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**PUBLIC HEARING**  
**COMMISSION ON STATE MANDATES**

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**ORIGINAL**

**TIME:** 9:34 a.m.

**DATE:** Thursday, July 29, 2004

**PLACE:** Commission on State Mandates  
State Capitol, Room 126  
Sacramento, California

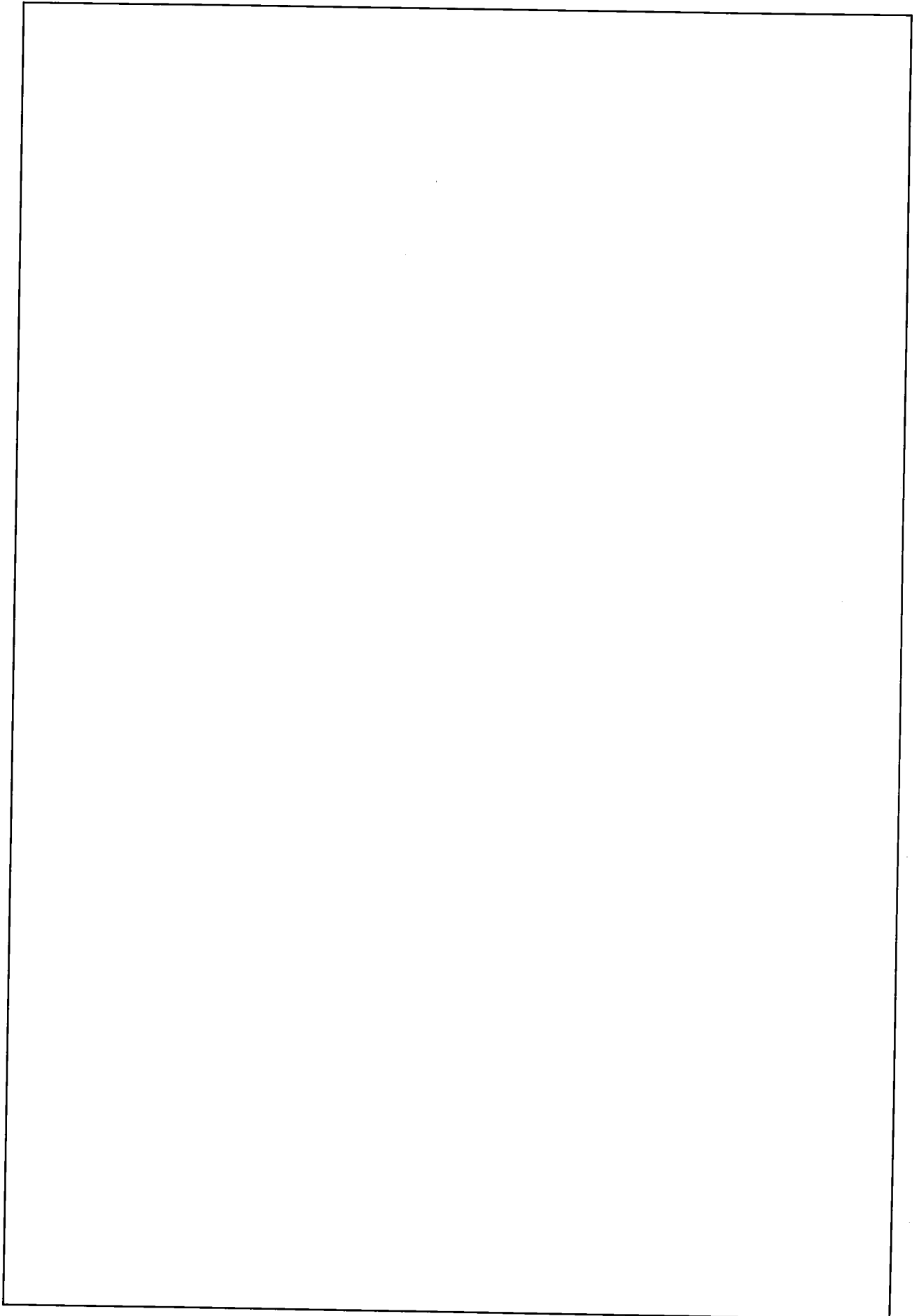
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By:

DANIEL P. FELDHAUS  
CSR #6949, RDR, CRR



A P P E A R A N C E S

COMMISSIONERS PRESENT

JAMES TILTON  
(Commission Chair)  
Representative for DONNA ARDUIN  
Director  
Department of Finance

BRUCE VAN HOUTEN  
(Commission Vice Chair)  
Representative for PHILIP ANGELIDES  
State Treasurer

WALTER BARNES  
Representative for STEVE WESTLY  
State Controller

JAN BOEL  
Acting Director  
State Office of Planning and Research

JOHN S. LAZAR  
City Council Member  
City of Turlock

COMMISSION STAFF PRESENT

PAULA HIGASHI  
Executive Director

PAUL M. STARKEY  
Chief Legal Counsel

CAMILLE SHELTON  
Senior Commission Counsel

ERIC FELLER  
Commission Counsel

NANCY PATTON  
~~Legislative Coordinator~~  
Assistant Executive Director

LaTOYA JACKSON  
Student Assistant

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 3 and Item 4:**

For Sweetwater Union High School District:

LAWRENCE L. HENDEE  
Sweetwater Union High School District  
1130 Fifth Avenue  
Chula Vista, CA 91911

RUTH ANN DUNCAN  
Math Curriculum Specialist  
Sweetwater Union High School District  
1130 Fifth Avenue  
Chula Vista, CA 91911

For Department of Finance:

MICHAEL WILKENING  
Principal Program Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

**Appearing Re Item 5 and Item 6:**

For Claimant, County of Los Angeles:

LEONARD KAYE  
Certified Public Accountant  
Office of Auditor-Controller  
County of Los Angeles  
500 W. Temple Street, Suite 603  
Los Angeles, CA 90012

For Santa Monica Community College District

LEO SHAW, J.D.  
Associate  
SixTen and Associates  
5252 Balboa Avenue, Suite 807  
San Diego, CA 92117

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 5 and Item 6:**

For Commission on Peace Officer Standards and Training:

BUD LEWALLEN

Commission on Peace Officer Standards and Training  
1601 Alhambra Boulevard  
Sacramento, CA 95816

AL STOWE

Commission on Peace Officer Standards and Training  
1601 Alhambra Boulevard  
Sacramento, CA 95816

For Department of Finance:

GEORGIA JOHAS

Department of Finance  
915 L Street  
Sacramento, CA 95814

For CSAC SB90 Committee:

PAMELA A. STONE

Maximus  
4320 Auburn Boulevard, Suite 2000  
Sacramento, CA 95841

**Appearing Re Item 7:**

For Claimant, County of San Bernardino

BONNIE TER KEURST

Auditor/Controller-Recorder  
222 W. Hospitality Lane  
San Bernardino, CA 92415

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 7:**

For County of Los Angeles:

LEONARD KAYE,  
Certified Public Accountant  
Office of Auditor-Controller  
County of Los Angeles  
500 W. Temple Street, Suite 603  
Los Angeles, CA 90012

DAVID A. CAMPBELL (Captain)  
Operations Bureau  
Department of Coroner  
County of Los Angeles  
1104 N. Mission Road  
Los Angeles, CA 90033

For the Department of Justice:

JOHN TONKYN  
Missing Persons DNA Program  
Department of Justice  
State of California  
1001 W. Cutting Boulevard, Suite 110  
Richmond, CA 94804

Jeannine Willie  
Missing Persons DNA Program  
Department of Justice  
State of California  
1001 W. Cutting Boulevard, Suite 110  
Richmond, CA 94804

For the Department of Finance:

DIRK ANDERSON  
Principal Program Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 9 and Item 10:

For Santa Monica Community College District

LEO SHAW, J.D.  
Associate  
SixTen and Associates  
5252 Balboa Avenue, Suite 807  
San Diego, CA 92117

For the Department of Finance:

THOMAS TODD  
Principal Program Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

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1 BE IT REMEMBERED that on Thursday, July 29, 2004,  
2 commencing at the hour of 9:34 a.m., thereof, at the  
3 State Capitol, Room 126, Sacramento, California, before  
4 me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the  
5 following proceedings were held:

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7 CHAIR TILTON: The time of 9:30 arrived and it looks  
8 like we've got a quorum. And I'd like to establish the  
9 meeting of the Commission on State Mandates.

10 Paula, can you call the roll?

11 MS. HIGASHI: Mr. Barnes?

12 MEMBER BARNES: Here.

13 MS. HIGASHI: Ms. Boel?

14 MEMBER BOEL: Here.

15 MS. HIGASHI: Mr. Lazar?

16 MEMBER LAZAR: Here.

17 MS. HIGASHI: Mr. Van Houten?

18 MEMBER VAN HOUTEN: Here.

19 MS. HIGASHI: Mr. Tilton?

20 CHAIR TILTON: Here.

21 We have a quorum.

22 Paula, can you introduce the first item?

23 MS. HIGASHI: The first item on the agenda is  
24 adoption of the minutes from our last meeting.

25 CHAIR TILTON: Are there any objections or

1 corrections to the minutes from the last meeting?

2 MEMBER BOEL: I move we adopt the minutes.

3 CHAIR TILTON: Do we have a second?

4 MEMBER VAN HOUTEN: I'll second.

5 CHAIR TILTON: A motion for a second.

6 Any discussion?

7 *(No audible response was heard.)*

8 CHAIR TILTON: All in favor, say "aye."

9 *(A chorus of "ayes" was heard.)*

10 CHAIR TILTON: Opposed?

11 *(No audible response was heard.)*

12 CHAIR TILTON: The minutes are approved.

13 MEMBER LAZAR: I'll abstain because I was absent  
14 from the last meeting.

15 CHAIR TILTON: Okay, so noted.

16 MS. HIGASHI: I'd just like to note for the record  
17 that there are no appeals to be considered under Item 2.

18 And this brings us to the test claim portion of our  
19 meeting. And as is our custom, what I'd request is that  
20 all of the parties and witnesses that will be speaking  
21 on the test claims that are set for hearing, please  
22 stand. And what we will do is have the swearing in of  
23 witnesses.

24 *(Several people stood up.)*

25 MS. HIGASHI: Do you solemnly swear or affirm that

1 the testimony which you are about to give today is based  
2 upon your personal knowledge, information or belief?

3 *(A chorus of "Yeses" was heard.)*

4 MS. HIGASHI: Thank you very much.

5 The first claim today is Item 3. And it is on the  
6 *Algebra Instruction* test claim. This item will be  
7 presented by Eric Feller, Commission Counsel.

8 Oh, I'm sorry. I skipped the Consent Calendar.  
9 Sorry about that.

10 The proposed Consent Calendar, I'll just read it  
11 very quickly, is Items 11, 12, 13, 14 and 15. And it is  
12 my understanding that there are no objections to any of  
13 these items on the Consent Calendar. It is the green  
14 sheet that you have before you.

15 CHAIR TILTON: Do we have a motion to approve the  
16 Consent Calendar?

17 MEMBER LAZAR: So moved.

18 CHAIR TILTON: Do I have a second?

19 MEMBER BOEL: Second.

20 CHAIR TILTON: Okay, we have a motion and a second  
21 to approve the Consent Calendar.

22 Is there anyone that wants to raise any issues with  
23 any of these items?

24 *(No audible response was heard.)*

25 CHAIR TILTON: Hearing no objections, we'll take

1 roll call.

2 MS. HIGASHI: Mr. Barnes?

3 MEMBER BARNES: Aye.

4 MS. HIGASHI: Ms. Boel?

5 MEMBER BOEL: Aye.

6 MS. HIGASHI: Mr. Lazar?

7 MEMBER LAZAR: Aye?

8 MS. HIGASHI: Mr. Van Houten?

9 MEMBER VAN HOUTEN: Aye.

10 MS. HIGASHI: Mr. Tilton?

11 CHAIR TILTON: Aye.

12 Motion passes.

13 MS. HIGASHI: The motion is carried.

14 This now brings us back to Item 3. And Mr. Feller  
15 will introduce this item.

16 MR. FELLER: Good morning. As Paula mentioned, this  
17 is the *Algebra Instruction* test claim.

18 The test claim statute requires pupils to pass a  
19 course in algebra, before obtaining a high school  
20 diploma. Claimant pled activities related to remedial  
21 instruction to help pupils pass the course. Staff found  
22 that the test claim statute does not require or refer to  
23 remedial instruction, so these activities are not  
24 reimbursable.

25 As to the algebra course itself, preexisting law



1 already requires two courses in mathematics in order to  
2 graduate from high school. Therefore, the test claim  
3 statute merely places *Algebra Instruction* within the  
4 existing framework of mathematics instruction, without  
5 adding to the framework. So staff found that this  
6 activity was also not reimbursable.

7 Therefore, staff recommended that the Commission  
8 deny this test claim.

9 Would the parties and witnesses please state their  
10 names for the record?

11 MS. DUNCAN: Ruth Ann Duncan.

12 MR. HENDEE: Larry Hendee, Sweetwater.

13 MR. WILKENING: Mike Wilkening with Finance.

14 CHAIR TILTON: Mr. Hendee, do you want to start?

15 MR. HENDEE: Well, I'm here this morning on behalf  
16 of the claimant to indicate that we don't agree with the  
17 staff's findings.

18 First, let me qualify my statements by indicating to  
19 you that I'm not an attorney, and I'm also not a  
20 curriculum instruction-type person. So I won't be trying  
21 to address issues related to that.

22 What I am is a school businessperson; but probably  
23 more importantly -- at least more importantly to me --  
24 I'm a father of three, one of which had problems with  
25 math in high school. I'm a grandfather of seven, with

1 one of them being a high-school-aged student, who is  
2 currently having problems with math. And the other ones  
3 are a little bit young yet to be able to determine  
4 whether they're going to have the same kind of problems.

5 But the bottom line is, I want all of them to go to  
6 college. And as importantly, if they need not to go to  
7 college, I want them at least to get a high school  
8 diploma and graduate.

9 So with that said, let me talk for a few minutes  
10 about what the staff's findings were and our positions on  
11 those findings.

12 The staff found that the statute and legislative  
13 history didn't mention remedial instruction, and made the  
14 conclusion that it was not reimbursable under  
15 Article XIII B, section 6. Staff supported those  
16 statements by indicating that if the Legislature had  
17 intended that the activity to be part of the *Algebra*  
18 *Instruction* program, that intent would have been stated  
19 in either the test claim statute or the legislative  
20 history.

21 Two, the staff indicated, nor is there a threat of  
22 penalty for not providing it.

23 And three, staff indicated that remedial instruction  
24 would be undertaken as a discretionary or optional  
25 activity by the school district.

1           In the staff analysis background statement, the  
2           State Board of Education math standards were discussed.  
3           And in that discussion, it was disclosed that 30 to  
4           40 percent of the pupils don't take high school algebra.  
5           There is no disclosure, either by the staff or the  
6           legislative history, relative to why those 30 to  
7           40 percent don't take algebra.

8           Our contention, i.e., the claimant's contention,  
9           is that a large percent of those 30 to 40 percent don't  
10          take algebra because, one, they don't have the desire for  
11          higher education; two, they don't have the ability to be  
12          successful with algebra; and/or three, they don't have  
13          the ability -- they lack the ability to do algebra,  
14          period.

15          Staff also discloses in the staff analysis  
16          background statement, in the section, "Related Claims,"  
17          that the test claim statute was enacted, in part, to  
18          protect High School Exit Exam from court challenges  
19          because pupils must have the opportunity to learn the  
20          subject matter tested.

