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COMMISSION ON
STATE MANDATES

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PUBLIC HEARING

COMMISSION ON STATE MANDATES



TIME: 9:30 a.m.

DATE: Thursday, March 24, 2011

PLACE: State Capitol, Room 447
Sacramento, California



REPORTER'S TRANSCRIPT OF PROCEEDINGS



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A P P E A R A N C E S

COMMISSIONERS PRESENT

PEDRO REYES
(Commission Chair)
Representative for ANA MATOSANTOS
Director, State Department of Finance

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

KEN ALEX
Director
Office of Planning & Research

PAUL GLAAB
City Council Member
City of Laguna Niguel

FRANCISCO LUJANO
Representative for BILL LOCKYER
State Treasurer

SARAH OLSEN
Public Member

J. STEVEN WORTHLEY
Supervisor and Chairman of the Board
County of Tulare



COMMISSION STAFF PRESENT

DREW BOHAN
Executive Director
(Item 19)

ERIC FELLER
Senior Staff Counsel
(Items 8 and 9)

NANCY PATTON
Assistant Executive Director
(Item 17)

A P P E A R A N C E S

COMMISSION STAFF PRESENT

continued

HEATHER HALSEY
Senior Staff Counsel
(Items 6, 7, and 14)

KENNY LOUIE
Staff Counsel
(Item 4 and 5)

HEIDI PALCHIK
Program Analyst
(Item 14)

CAMILLE SHELTON
Chief Legal Counsel
(Item 18)



PUBLIC TESTIMONY

Appearing Re Items 4 & 5 (Discrimination Complaint Procedures)

For Claimants:

KEITH B. PETERSEN
President
SixTen and Associates
5252 Balboa Avenue, Suite 900
San Diego, California 92117

For Department of Finance:

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 6 & 7 (School Facilities Funding Requirements):

For Claimant Clovis Unified School District:

ART PALKOWITZ
Stutz, Artiano, Shinoff & Holtz
2488 Historic Decatur Road, Suite 200
San Diego, California 92106

For Department of Finance

DONNA FEREBEE
Staff Counsel III
Department of Finance
915 L Street
Sacramento, California 95814

Appearing Re Item 8 (Municipal Storm Water and Urban Runoff):

For County of Los Angeles:

LEONARD KAYE
County of Los Angeles
Department of Auditor-Controller
500 West Temple Street, Suite 603
Los Angeles, California 90012

JON WALKER
Los Angeles County

WENDY BUI
Transit Manager
County of Los Angeles
Department of Public Works
900 S. Fremont Avenue
Alhambra, California 91803

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 8 (Municipal Storm Water and Urban
Runoff):** *continued*

For City Claimants:

DAVID W. BURHENN
Burhenn & Gest LLP
624 South Grande Ave., Suite 2200
Los Angeles, California 90017

For Department of Finance:

CARLA SHELTON
Department of Finance
915 L Street
Sacramento, California 95814

SUSAN GEANACOU
Senior Staff Attorney
Department of Finance

For State Controller's Office:

JAY LAL
Manager
Division of Accounting and Reporting
State Controller's Office
300 Capitol Mall, Suite 518
Sacramento, California 95814

JIM SPANO
Chief, Mandated Cost Audits Bureau
Division of Audits
State Controller's Office
300 Capitol Mall, Suite 518
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 8 (Municipal Storm Water and Urban
Runoff): *continued***

For California State Association of Counties and League
of California Cities:

ALLAN BURDICK
California State Association of Counties
SB-90 Service
4320 Auburn Boulevard, Suite 2000
Sacramento, California 95841

**Appearing Re Item 14 (Final Regulations to Implement
Mandate Redetermination Process):**

For School Boards Association:

DEBORAH B. CAPLAN
Olson Hagel & Fishburn
555 Capitol Mall, Suite 1425
Sacramento, California 95814

Appearing Re Public Comment:

RICHARD HAMILTON
Director
CSBA Education Legal Alliance
3100 Beacon Boulevard
West Sacramento, California 95691



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1 BE IT REMEMBERED that on Thursday, March 24,
2 2011, commencing at the hour of 9:35 a.m., thereof, at
3 the State Capitol, Room 447, Sacramento, California,
4 before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR,
5 the following proceedings were held:



7 *(The following proceeding commenced with*
8 *Mr. Lujano absent from the meeting room.)*

9 CHAIR REYES: Okay, the meeting of the
10 Commission on State Mandates will come to order.

11 Drew, would you please call the roll?

12 MR. BOHAN: Mr. Alex?

13 MEMBER ALEX: Here.

14 MR. BOHAN: Mr. Chivaro?

15 MEMBER CHIVARO: Here.

16 MR. BOHAN: Mr. Glaab?

17 MEMBER GLAAB: Here.

18 MR. BOHAN: Mr. Lujano?

19 *(No response)*

20 MR. BOHAN: Ms. Olsen?

21 MEMBER OLSEN: Here.

22 MR. BOHAN: Mr. Worthley?

23 MEMBER WORTHLEY: Here.

24 MR. BOHAN: And Chair Reyes?

25 CHAIR REYES: Present.

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1 Thank you.

2 MR. BOHAN: The Chair of the Commission,
3 Mr. Reyes, will conduct the annual election of officers.

4 CHAIR REYES: Are there nominations for the
5 chairperson?

6 MEMBER ALEX: Yes, I would like to nominate
7 Pedro Reyes for Chair.

8 MEMBER CHIVARO: Second.

9 CHAIR REYES: Thank you.

10 Are there other nominations?

11 MEMBER OLSEN: I think we need a clarification.

12 MR. BOHAN: Mr. Chair, we just need to clarify
13 that technically, the Director of Finance is the chair.
14 And you would serve in her capacity.

15 CHAIR REYES: Okay. So the nomination is for
16 the Director of Finance.

17 MEMBER ALEX: Okay, let me clarify the
18 nomination and make it for the Director of Finance.

19 MEMBER CHIVARO: I'll second the motion.

20 CHAIR REYES: Okay, without objection,
21 nominations are closed.

22 All those in favor of electing the Director of
23 Finance as chairperson, say "aye."

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

25 CHAIR REYES: Opposed?

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(No response)

CHAIR REYES: The ayes have it.

Thank you.

The Director of Finance, in this case myself,
as the delegate for now.

So thank you.

Are there nominations for vice-chairperson?

Is there a motion?

I nominate the State Controller's as vice-
chairperson.

MEMBER GLAAB: Second.

CHAIR REYES: Thank you.

There's been a nomination and a second.

Are there other nominations?

(No response)

CHAIR REYES: All in favor of nominating the
vice-chair as the Controller, please say "aye."

(A chorus of "ayes" was heard.)

CHAIR REYES: Oppose?

(No response)

CHAIR REYES: Great.

Congratulations.

MEMBER CHIVARO: Thank you.

CHAIR REYES: Okay, Drew?

MR. BOHAN: Okay, Mr. Chairman. Item 2 is

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1 the minutes from the December 2nd, 2010, meeting. And
2 they're before you.

3 And you'll notice there's a blue sheet. We put
4 out a couple colored sheets. The blue one is a very
5 minor correction to the minutes under Item 7.

6 CHAIR REYES: Are there any objections or
7 additional corrections to the minutes?

8 MEMBER CHIVARO: I'll move approval.

9 MEMBER GLAAB: Second.

10 CHAIR REYES: As amended?

11 MEMBER CHIVARO: As amended.

12 CHAIR REYES: Thank you.

13 It's been moved and seconded.

14 All those in favor, say "aye."

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

16 CHAIR REYES: Opposed?

17 *(No response)*

18 CHAIR REYES: The "ayes" have it.

19 Thank you.

20 Drew?

21 MR. BOHAN: The next item is the Consent
22 Calendar.

23 *(Mr. Lujano entered the meeting room.)*

24 MR. BOHAN: And the consent items today are
25 Items 11, 12, 13, and 15.

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1 MEMBER WORTHLEY: Move approval of the consent
2 items.

3 MEMBER OLSEN: Second.

4 CHAIR REYES: Thank you.

5 All in favor, say "aye."

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

7 CHAIR REYES: Opposed?

8 *(No response)*

9 CHAIR REYES: Thank you. The "ayes" have it.

10 MR. BOHAN: Item 3, Chairman, is the appeals of
11 the Executive Director decisions.

12 There aren't any for this hearing, so there
13 isn't anything for that item.

14 CHAIR REYES: Next item.

15 MR. BOHAN: The next matter is to swear in the
16 witnesses. So I'll address the folks in the audience and
17 anyone who would be speaking today.

18 Will the parties and witnesses for Items 4, 5,
19 6, 7, and 8, please rise?

20 *(Several persons stood up.)*

21 MR. BOHAN: Thank you.

22 Do you solemnly swear or affirm that the
23 testimony which you are about to give is true and
24 correct, based on your personal knowledge, information,
25 or belief?

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1 (A chorus of "I do's" was heard.)

2 MR. BOHAN: Thank you very much.

3 Mr. Chairman, Item 4 is going to be presented
4 by Commission Counsel Kenny Louie across the dais from
5 me, and it's entitled the *Discrimination Complaint*
6 *Procedures* test claim.

7 Kenny?

8 CHAIR REYES: I see the Department of Finance
9 moving forward.

10 We're on Item 4.

11 Proceed.

12 MR. LOUIE: *Discrimination Complaint Procedures*
13 addresses state anti-discrimination laws as they apply to
14 community-college districts in the areas of employment,
15 provision of programs and activities to students, and
16 procedures that are used to deal with allegations of
17 discrimination.

18 The areas in dispute -- primary areas in
19 dispute -- are whether or not the minimum conditions
20 which set forth -- the regulations setting forth the
21 minimum conditions entitle -- satisfaction which entitles
22 districts to state aid for state-mandated activities.

23 Staff has found that they do not.

24 The other issue is whether or not the statutes
25 and regulations in the areas of employment, student

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1 equity, and discrimination-complaint procedures impose
2 federal mandated activities.

3 Staff has found that some of the regulations of
4 statutes do; however, some of them don't. And the ones
5 that do, the activities can be found on pages 246 to 260.

6 Will the parties and witnesses state their
7 names for the record, please?

8 MR. PETERSEN: Keith Petersen, representing the
9 test claimants.

10 MS. GEANACOU: Susan Geanacou, for the
11 Department of Finance.

12 CHAIR REYES: Thank you.

13 Mr. Petersen?

14 MR. PETERSEN: Good morning.

15 This test claim, as filed, was separate in the
16 sense that it's a combination of the *Discrimination*
17 *Complaint* test claim, but it also pulls two items from
18 another claim called, "*Minimum Conditions for State Aid.*"
19 The *Minimum Conditions for State Aid* test claim is
20 scheduled for hearing right now in May.

