* parameters and guidelines.

The Commission finds that Education Code sections 47602, 47604, 47613, 47613.5, 47614 and CDE Memorandum dated April 28, 1999, do not require any additional mandatory activities of school districts or county offices of education, and therefore do not impose a new program or higher level of service.