21          Our contention -- again, claimant's contention --  
22          is that the student must have the ability to learn the  
23          subject matter as it relates to that portion of the  
24          30 to 40 percent that are in those three categories  
25          above, implies the probable need for remediation

1 intervention.

2 Claimant also disagrees with staff analysis finding  
3 that remediation is not subject to Article XIII B because  
4 it's not so stated in the statute or legislative history.  
5 The minutes of all of the Assembly hearings and Senate  
6 hearings on this piece of legislation disclose the facts  
7 of 30 to 40 percent of pupils that choose not to take  
8 algebra and the need to protect the High School Exit Exam  
9 because of the need to -- or they must have the  
10 opportunity to learn the subject matter.

11 Claimant disagrees that there's no penalty to the  
12 District for not offering algebra as a course. The  
13 District has to either graduate the student or not. The  
14 student suffers the penalty.

15 And I'd also like to indicate in the same area, that  
16 the staff has used a term "enforceability," as it was  
17 defined by the Court, to determine whether an item is  
18 mandatory or discretionary. And I'd like to point out  
19 that that basically renders 90 percent of the Education  
20 Code, as an advisory code, which, in other words, means  
21 that the school districts don't have to do anything  
22 unless it's in the code, unless there's something in  
23 there that indicates there's going to be a penalty if  
24 they don't.

25 The claimant also disagrees that remediation becomes

1 an option or discretionary to school districts. Only in  
2 settings where districts don't care whether the students  
3 are successful or not in algebra, would those two terms  
4 be appropriate. The students who fall in that 30 to  
5 40 percent class need to have some sort of remediation  
6 intervention in order to be able to be successful in the  
7 classroom with algebra, with an algebra course.

8 Just as a safe and secure building can't be built  
9 without doing an enormous amount of groundwork and  
10 preparation, the same thing is true with an instructional  
11 program. You have a lot of ground work and preparation  
12 that needs to be done.

13 Staff also found that the other activities were not  
14 mandated because they fall into the same categories of  
15 not being in the legislative history or in the statute.  
16 And we contend that the opposite is true, that there is a  
17 process of getting to an end result, and that includes  
18 all of these things that have to be done, i.e. primarily  
19 remedial intervention.

20 Staff found that *Algebra Instruction* is not a new  
21 program or a higher level of service based upon court  
22 decision involving domestic violence, training courses  
23 being required as a 24-hour continuing education  
24 requirement for law enforcement officers. Claimant  
25 disagrees with that. Claimant believes that that is an

1 apples and oranges comparison. You have law enforcement  
2 officers who have the same abilities, essentially, they  
3 have the same desires and goals and so forth; and they  
4 are not comparable with a group of school students who  
5 may or may not even know what they want to do at the time  
6 that they enter into high school.

7 Claimant would also like to point out that staff  
8 ignored the April 10th, 2000, and May 25th Appropriations  
9 Committee fiscal summaries, in which there was disclosure  
10 to the committee that, one, additional costs to be  
11 incurred to attract, retain or retrain teachers for the  
12 new course work demands; and two, that the mandate in the  
13 bill would make districts eligible for reimbursement for  
14 all related costs.

15 The question is not whether the Legislature has the  
16 right to establish its priorities. The question is, in  
17 the process of setting those priorities, did the  
18 Legislature impose a higher level of service? Claimant  
19 believes it did. And under the Constitution, the State  
20 of California is entitled to be reimbursed,  
21 dollar-for-dollar, for the cost of those impositions.

22 At this point, I'd like to introduce Ms. Ruth Ann  
23 Duncan, who is currently serving as a math curriculum  
24 specialist for the Sweetwater Union High School District.  
25 Ruth Ann has served as a mentor teacher and business

1 support provider for more than six years, and was  
2 selected out of 1,300 employees in our District, a  
3 certificated teacher employees, as Teacher of the Year in  
4 2000-2001.

5 She also was selected as a one of three American  
6 teachers in 2000-2001 to participate in an international  
7 study on how students process algebra instruction, which  
8 was conducted by the University of Australia. Ruth Ann  
9 has also participated in an assessment of community  
10 teachers, which was a project conducted by the National  
11 Science Foundation and the U.S. Department of Education.  
12 And she is a member of the National Council of  
13 Supervisors of Mathematics.

14 I've asked Ruth Ann to come this morning, and she  
15 has over 25 years of teaching experience also, which I  
16 didn't mention, but she does have that. I've asked her  
17 to come this morning to answer questions that you might  
18 have, as well as discuss some of the subject offerings  
19 that had to be written and developed in order to  
20 implement the legislation that was passed -- imposed upon  
21 us. And she'll also touch on the effects that  
22 remediation, intervention, assessments and trainings as a  
23 result of the legislation.

24 MS. DUNCAN: Good morning. I'd like to talk about  
25 the algebra requirement and the higher level of service

1 the District must provide as a result of its inception.

2 I have, indeed, been a math teacher in the  
3 Sweetwater Union High School District for 14 years.  
4 Seven of those years have been spent as an algebra  
5 teacher and an algebra readiness teacher. And the last  
6 three, part-time developing curriculum in our office of  
7 curriculum, as a middle-school math specialist.

8 I have seen enormous changes as a result of the  
9 changing requirements and the level of proficiency to  
10 which we need to raise our students over the 14 years  
11 in which I have been in the District.

12 I wanted to give a bit of a context of the  
13 requirement because it's important to me. Larry  
14 mentioned it, but I'd like to reiterate it, so that you  
15 can see it clearly and see it through my eyes.

16 This is the context: Prior to 2000, California high  
17 school students were required merely to take two high  
18 school math courses for their diploma. These courses  
19 were decided at the discretion of their districts.  
20 Around about 2000, we had the inception of the California  
21 high school exit examination. As you probably know,  
22 70 percent of that test consists of grade seven  
23 standards, certainly a minimal expectation for California  
24 high school graduates.

25 30 percent of the tests -- 30 percent of the items



1 address algebra standards.

2 As Larry pointed out, the imposing of the algebra  
3 requirement and the birth of the California high school  
4 exit examination coincided, as it were; because in order  
5 to impose the KC, we need to offer the opportunity to  
6 learn the algebra standards to all of our students who  
7 are the potential test-takers.

8 The staff has suggested that replacing the two math  
9 courses with an algebra requirement is a one-to-one  
10 trade-off, as it were. The requirement states that a  
11 student may take the algebra as two math courses -- that  
12 is, the content may be delivered over two years; thus,  
13 fulfilling that two-year requirement; or algebra plus  
14 something else, obviously, what remains to fulfill the  
15 two requirements.

16 I am here to say that to impose an algebra  
17 requirement as one of those two suggested courses does,  
18 indeed, constitute a higher level of service. It is  
19 a unprecedented request that involves a multitude of  
20 students who have not been successful heretofore, nor  
21 credentialed in algebra at the time of their graduation.

22 Our framework, our mathematics framework refers to  
23 universal access. This is really the issue around which  
24 I state the claim that a higher level of service needs to  
25 be provided. If we are, indeed, to provide universal

1 access and, thus, a diploma to all of our students, we  
2 must for the first time address the needs of special  
3 education students, our language learners, our at-risk  
4 learners who are struggling and who lack a number of  
5 prerequisite skills, and also students who heretofore  
6 have chosen vocational or general math paths as their  
7 life choice.

8 So, therefore, it is up to us as curriculum people  
9 and as math teachers to raise skills levels, to enable  
10 our students to be verifiably algebra-proven. This is  
11 a costly and labor-intensive effort.

12 It is a far different thing to deliver an abstract  
13 and rigorous discipline like algebra to the  
14 aforementioned at-risk students, special education  
15 students, low performers, that seems to be evident in  
16 the thinking that I have seen reflected in our  
17 documentation.

18 Our Board has struggled to develop policies that  
19 will enable all of our students to meet the expectation  
20 of the algebra requirement. We have had a great deal of  
21 reshuffling. Many programs have been rewritten. And  
22 I will be describing them a little bit more fully in a  
23 second.

24 Our counselors -- although this is not the year in  
25 which the algebra requirement must be demonstrated, our

1 counselors have spent a great deal of time and energy  
2 examining transcripts, to see that, indeed, our students  
3 have met the letter of the law; and that is to say, that  
4 they have addressed all 26 of the algebra standards, and  
5 have not simply given lip service to an algebra course.  
6 That would be our "easy out," but the state requires us  
7 to address all 26 quadratics, rational expressions, those  
8 of you who remember in algebra what is like.

9 Let me describe some of the courses that have been  
10 developed. Certainly, a higher level of service.  
11 Heretofore, we were teaching algebra to those who had  
12 the desire and the ability to be successful. I have to  
13 be honest about that, after 25 years of math instruction.  
14 Now, these are the variations that our district has  
15 developed. We have special ed. algebra classes, and we  
16 have three- and four-year sequences for our Level 1's and  
17 our Level 2's, respectively, which presents the algebra  
18 in the increments by which we hope students to be able to  
19 achieve mastery.

20 Also, these courses are written at the minimal  
21 degree of complexity, so that the students have a chance  
22 to be able to master the standards. For the students  
23 that the framework described as our "intensive and  
24 strategic group," that is, those who have shown  
25 themselves to be short in a series of measures over time

1 and who have demonstratively proven that they do not have  
2 a strong background, we have various forms of extended  
3 time. These take several models.

4 There's an extended algebra that has been  
5 administratively developed to deliver the content over  
6 two years, one of the possibilities that is given to us.

7 We have an academy model, which is an extended  
8 algebra, two years' delivery, with an additional support  
9 class in each of those successive years.

10 We have, a third variation, an algebra with a  
11 concurrent support class, in which the core content is  
12 presented in the mathematics hour; and in the elective,  
13 the different approaches are taken to reach various  
14 learners.

15 Additionally, we have drafted some algebra-readiness  
16 courses that are delivered in the summer, to scaffold  
17 eighth graders -- incoming eighth graders who would not  
18 necessarily be successful in algebra at the eighth grade.

19 There is a small penalty, not a financial penalty,  
20 but a small penalty, as you know, attached to not taking  
21 algebra at the eighth grade level. And that is a loss of  
22 API points.

23 There are a series of interventions and remediations  
24 that we have put into place. For our benchmark  
25 students -- that is, students who are making good

1 progress but who are experiencing minimal or temporary  
2 difficulties in their understanding -- we have developed  
3 before- and after-school classes, Saturday classes,  
4 special intercession classes, not the traditional ones,  
5 not the traditional summer school, but classes which  
6 address small pieces of the content for these students.

7 We have the whole panoply of tutoring opportunities,  
8 which our teachers are sometimes delivering gratis.

9 Professional development involved is also a cost to  
10 us. Our special education teachers who are delivering  
11 math content, now on a much higher level, often lack the  
12 content knowledge, although they are rich in  
13 instructional strategies that work for these students.  
14 Conversely, our regular ed teachers need a great deal  
15 of help with differentiation and diagnostic teaching.

16 We have supported our innovative courses and  
17 remediation measures with a backup of assessments that  
18 measure before the California standards test and before  
19 the California high school test, exit examination, how  
20 well our students are doing, vis-a-vis the algebra  
21 standards. We have written end-of-course exams, which  
22 verify mastery and give us a legitimate reason for  
23 passing our students in algebra.

24 We have benchmarks that tell us at intermittent  
25 points whether or not a student is making progress

1 toward the standards.

2 And lastly, we have had to implement a number of  
3 diagnostic tests and, again, unprecedented quantity  
4 because of the necessity of placing students correctly  
5 and judiciously; and also of providing for intervention  
6 for those students who need it.

7 Lastly, the implementation of these support classes,  
8 this extended time; what do we do with that? We don't  
9 deliver algebra by speaking longer and louder. To reach  
10 the students who are now under our umbrella, we need a  
11 different delivery. So we have spent a great deal of  
12 money on software technology, supplemental materials,  
13 models, manipulatives, to provide that active learning  
14 that our framework calls for special-needs learners.

15 In terms of the penalty to our district, there's not  
16 a clear financial penalty. But what are the two  
17 penalties that I see every day, as a math teacher,  
18 dealing with students and parents? I see the great fear  
19 that our students will not be receiving a high school  
20 diploma, just as Larry mentioned, if they cannot meet  
21 these expectations. And it is an expectation far beyond  
22 any that has existed in my career -- 25 years, actually,  
23 plus.

24 Thanks.

25 CHAIR TILTON: Maybe we can hear from the Department

1 of Finance and then ask you questions. I know some  
2 members may have questions.

3 MR. WILKENING: Michael Wilkening, the Department of  
4 Finance.

5 We concur with the staff analysis in that the  
6 Legislature is prioritizing within the existing  
7 mathematics curriculum for high school.

8 CHAIR TILTON: Can I hear from staff?

9 One question I had, what we're hearing from the  
10 claimants, is the issue of expanded workload, and I  
11 understand the change. And I want to respond to the  
12 perception that this is a prioritization of the workload,  
13 not a new workload. It seems to me that's the point that  
14 staff hears, that there's a requirement of two classes,  
15 there's still a requirement of two classes, and it's a  
16 matter of prioritization of your staff time and your prep  
17 time to do that.

18 Is that a fair -- or is that the issue here? Can  
19 the staff respond?

20 MR. FELLER: Yes. That's a part of it.

21 The other part is that all the activities that the  
22 claimants mentioned weren't anywhere to be found in the  
23 law or in the statutes or elsewhere, that we could find,  
24 so that all those activities, as laudable as they are,  
25 they're just not state-mandated, that we could determine

1 within the meaning of Article XIII, section 6.

2 CHAIR TILTON: Any questions by the Board members?

3 MEMBER BOEL: Yes, I have a question.

4 Before you implemented all these supplemental  
5 classes and remedial classes, what was your pass rate on  
6 the exam for high school exit, and how much did that  
7 change when you implemented all the remedial classes?  
8 Did it change substantially?

9 MS. DUNCAN: It has in the range of 20 points, yes.

10 MEMBER BOEL: 20 points, you said?

11 MS. DUNCAN: Yes.

12 MEMBER BOEL: Before you put these remedial  
13 classes --

14 MS. DUNCAN: Since.

15 MEMBER BOEL: -- 20 percent --

16 MS. DUNCAN: Since.

17 MEMBER BOEL: Since?

18 MS. DUNCAN: Since we have them, yes, over the time.

19 MEMBER BOEL: And prior to that, you think most of  
20 those people were failing the test because of the algebra  
21 requirements? Was that the main things that they were  
22 not passing the test on, the algebra requirements? Or  
23 were they just not taking algebra?

24 MS. DUNCAN: In the California high school exit  
25 examination?



1 MEMBER BOEL: Yes.

2 MS. DUNCAN: It is a component and it is assumed  
3 within the test, that the student has had those  
4 standards. So some of the students were taking algebra,  
5 a number of them were. The requirement came to be. And  
6 so, yes, but they were confounded with algebra as it was  
7 taught at the beginning of this experience. It was --  
8 our algebra has terribly been taught to people who are  
9 ready to learn it, people like ourselves, like the math  
10 teachers, and those who are successful stay with it and  
11 persevere. And those who were not, were just suddenly  
12 not involved in this.