21 Some of the legal issues in this test claim
22 will have an effect on some of the legal issues in that
23 test claim. So those are bound together, which is why
24 I want to focus on a couple of the issues.

25 In my March 1st response, I raised five

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1 objections; and those are listed conveniently on the
2 bottom of page two. I'll try to avoid reading too much
3 of this back to you, but to focus on those, I'll have to
4 reference them.

5 The first issue is, test claimants would like
6 to abandon a portion of the reimbursable period,
7 two-month period as a result of the *Connerly* case.

8 Number two, there is a disagreement with the
9 standard of review the staff uses; and that standard is
10 whether you compare things to 1975 or whether you compare
11 the new law to the law immediately preceding.

12 The third is a disagreement with portions of
13 the federal mandate analysis.

14 Fourth, a disagreement with all of the
15 minimum-conditions analysis. And as I prefaced, that
16 is relevant to the next test claim that you'll hear next
17 time, if you're here.

18 And five, a disagreement with some of the
19 findings regarding the programs.

20 Lucky for you, I only want to respond to one,
21 four, and five today, okay. And what I'll do is take
22 some procedural things first.

23 If you look at page 33, at the very bottom,
24 this is the issue of the abandonment of a portion of the
25 test claim. It's a procedural issue. And I think with

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1 some more information, it might be cleared up today.

2 At the bottom, it says, "The Commission must
3 take jurisdiction over the pled test claim." I agree.

4 The next sentence says, "There is no process
5 under the governing statutes of the Commission's
6 regulation that provides for abandonment of a portion of
7 a claim."

8 And I think that's where I'm confused because
9 I have a copy of the regulation that says, in the first
10 sentence, "A test claim or any portion of the test claim
11 may be withdrawn by the claimants upon written
12 application." So I think the confusion is probably in
13 the next sentence.

14 "Thus, unless the claimants wish to withdraw
15 portions of their test claim in accordance with the
16 Commission's regulations, the Commission must make a
17 finding on the statutes and regulations pled."

18 The reason we want to abandon this two-month
19 period is, the Connerly case is an issue that changed the
20 Equal Employment Opportunity program from the affirmative
21 action program. And based on the date the test claim was
22 filed, the change occurs two months after the start. And
23 since this is covering seven or eight years, I believe it
24 would be less confusing for the claimants, much easier
25 to write parameters and guidelines if the claimants just

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1 give up that two-month period of the old law and we just
2 start with the new law.

3 So I guess my question is -- and it probably
4 has to be directed to counsel -- is, how was I defective
5 in requesting an abandonment of that portion?

6 CHAIR REYES: Ms. Shelton?

7 CAMILLE SHELTON: We did not consider your
8 letter as a request to withdraw because it was entitled
9 "Comments on the Draft Staff Analysis."

10 If you are wanting to withdraw those sections,
11 then under the Commission's regulations, we have to issue
12 your withdrawal to the entire class of claimants and
13 allow them 60 days in case somebody else wants to take it
14 over.

15 If that is the claimants' intent, the
16 Commission can still go forward if you sever those
17 portions of what he is trying to withdraw from today's
18 hearing.

19 I'm not sure if that's easily done. If you can
20 easily do that here, to sever those portions out.

21 MR. PETERSEN: I'm sorry, I thought I did that
22 in my March 1 letter. I have a sentence that says, "This
23 letter is notice that the test claimant has abandoned the
24 pre-Connerly reimbursement period."

25 CAMILLE SHELTON: Okay, it would have to be

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1 severed with respect to the statutes and chapters and
2 Ed. Code sections.

3 MR. PETERSEN: How about the Equal Employment
4 Opportunity program as it existed -- never mind.

5 CHAIR REYES: Yes, let's not go on a fishing
6 expedition. Let's figure out what we want to do with
7 that.

8 CAMILLE SHELTON: It did become difficult in
9 our office. We did kind of take a look at it, and it got
10 to be: Well, what is he actually trying to sever?

11 I mean, time-wise, it's easy pre-Connerly. But
12 he has pled some of those statutes and chapters, and they
13 continue.

14 So if you are --

15 MR. PETERSEN: Right. It had to --

16 CAMILLE SHELTON: It's very difficult to
17 separate those out.

18 I would need a very clear statement of what is
19 being withdrawn, and then we'd have to issue for comment
20 for 60 days to allow another claimant to take it back and
21 bring it back in if they want.

22 And then it could be dismissed if nobody steps
23 in the shoes of the claimant on those portions that are
24 withdrawn.

25 But for today, if that's the intent, the

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1 Commission can still hear the claim, and then the
2 claimant can request that those portions be severed.

3 And I would recommend that if the Commission --
4 if this proceeds this way, to bring back the Statement of
5 Decision for next month so that we can clean it up in the
6 Statement of Decision. You can still come to a decision
7 today, but we would need to clean up the Statement of
8 Decision.

9 CHAIR REYES: Mr. Petersen?

10 MR. PETERSEN: Mr. Chair, my concern was this:
11 We have to do it before decision is adopted. I can't
12 abandon it after you've adopt the decision, so...

13 CHAIR REYES: Right. And that's the thing that
14 counsel is alluding to.

15 CAMILLE SHELTON: Correct. And if you're
16 saying that your statement is a written -- you know,
17 consider your written request to withdraw, then we can
18 take it as a written request to withdraw. That would be
19 all right.

20 MR. PETERSEN: And then subject to the
21 technical cleanup?

22 CAMILLE SHELTON: Right. I would recommend --
23 I mean, it would require a motion. I would recommend
24 that the Commission sever those portions that you are
25 withdrawing, hear the portions that remain. And then

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1 we'd need to -- I would recommend that you -- you could
2 take a vote today, if you choose to do that. But we
3 would need to bring back the Statement of Decision on
4 Item 5 for next month so that we can clean it up and you
5 can review that again and then you can adopt.

6 CHAIR REYES: Before we take a motion, I want
7 to make sure Mr. Petersen is on board with that.

8 Does that satisfy your issue?

9 MR. PETERSEN: Yes. I just need some
10 acknowledgment that the requests that I have, provided
11 adequate notice of abandonment before your decision is
12 made. And then the next step, of course, is procedural.

13 CHAIR REYES: And you're providing notice, now?
14 Is that what I'm hearing?

15 MR. PETERSEN: I thought I had on March 1st,
16 but...

17 CHAIR REYES: I don't think you were in a place
18 to do so, given what I just heard.

19 CAMILLE SHELTON: Right. I'm not saying it was
20 defective. We've read your written letter as comments to
21 the draft staff analysis without specifically identifying
22 which sections you are withdrawing.

23 So I still need from you what are you
24 withdrawing.

25 If it's clear to our counsel here and he

1 understands it, then it's good to go.

2 MR. PETERSEN: Okay. If you're asking me to
3 enumerate the Title 5 sections, right now I can't do
4 that. In that sense, that's defective, I guess.

5 What we intend to abandon is eligibility for
6 reimbursement for the two-month period, which is slightly
7 different than abandoning the statutes and the sections
8 because you need the statutes and the sections, as the
9 staff did, to analyze the historical law.

10 So I think this is kind of an issue of first
11 impression in the sense that I have before abandoned
12 activities and code sections in other test claims, but
13 I've never abandoned an eligibility period.

14 I guess the other alternative is not to do it
15 and then just have everybody ignore the parameters and
16 guidelines.

17 But I think, as you saw, there's 35 pages of
18 activities. And to the extent I can slice out something
19 that's happened two months ago -- seven years ago in a
20 two-month period, I think it will benefit everybody
21 involved.

22 So if it's possible for me to do that with
23 another writing, I would like to do that.

24 CAMILLE SHELTON: Okay, the difficulty is this:
25 The regs only allow an abandonment of statutes that have

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1 been pled. And I understand that the claimant doesn't
2 want to withdraw any of those statutes because they're
3 relevant after the period of reimbursement that you're
4 talking about. So we have discussed that in our office
5 and decided to go forward with the claim as it stands.

6 If the claimant chooses to abandon that period
7 of reimbursement and any other claimant also chooses to
8 abandon the period of reimbursement and the Commission
9 adopts the staff recommendation to partially approve this
10 test claim, then those eligible claimants simply don't
11 have to seek reimbursement on a reimbursement claim with
12 the Controller's office.

13 MR. PETERSEN: That's probably best. And if we
14 can get separate P's & G's for that period, we can all
15 just ignore it.

16 CAMILLE SHELTON: And that is easily done.

17 MR. PETERSEN: It will cost us a tree, but
18 there's a lot of trees falling on this one, anyway.

19 CHAIR REYES: Okay.

20 MR. PETERSEN: Okay, so I guess to make this
21 work, I am not formally abandoning the pre-Connerly
22 reimbursement period.

23 And thank you for your patience. I didn't
24 quite understand what was happening here.

25 Okay, looking back at page 2 again, I'm

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1 responding to Item 5 on one particular activity --

2 CHAIR REYES: Before you move there, do we need
3 to take a motion on that particular, or do we take
4 that --

5 CAMILLE SHELTON: No, everything's fine, and
6 there's no request to sever, no request to abandon.

7 CHAIR REYES: Okay, thank you.

8 MR. PETERSEN: Okay, so going back to page 2,
9 quickly, just to remind you, I'm looking at Item 5 now,
10 disagreement with some of the findings, some of the
11 statutes or regulations are reimbursable activities.
12 There's a lot of that in there. But based on my
13 experience with the Commission process for 20 years, I
14 think those activities are analyzed consistent with the
15 Commission procedure.

16 I do have one issue I'd like to take today, and
17 that's on page 208.

18 I will also be referencing my March 1 letter.
19 I hope you have that in front of you. Page 14 of my
20 March 1 letter.

21 MR. BOHAN: Just to clarify, you don't have in
22 front of you the paper version of his comments. You
23 have them on a flash drive, so he's referring to a
24 document you don't have.

25 MR. PETERSEN: You're kidding?

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1 MEMBER WORTHLEY: Well, we were given it.

2 Mr. Chairman, we were given it, but it's on our flash
3 drive, but it's not on a hard copy.

4 Okay, going forward, that's an important kind
5 of concept, if somebody wants to reference something like
6 that, it might be well to bring copies for members of the
7 Commission so that we have it to look at. Because, I
8 mean, this is -- the way it's gone forward is really
9 preferable to the way we do things as far as --

10 MEMBER OLSEN: As far as the tree issue.

11 MEMBER WORTHLEY: Yes, so they don't send boxes
12 of stuff to us, they send us an envelope, so...

13 MR. PETERSEN: But we're not all reading flash
14 drives right now, are we --

15 MEMBER WORTHLEY: No.

16 MR. PETERSEN: -- so I will have to read some
17 sentences to you.

18 MEMBER WORTHLEY: Yes, you will.

19 MR. PETERSEN: And I'll try to do that.

20 All right, the issue is, on the *Discrimination*
21 *Complaints Program*, looking at page 208, which is before
22 you, there is essentially a two-step complaint process.

23 One is an informal complaint process handled
24 mostly by the college district. Again, this is someone
25 complaining that they were improperly discriminated

1 against.

2 And then there's a formal chancellor's office,
3 State Chancellor's office, appeal process, at the formal
4 level. That's described in the large paragraph in the
5 middle of the page that says, "If a complainant appeals
6 the decision to the Chancellor, the process on the
7 Chancellor's Office involves the Chancellor reviewing the
8 district's decision, the materials that the decision was
9 based upon, the complainant's appeal in order to
10 determine if there's a reasonable cause.. If reasonable
11 cause is found, the Chancellor must investigate to
12 determine if there's a probable cause. During the course
13 of the investigation, attempts at informal resolution
14 must be made."

15 This goes on and describes the process, the
16 Chancellor contacting the district for acquiescence.

17 The situation here is -- and that's stated at
18 the very bottom of the page -- "The claimants disagree
19 with the finding that the appeal process on the
20 Chancellor's office level does not impose any
21 activities.."

22 On the next page, the staff analysis says,
23 however, there is no language in those sections that
24 requires community-college districts to engage in any
25 activity -- and that's what's pertinent.

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1 From their standpoint, I agree there are no
2 words that say that when an appeal is filed, the district
3 is a party to the appeal, it must respond to the appeal.
4 Nor does it say when the chancellor calls the college,
5 it's supposed to respond, or when the chancellor sends a
6 brief to a college, it is supposed to respond.

7 It would seem essential that the appeal
8 process, which is in a complaint against the district,
9 involve the district. The regulations indicate that the
10 chancellor's office is involving the district. And an
11 appeal should involve all the essential parties in a
12 complaint that is against the community-college district.

13 This reminds me a great deal of something that
14 happened about two years ago on something called, "*Pupil*
15 *Discipline Records.*"

16 The plain law said, the district who gets the
17 transfer student must contact the district who sent the
18 transfer student and say, "Send me all your discipline
19 records on this student. It's a public-safety issue."

20 The law did not say that the district who sent
21 the student has to send the records; but the purpose of
22 the mandate would not have been implemented unless the
23 sending district sent the receiving district those
24 records.

25 And I think the same situation is occurring

1 here; that is, there is a formal appeal process. The
2 community-college district is the party against which the
3 complaint is filed by an individual. The community-
4 college district is not the one who starts the appeal,
5 it's the person who is appealing, an employee or someone
6 who went through the employment process. So it's not up
7 to the community college to start the appeal. They have
8 to be a party to it and participate.

9 The Commission regulations -- again, this is a
10 procedural thing, and it's one of those catch-22's. I'm
11 not sure if I don't mention it now, I can mention it as
12 part of the parameters and guidelines process.

13 The parameters and guidelines regulations state
14 that a description of specific costs and types of costs
15 that are reimbursable, including one-time costs and
16 ongoing costs, and a description of the most reasonable
17 methods of complying with the mandate. And the quote is,
18 *"The most reasonable methods of complying with the*
19 *mandate are those methods not specified in the statute or*
20 *executive order, but that are necessary to carry out the*
21 *mandate program."*

22 And I'm asserting, if not as a matter of exact
23 words and statute but as a matter of the most reasonable
24 and necessary method, a community college needs to
25 respond to those appeals and, therefore, it should be a

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1 reimbursable activity.

2 And I don't know whether you want to vote on
3 that before we move on to the next issue or...

4 CHAIR REYES: Does Finance have any comments on
5 this?

6 MS. GEANACOU: We don't have any specific
7 comments. We agree with the Commission's final staff
8 analysis on this issue, although I do recall the *Pupil*
9 *Discipline Records* issue.

10 CHAIR REYES: Commissioner Olsen?

11 MR. PETERSEN: Fondly or...

12 MS. GEANACOU: I remember it.

13 MEMBER OLSEN: I just want a clarification.

14 I think on *Pupil Discipline*, what we did is, we said that
15 it could be dealt with in the P's & G's.

16 Is that correct?

17 MR. PETERSEN: That's my recollection.

18 CAMILLE SHELTON: I have not reviewed *Pupil*
19 *Discipline* in preparation for this hearing. I haven't
20 heard that argument made. As I recall, I don't know if
21 Mr. Louie has, and he can definitely respond.

22 Let me just say that the issue before the
23 Commission is whether or not there's a mandate as a
24 matter of law. So you have to find that this -- are we
25 in a reg or a statute? If this regulation does mandate

1 an activity on school districts. First, you have to find
2 that.

3 If you find that mandated activity, then, at
4 the parameters and guidelines phase, you can include
5 other additional activities that are reasonably necessary
6 to comply with that mandated activity.

7 And I think the recommendation here, by the
8 plain language of this regulation, there is no mandated
9 activity imposed on the district.

10 MEMBER WORTHLEY: Mr. Chairman?

11 CHAIR REYES: Yes?

12 MEMBER WORTHLEY: I have a question for
13 counsel.

14 Would it be possible to apply the provision of
15 practical compulsion in this situation?

16 CAMILLE SHELTON: Yes, you have to have
17 evidence in the record of that. And I don't think it
18 is -- Mr. Petersen, I'm not sure if you're making a
19 practical compulsion argument.

20 I think he's making a legal compulsion
21 argument.

22 MR. PETERSEN: Yes. I don't know whether
23 parties are legally compelled to participate in formal
24 administrative adjudications.

25 CAMILLE SHELTON: And you can correct me if I'm

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1 wrong, because I really have not looked at *Pupil*
2 *Discipline* in several years, but if I remember a little
3 bit, I do think there was some procedure laid out there,
4 correct?

5 And there were --

6 MR. PETERSEN: In what sense?

7 CAMILLE SHELTON: Pardon me?

8 MR. PETERSEN: In what -- people had to do
9 things.

10 CAMILLE SHELTON: Right.

11 MR. PETERSEN: Yes.

12 CAMILLE SHELTON: And I think that you could
13 have found a mandate in that language where I believe,
14 here -- well, Mr. Louie can discuss the recommendation.

15 MR. LOUIE: I can only say "ditto" to what
16 counsel said.

17 I mean, essentially the plain language of the
18 law does not require these activities. Argument hasn't
19 been set forth that they are practically compelled.
20 There's no analysis within the analysis that they're
21 practically compelled. So we haven't -- we don't have
22 any evidence to suggest that they are practically
23 compelled to engage in these activities that are being
24 suggested, so...

25 MR. PETERSEN: I agree with that, to some

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1 extent, if I may. Except the P's & G's regulation I
2 wrote you, specifically says it does not have to be
3 stated in the statutes or the regs.

4 MR. LOUIE: But that is a P's & G's issue,
5 though.

6 Here, we're making a mandates finding. So on
7 this level of the analysis, we're making a mandates
8 finding.

9 Plain language does not mandate these
10 activities.

11 MEMBER WORTHLEY: May I ask a question?

12 Is it possible that this might be addressed
13 again as another issue in the P's & G's?

14 CAMILLE SHELTON: The recommendation is for the
15 Commission to deny this regulation. So, no, it would not
16 come back.

17 CHAIR REYES: There's no mention in the
18 P's & G's.

19 CAMILLE SHELTON: You would need to make a
20 decision now.

21 And just to say that whatever decision you're
22 making today is a question of law when -- you know, and
23 it's based on the interpretation of the regulation and
24 the plain language and whatever history you have, and the
25 analysis that you have.

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1 When you go to P's & G's, it's where you can
2 exercise your discretion. You cannot exercise discretion
3 at this level.

4 MEMBER WORTHLEY: My only comment is that this
5 matter has come before us before, and probably come up
6 again in the future. And it would be good to come up
7 with some sort of way of dealing with it. Because I
8 agree with counsel, the failure to say, "Thou shalt" is
9 almost an omission by default. But I think everybody
10 intends that, of course, people will respond. If you're
11 being sued, you know, you don't have to -- you can have a
12 default judgment taken against you. But practically,
13 you'd better get in there and wage war or you're going to
14 have defaults taken against you.

15 And this is a similar situation. If I'm being
16 contacted by the Chancellor's office and said, "I'm going
17 to make these findings," and I don't respond to it, then
18 I'm stuck with the findings. I may not like the results.
19 So that's a very practical thing. It's just -- you know,
20 and the Legislature is not necessarily inclined to want
21 to fix this because it means they don't have to pay for
22 something. So I think we're almost rewarding bad
23 behavior.

24 So I would like to look at this -- I mean, I
25 realize it's kind of late, but I just see this as a

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1 practical compulsion issue. I mean, that's how it feels
2 to me, but I'm one commissioner.

3 CHAIR REYES: Mr. Chivaro?

4 MEMBER CHIVARO: Are we ready for a motion?

5 CHAIR REYES: Yes.

6 Well, are there any other questions from
7 members?

8 *(No response)*

9 CHAIR REYES: Is there any other further
10 discussion?

11 Mr. Petersen, you're raising your hand.

12 MR. PETERSEN: Yes, again, I just want to -- my
13 understanding is that this is a procedural issue that you
14 can adopt the staff position on this. But that does not
15 foreclose it becoming an issue at the parameters and
16 guidelines stage.

17 Is that correct?

18 CHAIR REYES: That's not correct.

19 MEMBER OLSEN: That's not what I heard.

20 CAMILLE SHELTON: If the Commission adopts the
21 regulation, then the statute wouldn't even be discussed
22 during parameters and guidelines.

23 MR. PETERSEN: Except that the Commission
24 regulations allow activities that are not stated in
25 statute.

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1 CAMILLE SHELTON: But that's after they find a
2 legal mandate. And that issue would be resolved today;
3 or if it was resolved when they issued the decision.

4 MR. PETERSEN: Perhaps I didn't state that very
5 well.

6 So it's my understanding that you can go ahead
7 and adopt the staff recommendation, but that doesn't
8 preclude me from discussing that this is a reasonable and
9 necessary activity for the parameters and guidelines?

10 CAMILLE SHELTON: If you can tag it to a
11 state-mandated activity, certainly they would need to
12 entertain those arguments.