13 CHAIR TILTON: Any more questions?

14 *(No audible response was heard.)*

15 CHAIR TILTON: Do we have a sense of the Commission?

16 MEMBER BARNES: I move the staff recommendation.

17 CHAIR TILTON: We have a motion to move the staff  
18 recommendation.

19 Do we have a second?

20 MEMBER VAN HOUTEN: I second.

21 CHAIR TILTON: We have a motion and a second.

22 Any further discussion?

23 *(No audible response was heard.)*

24 CHAIR TILTON: Paula, will you call the roll?

25 MS. HIGASHI: Mr. Barnes?

1 MEMBER BARNES: Aye.

2 MS. HIGASHI: Ms. Boel?

3 MEMBER BOEL: Aye.

4 MS. HIGASHI: Mr. Lazar?

5 MEMBER LAZAR: Aye.

6 MS. HIGASHI: Mr. Van Houten?

7 MEMBER VAN HOUTEN: Aye.

8 MS. HIGASHI: Mr. Tilton?

9 CHAIR TILTON: Aye.

10 MS. HIGASHI: The motion carries.

11 Item 4.

12 MR. FELLER: Unless there's objections, the Staff

13 recommends that the Commission adopt the Proposed

14 Statement of Decision which accurately reflects the

15 decision on the test claim. Staff also recommends the

16 Commission allow minor changes be made to the Statement

17 of Decision, including reflecting the hearing testimony

18 and the vote count will be included when in final

19 Statement of Decision.

20 CHAIR TILTON: Do we have a motion to approve

21 Item 4?

22 MEMBER LAZAR: So moved.

23 CHAIR TILTON: We've got a motion.

24 MEMBER BOEL: Second.

25 CHAIR TILTON: And a second.

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Call the roll please, Paula.

MS. HIGASHI: Ms. Boel?

MEMBER Bowl: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Van Houten?

MEMBER VAN HOUTEN: Aye.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: The motion carries.

This brings us to Item 5. And this is the test claim on *Mandatory On-The-Job Training for Peace Officers Working Alone*.

This item will be presented by Ms. Shelton.

MS. SHELTON: Good morning.

This test claim has been filed on documents issued by the Commission on Peace Officer Standards and Training. POST Bulletin 98-1 and the POST Administrative Manual Procedure D-13 establish field training requirements for peace officers that work alone and are assigned to general law enforcement patrol duties.

As indicated in the staff analysis, staff finds that POST field training program is required only if the local

1 agency or school district employer elects to become a  
2 member of POST and for those officers employed by a  
3 POST-participating agency, only after the officer has  
4 completed the basic training course.

5 Staff recommends that the Commission adopt the staff  
6 analysis and deny this test claim for the following  
7 reasons:

8 One, that state law does not require school  
9 districts and community college districts to employ peace  
10 officers, and, thus, POST field training requirements do  
11 not impose a state mandate on school districts and  
12 community college districts; and

13 Two, state law does not require local agencies or  
14 school districts to participate in the POST program and,  
15 thus, the field training requirements imposed by POST on  
16 their members are not mandated by the State.

17 Will the parties and their representatives please  
18 state your names for the record?

19 MR. KAYE: Leonard Kaye, County of Los Angeles.

20 MR. SHAW: Leo Shaw for Santa Monica Community  
21 College District.

22 MR. LEWALLEN: Bud Lewallen. I'm with the  
23 Commission on POST; and we support the staff  
24 recommendation.

25 MS. JOHAS: Georgia Johas, Department of Finance.

1 MR. STOWE: Al Stowe, with the Commission on POST.

2 CHAIR TILTON: Mr. Kaye, would you like to start?

3 MR. KAYE: Thank you. Good morning.

4 It is a real pleasure being here this morning; and  
5 we certainly appreciate this opportunity to discuss and  
6 clarify this very, very critical area. We believe that  
7 there is a legal compulsion -- unambiguous legal  
8 compulsion to provide this subject of mandatory field  
9 training; and we just have a few brief remarks in this  
10 area, and are anxious to hear from our colleagues in POST  
11 and Finance, why they might believe otherwise.

12 To us, it appears that the field training standards  
13 and requirements apply to all our officers, all our peace  
14 officers, patrolling all our streets, whether they be  
15 city streets, whether they be county streets, whether  
16 they be streets in school districts, on our campuses, and  
17 so forth.

18 We think that there is an implied and, certainly in  
19 the language of POST Bulletin 98-1, an express  
20 understanding that they are to be applied consistently  
21 throughout California; that no jurisdiction, no locale,  
22 in effect, should be excused simply because their City  
23 Council or their Board of Supervisors elected not to  
24 receive POST reimbursement.

25 That, in a nutshell, is our argument, in addition to

1 the very, very clear and explicit language that we found,  
2 that we read in the POST training bulletin and question.  
3 And I'd like to just briefly cite a few sections of that.

4 But before I do, I will note that this bulletin was  
5 sent with some attachments to all, quote, "affected  
6 agencies." Now, there are two ways of reading that  
7 phraseology, and I don't propose that we parse and get  
8 into some highly theoretical discussion; but the way  
9 we read it is that the attachments, those that this  
10 memorandum was sent to -- and maybe we can get  
11 clarification this morning -- the way we read it, is to  
12 all sheriffs' departments, to all police departments,  
13 schools, et cetera. And the phrase, "and other agencies  
14 participating in POST," that modifier, "other agencies  
15 participating in POST," immediately applies to those  
16 other agencies. And it doesn't say that this applies  
17 only to police departments participating in POST, et  
18 cetera. That's the way we read it. And we recognize  
19 that it's subject to various interpretations.

20 But nevertheless, the one thing to us that is not  
21 subject to interpretation, is the clear language in POST  
22 Bulletin 98-1, entitled, "Mandatory field training  
23 program." It says it's a mandatory field training  
24 program. And it also indicates it's an integral part of  
25 the previously mandated Basic training requirement. And

1 Mr. Kenneth O'Brien -- excuse me, Mr. Kenneth J. O'Brien,  
2 POST Executive Director, specifically states that,

3 *"The Commission on Peace Officer Standards*  
4 *and Training, POST, approved amendments to*  
5 *Commission Regulation 1005 and Procedure D-13*  
6 *relating to establishing a mandatory*  
7 *POST-approved field training program for peace*  
8 *officers assigned to general law enforcement*  
9 *patrol duties. This Commission action*  
10 *implements one of the objectives in a strategic*  
11 *plan to increase standards and competencies of*  
12 *officers by integrating a mandatory field*  
13 *training program as part of the Basic training*  
14 *requirement. POST regulations and procedures*  
15 *have incorporated most of the important*  
16 *elements of successful field training programs*  
17 *already in existence in California law*  
18 *enforcement agencies."*

19 And I must note that it is a cooperative effort;  
20 and we appreciate what POST is doing and has done in this  
21 area.

22 Nevertheless, we believe that POST's new field  
23 training program for all peace officers assigned to  
24 general law enforcement patrol duty is, as POST has  
25 stated, an integral and required component of such

1 officer basic training. And this is further illustrated  
2 in pertinent part of section 1005(a) of Title 11,  
3 Division 2 of the California Code of Regulations. And  
4 this is on Bates page 570, for those of you that would  
5 like to follow along. But I think it graphically  
6 represents -- and I'll give you a minute to find that  
7 page -- at the top of page 570, Bates page 570, it  
8 says -- the entire section is called "Minimum Entry-Level  
9 Training Standards," and then it has parentheses,  
10 "required."

11 And under that section, to us, it's instructive that  
12 POST portrays as, one, basic course requirements, and  
13 then they go into the basic course requirements, which  
14 most of us know about.

15 And then at the bottom of that paragraph, they have  
16 requirements for the regular basic course are set forth  
17 in PAM section D-1-3. And then as a subset or a subtopic  
18 within the required training, they have, "Field training  
19 program requirements."

20 Now, maybe we're reading along and we don't  
21 understand how it's organized; but to us, this clearly  
22 states that the field training is part and parcel, a  
23 subset of the required training. So that's how we read  
24 it.

25 Finally, we note that the POST mandate, and I think



1 Commission staff -- Camille -- has done a really  
2 outstanding job in looking on the Internet and seeing  
3 all of the agencies that do participate in POST and don't  
4 participate in POST and so forth; but what we found, when  
5 we checked the same information, is that basically, every  
6 agency that we found, if they're not members of POST,  
7 uses officers from agencies that are members of POST. In  
8 other words, they contract, for example, with county  
9 sheriffs' departments that receive the mandated training.  
10 So in our view, this training requirement is not only  
11 legally compelled; we have no reasonable alternative --  
12 we have no alternative but to provide this; but also in  
13 fact, in the state of California, it is also very  
14 pervasive, and it is consistently applied which, to us,  
15 is a good thing.

16 And I'd just like to conclude by saying that we  
17 cannot believe that if certain peace officers are to be  
18 excused from meeting this very, very important  
19 requirement, that they be done so on the basis that our  
20 city councils and our boards of supervisors simply have  
21 not elected to receive POST reimbursement. We feel,  
22 respectfully so, that this is irrelevant to the  
23 fundamental issue before us.

24 And as I say, I'm very anxious to hear what others  
25 have to say in this matter; and we'd like to reserve

1 further comments, if we could, based upon what they say.

2 Thank you.

3 CHAIR TILTON: Very good. Thank you, Mr. Kaye.

4 Mr. Shaw?

5 MR. SHAW: Yes, on behalf of Santa Monica, we would,  
6 of course, concur with the comments of Mr. Kaye; and  
7 otherwise we would submit on the record. And, of course,  
8 I'd be happy to answer any questions of the Commission,  
9 as they might particularly relate to community colleges  
10 and school districts.

11 CHAIR TILTON: Thank you.

12 The Department of Finance?

13 MS. JOHAS: Georgia Johas, Department of Finance.

14 We would concur with the staff analysis that  
15 training requirements do not impose a reimbursable  
16 state-mandated cost.

17 CHAIR TILTON: I think we heard POST's position, but  
18 maybe we can hear it officially again for the record.

19 MR. STOWE: Yes, Mr. Chairman and Members, we concur  
20 with the staff analysis and conclusion that this is not a  
21 state mandate.

22 I should also add a couple of other historical  
23 comments, and that is that POST was created back in the  
24 late fifties, with an agreement between the Legislature,  
25 local agencies, city and county, primarily, and law

1 enforcement, to create POST as a voluntary program. And  
2 it is clear that it is a voluntary program, even though  
3 all cities and all counties have elected, voluntarily, to  
4 pass ordinances of participating in the POST program.

5 And the agreement was that those agencies agreeing  
6 to participate in the POST program would get the benefits  
7 of reimbursement, certificates and other services in  
8 return for voluntarily meeting our selection and training  
9 requirements. And over the years, we have embellished  
10 upon those training and selection requirements with the  
11 concurrence of our clients.

12 And it is true that both of these agencies have  
13 passed ordinances to voluntarily participate in the POST  
14 program. And the field training program is a part of our  
15 training requirements that became effective in 1999. And  
16 so the POST program was and continues to be a voluntary  
17 program.

18 We do make provisions for agencies that have  
19 financial hardship to exempt from that particular  
20 requirement, but not the others.

21 We have a few agencies that have elected to seek a  
22 waiver for this requirement. But the vast majority of  
23 agencies participating in the POST program do, in fact,  
24 meet this requirement.

25 I'd be happy to answer questions.

1 CHAIR TILTON: Let me restate that, because  
2 basically you've answered the question I had, which was  
3 the issue, it seems like this is one of those areas where  
4 the State has stepped in to establish a standard that  
5 then local entities can use to measure themselves  
6 against.

7 But our basic point here, it's not a mandate by the  
8 state. It's a service we provide to establish the  
9 standard in terms of training. And then your basic  
10 premise is that then is -- responding to Mr. Kaye's  
11 point, is it makes it a voluntary program to do that.  
12 So we've stepped in and taken on the role of establishing  
13 some standards. But in order to acknowledge this is  
14 really assisting in a local effort in terms of providing  
15 peace officer responsibilities and quality staff, we've  
16 just stepped up to do that standardization establishment.

17 Any other questions from the board members?

18 *(No audible response was heard.)*

19 CHAIR TILTON: Mr. Kaye, do you want to respond?

20 MR. KAYE: No, I think our position is and remains,  
21 respectfully, that we view this as a mandated program.  
22 We, I think, along perhaps with other jurisdictions that  
23 I've met and conferred with on this matter, feel that if  
24 they were to, you know, not to elect to participate in  
25 POST, that POST standards and requirements would still

1 be imposed, certainly in the area of basic training,  
2 where peace officers certainly can't arrest folks without  
3 having met minimum basic training. And since the County  
4 Sheriff, at least, is required to make arrests when  
5 appropriate to do so and to deputize folks, to do that.  
6 Our position is that any fact -- there is enormous legal  
7 compulsion to participate in POST. And even apart from  
8 that legal compulsion, there's legal compulsion to make  
9 sure that our officers are properly trained, so that  
10 their arrests are valid.

11 And I guess we could go on and argue about whether  
12 they would be valid if they weren't on patrol and they  
13 simply came into the station house and gave themselves up  
14 or whether our streets are really safe, as we would want  
15 them to be, and ensuring that every peace officer is  
16 consistently trained and meets certain standards when  
17 they're out in the street, keeping us safe.

18 And so I think our position is, we understand the  
19 other side and we understand the constraints that  
20 everyone is under. But we feel, I think, that we are  
21 under legal compulsion to provide these services.

22 Thank you.

23 CHAIR TILTON: Camille, do you have any comments?

24 MS. SHELTON: I don't have anything further to add,  
25 unless you have a specific question that I'd be happy to

1 answer.

2 CHAIR TILTON: Let me just summarize this, I think,  
3 for the record, because it's clear sometimes, at least  
4 from our perspective, to document what our  
5 responsibilities are here, in terms of the issue.

6 It seems to me that the fundamental issue is whether  
7 or not the State is requiring this additional effort. It  
8 is clear to me that in order to get POST certification,  
9 there's an increased level of service or requirement in  
10 order to get that certification. But the fundamental  
11 issue for me is the fact, unless there's statutes  
12 somewhere that require these agencies to, in fact, be  
13 POST-certified, then there's not that underlying legal  
14 requirement for the State to pay the mandate.

15 And I haven't heard that, unless someone can cite  
16 where the Legislature has required these agencies to be  
17 POST-certified. Without that, I think there's not the  
18 linkage that we would need.

19 MS. STONE: Mr. Chairman, Members of the Commission,  
20 Pamela Stone on behalf of the CSAC SB90 Committee.

21 I have had to do research on this because I also  
22 have another test claim which is pending before your  
23 Commission, addressing the issue of meeting POST  
24 standards. There are two subdivisions in the Penal Code  
25 that address this issue.

1           The first subdivision speaks to the standards which  
2           are required to be met if you are to be a peace officer  
3           within the state of California, and the training  
4           standards and standards which must be met. It is not  
5           incumbent that one be a member of POST in order for the  
6           standards to be applicable. They are applicable whether  
7           or not you are a member of POST. In other words, in  
8           order to be able to exercise peace powers, you must have  
9           the requisite training and certificates of POST.

10           The second division is separate and apart, and deals  
11           with the fact that an entity can be a voluntary member of  
12           POST. But this does not mean that the POST standards are  
13           not applicable to all officers, whether or not their  
14           agency is, in fact, a member of POST.

15           There's also -- and I don't have the citation with  
16           me, sir, for which I apologize -- but there is an  
17           Attorney General opinion which also underlines the fact  
18           that for one to exercise the office of a peace officer  
19           within the state of California, one must meet peace  
20           officer -- the POST standards, as set forth in the code  
21           and regulations.

22           Thank you.

23           CHAIR TILTON: Camille, do you want to respond to  
24           that?

25           MR. STOWE: Yes, just a clarification.

1           The only certificate that is required of individual  
2 peace officers in California, is the Basic certificate.  
3 And we have an Attorney General's opinion that says that  
4 we're obliged to provide that certificate, whether the  
5 person is participating in an agency participating in the  
6 POST program or not. So the --

7           CHAIR TILTON: Is that what is referred to as  
8 "Basic 832"?

9           MR. STOWE: That refers to the Basic course, 832.3,  
10 which is the regular basic academy.

11           So if asked by a non-participating agency, we will  
12 issue a Basic certificate, if they meet all the other  
13 requirements, whether that person's agency participates  
14 in a POST program or not.