13 MR. PETERSEN: And you're saying there's no
14 state-mandated activity for a formal appeal?

15 I see.

16 CHAIR REYES: Okay.

17 MR. PETERSEN: The thing you're saying I should
18 tag it to, you're saying, doesn't exist.

19 CHAIR REYES: At this time, on this mandate, it
20 does not.

21 MEMBER CHIVARO: I'm going to move the staff
22 recommendation.

23 CHAIR REYES: Okay, I have a motion.

24 Is there a second?

25 MEMBER LUJANO: I will second.

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1 CHAIR REYES: We have a second.
2 Thank you.
3 There's been a motion and there's a second.
4 Are you ready to take the question?
5 Drew, please call the roll.
6 Yes?
7 MR. LOUIE: I don't believe Keith has addressed
8 every issue that he has on this test claim.
9 MR. PETERSEN: No, there's one more.
10 CHAIR REYES: One more?
11 MR. PETERSEN: It's kind of big.
12 CHAIR REYES: Okay, let's see go ahead and --
13 MR. PETERSEN: I was hoping to address the
14 issues one at a time, rather than -- okay.
15 MS. GEANACOU: Is this the motion on the entire
16 analysis or on the issue regarding the one he just
17 testified on?
18 The entire?
19 MEMBER CHIVARO: Affirmative. We can hold
20 that.
21 CHAIR REYES: We can hold that until -- go
22 ahead -- you finish your last, and then Finance, you want
23 to address that issue, too, I suspect.
24 MS. GEANACOU: The one he just addressed?
25 CHAIR REYES: Yes.

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1 MS. GEANACOU: We do not have any specific
2 comments.

3 CHAIR REYES: You're done with that?

4 MS. GEANACOU: Yes, sir.

5 CHAIR REYES: And, Mr. Petersen?

6 MR. PETERSEN: Looking at page 2 again, that
7 leaves me with number four, which is the threshold issue,
8 of whether compliances with the minimum -- with the
9 20 programs that are called the "minimum conditions" are
10 required for state funding.

11 Thankfully, the code citation is rather short.
12 It's on the bottom of page 24.

13 Okay, I'll walk you through this.

14 The provisions of the subchapter sections 51000
15 through 51207, and the 51000 through the 51207 are the
16 20 different programs, of which two of them are part of
17 this test claim, are adopted under the authority of
18 Education Code 70901, and comprise the rules and
19 regulations fixing and affirming the minimum conditions,
20 satisfaction of which entitles a district maintaining
21 community colleges to receive state aid for the support
22 of its community colleges.

23 This is a threshold issue in this test claim
24 and it's a threshold issue in the next test claim.

25 Our position is that that language, since it's

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1 a regulation, has the same force as a statute, by itself,
2 is legally compelling, and that the staff's subsequent
3 analysis of the *Kern* case and the *POBR* case to discuss
4 practical compulsion is not required.

5 If you look on the page -- the top of page 25,
6 you'll see after the quote, that, "The Chancellor's
7 Office and the claimants both describe the language as
8 providing that most of the regulations pled by the
9 claimants establish minimum conditions for the receipt of
10 state aid." It appears the chancellor's office intended
11 that it be coercive and compulsory. That section alone,
12 the staff spends several paragraphs describing what the
13 language does not exclude -- well, the language doesn't
14 exclude a lot of things. You don't have to add things it
15 doesn't exclude. That takes them to the *Kern* analysis.

16 The *Kern* case, you'll probably remember, dealt
17 with school districts who establish school site councils,
18 informal small groups that meet on particular issues.
19 Some of them are funded by federal agencies. Some are
20 funded by state categorical money.

21 After several years of being in operation, a
22 law came out requiring that those groups write and post
23 agendas, kind of a semi Open Meetings Act requirement.
24 The test claim was filed to get reimbursement for the
25 agendas.

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1 The subsequent litigation said that since the
2 district voluntarily decided to operate those committees,
3 any subsequent mandate downstream was not reimbursable.
4 That's the essence of the *Kern* analysis. For *Kern* to
5 work, you'd have to have a precursor program and a
6 downstream program.

7 The 20 programs putatively are downstream, but
8 they're not downstream of any other program.

9 Section 51000 is not a program. Section 51000
10 is a coercive requirement compelling implementation of
11 the 20 programs at the risk of losing state aid.
12 Therefore, the facts of *Kern* don't fit.

13 And the reality of the code section -- of the
14 Title 5 code section don't fit. Title 5, 51000, is not a
15 precursor program voluntarily established by the college
16 districts.

17 That takes us to *POBR*. *POBR* -- you don't get
18 to *POBR* unless you buy into *Kern*.

19 *POBR* requires proof of coercion, proof of
20 severe penalty.

21 The *POBR* case, you might remember -- some of
22 you might remember, had to do with school districts and
23 colleges requesting reimbursement for training and other
24 costs for peace officers. The Court decided that peace
25 officers -- employing peace officers at school districts

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1 and colleges but not cities was a discretionary act, and
2 there was no coercion to do so.

3 The fact that most college districts and
4 schools do not have peace officers as opposed to guards
5 probably had some influence there -- factual influence.
6 That's not the case here. Every college is being coerced
7 to comply with those programs.

8 So you can't get to the *POBR*, even, until you
9 go through *Kern*.

10 I provided for the record in my response to
11 March 1st the only copy of the minimum conditions penalty
12 review by the Chancellor's Office and the Board of
13 Governors that I could find. And the regulations require
14 the Chancellor's Office every seven years to review the
15 community-college districts to see if they're complying
16 with this coercion; or if they are notified otherwise,
17 the Board of Governors have jurisdiction over alleged
18 noncompliance.

19 And the example I gave them was the alleged
20 non-compliance in the hiring of the chancellor at
21 San Mateo Community College about four or five years ago.

22 The chancellor's staff recommended a penalty of
23 \$500,000 for violating one or two sections of the Equal
24 Employment Opportunity program -- just coincidentally,
25 the subject of this test claim. And the Board of

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1 Governors had three choices: They can agree with what
2 the district did, they can discuss a remediation plan, or
3 they can penalize.

4 In this case, they did not penalize, and the
5 staff analysis indicates that's further proof that
6 there's no teeth in section 51000 in the coercion. And
7 they indicate there's no evidence in the record that
8 there's a severe penalty to back up the coercion.

9 Once again, I'm alleging you don't need to get
10 to *POBR*. Section 51000 is sufficient and legally
11 compelling. But for there to be evidence on the record
12 of severe loss of funding, there would have to be extreme
13 malfeasance by community-college personnel, it appears.
14 They would have to intentionally ignore the requirements
15 of those 20 programs.

16 And I would suggest to you that it's unlikely
17 there's ever going to be that sort of evidence because
18 community-college district officers are public servants,
19 professionals. They don't behave in that manner.

20 So the evidence they say is lacking, I don't
21 think is extant. I don't think it's possible. So that's
22 a catch-22 there.

23 So what I'm asking for is for the Commission to
24 ask the Commission staff to reconsider their treatment of
25 this legal issue, with directions that *Kern* is not

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1 applicable and POBR is not applicable, factually.

2 CHAIR REYES: Mr. Louie?

3 MR. LOUIE: So, the reason why Kern is
4 applicable in this case is the language of 51000, which
5 Mr. Petersen has referred to, is a condition. It states
6 specifically that these activities within this chapter
7 of regulations are conditions. As a result, is there a
8 legal requirement to -- is there a legal requirement to
9 engage in these activities to achieve whatever it's a
10 condition of? No, there's no legal requirement here.

11 As a result, you then go to whether or not it's
12 practically compelling. We have done the analysis here
13 within the staff analysis whether we found practical
14 compulsion.

15 We have not found evidence that there's certain severe
16 penalties.

17 As Mr. Petersen has stated in the example that
18 he's found, it was suggested that there would be fines --
19 or something of that extent. However, the only thing
20 that actually occurred was increased supervision, which
21 community-college districts are subject to, anyway.

22 I mean, this was increased supervision.
23 However, we didn't find that it was certain and severe --
24 or evidence of severe penalties. So that was the extent
25 of our analysis right here for this issue.

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1 MEMBER WORTHLEY: Mr. Chairman?

2 CHAIR REYES: Yes.

3 MEMBER WORTHLEY: One thing that strikes me
4 about this is that we're saying that there's no evidence
5 of a factual situation; but it doesn't take away from the
6 fact that the \$500,000 claim, although it wasn't, in
7 fact, charged, could have been charged.

8 In other words, when you think about it --

9 MR. PETERSEN: They have the power.

10 MEMBER WORTHLEY: Yes, they have the power to
11 do these things.

12 Whether or not they've been exercised at this
13 point in time is really of some bearing, I suppose. But
14 if you have the authority and the ability to impose these
15 draconian measures, the fact that they haven't exercised
16 it to date doesn't mean it won't be sometime in the
17 future. All you have to do is take a look at what's
18 happening in certain communities in Southern California,
19 and realize that people in high authority can do some
20 very strange things that could have tremendous impact.

21 So I don't know why that really is -- if that
22 would be the -- I mean, I don't know why the burden would
23 be on the claimant here. If they can show that there is
24 the authority to impose such draconian measures, that
25 should be sufficient. You don't actually have to have a

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1 case to show that it's actually occurred in the past.

2 MR. LOUIE: But we have a situation here where
3 we have to deal with the certainty and severity of the
4 consequences. Here, we don't have evidence of certainty
5 or severity of what the consequences would be.

6 Now, the consequence -- I mean, it's a possible
7 consequence. However, it could be a remote consequence.

8 These situations in which --

9 MEMBER WORTHLEY: Well, this goes back to the
10 issue of practical compulsion. Because you can say that
11 that's only possible. Well, probably it's less likely if
12 people get them to respond. So in other words, they go
13 through the steps of actually responding to measures from
14 a procedural standpoint to protect themselves; and as a
15 consequence, they don't suffer the severe consequences.

16 If they did nothing -- if it was a default
17 situation, and they said, "Well, you're not required to
18 compel to respond," then there's more of a likelihood
19 that they're going to have some burdensome things that
20 occur to them.

21 I just think that trying to find a factual
22 situation, to me, is not really the issue. The issue is,
23 is there a legal ability to impose this on the local
24 agency? If there is, that should be the draconian
25 measure that we have to deal with, that that possibility

1 exists.

2 MR. LOUIE: I would just disagree in terms of,
3 we still don't -- it's just -- we still have to deal with
4 the certainty of it. We don't have any certain evidence
5 of whatever the consequences would be from the situation.

6 In every other case, this analysis was taken
7 from federal mandate analysis. In each of those cases,
8 there was actual evidence of consequences that would
9 happen in those situations.

10 In one instance, the State would have to
11 face -- the State would face double taxation of its
12 businesses -- it would face it; or it would face the
13 actual consequence of terminating its own unemployment
14 insurance program. Here, we don't have a situation of
15 any certainty of any consequences.

16 CHAIR REYES: Mr. Petersen?

17 MR. PETERSEN: Well, several thoughts on that.

18 In the Sacramento case he cited, none of those
19 things happened.

20 MR. LOUIE: Because the --

21 MR. PETERSEN: And second, for *POBR* to work for
22 the Commission staff, it appears that in addition to
23 facing a fiscal firing squad, I've got to show that
24 somebody got shot. I don't think that's necessary, and
25 I don't think it's going to happen.

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1 If you're still thinking practical compulsion,
2 I've often thought that the Commission position on that
3 as to state mandates is rather disingenuous. Because if
4 you compare this to how they treat federal mandates --
5 and there's 20 or 30 pages of federal mandate discussion
6 in here -- they find, based on court cases, that there is
7 a practical compulsion for schools, cities, counties, in
8 various situations, to implement federal mandates that
9 threaten fund loss or future program loss; or second,
10 threaten potential litigation. That is sufficient for
11 them to find a federal mandate here. And the court cases
12 support that.

13 None of those things actually occurred. Those
14 people never got shot. It was the threat. And for that
15 reason, I believe to apply a different standard to
16 require that the chancellor of the various community-
17 college districts, one of them actually has to get shot,
18 exceeds the standard they apply to the federal analysis.

19 So, again, I think 51000 is legally compelling,
20 sufficient on its own. Second, the facts in *Kern* don't
21 match. And you can't get to POBR because you can't get
22 the evidence they seem to think they need.

23 CHAIR REYES: I'll go to Ms. Shelton and then
24 I'll go to Commissioner -- oh, you're not?

25 Okay, Commissioner Glaab will go after

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1 Ms. Shelton.

2 Go ahead, Ms. Shelton, respond to that and then
3 we'll go --

4 CAMILLE SHELTON: Just to kind of clarify the
5 discussion, these are interesting arguments and they are
6 good arguments. There's not a lot of case law to help
7 the situation.

8 You have two federal mandate cases: One, in
9 the *City of Sacramento* case where the statute plainly
10 said as a consequence "there shall be double taxation if
11 you don't comply."

12 That's different than this case, where it gives
13 the authority to the chancellor to impose whatever
14 consequence the chancellor sees fit. That was the key
15 distinguishing factor, at least for me, when I was
16 reviewing this case.

17 In *Hayes*, you did have things actually occur.
18 Litigation was actually occurring. You had the language
19 saying you would lose all of your funding, you know,
20 directly, without the discretion there. Those are key
21 differences between those statutes and this one here.
22 And that's why we have the recommendation based on what
23 we have here.

24 CHAIR REYES: Commissioner Glaab?

25 MEMBER GLAAB: Thank you, Mr. Chairman and

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1 Members.

2 I certainly want to comply with our mandate
3 here of adjudicating cases, but some of the issues that
4 Mr. Petersen raises resonates with me.

5 And I'm just wondering -- I might be the only
6 person up here -- but might it be worthwhile to bring
7 it back to the next meeting and allow Mr. Petersen and
8 staff to work some of these things out? Because I think
9 there's a lot of back and forth here. And I think that
10 that might prove of benefit. But, again, I'm just one
11 commissioner.

12 Thank you.

13 CHAIR REYES: Finance, I have not given you a
14 chance to comment.

15 MS. GEANACOU: That's okay.

16 Susan Geanacou for the Department of Finance.

17 Finance overall supports the final staff
18 analysis on this issue. And in particular, we support
19 Mr. Louie's comments just a few minutes ago about lack of
20 certainty regarding any adverse or severe consequences.

21 And I think I also observed that the staff
22 draws a distinction in the analysis between entitlement
23 to receive state aid versus the actual receipt of aid.
24 I defer to staff on what they're observing, but I think
25 that's a key distinction in the analysis as well.

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1 CHAIR REYES: Okay.

2 MR. PETERSEN: I would like to respond to that.

3 CHAIR REYES: Okay.

4 MR. PETERSEN: Does anybody see any substantive
5 legal difference in that statement, "being entitled to"
6 and "receiving it"?

7 CHAIR REYES: Ms. Shelton?

8 CAMILLE SHELTON: Just under the rules of
9 statutory construction, the Legislature chose to put that
10 word in there for a reason. And they could have just
11 said, "directly the receipt of state aid." They chose to
12 say, "entitlement to the receipt of state aid." So it
13 has to have meaning.

14 MR. PETERSEN: But we know they're entitled by
15 their mere existence as community colleges. And that
16 entitlement is subject to an action after the fact if
17 they fail to comply.

18 MR. LOUIE: It indicates that a failure to
19 comply doesn't necessarily lead to a direct loss of
20 funds.

21 MR. PETERSEN: No, it doesn't. That's --

22 MR. LOUIE: That's what occurred in *San Mateo*.

23 MR. PETERSEN: That's what occurred, but it
24 doesn't say that.

25 MR. LOUIE: That's what entitlement -- if you

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1 don't --

2 MR. PETERSEN: Okay, we --

3 MR. LOUIE: We disagree on the terms.

4 CHAIR REYES: There's clearly a disagreement on
5 that perspective, okay.

6 A few minutes ago, we actually had a motion and
7 a second.

8 I don't know if the maker of the motion wants
9 to rescind the motion and go with Commissioner Glaab, or
10 do you still stand by your motion?

11 MEMBER CHIVARO: I stand by the motion.

12 CHAIR REYES: And the second?

13 MEMBER LUJANO: Yes.

14 CHAIR REYES: So we have a motion and a second.

15 Are there additional comments or questions from
16 the board or from the public?

17 Yes, Mr. Alex?

18 MEMBER ALEX: I have a question.

19 I'm a little unclear on the first -- on issue
20 number five, in the order that you brought it up.

21 When does practical compulsion need to be
22 raised? And is that purely factual?

23 That's for counsel.

24 CHAIR REYES: Is that a question to --

25 MEMBER ALEX: For counsel. For Ms. Shelton.

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1 MR. PETERSEN: Is that on due process?

2 CHAIR REYES: Ms. Shelton. That's a question
3 to Ms. Shelton?

4 MEMBER ALEX: Yes.

5 CAMILLE SHELTON: Under mandates law, I'll let
6 Mr. Petersen just direct the answer with respect to his
7 claim.

8 You have to find whether or not there is a
9 mandated program. And there are two ways that you can do
10 that.

11 Clearly, the law says, based on the
12 Constitution, that they have to be mandated by the State.
13 There has to be strict legal compulsion. And that is
14 based on the plain language of the statute.

15 The courts have suggested, although they have
16 yet to find, a situation where the local government has
17 been practically compelled by the circumstances.

18 Under that situation, you have to show that
19 despite the language or the silence of their
20 discretionary triggering decision, that the downstream
21 requirements are practically compelled because there are
22 certain and severe penalties imposed if they fail to
23 comply. That is a first element of finding whether or
24 not there's a reimbursable state-mandated program.

25 The practical compulsion is based on you have

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1 to have facts and evidence in the record, but ultimately,
2 it is a question of law.

3 MEMBER ALEX: But those facts would be in the
4 record at this point?

5 CAMILLE SHELTON: Right.

6 MEMBER ALEX: And your finding was that there
7 are no facts to give rise to a practical compulsion
8 determination?

9 CAMILLE SHELTON: That's correct.

10 MEMBER ALEX: Thank you.

11 CHAIR REYES: Okay, any further discussion?

12 *(No response)*

13 CHAIR REYES: Call the question, Mr. Bohan.

14 MR. BOHAN: Mr. Alex?

15 MEMBER ALEX: Aye.

16 MR. BOHAN: Mr. Chivaro?

17 MEMBER CHIVARO: Aye.

18 MR. BOHAN: Mr. Glaab?

19 MEMBER GLAAB: Aye.

20 MR. BOHAN: Mr. Lujano?

21 MEMBER LUJANO: Aye.

22 MR. BOHAN: Ms. Olsen?

23 MEMBER OLSEN: Aye.

24 MR. BOHAN: Mr. Worthley?

25 MEMBER WORTHLEY: No.

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1 MR. BOHAN: And Chair Reyes?

2 CHAIR REYES: Aye.

3 The motion carries. Thank you.

4 Mr. Louie, do you want to take us through
5 Item 5, please?

6 MR. LOUIE: So, Item 5, the only issue before
7 the Commission is whether the proposed Statement of
8 Decision accurately reflects the Commission's decision on
9 the *Discrimination Complaint Procedures* test claim.

10 Staff will update the final Statement of
11 Decision reflecting the witnesses testifying and the vote
12 count in Item 4.

13 CHAIR REYES: Thank you.

14 Are there any comments --

15 MEMBER OLSEN: Mr. Chairman?

16 CHAIR REYES: Yes?

17 MEMBER OLSEN: I just want you to know that I
18 will have to abstain from this vote because my packet did
19 not include Item 5. I assumed that it was coming in
20 later mail, and it never came, so...

21 CHAIR REYES: Our apologies for that.

22 MEMBER OLSEN: That's okay.

23 MEMBER WORTHLEY: Mr. Chairman, if I recall, we
24 wanted to bring this back actually because of the fact
25 that he's withdrawing a portion of -- that's not

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1 necessary today?

2 CAMILLE SHELTON: He is not withdrawing. He
3 decided not to withdraw. We would handle that during
4 P's & G's.

5 MEMBER WORTHLEY: Okay, very good. Thank you.

6 MEMBER CHIVARO: I'll move staff recommendation
7 for approval.

8 CHAIR REYES: Staff recommendation has been
9 moved.

10 Is there a second?

11 MEMBER ALEX: Second.

12 CHAIR REYES: Okay, it's been moved and
13 seconded.

14 Any additional discussion or comments?

15 *(No response)*

16 CHAIR REYES: Call the question.

17 MR. BOHAN: Mr. Alex?

18 MEMBER ALEX: Aye.

19 MR. BOHAN: Mr. Chivaro?

20 MEMBER CHIVARO: Aye.

21 MR. BOHAN: Mr. Glaab?

22 MEMBER GLAAB: Aye.

23 MR. BOHAN: Mr. Lujano?

24 MEMBER LUJANO: Aye.

25 MR. BOHAN: Ms. Olsen --

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1 MEMBER OLSEN: Abstaining.

2 MR. BOHAN: -- you're abstaining.

3 Mr. Worthley?

4 MEMBER WORTHLEY: Aye.

5 MR. BOHAN: And Mr. Reyes?

6 CHAIR REYES: Aye.

7 Thank you.

8 MR. PETERSEN: Thank you.

9 CHAIR REYES: Okay, we're on Item 6. And,
10 Senior Staff Counsel Heather Halsey will present this,
11 entitled the *School Facilities Funding Requirements* test
12 claim.