15           CHAIR TILTON: Okay, thank you.

16           MR. KAYE: Yes. I think in this regard, perhaps it  
17 was a euphemism, but I think the Executive Director's  
18 characterization of the field training as an integral  
19 part of the Basic training, we required as an essential  
20 element before an officer can be assigned to uniformed  
21 patrol duties. And so that's how we reasoned that  
22 result.

23           But we see the other side of it as well. So as I  
24 say, this is something that I am sure the others will  
25 look at very closely in the future, because it is a very,



1 very important issue. Because as our understanding is,  
2 the one thing that we all want to achieve is, we all want  
3 to be very uniform and consistent throughout California,  
4 so that, you know, one jurisdiction doesn't go off on  
5 their own and have one set of values and standards, and  
6 another one abides by the very high standards, the very  
7 great standards that POST has asked them to perform.

8 CHAIR TILTON: Do you have questions of Members?

9 MR. LEWALLEN: I'd ask for Camille's comment also.

10 MS. SHELTON: I'd add to some of the information  
11 that's on page 16 of the staff analysis. In the plain  
12 reading of the POST Bulletin 98-1, it states that the  
13 requirements for regular Basic certificate are not  
14 affected by the field training requirements.

15 Also, the field training was incorporated into POST  
16 regulations section 1005. And subdivision (a)(1)  
17 indicates that, "The officer is authorized to exercise  
18 peace-officer powers while engaged in the field training  
19 program." So that officer does have the power to make  
20 an arrest and serve warrants and carry a concealed weapon  
21 during the field-training program. So it's not part of  
22 the Basic training requirement.

23 CHAIR TILTON: Thank you.

24 Any other questions? Do I have a motion?

25 MEMBER LAZAR: I'll make the motion to adopt the

1 staff analysis.

2 CHAIR TILTON: Okay. Second?

3 MEMBER BARNES: I'll second.

4 CHAIR TILTON: We have a motion and a second. Any  
5 other discussion?

6 *(No audible response was heard.)*

7 CHAIR TILTON: Call the roll please.

8 MS. HIGASHI: Mr. Lazar?

9 MEMBER LAZAR: Aye.

10 MS. HIGASHI: Mr. Van Houten?

11 MEMBER VAN HOUTEN: Aye.

12 MS. HIGASHI: Mr. Barnes?

13 MEMBER BARNES: Aye.

14 MS. HIGASHI: Ms. Boel?

15 MEMBER BOEL: Aye.

16 MS. HIGASHI: Mr. Tilton?

17 CHAIR TILTON: Aye.

18 MS. HIGASHI: The motion is carried.

19 This brings us to Item 6, which is the Statement of  
20 Decision on the previous test claim.

21 MS. SHELTON: This is the proposed Statement of  
22 Decision. And the sole issue before the Commission is  
23 whether this decision accurately reflects your decision  
24 and your motion today.

25 Unless there's any objection, staff recommends that

1 the Commission adopt the proposed Statement of Decision  
2 and authorize staff to make any minor changes necessary  
3 to reflect the vote count and the witnesses present at  
4 the table today.

5 MR. SHAW: I have a comment on this matter.

6 CHAIR TILTON: Sure, Mr. Shaw?

7 MR. SHAW: Because there is a mistake in the  
8 proposed statement of substance, and not a minor one,  
9 that's on page 14, the last paragraph reads Penal Code  
10 section 13352. It should read Penal Code section 13522.  
11 And that's a substantive matter which should be changed.

12 MS. SHELTON: Can I ask a question? That might be  
13 true. I'd have to go back and take a look.

14 Do you disagree with the substance of the quotation,  
15 of the statute? Is that an accurate citation? I mean,  
16 not the citation, but the language of the statute?

17 MR. SHAW: Yes, it's just a transposition and a typo  
18 there.

19 MS. SHELTON: I can change that when we get back and  
20 before it's issued.

21 CHAIR TILTON: Very good. Thank you.

22 Do we have a motion?

23 MEMBER BOEL: I move we adopt the proposed Statement  
24 of Decision.

25 MEMBER BARNES: I'll second.

1 CHAIR TILTON: We've got a motion and a second.  
2 Any discussion?  
3 (No audible response was heard.)  
4 CHAIR TILTON: The motion is to approve the staff  
5 recommendation with Camille double-checking the citation.  
6 Call the roll.  
7 MS. HIGASHI: Mr. Van Houten?  
8 MEMBER VAN HOUTEN: Aye.  
9 MS. HIGASHI: Mr. Barnes?  
10 MEMBER BARNES: Aye.  
11 MS. HIGASHI: Ms. Boel?  
12 MEMBER BOEL: Aye.  
13 MS. HIGASHI: Mr. Lazar?  
14 MEMBER LAZAR: Aye.  
15 MS. HIGASHI: Mr. Tilton?  
16 CHAIR TILTON: Aye.  
17 MS. HIGASHI: Thank you.  
18 This brings us to Item 7. It's the test claim on  
19 the *DNA Database* and the amendment from the *Postmortem*  
20 *Examinations: Unidentified Bodies* test claim. This item  
21 will be presented by Commission counsel Eric Feller.  
22 MR. FELLER: Good morning again. As indicated in  
23 the analysis, staff found the test claim to be a  
24 reimbursable state mandate for three sets of activities:  
25 First, for coroners to collect samples for DNA

1 testing from the remains of unidentified persons, and  
2 send the samples to the Department of Justice in  
3 accordance with the DOJ-developed standards and  
4 guidelines for preservation of storage.

5 Second, for local law enforcement to do two things:  
6 First, inform parents or other appropriate relatives of  
7 those missing under high-risk circumstances as defined  
8 in the statute, that they may give a voluntary sample of  
9 DNA within 30 days after making a report; and second, to  
10 take a DNA sample, in a ~~matter~~<sup>manner</sup> prescribed by DOJ,  
11 including using a model DNA collection kit.

12 Third is the local law enforcement to, again, do two  
13 things: Reverify the status of a missing person before  
14 submitting a DNA sample to DOJ; and second, send the DNA  
15 sample and any supplemental information to DOJ with a  
16 copy of the crime report 30 days after the filing of a  
17 report.

18 Possible points of disagreement with the analysis  
19 are: First, whether exhuming unidentified remains to  
20 submit to the DOJ ~~is~~<sup>is</sup> reimbursable. Staff finds that it  
21 is not based on language in Penal Code section 14251.  
22 And second is, whether storage of DNA from an  
23 unidentified person's remains is reimbursable. Staff  
24 finds that neither the test claim statute nor DOJ  
25 guidelines support reimbursement for storing DNA from

1 unidentified remains. Therefore, staff recommends  
2 approving the test claim for the activities listed.

3 Would the parties and witnesses please state their  
4 names for the record?

5 MS. TER KEURST: Hi. I'm Bonnie Ter Keurst with the  
6 County of San Bernardino.

7 MR. KAYE: Leonard Kaye, Los Angeles County.

8 MR. TONKYN: John Tonkyn, California Department of  
9 Justice, Missing Persons DNA Program.

10 MR. CAMPBELL: David Campbell, Los Angeles County.

11 MS. WILLIE: Jeannine Willie, Department of Justice,  
12 Missing Persons DNA Program.

13 MR. ANDERSON: Dirk Anderson, Department of Finance.

14 CHAIR TILTON: Who would like to start?

15 MS. TER KEURST: I think I got elected.

16 Before I start, I did want to introduce Jeannine  
17 Willie. I asked her to be in attendance as part of the  
18 Bureau of Forensic Services, to answer any questions you  
19 might have concerning any administrative issues, so  
20 that's why she is here this morning. And I thank her for  
21 being here.

22 While I agree, in most respects, with the staff  
23 analysis, in particular, we have no issues with their  
24 analysis of the law enforcement duties.

25 I would like to address the two issues that were

1 mentioned, primarily the exhumation and the storage. The  
2 executive summary begins with,

3 *"Enacted in 2000 the test claim statute*  
4 *requires the Department of Justice to create a*  
5 *data bank of DNA samples for two purposes: To*  
6 *identify unidentified deceased persons, and/or*  
7 *remains, and to close missing-person cases."*

8 Penal Code 14250(c) 1 reads,

9 *"A coroner shall collect samples for DNA*  
10 *testing from the remains of all identified*  
11 *persons, and shall then submit those samples to*  
12 *the Department of Justice."*

13 I think it is important to note that this  
14 legislation is directed to the coroner. The coroners  
15 have the responsibility to collect samples from all  
16 unidentified persons, with the key word being "all."

17 The staff, on page 11 of the summary, refers to a  
18 statement in the preamble of that statute, which reads,

19 *"Coroners retain dozens of remains each*  
20 *year that cannot be identified...Further*  
21 *references are to 'these remains,' meaning,*  
22 *those held by the coroners."*

23 The staff position in that statement is, in a sense,  
24 a type of a legal play on words.

25 I met with the San Bernardino Deputy Coroner, who

1 explained to me that skeletal or mummified remains in  
2 most cases will be stored or retained as opposed to  
3 buried. This is economically more feasible for  
4 investigative purposes like the DNA-testing process.  
5 He said as technology is evolving, they want to have  
6 the ability to go back and do those types of processes.  
7 However, bodies that are in various stages of  
8 decomposition need to be buried for health and safety  
9 reasons.

10 That scenario would create a conflict within the  
11 staff position. Preexisting cases, as was the  
12 terminology used again by the staff on page 11, could be  
13 part of the DNA testing because they were in a different  
14 state of decomposition. So you could have preexisting  
15 cases where your results are different. So those where  
16 they were skeletal could be investigated and hopefully  
17 resolved; those that were not mummified, would not be  
18 part of the DNA investigative process because they were  
19 buried.

20 The staff also states "these remains," meaning  
21 those held by the coroner. In San Bernardino County's  
22 unidentified, we bury them in county's potter's field.  
23 So I would suggest that "held by the coroner" could mean  
24 those bodies that are buried in our plot, per se.

25 I agree with the staff statement at the top of



1 page 12, which reads, "Although its comments" -- and  
2 "its" referring to the Department of Justice -- "on the  
3 test claim indicate that DOJ expects exhumation, there is  
4 nothing in the record to show the DOJ requires it or has  
5 funded it." I disagree with the end of that statement,  
6 which says, "or otherwise deemed it necessary.

7 Mr. Tonkyn, in his letter to the Commission, said  
8 there will be additional cost for exhumation and  
9 pathology. His statement isn't, you know, "There may be  
10 costs," or "We would like to see costs -- or we would  
11 like to see exhumation. So while I really don't want to  
12 speak for him and he is going to speak shortly, I  
13 wouldn't interpret his statement as finding exhumation  
14 not deemed necessary.

15 The second statement I would like to address is  
16 storage -- or the second item, I'm sorry -- is storage,  
17 retention and refrigeration of evidence. This item,  
18 while probably not a major part of this claim, still  
19 represents activities which our coroner's office deems  
20 reasonably necessary to carry out the directives of the  
21 legislation, which will be providing good samples to the  
22 Department of Justice. The staff analysis indicates that  
23 the Department of Justice Information Bulletin 01-BFS-04  
24 addresses refrigeration of non-desiccated remains, but  
25 did not otherwise address storage. That's on page 12.

1 I disagree. The first page of the info bulletin  
2 reads, "The primary purpose of this bulletin is to  
3 provide guidance for collection, for storage and  
4 submission of samples for DNA testing." The last  
5 paragraph on the first page of that bulletin reads,  
6 "Contamination could come from the person handling the  
7 remains, from the environment, or the tools used during  
8 the examination." "The environment" does include means  
9 of storage and/or retention.

10 In the section entitled, "Sample submission  
11 prioritization," each state of decay refers to a method  
12 of storage and shipping. I do not believe storage and/or  
13 refrigeration costs should be discounted.

14 I would like at this time to pass the mike on to  
15 Leonard Kaye.

16 MR. KAYE: Thank you. Leonard Kaye, County of  
17 Los Angeles.

18 It's a pleasure to be before you again this morning.  
19 This time, on the same side of the table with our  
20 esteemed colleagues from the state, the State Department  
21 of Justice.

22 I think that we certainly concur with San Bernardino  
23 County's -- Bonnie's remarks; and we found that this is  
24 an exceptionally important program, as Eric Feller,  
25 commission staff, indicated, it's early history. But I

1 would remind folks, as we're trying to see the  
2 importance, particularly where we disagree over the issue  
3 of exhuming bodies, just to cite you the Legislature's  
4 intent, specifically in this legislation.

5 The Legislature said,

6 *"The unidentified remains and unsolved*  
7 *missing persons cases constitute a critical*  
8 *problem for law enforcement and victims*  
9 *families here in the state of California.*  
10 *Hundreds of people, both children and adults,*  
11 *vanish each year under suspicious*  
12 *circumstances, and their cases remain unsolved.*  
13 *Meanwhile, coroners retain dozens of remains*  
14 *each year that cannot be identified. Families*  
15 *of missing persons must live with no sense of*  
16 *closure, even though their loved ones may have*  
17 *already been found. The Legislature finds that*  
18 *this new technology can play an invaluable role*  
19 *in identifying these remains through DNA*  
20 *analysis."*

21 And we would respectfully suggest that when the  
22 State Department of Justice requires or asks us or  
23 mandates, that we are under a legal compulsion to exhume  
24 the bodies where it is possible for this purpose. This  
25 is specifically the intent that the Legislature had in

1 mind. And I don't think we should equivocate on this  
2 matter. I think it's very, very central to the  
3 fundamental purpose of its legislation.

4 Thank you.

5 MR. CAMPBELL: My name is David Campbell. And I  
6 want to thank the Commission for the time it has  
7 dedicated to our concerns since the inception of the test  
8 claim.

9 Oftentimes, we complain about mandates imposed on  
10 government agencies by the state. In this one, the L.A.  
11 County Coroner's Office welcomes this mandate because it  
12 not only allows the coroner to provide a higher level of  
13 service, it requires it.

14 The language that I was concerned about was the  
15 reference to "those remains held by the coroner." When a  
16 coroner completes as much as it reasonably can, in terms  
17 of its investigation and inquiry into death and  
18 identification of the Doe, we may relinquish physically  
19 the body to a pauper's field, as described by  
20 San Bernardino; but it doesn't mean we relinquish our  
21 responsibility to the decedents. We are advocates of the  
22 dead and also advocates for the families.

23 The mandate does, in fact, in my opinion, require  
24 that these bodies be exhumed, so that, indeed, with the  
25 advanced technology we now have in the area of DNA

1 analysis, we can bring closure to the families. And I  
2 think that is extremely important to us.

3 In Los Angeles County, we recently resolved a case  
4 by means of improved fingerprint methodology, and  
5 identified a case from 1999. We just accomplished that  
6 last month. Cases that came to us -- Los Angeles, or  
7 more specifically, California is a Mecca that has drawn  
8 people from all over the world -- not really the United  
9 States, but all over the world, to live both the  
10 California dream and the American dream. We have lots of  
11 people here. Many, sadly, have died under tragic  
12 circumstances and have come under the coroner's  
13 jurisdiction.

14 Simply because they have died, we have examined the  
15 bodies and they are now buried, no longer means we have  
16 no more responsibility. We are grateful that the mandate  
17 imposes this obligation on the coroner; and we feel that  
18 because it is mandated, we do, indeed, incur expenses  
19 that should be reimbursed. And, again, we concur with  
20 San Bernardino County's conclusions and opinions; and I  
21 welcome questions for clarification.