13 MS. HALSEY: Good morning.

14 This test claim addresses activities required
15 of school districts as a condition of receipt of school
16 facility funding pursuant to the test-claim statutes and
17 regulations.

18 The primary issue in this test claim is the
19 following: Staff finds that the decisions to acquire a
20 new school site, build a new school, undertake a school
21 modernization project, add portable classrooms and accept
22 state facility program funding, issue local bonds or
23 participate in one of the other voluntary programs put in
24 this test claim are discretionary decisions; and that
25 based on the analysis in *Kern*, the downstream requirement

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1 to comply with *School Facilities Funding Requirements* is
2 not reimbursable.

3 Additionally, staff finds there is no evidence
4 in the record to support a finding of practical
5 compulsion.

6 Claimant disagrees, asserting school districts
7 are legally and practically compelled to build new
8 schools and otherwise provide additional classrooms.

9 Staff recommends that the Commission adopt the
10 staff analysis to deny the test claim.

11 Will the parties and witnesses please state
12 your name for the record?

13 MR. PALKOWITZ: Good morning. Art Palkowitz on
14 behalf of plaintiff -- I'm sorry, the claimant.

15 MS. FEREBEE: Donna Ferebee for the Department
16 of Finance.

17 CHAIR REYES: Thank you.

18 Are there any questions from the members?

19 MEMBER CHIVARO: No.

20 CHAIR REYES: Please.

21 MR. PALKOWITZ: Thank you.

22 The claimant brought this test claim that was
23 filed back on June 23rd, 2003.

24 And what the claimant is requesting is that the
25 activities that relate to schools to receive funding,

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1 whether it be state funding or issue bonds, that those
2 activities are a reimbursable mandate.

3 I would like to try to express to you in the
4 next few minutes on why we believe there is legal and
5 practical compulsion to find the mandate.

6 As stated in the analysis by staff on page 45,
7 Article XIIIIB of the California Constitution states,
8 *"The purpose is to preclude the State from shifting*
9 *financial responsibility for carrying out government*
10 *functions to local agencies which are ill-equipped to*
11 *assume increased financial responsibilities because of*
12 *the taxing and spending limitations."*

13 What we have before us today is the following:
14 It is clear, as pointed out in the analysis, that public
15 education is a statewide concern. That is not a concern
16 that is brought about by local agencies. The courts have
17 been clear on this.

18 What we have is that once a school decides to
19 build a new facility, it must comply with numerous
20 state-agency requirements. Those requirements start out
21 with the CDE -- California Department of Education -- to
22 have a site approval, to have final plans approved by
23 them, to go through escrow.

24 They're required to comply with the Division of
25 State Architects, DSA, regarding the construction of a

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1 school. They're required to comply with the Field Act.

2 Building a school is quite a task; and it's a
3 task that is required by the State.

4 What is trying to be decided here today is, are
5 those requirements and activities a state mandate?

6 We believe there's a legal compulsion by the
7 requirement that the State require the school district
8 provide public education; and there's practical
9 compulsion.

10 I would like to go through those analyses and
11 cover any questions you might have.

12 Once a school is built, it's the State that
13 owns the property. The school is only a trustee. The
14 district or a local agency is building a school for the
15 State, yet it's the burden, because Prop. 13 doesn't
16 allow the local agency to levy taxes.

17 This is exactly what the Legislature had in
18 plan when they thought and realized that the government
19 of the State is going to pass these financial burdens to
20 the local agencies.

21 This is the perfect textbook example: You are
22 required to build schools. You must have public
23 education, but we can't pay for it. So down at the local
24 agency, it's going to be your responsibility. But once
25 you have that responsibility, we want you to comply with

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1 all the state laws that are related to it.

2 This is exactly what it is, is a shifting of
3 the burden to a local agency. That is prohibited by
4 Article XIII, and schools should be reimbursed for those
5 activities.

6 I submit that the practical compulsion of not
7 building a school is what exactly the courts were looking
8 at when they talked about severe consequences.

9 Public education consists of nearly 40 percent
10 of the State's budget. This is a high priority. This is
11 a draconian consequence if a school is not built.

12 Now, the staff analysis goes through a detailed
13 example of options what may be done before you decide to
14 build a school. And I agree, those are options a school
15 must go through before making that decision. However,
16 after these options are analyzed, I believe that the
17 schools are taking these options into consideration
18 before they're building, whether it be transferring
19 students or creating a double session of kindergarten
20 classes or moving boundary changes or multi-track or
21 bussing or reopening closed schools. That is analysis
22 that is gone through by the districts.

23 The districts are not opening schools before
24 this analysis and then making a decision that is not
25 complete and is also voluntary. It's a decision that is

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1 done after all other alternatives have been looked at.

2 It is clear that the public education and
3 providing education at the local level is an enhanced
4 service to the public, it's a new activity, and what is
5 defined under the mandate law as a basis for having
6 reimbursable mandates.

7 The claimant doesn't have any dispute with the
8 decision regarding the hazardous waste and other items
9 I'm not discussing, as those, I agree, are not only
10 impacting local agencies, it also impacts the private
11 sector.

12 However, we are adamant on our contention that
13 the funding requirements that affect schools is a
14 reimbursable mandate.

15 Thank you.

16 CHAIR REYES: Thank you.

17 Finance?

18 MS. FEREBEE: Yes. Donna Ferebee for the
19 Department of Finance.

20 The Department of Finance agrees with the final
21 staff analysis, that there is neither a legal, nor
22 practical compulsion to construct or build a school.

23 Thank you.

24 CHAIR REYES: Ms. Halsey, do you want to
25 respond to any of the issues raised by the claimant, or

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1 do you feel you've done so in your write-up already?

2 MS. HALSEY: No, not unless the members have
3 any particular questions.

4 CHAIR REYES: Do the members have any
5 questions?

6 *(No response)*

7 CHAIR REYES: Does anybody in the audience have
8 any comments?

9 *(No response)*

10 CHAIR REYES: Okay, Mrs. Olsen?

11 MEMBER OLSEN: I'll move the staff analysis on
12 this one.

13 MEMBER CHIVARO: Second.

14 CHAIR REYES: The staff analysis has been moved
15 and seconded.

16 Okay, all in favor, say aye -- or no, you take
17 the roll call. I'm sorry, I forget.

18 MR. BOHAN: Sure.

19 Mr. Alex?

20 MEMBER ALEX: Aye.

21 MR. BOHAN: Mr. Chivaro?

22 MEMBER CHIVARO: Aye.

23 MR. BOHAN: Mr. Glaab?

24 MEMBER GLAAB: No.

25 MR. BOHAN: Mr. Lujano?

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1 MEMBER LUJANO: Aye.

2 MR. BOHAN: Ms. Olsen?

3 MEMBER OLSEN: Aye.

4 MR. BOHAN: Mr. Worthley?

5 MEMBER WORTHLEY: No.

6 MR. BOHAN: And Mr. Reyes?

7 CHAIR REYES: What's the vote right now?

8 CAMILLE SHELTON: 4-2.

9 CHAIR REYES: 4-2, right? We need four, right?

10 I am going to abstain only because I'm very
11 biased, since I also chair the State Allocation Board.

12 And in all fairness, I just...

13 Thank you.

14 The motion carries.

15 MR. BOHAN: That brings us to the next item,
16 which is Item 7, and Heather Halsey will introduce this
17 one as well.

18 MS. HALSEY: Staff recommends that the
19 Commission adopt the proposed Statement of Decision.
20 The sole issue before the Commission is whether the
21 proposed Statement of Decision accurately reflects the
22 decision of the Commission on Item 6.

23 Minor changes to reflect witnesses and vote
24 count will be included in the final Statement of
25 Decision.

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1 CHAIR REYES: Thank you.

2 MEMBER OLSEN: I'll move the Statement of
3 Decision.

4 MEMBER CHIVARO: Second.

5 CHAIR REYES: Are there any comments from the
6 public?

7 *(No response)*

8 CHAIR REYES: All in favor -- Drew?

9 MR. BOHAN: Mr. Alex?

10 MEMBER ALEX: Aye.

11 MR. BOHAN: Mr. Chivaro?

12 MEMBER CHIVARO: Aye.

13 MR. BOHAN: Mr. Glaab?

14 MEMBER GLAAB: Aye.

15 MR. BOHAN: Mr. Lujano?

16 MEMBER LUJANO: Aye.

17 MR. BOHAN: Ms. Olsen?

18 MEMBER OLSEN: Aye.

19 MR. BOHAN: Mr. Worthley?

20 MEMBER WORTHLEY: Aye.

21 MR. BOHAN: And Mr. Reyes?

22 CHAIR REYES: I'll abstain.

23 MR. BOHAN: Abstain.

24 That brings us, Mr. Chairman, to the next item
25 on the agenda, which is Item 8.

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1 And Senior Staff Counsel Eric Feller will
2 present this item. It's entitled *Municipal Storm Water*
3 *and Urban Runoff*, and it's the proposed parameters and
4 guidelines and Statement of Decision for this matter.

5 MR. FELLER: Good morning.

6 The parameters and guidelines for the test
7 claim are based on a permit issued by the Los Angeles
8 Regional Water Quality Control Board.

9 The Commission approved the test claim for
10 placing and maintaining trash receptacles at transit
11 stops and local agencies not subject to a trash TMDL.

12 The primary issue in dispute is whether the
13 installation activities in the parameters and guidelines
14 are reasonably necessary to comply with the mandate. The
15 LA Regional Water Board and Department of Finance contend
16 the activities go beyond the scope of the mandate, but
17 the claimants contend that they are reasonably necessary
18 to comply with it.

19 Staff finds that the activities in the
20 parameters and guidelines are reasonably necessary to
21 comply with the mandate.

22 Staff also limited activities to one time per
23 transit stop, limited pickup to no more than three times
24 per week, and deleted graffiti removal as a reimbursable
25 activity.

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1 The Department of Finance and State
2 Controller's Office also assert that the reasonable
3 reimbursement methodology should not be adopted but
4 reimbursement should be based on actual costs.

5 Staff finds that there is substantial evidence
6 in the record to support the reasonable reimbursement
7 methodology, or RRM, of \$6.74 for the ongoing maintenance
8 activities, and that the RRM complies with the statutory
9 requirements.

10 Staff recommends that the Commission adopt this
11 analysis as its decision and the attached parameters and
12 guidelines and reasonable reimbursement methodology as
13 modified by staff, allowing for minor changes, including
14 reflecting the witnesses and vote count and the proposed
15 clarifying changes submitted by Claimant Los Angeles
16 County on green-colored paper that you should have before
17 you.

18 Will the parties and witnesses please state
19 your names for the record?

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

21 MR. BURHENN: David Burhenn for the City
22 claimants.

23 MR. WALKER: Jon Walker, County of Los Angeles.

24 MS. BUI: Wendy Bui, County of Los Angeles.

25 MR. LAL: Jay Lal, State Controller's Office.

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1 CARLA SHELTON: Carla Shelton, Department of
2 Finance.

3 CHAIR REYES: Thank you.

4 MS. GEANACOU: There are folks back here, if
5 you want this on the record.

6 CHAIR REYES: Okay. Yes, please.

7 MS. GEANACOU: Susan Geanacou, for the
8 Department of Finance.

9 MR. SPANO: Jim Spano, State Controller's
10 office.

11 CHAIR REYES: Thank you.

12 Are there any questions from the members at
13 this point?

14 *(No response)*

15 CHAIR REYES: Mr. Kaye?

16 MR. KAYE: Good morning. It's a pleasure being
17 here, even though it's a rainy morning.

18 And we'd like to, first of all, thank staff for
19 their diligence and very finely crafted decision and
20 analysis on this matter. I think it reflects an awful
21 lot of work. And we also have been diligent in trying to
22 be responsive to State agency concerns.

23 What we have, I think, before you is a staff
24 recommendation that we heartily endorse and agree with.

25 We have requested a tiny, clarifying change on

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1 some of the language which Eric referred to; and that is
2 before you as well. And we're prepared to answer any
3 questions you, as commissioners, have for us this
4 morning.

5 Thank you.

6 MR. BURHENN: Good morning, Chair Reyes and
7 Members of the Commission. My name is David Burhenn. We
8 represent the City claimants on this test claim.

9 I would like to echo Mr. Kaye's appreciation
10 for the hard work on this pioneering matter in terms of
11 the municipal storm water area.

12 We also would like to note that we also agree
13 with the suggested change on your green sheet.

14 And finally, we also would like to urge the
15 Commission to approve the reasonable reimbursement
16 methodology, which has been, I think, crafted with a good
17 deal of care through the work largely led by Mr. Kaye
18 with his Excel spreadsheet. I should be kept away from
19 all numbers.

20 Thank you very much.

21 CHAIR REYES: Is that a reimbursable mandate
22 right there, because you broke that?

23 MR. WALKER: Thank you, Commissioners and
24 Chair.

25 On behalf of the County of Los Angeles, I'd

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1 like to, again, thank staff as well, and just indicate
2 that we are pleased to be here and that we're pleased to
3 concur with the staff's recommendation.

4 MS. BUI: Hi. I'm Wendy Bui, also County of
5 Los Angeles. Thanks for having us here today.

6 I also, of course, agree with the
7 recommendations. And my involvement has been coming up
8 with the costs for the County.

9 So thank you.

10 MR. LAL: Chairperson, Commission Members, my
11 name is Jay Lal with the State Controller's Office.

12 Our office has reservations on approval of this
13 RRM for two reasons.

14 First, it is based on a survey response of
15 seven of 85 city/county-reported expenditures that have
16 not been validated.

17 Secondly, the respondents' survey developed by
18 the Cities and County, resulted in greater costs for the
19 eight cities/county sampled than what expenditures they
20 stated as actual on the survey over the seven-year
21 period.

22 CHAIR REYES: Finance?

23 CARLA SHELTON: Good morning. Carla Shelton,
24 Department of Finance.

25 We would like to recognize or acknowledge that

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1 the claimants addressed some of our concerns noted in our
2 comments. However, we continue to believe that some of
3 the activities found to be reasonably necessary to carry
4 out the mandate go beyond the scope of the mandate.

5 CHAIR REYES: Okay, so you disagree with some
6 of the activities that are being costed out?

7 CARLA SHELTON: Right. Yes, such as on page --
8 I want to say, I want to say, 14 -- wait, page 29, excuse
9 me -- were it says "for one-time costs," installation of
10 pads is okay.

11 But also where it says under B.4, under the
12 RRM, they also can claim the costs --

13 CHAIR REYES: What page are you on again?

14 CARLA SHELTON: Oh, I'm sorry. Excuse me,
15 page 4. I apologize.

16 CHAIR REYES: Page 4.

17 I'm trying to read along with you.

18 CARLA SHELTON: I apologize.

19 MR. FELLER: Page 4 of the parameters and
20 guidelines, I believe that's the same as page 30 of the
21 analysis.

22 CHAIR REYES: Okay, great.

23 CARLA SHELTON: I apologize. Okay.

24 There's actual costs, one-time costs for
25 installing pads. But then also under "B," to maintain

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1 the trash receptacles, the maintenance of installing pads
2 also can be claimed under the reasonable reimbursement
3 methodology rate.

4 So, again, the Commission has the authority to
5 determine that these activities are reasonably necessary
6 to implement the mandate. But we still feel like these
7 activities go beyond the scope of the mandate.

8 CHAIR REYES: Mr. Feller?

9 MR. FELLER: I'd just like to point out that
10 the one-time costs are for transit stops that are moved.

11 The ongoing costs are for receptacles pads that
12 go missing or become damaged beyond use; and that all the
13 activities in "B" are covered under the \$6.74 RRM, so
14 there is no extra payment for those replacement or
15 installations for missing trash receptacles. They're all
16 covered through the RRM -- all the activities under B,
17 ongoing activities for maintenance.

18 CHAIR REYES: Any questions from the Members?

19 MEMBER CHIVARO: Does Finance have a position
20 on the RRM?

21 CARLA SHELTON: Our position is that we don't
22 have -- at this point, we don't have any -- we have
23 concerns with the RRM because, again, it's based on those
24 activities found to be reasonably necessary to carry out
25 the mandate. So we will go on record noting that.

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1 CHAIR REYES: Ms. Olsen?

2 MEMBER OLSEN: Mr. Chairman, could I get some
3 clarification from staff?

4 On the green sheet, are you guys -- is staff
5 okay, they've evaluated this, and you're okay with the
6 change on the green sheet?

7 MR. FELLER: Correct. Yes, the recommendation
8 was -- the staff recommendation included those clarifying
9 changes.

10 MEMBER OLSEN: Thank you.

11 MS. GEANACOU: Can I ask a question?

12 CHAIR REYES: Yes. Finance, do you want to get
13 to the mike so we can go on record, please?

14 Thank you.

15 MS. GEANACOU: I have a loud voice.

16 I just wanted to hear whether Commission staff
17 had any feedback on the State Controller's Office
18 concerns raised about the proposed RRM and the costs that
19 underlie it. That may very well affect Finance's
20 position on it regarding the receptivity of the
21 Commission to have some doubts about its accuracy for
22 reimbursing the claimants.

23 MEMBER ALEX: I had the same question, which is
24 the survey issue raised and whether you have comments on
25 that survey.

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1 MR. FELLER: The concerns that I'm hearing
2 today were raised for the first time today, so staff
3 hasn't had time to really consider those.

4 CHAIR REYES: And that is, that you have seven
5 out of 85 surveys?

6 MR. FELLER: Yes.

7 CHAIR REYES: Okay.

8 MEMBER CHIVARO: And what's the difference
9 between the actual costs on those surveys and the hourly
10 rate that's been approved?

11 MR. KAYE: Okay, Commissioner Chivaro?

12 MEMBER CHIVARO: Yes?

13 MR. KAYE: I have prepared, in anticipating
14 that this issue would come up, I've prepared an analysis
15 with two schedules. I can distribute that now for --

16 MEMBER CHIVARO: That would be helpful.

17 MR. KAYE: -- just to go along with the talking
18 points.

19 MEMBER CHIVARO: Okay, sure.

20 MR. LAL: Our analysis has, over the seven-year
21 period, it's a 14 percent increase over the actual costs.

22 CHAIR REYES: The City frowns on that number.
23 Do you want to articulate that frown?

24 MR. BURHENN: I haven't seen the analysis,
25 Chair Reyes. And, though, again, as I previously

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1 indicated to the commissioners, I stay away from numbers.

2 MR. KAYE: Okay, you'll be getting your copy in
3 a minute.

4 CHAIR REYES: I do have good news for the
5 audience: The crazy staff person that was pushing for
6 reasonable reimbursement methodology no longer works in
7 the Assembly. So just -- that's good. No crazy ideas
8 will be forthcoming.

9 MR. KAYE: Okay, as I say, this is -- was
10 prepared in anticipation that this issue would come up.
11 There is also the issue of equity between City and County
12 claimants and so forth.

13 So going to Schedule 1, you see that the unit
14 costs under column A, is the actual unit cost. This is
15 simply a result of the actual costs that were measured by
16 each claimant -- I'm sorry, do we have -- I guess our
17 friends and -- we're waiting to distribute the copy to
18 the State Controller and Finance.

19 Okay, so we have, under column A, the actual
20 unit cost for these claimants. And you will see that if
21 you do a straight, non-weighted average cost, considering
22 the unit cost for each claimant to weigh the same amount,
23 you come up with an average cost of \$8.60. That's
24 column B.

25 Then what I did was, I subtracted the average

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1 unit cost from their actual cost, and I came up with the
2 variance by jurisdiction. Some were over -- three were
3 over -- excuse me, four were over and three were under.
4 So the net difference, as you would expect, would be
5 zero.

6 Okay, next, I computed the number of pickups.
7 That goes to the issue of overall, what would be the cost
8 to the State? Because you just multiply the average unit
9 cost times the number of pickups. And what I did is,
10 I just multiplied it by the difference. So, for example,
11 Los Angeles County, using the straight average of
12 \$8.60 -- as an RRM -- would be gaining \$3,719.24 over
13 their actual cost.

14 Then what I did is, I did the same for each
15 respondent.

16 The bottom line would be that the State would
17 lose, using this methodology, \$13,398.39.

18 Okay, next, what I did was I illustrated what
19 it would be under the averaging method that I actually
20 used to compute the \$6.74.

21 What I did was, I took the same unit cost; but
22 this time, I weighted it, saying that we have, for
23 example, 2,513 pickups in Los Angeles County but only
24 39 pickups in the City of Azusa. So to weight them the
25 same, I think, would create a statistical anomaly. And

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1 so what I did is, I came up with a weighted average of
2 \$6.74.

3 And as you can imagine, this weighted average
4 caused various dispersions about the mean on the
5 unit-cost basis; but you can see from column E, that we
6 had the percentage gains or losses come out pretty
7 neutral.