22 MR. TONKYN: Yes, my name is John Tonkyn. I am the  
23 supervisor in charge of Missing Persons DNA Program  
24 within the Attorney General's office. And I would like  
25 to concur with the statements said previously.

1           Just to give you some historical information on the  
2 law, it's quoted that, dating back to 1959, there are  
3 approximately 2,100 records of unidentified human  
4 remains, and dating back to approximately 1972, there are  
5 approximately 3,100 reports of high-risk missing persons.  
6 And we believe that many of those high-risk missing  
7 persons ended up as unidentified persons.

8           And the technology, obviously, with DNA has advanced  
9 to the point that it can be used now. But before this  
10 law became effective, there were many widely varying  
11 methods of dealing with these cases and disposing of  
12 remains.

13           So along with Senate Bill 1818, enacted in January  
14 of '01, Assembly Bill 1736 was enacted, mandating  
15 specific procedures for coroners to deal with  
16 unidentified remains, including retaining samples for  
17 DNA testing.

18           But before that date, there were no state-mandated  
19 minimum procedures.

20           And so what we have found in going back and  
21 surveying coroners, that many of these bodies are buried.  
22 And roughly, in a survey we took three years ago,  
23 roughly, 350 bodies were buried. And there was never any  
24 distinction made between those that were held at the  
25 coroner's facility, versus those that had been disposed

1 of by being buried in a pauper's field.

2 With such a high number of cases that we will never  
3 have a chance to analyze and never be able to make those  
4 identifications, I think it's incumbent upon this  
5 committee to allow the reimbursement to local agencies  
6 for exhumation costs. Because without that, we're at a  
7 standstill, as far as those cases that bodies have been  
8 buried. And I also just wanted to reiterate what section  
9 14250(c)(1) states: "That the coroner shall collect  
10 samples from DNA testing from the remains of all  
11 unidentified persons." There's no distinction in the law  
12 made between "buried remains" and "remains in the  
13 possession of the coroner."

14 And if you had any other problematic or technical  
15 questions, I'm happy to answer those as well.

16 Thank you.

17 CHAIR TILTON: Thank you.

18 The Department of Finance?

19 MR. ANDERSON: Dirk Anderson, Department of Finance.

20 We concur with the staff analysis. And in response  
21 to some of the concerns made, namely on exhumation and  
22 also on retention of records, we concur with the  
23 analysis, and the effect that section 14251 -- I'm at the  
24 bottom of page 11 in their analysis -- where they refer  
25 to the fact, plainly speaking, that the exhumation is

1 subject to the funding, and as DOJ deems necessary, we  
2 agree with that. And we do recognize it as well, just  
3 because it has been mentioned to this point about the  
4 two-dollar fee that has been stated in the statute to  
5 help pay for these programs.

6 As far as the storage and retention goes, we also  
7 want to state for the record that after the sample is  
8 returned, the statute doesn't state -- it doesn't require  
9 the coroner or the local entities to dispose of it, but  
10 it's at their discretion again. And so in these matters,  
11 we simply agree with the staff analysis and we concur  
12 with it.

13 CHAIR TILTON: Is your point that if the exhumation  
14 is required by the DOJ, then it is covered, or covered  
15 under the two-dollar fee?

16 MR. ANDERSON: It would be subject to available  
17 funding.

18 CHAIR TILTON: Eric, you have a comment?

19 MR. FELLER: Just to reiterate what Dirk said, a  
20 lot of mention was made to 14250 and the general intent  
21 behind the statute and the things that are reasonably  
22 necessary to comply with it. But one of the rules of  
23 statutory construction is that the specific governs the  
24 general. So if we're looking for whether exhumation is  
25 required, any specific reference to it would trump any



1 other references in the leg. history or in the  
2 accompanying statutes, section 14250. So we found that  
3 this statement in 14251, that was the funding provision  
4 that was going to add two dollars per death certificate  
5 to fund this program, this statement controls in this  
6 area.

7 "Funds may be distributed by the Department to  
8 various counties for the purposes of pathology and  
9 exhumation as the Department deems necessary." And in  
10 the two information -- well, in all the information  
11 bulletins that I could find from the Department of  
12 Justice, I didn't see that they deemed that necessary.

13 As you know, in order to find a reimbursable  
14 program, something has to be compelled legally. And in  
15 this case, because the law refers to DOJ standards and  
16 guidelines that have to be followed, those are  
17 incorporated into that legal compulsion. But because  
18 there was nothing in there about exhumation, we did not  
19 find it was a reimbursable mandate.

20 As Dirk said, if it seems as if it were, then the  
21 DOJ would need to find that based on the language in  
22 14251.

23 CHAIR TILTON: Any questions of members?

24 Ms. Ter Keurst, I think you referenced requirements  
25 by DOJ over handling of samples.

1 MS. TER KEURST: Yes.

2 CHAIR TILTON: Is that requirement before the DNA  
3 tests are made, or is that -- it sounded like those  
4 were samples -- or make sure you're making total  
5 evidence and maintaining that sample in a particular  
6 fashion, so that you can do a good DNA test. And the  
7 issue we're talking about here is storage after the test  
8 has been done; is that a proper distinction?

9 MR. TONKYN: Yes, I think that information that we  
10 described were procedures for handling those remains, and  
11 handling before shipping to us and the shipping  
12 requirements.

13 The other thing I just want to clarify about what  
14 would happen to those remains if we make an  
15 identification, they're returned to the coroner, to be  
16 given back to the family for proper disposal. If we do  
17 not make an identification, we maintain the DNA profile  
18 in the database. Those remains are still returned to the  
19 coroner.

20 And there is always the prospect of future  
21 technology. And the one thing that has hampered a number  
22 of our cases and investigations has been cremation of  
23 remains. If remains are cremated, then we can't do  
24 anything with regards to the DNA.

25 So although we don't require it, it's a practice

1 that those remains are maintained in some fashion,  
2 whether it's being buried in a pauper's field for  
3 possible future reference, or maintained in the coroner's  
4 office for possible future technology.

5 If I could just also state for the record about  
6 the discretionary funds to expand on that, it says,

7 *"The funds shall be directed on a quarterly*  
8 *basis to the Missing Persons DNA Database Fund"*

9 -- this is section 14251(b) --

10 *"hereby established to be administered by the*

11 *Department for establishing, maintaining*

12 *laboratory infrastructure, DNA sample storage,*

13 *DNA analysis and labor costs for cases of*

14 *missing persons and unidentified remains.*

15 *Funds may also be distributed by the Department*

16 *to the various counties for the purposes of*

17 *pathology and exhumation, as the Department*

18 *deems necessary."*

19 And I think, again, the intent behind that, was that  
20 the primary purpose of this fund was to fund the  
21 functions of the laboratory. If the Department deemed it  
22 necessary, and in addition had the discretionary funds  
23 available to it, they would be used for exhumation. But  
24 DNA is very expensive, and that has not been the case.

25 MR. KAYE: Leonard Kaye, County of Los Angeles.

1 I would also like to add that traditionally, one of  
2 the provisos in our parameters and guidelines is that if  
3 certain funds, from time to time, may be made available,  
4 which it sounds like these funding sources are not a sure  
5 thing, then they'll be subtracted from whatever SB 90  
6 claims that are eventually sent in.

7 So I see a sort of a bipolar situation. We have, on  
8 one hand, uncertain funding, which we can certainly deal  
9 with in our Parameters and Guidelines; but we have  
10 absolute mandatory exhumation of bodies under certain  
11 specific conditions, conditions deemed to be required by  
12 the State Department of Justice. And we cannot presume  
13 to second-guess or fail to obey an order -- an executive  
14 order that's a specific order -- a very, very specific  
15 order -- "That body, that grave, dig it up." I can't see  
16 us failing to obey that. I think that's the most  
17 specific executive order that one could think of.

18 Thank you.

19 CHAIR TILTON: Walter?

20 MEMBER BARNES: Yes, I've been perusing the  
21 information bulletins that you've sent out, which I  
22 assume is the basis for the county coroners to do the  
23 work under this bill.

24 Is there a specific place in here where the  
25 Department of Justice notifies the coroners that they are

1 to specifically exhume the bodies?

2 MR. TONKYN: No.

3 MEMBER BARNES: And is that -- and why is there not  
4 something like that?

5 MR. TONKYN: I would say, again, we didn't make a  
6 distinction between bodies that were buried in a pauper's  
7 grave versus bodies that were stored at their facility.  
8 They're all, as was said earlier, in the possession of  
9 the coroner's office. They're the ones who are  
10 responsible for that body, until it becomes identified.  
11 So I don't think there was a feeling that they needed to  
12 be distinguished between those that have been buried and  
13 needed exhumation, which, really, the process of  
14 exhumation isn't related to the quality of the DNA sample  
15 that would be obtained from that grave. You know, the  
16 quality of getting a sample is related to time and  
17 environment; and there is nothing to change about the  
18 fact that it's been buried or how these things have been  
19 stored.

20 And as I said, there's been a wide variety of  
21 storage conditions, whether it's frozen, refrigerated,  
22 room temperature or cremated, buried. There's a wide  
23 variety of storage means out there. And we didn't  
24 specify any of those. But more the point that when they  
25 bring the body or body parts out on the slab, how they

1 should prepare the samples. And at that point, you know,  
2 how they should be stored and shipped.

3 MEMBER BARNES: Then I guess the question is, how do  
4 the counties interpret that to indicate that they should  
5 go out and exhume the bodies?

6 MR. TONKYN: Yeah, the section 14250(c)(1) says,  
7 "The coroner shall collect samples for DNA testing."

8 MEMBER BARNES: Do you want to tell me where you're  
9 reading from?

10 MR. TONKYN: Sorry. Penal Code -- do they have a  
11 copy of this -- Penal Code 14250, section (c)(1). It's  
12 not in the --

13 MR. FELLER: Page 112 of the -- it's right after  
14 Exhibit A, it has the statute.

15 MR. ANDERSON: It's also at the top of page 11, at  
16 least partially -- probably the point he's going to make,  
17 of the staff analysis.

18 MEMBER BARNES: Okay, so which section now?

19 MR. TONKYN: Yes, the top of section 11, page 11,  
20 staff analysis. It says, "Exhumation."

21 MEMBER BARNES: Let's go to 112, where the bill is  
22 itself. Where is that?

23 MR. FELLER: Are you reading from (c)(1) in 14250;  
24 is that correct?

25 MR. TONKYN: I'll read the whole sentence from

1 (c) (1). It says,

2 "A coroner shall collect samples for DNA  
3 testing from the remains of all unidentified  
4 persons, and shall send those samples to the  
5 Department of Justice for DNA testing and  
6 inclusion in the DNA data bank."

7 So I believe that the coroners interpret their  
8 mandate from that statement. It says "they shall collect  
9 samples from all unidentified persons." Again, no  
10 distinction being made between buried or otherwise  
11 cremated or stored remains.

12 MEMBER BARNES: Is there a definition somewhere  
13 about the remains of unidentified persons somewhere in  
14 the law, either this one or someplace else?

15 MR. FELLER: You're asking if there's a definition?  
16 No, I didn't see a definition in this test claim.

17 I think in order for the statute to apply  
18 retroactively, there would have to be some indication  
19 that the Legislature intended that to be the case. And  
20 we don't have that here, except for potentially the  
21 reference to exhumation, 14251(b), which you have the  
22 full text on page 113.

23 I've already read the applicable provision there.  
24 That's the only place exhumation is required.

25 MEMBER BARNES: Excuse me, can you give me the cite

1 one more time?

2 MR. FELLER: It's 14251(b). So it's on page 113,  
3 the third paragraph from the bottom.

4 CHAIR TILTON: The point, Eric, is that if there  
5 hadn't been a reference here to exhumations that are  
6 required or necessary -- in other words, that's not all.  
7 So that's the legal citation we have that says -- there  
8 is inference that we're not requiring all bodies to be  
9 exhumed.

10 MR. FELLER: Well, yes, the interpretation is that  
11 it's only as the Department deems necessary.

12 And also, as Mr. Kaye suggested, there's sort of  
13 some funding priorities expressed in this statute -- or  
14 Mr. Tonkyn suggested that the laboratory be funded. And  
15 then the second sentence, that funds may also be  
16 distributed by the Department for those other purposes.

17 CHAIR TILTON: I guess my point is that because this  
18 says "this," by inference, this provides -- the only  
19 place we talk about whether there's a requirement to  
20 exhume bodies or not, and this reads as if the intent is  
21 not to exhume all bodies.

22 MR. FELLER: Right, unless the DOJ funds it and  
23 deems it necessary.

24 MS. TER KEURST: I would interpret that section --  
25 that particular section is talking about funding, not



1 about the mandate to the coroners.

2 The funding is a two-dollar fee, a dollar ninety --  
3 it's a two-dollar fee per death certificate. And it was  
4 intended to get this program off the ground. Five --  
5 let's see, ten cents of it stays within the county, but  
6 it stays in the administrative area for the cost of the  
7 actual person that is doing the death certificates, not  
8 the program for the coroner. So any of this funding does  
9 not go back to the coroner; it's for the administrative  
10 purposes of this program.

11 I think that distinction needs to be made because  
12 this whole piece is dealing with the Department of  
13 Justice. It's not dealing with the piece that says to  
14 the coroner, "You have to get samples of all unidentified  
15 persons." So there's two separate issues here.

16 And I think that the fee thing, because it was  
17 addressed in the staff analysis, it was addressed early  
18 on -- and I think we all came to the same conclusion,  
19 that that has nothing to do with the mandate to the  
20 coroner, which is to get samples from all unidentified  
21 bodies.

22 CHAIR TILTON: Except it is some part of the record  
23 in terms of establishing the program and the direction  
24 from the Legislature around the program; correct? I  
25 mean, I understand the distinction you're making, but I'm

1 trying to find, where is there any guidance from the  
2 Legislature in terms of dealing with this issue? And  
3 where there is guidance, it seems to appear that it's not  
4 a requirement to do all. That's the only point I'm  
5 trying to catch on here.

6 MR. FELLER: One of the rules of statutory  
7 construction is, you read the statute as a whole, and you  
8 harmonize all the parts. And I think the claimant's  
9 interpretation would leave a little bit of a  
10 contradiction, in that 14250 would, according to them,  
11 indicate that exhumation is required; but 14251 would  
12 indicate that they only have to do it as DOJ deems  
13 necessary and as it funds that activity.

14 But because there is no express referenced  
15 exhumation in 14250, it's our position that 14251  
16 controls.

17 CHAIR TILTON: Okay.

18 MS. TER KEURST: And I would argue that when it  
19 talks about the funds being distributed, that I think  
20 that the Department of Justice interprets that to mean  
21 the funds distributed as they deem necessary. I don't  
22 think it's defining exhumation in the funding section.

23 MR. TONKYN: The other thing I would just want to  
24 add, is that the funding has a five-year sunset. It  
25 expires January 1st, 2006. That's 14251. So at this

1 point, the funding only exists for less than another year  
2 and a half. Nonetheless, the requirement under 14250  
3 will remain. So whether the DOJ has discretionary funds  
4 or not regarding exhumation becomes a moot point after  
5 January 1st, 2006, I believe; because the requirement  
6 that coroners take samples from all unidentified persons  
7 remains.

8 CHAIR TILTON: Walter?

9 MEMBER BARNES: I guess the other question I have is  
10 with regard to the sentence, it says, "The funds may also  
11 be distributed to pay for purposes of pathology." What  
12 do you feel "pathology," means, with regards to the  
13 activities that we're talking about here?

14 MR. TONKYN: It would refer to things like  
15 anthropology and odontology examinations of bodies.  
16 There may be other investigations as to the nature and  
17 cause of death, whether something becomes classified as  
18 homicide or not.

19 MEMBER BARNES: But in this particular case, with  
20 regard to this particular requirement, as I understand  
21 it, it's basically to pull the sample and provide that  
22 sample to the Department of Justice. So does this imply  
23 that you would reimburse them, if you had money for  
24 additional information and additional activities?

25 MR. CAMPBELL: If I may, Mr. Barnes.

1 MEMBER BARNES: Sure.

2 MR. CAMPBELL: Further pathology may require that  
3 the pathologist, the coroner, may be required to conduct  
4 further examination of the various body parts in order to  
5 identify the most appropriate sample for DNA collection  
6 and retention.

7 MEMBER BARNES: Okay. I guess my other question  
8 has to do with the question of exhuming bodies. My  
9 assumption is, this is a one-time cost that you're going  
10 to -- your expectation is that they would exhume all of  
11 the bodies that are out there. And from that point on,  
12 you would only be dealing with bodies that are -- or  
13 pieces of bodies that are coming in the door, so to  
14 speak. Am I correct about that?

15 MR. TONKYN: Yes.

16 MEMBER BARNES: And what have the counties done?

17 MR. TONKYN: In terms of exhumation? Very little  
18 to none. Almost, we received human remains for about  
19 300 individuals, unidentified individuals to this day.  
20 And I can only think of one, that I know of, that was  
21 exhumed.

22 MEMBER BARNES: So it sounds like they don't  
23 necessarily think it's an absolute requirement on their  
24 part.

25 MR. TONKYN: I think, actually, the -- as I said

1 earlier, I think there's kind of a loggerhead here. I  
2 think they do think it's a requirement; but the question  
3 is, who pays.

4 CHAIR TILTON: Good question.

5 MEMBER BARNES: Can I -- and I'm not sure who to ask  
6 this to -- but a previous question that I asked about  
7 who has responsibilities for these remains and the  
8 unidentified remains or missing remains. And I think  
9 somebody had said something about the fact that all of  
10 these remains are the property, so to speak, or under  
11 the guardianship, if you will, of the particular county  
12 coroner. And is that in law some place?

13 MR. CAMPBELL: I believe it is in the provisions  
14 provided through 27491, in sequence, where it mandates  
15 the responsibilities of the coroner to conduct an  
16 investigation to establish manner, mode and cause of  
17 death; to confirm the identity of the decedent, and  
18 notify the next of kin.

19 MEMBER BARNES: This one's a little less clear than  
20 perhaps we thought about it.

21 I guess my impression is that nobody really made a  
22 distinction between whether a body, or a body remains was  
23 buried or not buried. It just seemed to focus -- the  
24 legislation seems to focus on the aspect of the missing  
25 or unidentified person. And if there is a requirement,

1 you know, that those remains are to be under the control  
2 of the coroner, then it does seem that when they're  
3 asking for all of the missing persons to have this sample  
4 sent in, it seems like it would logically include them,  
5 as well as the ones that just happened to be in the lab.

6 I guess I'd like any thoughts that you may have on  
7 that -- the staff and also the Department of Finance,  
8 too.

9 MR. FELLER: Just two points. As I say, retroactive  
10 application of a statute would need to be either in the  
11 statute itself or somewhere in the legislative history,  
12 indicating that was the intent. And I did not see any  
13 intent in that direction, except for that statement in  
14 14251, which mentions exhumation as the Department funds  
15 and deems necessary.

16 So we found that in looking to the legislative  
17 intent, that was governed as the only statement expressly  
18 calling for exhumation.

19 MR. CAMPBELL: If I may, I'm a little confused by  
20 the issue of retroactivity. The decedents did not cease  
21 to be Does; they remain areas of concern for the  
22 coroner's office. When new information becomes  
23 available, we don't simply say, "Whoops, we closed that  
24 case two years ago, therefore, we're not going to reopen  
25 it."

1           Again, I don't understand what you mean by  
2 "retroactivity," if the coroner continues to have  
3 authority and responsibility over the decedent,  
4 independent of the statute.

5           MR. FELLER: If I can explain. A "retroactive  
6 statute" means any statute that governs prior to the time  
7 that it was enacted. So we didn't see any evidence that  
8 this statute applied to cases before it was enacted in  
9 2000.

10          MR. KAYE: Yes, I think it's very confusing. Let me  
11 see if I can, in plain English, say what I think is going  
12 on. I think what the Commission staff are saying is if  
13 a body is buried prior to the enactment of this  
14 legislation, which I note is September 28th, 2000, then  
15 you can't go back and bring that body out because the  
16 statute doesn't go back that far.

17          And, on the other hand, if that's their position,  
18 then anybody put in the ground on or after  
19 September 28th, 2000, we can dig up. So I see that as  
20 a dividing line, if you want to use that.

21          But I'd like to get back to Captain Campbell's  
22 point, as to what the Legislature intended here. And I  
23 think this legislation was passed specifically for all  
24 those unidentified folks that were either buried  
25 previously because the Legislature had no way of knowing

1 who would be buried in the future; but the previous  
2 thing. So I think the legislative intent is that it  
3 should expressly apply retroactively; that, at long last,  
4 we finally do dig up these people, we bring closure to  
5 the family.

6 I think it's crystal clear that it should be applied  
7 retroactively, even in the legal sense. I think this is  
8 specifically what the Legislature had in mind.

9 CHAIR TILTON: Let me ask the question more of  
10 process, since I'm new to this since November. It seems  
11 to me this is a good example where we've been trying to  
12 articulate what the Legislature intended or did not  
13 intend. We've got, in my view, at least one citation  
14 staff has brought to our attention that appears to be a  
15 message that there's not an assumption that all remains  
16 are exhumed.

17 But if the counties haven't gone off and done this,  
18 it seems to me this is one of those chances we have to  
19 get clarifying legislation, is to go back and get  
20 clarification, and have the Legislature be more specific  
21 on this particular issue, rather than us sitting here and  
22 try to guess -- you know, there's arguments on both sides  
23 that I think are very valid. But then is it still up in  
24 the air for me as a member to say, is there something in  
25 the statute that I can point to that gives me the basis



1 for making a vote here that, in fact, this is a mandated  
2 cost? And there's enough on both sides that make me kind  
3 of feel it's not clear. And especially if the situation  
4 is -- from the program, it sounds like you would like to  
5 have these bodies exhumed to get more cases solved.

6 But the counties are reserving -- there's even a  
7 judgment somewhere along the line here in terms of, at  
8 the County level, they're not even sure that it's  
9 reimbursable under mandates, so they're not doing it. So  
10 it looks like, even on both sides, there's some doubt  
11 here. I mean, that's the solution, is to go back and do  
12 that.

13 MR. KAYE: I think basically you're correct, with  
14 one small caveat. I think that we are sure that, as  
15 Dr. Tonkyn has pointed out, that all human remains are  
16 subject, and we are all sure that the law was enacted  
17 effective September 28th, 2000.

18 So in the Parameters and Guidelines, we can specify  
19 that anyone buried on or after September 2000 is included  
20 in the "all," because "all" means all. And I think that  
21 is absolutely crystal clear. So I respectfully request  
22 that we could modify staff's analysis for this small  
23 point.

24 And we're not talking about many bodies, I don't  
25 think. So it won't be too many.

1 MS. WILLIE: I'd like to say something. My name is  
2 Jeannine Willie. I'm the administrator of the Missing  
3 Persons DNA Program. I've worked with Missing Persons  
4 for about 21 years.

5 This piece of legislation, Senate Bill 1818, which  
6 implemented 14250 through 14251, one of the instrumental  
7 persons in getting this legislation passed was a mother  
8 of a missing child. Kim Schwartz is the mother, her  
9 daughter is Amber Schwartz-Garcia, who disappeared in  
10 1988. And she found out about these bodies in our files,  
11 because bodies are not well-publicized. The wheel that  
12 squeaks the most, gets the most grease. And when you're  
13 an unidentified person, there's nobody squeaking for you.

14 When she found out that we had all of these bodies,  
15 she was the one who went forward to carry this piece of  
16 legislation because we have over 150 unidentified dead  
17 children, probably over 90 percent of them are homicide  
18 victims, because children just do not go out in fields  
19 and die on their own. And she went forward to carry this  
20 piece of legislation. She was instrumental in getting  
21 this passed because she believes, as well as many of  
22 these other parents and family members of these other  
23 200 -- excuse me two thousand-plus unidentified persons,  
24 believe that their missing persons are these dead people  
25 that are buried in pauper fields or unidentified and have

1       been, you know -- the remains have been saved in the  
2       coroner's office.

3               The whole intent of this piece of legislation was to  
4       get those bodies, get them up to the Department of  
5       Justice, now with new technology of DNA, analyze them and  
6       get them identified. With every identification, we all  
7       know, you bring closure for the family; but you also open  
8       up that homicide investigation. And hopefully, you're  
9       able to track an individual who has murdered this  
10      individual, and possibly solve a series of homicide  
11      cases.

12              But the intent of that bill was from the families of  
13      these old cases. I mean, the majority of these cases, as  
14      they said, they go back to 1959. If you don't bring  
15      those bodies up, those coroners -- the reason why they  
16      didn't bring those bodies up, they don't have funding.  
17      And that's why they're waiting for this test claim  
18      decision. It's not a misunderstanding or thinking that,  
19      you know, it's not a law. They understand the law. They  
20      just don't have the funds.

21              Thank you.

22              CHAIR TILTON: Walter?

23              MEMBER BARNES: You know, I've been reading --  
24      rereading, I guess -- section 1 of this bill that defines  
25      the legislative intent. And if you read the language in

1 it, it does seem to indicate that the intent of the  
2 Legislature was to deal with all missing persons, as  
3 opposed to, you know, those that were in one place or the  
4 other.

5 So I guess, you know, it seems to me that there is  
6 some fairly clear intent of the Legislature about which  
7 missing persons or which unidentified persons this is  
8 supposed to cover.

9 So I don't know that a new law is necessary to  
10 clarify this in any kind of way. It does seem to me that  
11 they indicated what they wanted.

12 Now, could they have drafted the legislation better?  
13 We all know that they could do a better job in drafting  
14 legislation. But it does seem to me that there is a  
15 reasonable presumption that this was an intent. And, I  
16 mean, I think you articulated it a little bit with regard  
17 to the sponsors and initiators of this bill, that they  
18 wanted to do the most that they could to deal with those  
19 bodies or remains that were unidentified, that were out  
20 there and known to, you know, the coroners.

21 So it does seem to me that, you know, the exhumation  
22 part of this is probably an appropriate reimbursable  
23 activity.

24 MR. ANDERSON: Could I say something, Mr. Chair?

25 CHAIR TILTON: Yes.

1 MR. ANDERSON: I just want to remind -- despite all  
2 of the very eloquent testimony given and their  
3 interpretation of intent, it seems to me that the DOJ's  
4 guidance, as far as requirements on exhumation, if that  
5 was the intent -- and the DOJ is so strongly behind  
6 this -- their requirements are completely lacking, as far  
7 as requiring exhumation. And I just wanted to bring that  
8 back up because we mentioned that early, and we had all  
9 of this testimony and all of these good thoughts; but  
10 then just to remind the Commission, it's my  
11 understanding, the Commission's job is to make decisions  
12 based on what is required. And it's just -- again, it is  
13 our understanding, that it's not --

14 CHAIR TILTON: Let me ask one more question, given  
15 where I think Walter is going, to take my other question  
16 and turn it around.

17 Could there be examples where you could satisfy the  
18 requirement to get DNA tests without exhuming the body?  
19 Is there other samples that you would have, blood samples  
20 or anything else on those individuals that you would have  
21 kept, besides the body, to allow a situation where you  
22 may not need to exhume it because you have some other way  
23 to get a DNA test, not knowing anything about your  
24 process? But is that what the Legislature could have --

25 MR. CAMPBELL: The reasonable answer I could give,

1 is that there may be samples in some; but not in all.

2 CHAIR TILTON: That's my point is, could the  
3 Legislature turn it around, with the way Walter is  
4 heading, is they're saying, "Well, you've had other ways  
5 to get tests without exhuming the body; therefore, you  
6 don't need to exhume all bodies." Could that be an  
7 interpretation?

8 MS. TER KEURST: My understanding from my coroner --  
9 and I'm definitely not an expert on this -- is that DNA  
10 is probably one of the last -- I mean, they do blood  
11 work on bodies that they have available to them, they  
12 will start with blood work. They go to odontology, and  
13 there's one other thing. And so DNA is not like the  
14 first choice.

15 I think what has happened here, is that we have  
16 bodies that are beyond those stages. And so in speaking  
17 with my coroner as well, you know, all of those  
18 resources -- the ones that are the most reliable,  
19 followed by the ones most available, those type of  
20 things would all be followed. So it's not like we're  
21 trying to make DNA the end-all.

22 The other thing that he said to me is, you know,  
23 in our field, we have bodies that go back over a hundred  
24 years, because we've just been around for a long time as  
25 a county. And he said, you know, what I would do is look

1 for reasonableness. There are -- like Jeannine said,  
2 there are some people that are really seeking closure.  
3 Those are the ones we would deal with. You know,  
4 somebody that's been dead for a hundred years, we're  
5 assuming, you know, we wouldn't just go out and exhume  
6 all those bodies in our pauper's field. So I think --  
7 you know, I think from that standpoint, I think there  
8 are cases where we wouldn't do that. But I think we need  
9 to give the coroners and the Department of Justice the  
10 framework to work within that, to make those decisions.

11 CHAIR TILTON: May I ask, what's the response or  
12 reaction to the recommendation Mr. Kaye made, to say that  
13 you exhume bodies as of "X" date, and that wouldn't cover  
14 some of these ones we've talked about right here? Your  
15 point was that if you didn't do the retroactive issue,  
16 you'd say, okay, when the bill is signed, if a body had  
17 been buried after that date, then that would be eligible  
18 under the mandate.

19 MR. TONKYN: Well, one of the things that we think  
20 about, whether the person was recovered by the coroner  
21 before or after the date or whether the person deceased  
22 before or after the date. And that's hard to measure.

23 Someone may have been recovered after the date of  
24 this bill, but their estimated date of death places them  
25 having been deceased and become a Jane Doe --

1           CHAIR TILTON:  Let's assume it's when you have  
2 possession of the body.

3           MR. TONKYN:  Well, again, we would make no decision  
4 between the date that the coroner got possession of the  
5 body.

6           The other thing I just want -- I just want to add  
7 one thing Mr. Barnes had mentioned about intent.  And I  
8 was present during the drafting of this legislation,  
9 along with the California Coroners Association,  
10 California State Sheriffs Association.  As Jeannine  
11 mentioned, there were some family advocates, the Amber  
12 Foundation, Polly Klaas Foundation and other law  
13 enforcement agencies.  And it certainly was the intent,  
14 as Jeannine mentioned, with someone like Kim Schwartz,  
15 who felt that her daughter may be out there somewhere  
16 since 1988.  If the body was in a coroner's possession  
17 since 1988, it certainly would have been buried by this  
18 time.  So depending on the agency, the coroner's office,  
19 they would maintain an open file and not bury an  
20 unidentified body for some period of time.  After perhaps  
21 six months or a year, many of these agencies said, "Okay,  
22 now, we don't have enough storage space so we're going to  
23 bury the body."

24           So, again, the intent during the drafting of this  
25 legislation was not to distinguish between the date of



1 the enactment of the legislation, nor was it the intent  
2 to distinguish between those bodies that have been buried  
3 or not.

4 MS. WILLIE: Also, I just wanted to answer your  
5 question with regards to the body. The only bodies they  
6 would be bringing up, are the bodies that they do not  
7 have biological evidence in storage currently in their  
8 office.

9 CHAIR TILTON: That was my point. So I was trying  
10 to articulate --

11 MS. WILLIE: Right.

12 CHAIR TILTON: -- that that would be the example,  
13 "No, this is acknowledging that you don't need to do it  
14 in all cases because there may be other ways to get a  
15 proper DNA.

16 MS. WILLIE: Right. And it's not a large number,  
17 thank God, for Los Angeles, because Los Angeles being our  
18 large county, they actually started taking biological  
19 samples many years ago. Now, if they have some that are  
20 buried prior to when we started taking biological  
21 evidence, then we would ask them to exhume those.  
22 Especially your small children. You have these children  
23 that have been murdered by serial killers. Those are the  
24 ones -- and that was the intent of the law, was to focus  
25 on the children first and then move to the adults. But

1 it would not be all of them, and there would not be a  
2 drastic amount. I mean, there's not a lot of amount  
3 there.

4 CHAIR TILTON: All you're helping with is in reading  
5 this statute, the legislation, the one we do have that  
6 talks about it, all you're saying is, this could be  
7 written this way because we know we don't necessarily  
8 need to exhume all bodies in order to get a valid DNA  
9 test.

10 MS. WILLIE: In some counties none. You wouldn't  
11 exhume any.

12 MR. TONKYN: And the other thing is after the  
13 passage of AB 1736, also in January of 2001, that  
14 mandated specific requirements for coroners. So we're  
15 not talking about an ongoing problem. They are required  
16 now, for the last few years, to take the biological  
17 sample. So we're just talking about before the enactment  
18 of that legislation requiring coroners to do that. They  
19 may or may not have.

20 In the cases where they have, absolutely, it's  
21 quicker, it's easier, there's no need to exhume a body,  
22 and there would be no reason to.

23 MEMBER BARNES: Yes, I think, you know, we're  
24 gradually getting to something here because, you know,  
25 again, I keep going back to the intent language of this

1 thing, which seems to indicate that they want some effort  
2 made to try to preserve evidence to identify everybody  
3 out there.

4 MEMBER BARNES (*speaking to Chair Tilton*): And I  
5 think you're correct that, in effect, this should be done  
6 in the most cost-efficient manner. To that extent that  
7 that evidence already exists, there's no need to dig up a  
8 body to pull another sample.

9 So I don't know if we're ready to --

10 CHAIR TILTON: I guess, I'm fishing -- hate to leave  
11 it kind of open-end, and I don't want to go to a  
12 situation that says, "By the way, if you exhume a body,  
13 then we will pay for it." So it seems to me -- maybe  
14 it's the next step in terms of some criteria that we  
15 could agree to --

16 MR. KAYE: Yes, I think the bright line for us is  
17 when Dr. Tonkyn and his staff -- you know, we send these  
18 samples in, we send this information in and so forth.  
19 And for us, we rely basically on the Department of  
20 Justice mandates and requirements for those specific and  
21 not frequent cases. But where it's really critical, I  
22 think that's how the parameters and guidelines should  
23 read, that it's in a very limited circumstance wherein  
24 the opinion of the state Department of Justice, it is  
25 absolutely required. And we could live with that kind

1 of language.

2 MR. CAMPBELL: Indeed, the Los Angeles County  
3 Coroner's Office, and I know coroners' offices throughout  
4 the state, consistently apply all of the available  
5 methodology to us before we even pursue the DNA. We do  
6 the fingerprints, we do the full-body x-rays, we do the  
7 circumstantial evidence, we do document scars, marks,  
8 tattoos, et cetera. For us, DNA has always been that  
9 final effort to confirm an identification. And even  
10 L.A. County that has a huge number of Doe cases that  
11 comes before it every year, by the end of the year,  
12 we're down to less than 200 that remain unidentified.  
13 That's at this point.

14 MR. FELLER: My concern with Mr. <sup>Kaye's</sup>~~Leonard's~~  
15 recommendation, is that it would somewhat conflict with  
16 14251 because the Legislature there mentioned exhumation  
17 and required it as DOJ deems it necessary and as it funds  
18 it.

19 If we're funding it outside the two-dollar per death  
20 certificate fee and we're funding it within the mandates  
21 process, then it's putting it outside where it appears  
22 the Legislature intended for it to be, the activity of  
23 exhumation.

24 MEMBER BARNES: And just to go back and answer your  
25 comment that you raised earlier, about we normally look

1 at the record, the written record, and try to interpret  
2 from that. You are correct, that that is basically what  
3 we do. But in addition, we also encourage departments  
4 and agencies to come help us to understand what that  
5 record means. And the Department of Justice, which  
6 issued, you know, the notice, has provided some  
7 clarification which, quite honestly, although it's not  
8 within our jurisdiction to say anything about it, but it  
9 certainly would probably be a good idea to maybe issue a  
10 supplement to this, to clarify what you really want done  
11 under this particular bill.

12 But having said that, I think there is enough  
13 information here for us to make a decision and to -- as  
14 Mr. Kaye mentioned, give some guidance in our decision to  
15 the writers of the Parameters and Guidelines, to ensure  
16 that exhumation costs are covered, but they're covered to  
17 the extent that that's the only way in which the law can  
18 be dealt with here.

19 And I would certainly hope, again, the Department of  
20 Justice would help the staff here in developing those  
21 limitations and expectations.

22 So having said that, are we ready to --

23 CHAIR TILTON: I generally agree.

24 Let me ask a process question to Paula.

25 Paula, I think I generally agree with you; but I'm

1 left with the uncomfortable level about what is that  
2 criteria. What are we saying here in terms of criteria?  
3 Because we're all going to disagree, maybe, what that  
4 means. Procedurally, what would we do to --

5 MS. HIGASHI: Procedurally, immediately, what I'd  
6 like to propose we do is take a ten-minute recess, which  
7 will allow us a moment to confer as staff. And then,  
8 two, it will give our court reporter a much-needed break.

9 CHAIR TILTON: Good point on both sides.

10 MS. HIGASHI: And then if we could come back and  
11 then we will have a response to your question.

12 CHAIR TILTON: Your wisdom we appreciate.

13 Let's take a ten-minute break.

14 (A recess was taken from 11:28 a.m. to 11:38 a.m.)

15 CHAIR TILTON: First of all, I want to make a  
16 comment. I appreciate the fact that we have the  
17 Department of Finance and the program folks here with us.  
18 Many times, I think, we do our deliberation without  
19 having the input from Finance staff and program staff.  
20 And I think your testimony here has helped us get a  
21 better understanding. And so I want to, first of all,  
22 thank you for coming and making that time for us. It  
23 helps us do our job better.

24 With that, I think --

25 MS. HIGASHI: Could we wait just a few moments for

1 Mr. Lazar?

2 CHAIR TILTON: Oh, excuse me. We'll wait for John  
3 to get back.

4 I just wanted to pass on that, just in terms of  
5 these issues. And we will continue, I think, to push to  
6 get program people in Finance here. Again, I just want  
7 to thank you for that effort.

8 And thanks, Paula. We'll wait for John. I was  
9 going to run without him.

10 *(Brief pause from 11:40 a.m. to 11:46 a.m.)*

11 *(Mr. Lazar entered the room.)*

12 CHAIR TILTON: One comment. John, in your absence,  
13 I was just commenting to the group it was nice to have  
14 Finance and the program people here on an issue. It  
15 really helps in our deliberations. I hope we can  
16 encourage that for future issues.

17 With that, I think -- Eric, I think you have some  
18 recommendations for us, or in terms of your reaction to  
19 some of the dialogue here about how we may proceed.

20 MR. FELLER: At this point, I would recommend that  
21 you adopt the final staff analysis, with any amendments  
22 that you wish to make to it, and then Commission staff  
23 would redraft the Statement of Decision, incorporating  
24 the testimony that we've heard today and the amendments  
25 to the final staff analysis, and bring that to the

1 hearing two months from now.

2 CHAIR TILTON: Okay, Walter, do you have a motion  
3 then?

4 MEMBER BARNES: Yeah, although I don't know why we'd  
5 have to wait two months for this. Is it that  
6 complicated?

7 MR. FELLER: We feel it would be prudent to include  
8 all the testimony that we've received today in the  
9 Statement of Decision, so that there would be concrete  
10 findings for any changes that you made to the final staff  
11 analysis.

12 MEMBER BARNES: Okay. Well, I think the motion that  
13 I would like to make is to adopt the staff's  
14 recommendation, with an amendment that would allow for  
15 exhumation costs in those circumstances where it is the  
16 only alternative available to meet the reporting needs  
17 under this particular law. That would be the motion.

18 CHAIR TILTON: Do I have a second?

19 MEMBER LAZAR: Second.

20 CHAIR TILTON: We have a motion and a second. I  
21 think we've heard all the testimony, and I think, Eric,  
22 you've got -- I think this is one of those things where  
23 we do need to wait for the second step and see the  
24 details.

25 So with that, do you want to call the roll?



1 MS. HIGASHI: Certainly.  
2 Mr. Lazar?  
3 MEMBER LAZAR: Aye.  
4 MS. HIGASHI: Mr. Van Houten?  
5 MEMBER VAN HOUTEN: Aye.  
6 MS. HIGASHI: Mr. Barnes?  
7 MEMBER BARNES: Aye.  
8 MS. HIGASHI: Ms. Boel?  
9 MEMBER BOEL: Abstain.  
10 MS. HIGASHI: And Mr. Tilton?  
11 CHAIR TILTON: Aye.  
12 MS. HIGASHI: The motion carries.  
13 Thank you.  
14 CHAIR TILTON: Thank you.  
15 With that, I think we'll also put over Item 8 then  
16 to --  
17 MS. HIGASHI: Yes, Item 8 will be scheduled for the  
18 next meeting. And the proposed Statement of Decision  
19 will be issued prior to that hearing, so parties will  
20 have a chance to take a look at it, as well as members,  
21 certainly.  
22 CHAIR TILTON: Thank you.  
23 MS. HIGASHI: This brings us now to Item 9, which is  
24 a test claim on *Cancer Presumption*. And this item will  
25 be presented by Commission counsel Camille Shelton.

1 MS. SHELTON: This case addresses Labor Code section  
2 ~~3112.1~~<sup>3212.1</sup>, which provides an evidentiary presumption in  
3 workers' compensation cases to specified firefighters and  
4 peace officers that develop cancer during employment.

5 In the present case, the claimant, a community  
6 college district, contends that the test claim statute  
7 imposes a reimbursable state-mandated program by  
8 requiring school districts and community college  
9 districts to pay additional costs of claims caused by  
10 the shifting of the burden of proof of the cause of the  
11 cancer from the police officer employee to the district.

12 As described in the analysis, staff concludes that  
13 school districts and community college districts are not  
14 eligible claimants for this test claim because the test  
15 claim statute does not provide a rebuttable cancer  
16 presumption to employees of a school district or  
17 community college district.

18 Assuming for the sake of argument only that Labor  
19 Code section 3212.1 does apply, staff further concludes  
20 that Labor Code section 3212.1 is not subject to Article  
21 XIII B, section 6 of the California Constitution because  
22 school districts are not required by the state to employ  
23 peace officers and/or firefighters; and, therefore,  
24 pursuant to the Department of Finance v. Commission on  
25 State Mandates case, litigating a workers' compensation

1 case under this test claim statute does not impose a  
2 state-mandated program on school districts and community  
3 college districts.

4 Staff recommends that the Commission adopt the staff  
5 analysis and deny this test claim.

6 I will mention that I did issue an errata sheet for  
7 the executive summary on this manila piece of paper.  
8 Something happened to my printer, and the top line on  
9 page 2 did not print when it was -- when the item was  
10 sent out with your binders. So here's an errata sheet  
11 with the correct line on top.

12 Will the witnesses and parties please state your  
13 names for the record?

14 MR. SHAW: For the record, Leo Shaw of SixTen and  
15 Associates appearing for the test claimant.

16 And based upon prior decisions of the Commission on  
17 this specific issue, we'd be very happy to submit on the  
18 record; and, of course, I'd be happy to answer any  
19 questions the Commission may have.

20 CHAIR TILTON: Thank you, Mr. Shaw.

21 MR. TODD: Thomas Todd, the Department of Finance.

22 CHAIR TILTON: So that's your testimony, Mr. Shaw?

23 MR. SHAW: That's it.

24 CHAIR TILTON: Okay, I appreciate it.

25 The Department of Finance?

1 MR. TODD: For the record, Mr. Chair, we would  
2 simply like to indicate our concurrence with the final  
3 staff analysis on this claim.

4 CHAIR TILTON: Thank you.

5 Thank you.

6 Any questions from the members?

7 *(No audible response was heard.)*

8 MEMBER BARNES: I'd follow the staff recommendation.

9 CHAIR TILTON: Second?

10 MEMBER LAZAR: *(Waved hand.)*

11 CHAIR TILTON: We have a motion and second to  
12 approve the staff recommendation.

13 Any other testimony?

14 *(No audible response was heard.)*

15 CHAIR TILTON: Call the roll.

16 MS. HIGASHI: Mr. Van Houten?

17 MEMBER VAN HOUTEN: Aye.

18 MS. HIGASHI: Mr. Barnes?

19 MEMBER BARNES: Aye.

20 MS. HIGASHI: Ms. Boel?

21 MEMBER BOEL: Aye.

22 MS. HIGASHI: Mr. Lazar?

23 MEMBER LAZAR: Aye.

24 MS. HIGASHI: Mr. Tilton?

25 CHAIR TILTON: Aye.

1 MS. HIGASHI: The motion is carried.

2 Item 10.

3 MS. SHELTON: This is the proposed Statement of  
4 Decision on the item that you just adopted. Staff  
5 recommends that you adopt the proposed Statement of  
6 Decision and allow the staff to make any minor changes  
7 to reflect the vote count and the witnesses present here  
8 today.

9 CHAIR TILTON: Do we have a motion on this item?

10 MEMBER LAZAR: *(Waved hand.)*

11 CHAIR TILTON: We have a motion.

12 MEMBER VAN HOUTEN: Second.

13 CHAIR TILTON: And a second.

14 Any discussion?

15 *(No audible response was heard.)*

16 CHAIR TILTON: Recommendation to approve staff  
17 analysis. Call the roll.

18 MS. HIGASHI: Mr. Barnes?

19 MEMBER BARNES: Aye.

20 MS. HIGASHI: Ms. Boel?

21 MEMBER BOEL: Aye.

22 MS. HIGASHI: Mr. Lazar?

23 MEMBER LAZAR: Aye.

24 MS. HIGASHI: Mr. Van Houten?

25 MEMBER VAN HOUTEN: Aye.

1 MS. HIGASHI: Mr. Tilton?

2 CHAIR TILTON: Aye.

3 MS. HIGASHI: Thank you.

4 Item 11, Item 12, Item 13, Item 14 and Item 15 were  
5 adopted on the Consent Calendar.

6 This brings us to Item 16. This is our proposed  
7 hearing schedule for 2005.

8 As is customary, we present the dates to you, and  
9 then we publish the dates on our Web site and provide the  
10 information to all the parties.

11 Are there any questions about that?

12 *(No audible response was heard.)*

13 CHAIR TILTON: As you'll note, we are still doing  
14 bimonthly hearings, which is what we're authorized by  
15 statute and budget to do.

16 MEMBER BOEL: My only question would be, what is our  
17 backlog at this point?

18 MS. HIGASHI: That will come up in Item 18, and  
19 we'll cover that.

20 MEMBER BOEL: Okay.

21 MS. HIGASHI: So I would just like a motion on  
22 adoption of this hearing calendar for 2005.

23 MEMBER BARNES: *(Raised hand.)*

24 CHAIR TILTON: We've got a motion.

25 MEMBER VAN HOUTEN: Second.

1 CHAIR TILTON: And a second to approve the calendar  
2 for next year.

3 All in favor, say "aye."

4 (A chorus of "ayes" was heard.)

5 CHAIR TILTON: Opposed?

6 (No audible response was heard.)

7 MS. HIGASHI: Thank you.

8 Mr. Starkey will present Item 17.

9 MR. STARKEY: This is a public report. A copy is  
10 filed with the Commission. The only update is that we  
11 received two days ago a decision from the Third District  
12 Court of Appeal in the San Diego Unified School District  
13 case. It's an unpublished decision that upheld the  
14 Commission's decision in the performance testing, STAR  
15 Testing case. It's possible that that may be appealed to  
16 the Supreme Court. At this time I don't have any  
17 information about that.

18 CHAIR TILTON: Thank you.

19 MS. HIGASHI: Item 18, the first item is part of my  
20 report. It indicates what the workload looks like, what  
21 our accomplishments were for the immediately past fiscal  
22 year, and also what new filings looked like. Just a  
23 comparison, so you can see what our record has looked  
24 like over the years and our pending caseload. Before the  
25 hearing, it was 117. And what we'll do next is, we'll

1 subtract out those test claims that were determined  
2 today.

3 Ms. Boel, did you have some additional questions?

4 MEMBER BOEL: No, that's fine.

5 CHAIR TILTON: Paula, I've got a comment. Maybe  
6 this is the time to do it. I think, as we know, there  
7 were significant discussions in the Legislature in terms  
8 of revising or modifying the mandate process. It seems  
9 to me it would be helpful for you at the next meeting to  
10 come back and kind of give us a recap of those issues.

11 In addition, given the cycle we have, this is the  
12 time for -- I know that you're taking a look at this  
13 backlog and preparing resource requests that you'll  
14 submit to those folks at the Department of Finance for  
15 consideration, addressing that fact. So I expect that  
16 between now and the next meeting, we will have some  
17 report back on those two activities.

18 MS. HIGASHI: Certainly. We are, in fact, working  
19 on that. Since we're not sure yet what the mandate  
20 reform changes ultimately will end up being, we're having  
21 to look at our backlog in different ways, whether, one,  
22 is there a priority imposed only on local agency test  
23 claims; or two, is the priority imposed on all test  
24 claims.

25 And the other fact is that we're also not sure yet



1       how many cases will be remanded back to the Commission  
2       for reconsideration.  Some of the language actually in  
3       budget trailer bills, some of it is proposed in the  
4       Assembly Special Committee on State Mandates Legislation,  
5       some has actual date-certain as to when actions need to  
6       be taken.  Other provisions may not have a date-certain  
7       but directives.

8               One of the budget trailer bills yesterday, for  
9       example -- and I think it was part of the  
10       administration's initial proposal -- recommended that  
11       it recommend making some of the local agency mandates  
12       optional.  And some of those proposed changes were  
13       included in one of the trailer bills yesterday.  And  
14       there was also an additional provision that required the  
15       Commission on State Mandates to then go back and adjust  
16       the parameters and guidelines, so that if those mandates  
17       are made optional, then we would then have to adjust the  
18       parameters and guidelines to put a cap on the  
19       reimbursement period.  So then the Controller's Office  
20       would have the notification it needs to proceed  
21       accordingly, to notify the claimants.

22               The Education Budget trailer bill, additionally,  
23       suspended some mandates that had not been suspended  
24       previously, that had been suspended for local agencies.  
25       And that was pretty much cleanup.

1           Also, there was a provision in that Ed. trailer bill  
2 to require the Commission to reconsider the STAR test  
3 claim decision. And as we continue to review these and  
4 as they move forward, we'll certainly be giving you much  
5 more specific information. But the list keeps changing.  
6 Added to the local government trailer bill is a provision  
7 also that requires the Commission to reconsider all of  
8 its decision or Board of Control decisions on the  
9 regional housing needs determinations. That same bill  
10 does some very interesting things in adding fee authority  
11 for local agencies, as well as for councils of  
12 governments that are performing some of these functions.

13           And all of these reconsiderations are made with the  
14 instruction to the Commission to reconsider these  
15 decisions that are all older decisions, in light of  
16 current case law and current statute -- federal statute,  
17 state statute. So these are items that don't yet show up  
18 here on the workload and caseload sheet.

19           And as we look at these bills, when you only see one  
20 reconsideration or one P's and G's amendment that needs  
21 to be made in the bill, the fiscal impact does not appear  
22 to be great. It appears to be something we could absorb.  
23 But once we see what the total impact is, you know,  
24 there's no doubt that there is going to be significant  
25 workload added to the Commission. And it's all going to

1       come out of the budget trailer bills or the Assembly  
2       Special Committee on state mandates package.

3               And so as I indicated earlier --

4               CHAIR TILTON: Times are changing, huh?

5               MS. HIGASHI: Times are changing and there is also,  
6       just for everyone's information -- I know Jim knows all  
7       of this, but there are also provisions in one of the  
8       trailer bills to require the state to pay deferred  
9       mandate obligations over a period of no more than  
10      five years, beginning in 2006-07, and that's the  
11      obligation that's well over a billion dollars.

12              And there was also a constitutional amendment that  
13      was adopted by the Assembly; and that is the one that is  
14      the state local agreement that has been under negotiation  
15      for some weeks now.

16              And what is interesting is that since Prop. 65 had  
17      already qualified, what the Legislature did is also  
18      enacted another bill that basically had notwithstanding  
19      language numbering this new <sup>SCA</sup>~~FCA~~-4 as Proposition 1A, I  
20      believe, and also authorizing the parties that had  
21      previously submitted valid arguments, to withdraw those  
22      valid arguments.

23              So there's a lot of cleanup work going on; and it's  
24      not all in print and some of the analyses that were  
25      passed out on the floor last night were only made

1 available this morning. So we are following it as  
2 quickly as we can, as we have time; but it's changing  
3 very quickly.

4 MEMBER BOEL: Well, considering the workload and the  
5 potential workload, should we consider going to monthly  
6 meetings, or your staff can't handle that?

7 MS. HIGASHI: With our current staffing, going to  
8 monthly meetings is not going to increase output.

9 MEMBER BOEL: Okay.

10 MS. HIGASHI: In fact, when we went to the bimonthly  
11 meetings --

12 CHAIR TILTON: It would slow it down.

13 MS. HIGASHI: -- I think we improved our output,  
14 just by having fewer hearings to prepare for and having  
15 more time in between to get all of the support work done  
16 that needs to be done.

17 CHAIR TILTON: My point, Jan, I think with the  
18 attention on mandates issues, there would also be an  
19 expectation that these backlogs not be there, the basic  
20 principles. So that's one of the issues that I've asked  
21 Paula to get a sense of what's going on. There's some  
22 active dialogue going. But rather than just take a look  
23 at this and assume we have the same process, let's do a  
24 workload analysis base, and give Paula a chance to add  
25 these new activities and then come back to us with,

1 "Okay, what do we need to do and what positions should we  
2 take in terms of how aggressively or what resources can  
3 or can't be brought to bear to have reasonable  
4 expectation on our work as a commission?"

5 MS. HIGASHI: And what also is uncertain is we have  
6 some pending court decisions and cases coming up that  
7 will have significant impact.

8 CHAIR TILTON: Thank you.

9 MEMBER BARNES: Have you thought about the BCP  
10 process for this year?

11 MS. HIGASHI: We're in the midst of -- we have at  
12 least a second draft, a third draft.

13 MS. PATTON: *(Nodding yes.)*

14 MS. HIGASHI: We've been having meetings for the  
15 last four months -- three months, ever since we became  
16 aware of the state-local agreement that was publicized  
17 during the May revision process, and even before that,  
18 because of the Assembly Special Committee, and their  
19 interest in having the Commission address the backlog.  
20 And those are all issues that we expect that committee  
21 to resume taking testimony on, and we expect them to  
22 start formulating the recommendations for mandate reform  
23 because there are a number of bills that are now parked  
24 at the Senate Appropriations, and those with fiscal  
25 impact will then go to suspense, and then there will be a

1 process for amendments to be made.

2 MEMBER BARNES: And I guess more specifically, are  
3 you going to propose BCP to deal with workload issue?

4 MS. HIGASHI: Yes, we'll have to. We'll have to.  
5 We haven't seen the sentence that was in some of the  
6 proposed language that had circulated after the May  
7 revision, and that was language that said that the  
8 Commission will address its entire -- well, all of its  
9 local agency backlog by July 1, 2006. And so if that  
10 language shows up in one of these bills, that would  
11 certainly be the impetus for making sure that at least  
12 the local agency backlog would be handled.

13 There's also the 17553 statute, which can always  
14 be relied upon, which basically requires the Commission  
15 to make its mandate determinations and adopt statewide  
16 cost estimates in 12 to 18 months' filing.

17 As you know, looking at our backlog here, that we  
18 have exceeded that timeline on most of our test claims.  
19 Only the most recent filings have not had that timeline.

20 CHAIR TILTON: Well, it's a strange process. I'm  
21 saying, you need to submit a BCP, and I'll come over here  
22 and say I need to receive the BCP.

23 MEMBER BARNES: You have to pitch and catch at the  
24 same time here.

25 One of the questions I have, is there a way to, you

1 know, age out particularly the test claims?

2 MS. HIGASHI: Certainly.

3 MEMBER BARNES: And, I mean, I don't know that you  
4 need it every month, but perhaps we've got some new  
5 members, too. If you, if this next meeting, if you could  
6 age out the --

7 MS. HIGASHI: The backlog?

8 MEMBER BARNES: The backlog, that would give us some  
9 sense of what we're dealing with.

10 MS. HIGASHI: Not a problem. I keep that data.  
11 It's on my desk.

12 MEMBER BARNES: Very good.

13 I guess one other question, and maybe you're going  
14 to cover this. But anything new on the Butte County  
15 issue?

16 MS. HIGASHI: We are -- let me defer to Ms. Patton  
17 on this issue. She had the most recent communication.

18 MS. PATTON: Butte County is indicating that they  
19 still plan to file their application around September 1.  
20 They said it might come a week or two after that.

21 We have submitted a request to the Department of  
22 Finance for funding, to complete the process. And we do  
23 have word from the OSA unit of Finance, that they're  
24 willing to contract with us and do the fiscal analysis.  
25 So we're getting pieces and, you know, getting it put

1 together.

2 But we do not have the application yet.

3 MEMBER BARNES: Okay, I just wondered if --

4 CHAIR TILTON: Walter, there's the new -- this  
5 budget that's does not provide an deficiency process  
6 anymore for agencies to come forward and get that; but  
7 there is a pot of funds that the Finance has. So what  
8 I would move forward is a request to use that pot of  
9 funds and approve resources for them. We haven't got an  
10 answer for that yet but at least we moved that forward  
11 and say this is the first test of that nondeficiency  
12 process and see whether or not we'll -- so the process is  
13 being laid out but that's in our front office. So  
14 hopefully in the next week, we'll get an answer soon, as  
15 soon the budget is done.

16 MS. HIGASHI: Super. But we've done about as much  
17 as we can do at this point to get ready for it.

18 MEMBER BARNES: That's fine.

19 MS. HIGASHI: As soon as it's been filed, we'll be  
20 in communication with you, because we'll have to work  
21 immediately to set up a hearing date and get you the  
22 application materials.

23 MEMBER BARNES: Butte County is lovely this year.

24 MS. HIGASHI: Yes, Oroville is quite lovely.

25 Are there any other questions?



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*(No audible response was heard.)*

MS. HIGASHI: Our pending legislation, as I indicated, there's one bill that has gone as far as enrollment, and that is the bill that has the elections procedures in it, one election procedure. That same election procedure, I believe, is also in one of the budget trailer bills. And it would be a modification of a mandate that's been suspended for a number of years. All the other bills are in Appropriations on Monday.

CHAIR TILTON: Okay, thank you.

MS. HIGASHI: Regarding the next agenda, we have a couple of test claims, Acquisition of Agricultural Land for a School Site and California English Language Development Test, which have been issued in the draft stage. The other two have not yet been issued in the draft stage. And we will be moving those forward because of our delay in getting them out.

And also, we would be adding to the agenda the proposed Statement of Decision for the test claim, the decision that was made today, that was not adopted.

We also have proposed parameters and guidelines. And we're working on a number of proposed statewide cost estimates. And as you can see, the list is long, so the efficiency just went up, if you adopt this.

Do you have any other questions?

1 CHAIR TILTON: Any questions from Members of Paula?

2 *(No audible response was heard.)*

3 MS. HIGASHI: Thank you.

4 CHAIR TILTON: With that, I think we're going to  
5 move into executive session, pursuant to Government Code  
6 sections 11126(e), to confer with and receive advice from  
7 legal counsel for consideration, action --

8 MR. STARKEY: Will we have public comment before we  
9 move into closed section?

10 CHAIR TILTON: Sure.

11 MR. STARKEY: Just ask if there is any.

12 CHAIR TILTON: Is there any other public comment?

13 *(No audible response was heard.)*

14 CHAIR TILTON: Thank you, hearing none.

15 And I'm going to continue reading into the record --  
16 as necessary and appropriate upon the pending litigation  
17 listed on the published notice and agenda; and to confer  
18 with and receive advice from legal counsel regarding  
19 potential litigation; and pursuant to Government Code  
20 sections 11126(a) and 17526, the Commission will also  
21 confer on personnel matters listed on the published  
22 notice and agenda.

23 We'll come back, but we're done with today's  
24 business.

25 *(The Committee met in executive session from*

1 12:09 p.m. to 12:29 p.m.)

2 CHAIR TILTON: Okay, now, we're reconvening the  
3 Commission on State Mandates. The Commission met in  
4 closed executive session pursuant to Government Code  
5 11126(e) to confer with and receive advice from legal  
6 counsel, for consideration and action as necessary and  
7 appropriate upon the pending litigation listed on the  
8 published notice of agenda and potential litigation; and  
9 Government Code sections 11126(a) and 17526, to confer on  
10 personal matters listed on the published notice of  
11 agenda.

12 All required reports from the closed session having  
13 been made, and with no further business to discuss, I  
14 will entertain a motion to adjourn.

15 MEMBER LAZAR: So moved.

16 CHAIR TILTON: So moved.

17 MEMBER BOEL: Second.

18 CHAIR TILTON: All in favor, say "aye"?

19 *(A chorus of "ayes" were heard.)*

20 MS. HIGASHI: Before you leave the room, I wanted to  
21 introduce our newest student assistant, Latoya Jackson.  
22 I didn't have a chance to do it during the public  
23 session. But you may see her at your offices bring by  
24 documents, binders, boxes.

25 MEMBER BOEL: Oh, all those binders we love. If we

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don't welcome you with open arms, don't take it personally.

CHAIR TILTON: Thank you.

*(Proceedings concluded at 12:30 p.m.)*

--oOo--

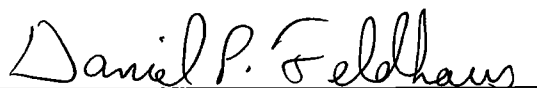
REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were duly reported by me at the time and place herein specified;

That the testimony of said witnesses was reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into type-writing.

I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In witness whereof, I have hereunto set my hand on August 23, 2004.



DANIEL P. FELDHAUS  
CSR 6949, RDR, CRR