8 So to answer the State Controller's Office's
9 concerns, basically using the actual costs from our
10 survey, translating that into a unit cost that's based on
11 the weighted average, is exactly within \$28.95 what our
12 actual costs would be.

13 CHAIR REYES: But how do we answer the
14 question, that if these dollars work for the seven, what
15 about the other folks who -- I mean, the sample survey is
16 small in their perspective.

17 MR. KAYE: Well, it's small in terms of the
18 number of claimants.

19 In terms of the number of pickups, you're
20 looking at 4,000, 7,000, 8,000, 9,000. I would say that
21 that's 50, 60 percent of all pickups.

22 Maybe Dave could indicate the number of cities
23 that are entitled to reimbursement, and indicate whether,
24 you know, they're large or small. But I expect, in terms
25 of the number of pickups, that this is at least 50 or

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1 60 or 70 percent of all pickups in the County of
2 Los Angeles, in the cities that are affected.

3 CHAIR REYES: Ms. Shelton, you were going for
4 the mike.

5 CAMILLE SHELTON: In the staff analysis, when
6 we've dealt with these before, we've tried to determine
7 whether the proposal is representative of the eligible
8 claimant pool. And in this case, based on the
9 information that we had, we did feel that it did
10 represent both large and small agencies, although it did
11 only have seven of the 85 or 88 claimants. It was
12 representative of both types of entities in that area,
13 LA area.

14 Let me just -- if this helps, 17518.5 requires
15 that the Commission look at a couple of factors when
16 adopting an RRM.

17 Well, first, it is based on approximations of
18 local costs and it is not based -- it doesn't have to be
19 based on actual costs incurred. But you do need to find
20 that it is based on cost information provided by a sample
21 of eligible claimants, and that the approximation shall
22 consider the variation and costs among local agencies to
23 implement the manner in a cost-efficient manner.

24 CHAIR REYES: Yes, sir?

25 MEMBER WORTHLEY: Mr. Chairman, I'm prepared to

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1 move the staff recommendation as amended with the
2 clarification language.

3 MEMBER OLSEN: I'll second.

4 CHAIR REYES: We have a second.

5 Is there any additional comments or questions
6 from anybody?

7 Yes?

8 MR. SPANO: I'm Jim Spano. I'm the bureau
9 chief for the Division of State Controller's Office.

10 And just to address on Susan's and Jay's
11 concerns about the activities being audited right now,
12 from the audit perspective, we can actually look at the
13 survey, cities and counties, not to question the
14 methodology, but just to validate the underlying costs
15 used in developing the RRM as an alternative.

16 MR. KAYE: Okay, could I respond to that?

17 CHAIR REYES: Well, I want to make sure I
18 understand.

19 So what would you do then?

20 MR. SPANO: Basically, what I'm saying is that
21 Susan and Jay brought up that the cost has not been
22 verified.

23 The comment I'm making is that we can actually
24 go out to those seven -- those eight -- six, seven or
25 eight entities that were surveyed, and actually look at

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1 the data that was used in reporting the actual costs to
2 validate that those costs are true and correct.

3 CHAIR REYES: And how long would that take you?

4 MR. SPANO: I would think that we can do it
5 within six months; and we'd try to get it done earlier,
6 if we can.

7 MR. KAYE: May I respond to that?

8 CHAIR REYES: Yes.

9 MR. KAYE: This is Leonard Kaye, County of
10 Los Angeles.

11 I'd like to read into the record -- again, we
12 didn't put this in the P's & G's, but I think Commission
13 staff, in anticipation of this issue coming up -- and I'd
14 like to read this into the record because it's very, very
15 pertinent to Jim Spano's concerns.

16 *"The reasonable reimbursement methodology" --*
17 *this is under the proposed parameters and guidelines,*
18 *section 7, Records Retention, B, Reasonable Reimbursement*
19 *Methodology: "Pursuant to Government Code section*
20 *17558.5(a), a reimbursement claim for actual costs filed*
21 *by a school district pursuant to this chapter is subject*
22 *to the initiation of an audit by the Controller no later*
23 *than three years after the claim," and so forth.*

24 And I'll just skip.

25 *"Pursuant to Government Code 17561(d)(2), the*

1 *Controller has the authority to audit application of a*
2 *reasonable reimbursement methodology."*

3 So built into the P's & G's are exactly what
4 Jim Spano has just mentioned.

5 Not only that, but we must retain documentation
6 which supports the reimbursement of the maintenance cost
7 identified in section 4(b) -- that's the reasonable
8 reimbursement methodology -- these parameters and
9 guidelines during the period subject to audit, including
10 documentation showing the number of trash receptacles
11 in the jurisdiction and the number of trash collections
12 of pickup. If an audit has been initiated by the
13 Controller during the period subject to the audit, the
14 record-retention period is extended until the ultimate
15 resolution of any findings.

16 So I believe, Commissioners, you have put into
17 concrete our liability for audit. And Mr. Spano is
18 certainly welcome anytime to come down and visit us.

19 Thank you.

20 CHAIR REYES: Mr. Spano?

21 MR. SPANO: Yes, just from my perspective, we
22 would not be auditing a claim. And I'm not sure -- I
23 wouldn't consider this an audit of a claim. This is just
24 an opportunity to validate costs that were incurred. So
25 I'm not sure there's a distinction; but we're not -- you

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1 know, 17558.5 talks about auditing a claim right now.
2 A claim has not been filed yet. This is actually
3 auditing the validity of data being used in developing an
4 RRM.

5 CHAIR REYES: Ms. Shelton?

6 CAMILLE SHELTON: Let me just kind of indicate
7 a couple of things when this statute was adopted. I
8 think -- and certainly Mr. Reyes can speak to this,
9 too -- but my understanding of when the statute was
10 adopted, was to allow the Commission to adopt an RRM
11 without having an audit of the actual costs occur before
12 a number was put into the parameters and guidelines.

13 It was supposed to balance simplicity with
14 accuracy. It wasn't, you know, prepared or placed into
15 statute for a perfection on actual cost. This RRM is
16 based on actual costs.

17 Let me just clarify a couple of things, though,
18 about the language that Mr. Kaye was mentioning in the
19 P's & G's.

20 If the Commission adopts the RRM of \$6.74, that
21 number cannot be then challenged by the Controller's
22 office. All the State Controller's Office can do would
23 be to audit maybe the number of times of pickup by the
24 agency; but they can't change that number.

25 They can look for backup supporting

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1 documentation to see if the number of times are actually
2 the number of times, but they wouldn't be able to change
3 or audit to that number.

4 CHAIR REYES: So here's what I'm struggling
5 with: As we sat in this room and came up with this crazy
6 notion of reasonable reimbursement methodology, it was a
7 methodology that you are correct, that folks did not have
8 to go out there and dot every "I" and cross every "T" and
9 keep all the records in perpetuity because folks can come
10 back and look at it. But the notion was that there would
11 be an agreement by parties, though. And I'm not getting
12 that notion of agreement right now.

13 What I'm hearing is, there is discomfort by
14 Controller's -- there are fiscal state agencies that are
15 saying, "I'm concerned that the sample is too small,"
16 when you came with that.

17 I'm concerned that we're agreeing on the \$6.74,
18 that nobody has really taken a look at and said that, "It
19 should be 7, it could be 5, it could be 6. It's in the
20 ballpark."

21 If somebody had said, from one of the State
22 agencies, "We know that the price ranges from 5 to 10
23 bucks, and 6.74 is reasonable," then this commissioner
24 would be much more comfortable in saying, "Yeah, move
25 forward, and we now have agreement."

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1 But the goal was to minimize the going back and
2 forth. And that's one issue I'm struggling with: That
3 we now have proposed reimbursable methodology or costs
4 per unit of \$6.74. But the two parties to the State are
5 not quite there yet. They're not there yet on the sample
6 size even though it represents over 50 percent of the
7 pickups, and they're not quite there yet on the cost, the
8 potential range.

9 Am I misunderstanding the issue?

10 CARLA SHELTON: No.

11 CHAIR REYES: Okay. But I do recognize that
12 the goal was not to be able to go back and look at -- if
13 we agree on \$6.74, that is the price that we go on in
14 perpetuity. And if Mr. Spano's group goes out there and
15 finds out they're actually doing it for \$3.25, we're out
16 \$3.50.

17 Go ahead.

18 CAMILLE SHELTON: There can always be a request
19 to amend the P's & G's.

20 So if the Commission decides to adopt this just
21 based on actual costs and not adopt the RRM or to adopt
22 the RRM, you can always change it later if there's a
23 request coming before the Commission to change that
24 amount.

25 CHAIR REYES: Who would initiate that request?

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1 CAMILLE SHELTON: Anybody but the Commission.

2 CHAIR REYES: All right. And then at that
3 point, though, there's really no data by the claimants to
4 retain -- to show that, in fact, it's this or this,
5 because we said you don't have to.

6 CAMILLE SHELTON: That would be correct.

7 So one option, you know, certainly would be to
8 adopt an actual cost requirement and get data in a couple
9 of years, you know, to develop another RRM, if that's
10 what the Commission decides to do. That's an option.

11 CHAIR REYES: Mr. Feller?

12 MR. FELLER: I just want to remind the
13 Commission, the claimants have been doing these pickups
14 since 2002, I believe. So I suppose if this isn't the
15 right case for an RRM, we just don't know what is,
16 really.

17 CHAIR REYES: Yes, that's what I'm struggling
18 with, too.

19 Mr. Alex?

20 MEMBER ALEX: Do you have a sense for this time
21 period, if it's \$5 versus \$10, how much money is at stake
22 here?

23 MR. FELLER: I just have to defer to the
24 claimant's evidence in the record and remind the
25 Commission that they're under oath.

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1 MR. KAYE: Okay, well, you can get a ballpark
2 figure by multiplying the total number of pickups, which
3 maybe the entire universe would be 12,000, 14,000 pickups
4 by \$6.74.

5 So you're not looking at a huge amount of
6 money.

7 Now, that doesn't include the actual cost. I
8 think with the actual cost for the installation of the
9 pads and so forth, we did have some concerns expressed.
10 But generally, I think the State Controller's Office and
11 the State Department of Finance recognize now that we
12 have to install pads and do things like that.

13 So this is a small amount of money. I think
14 the risk to the State is very, very small. As Camille
15 Shelton pointed out, the State Controller, whoever, can
16 revisit this matter in a year or two, and so forth.

17 But we feel it's an important money-saver for
18 local government because we won't be counting pennies and
19 these minuscule amounts of funds; and also it should be
20 much, much lower. I'm sure the State has much bigger
21 things to audit than a few hundred thousand dollars in
22 claims, although every penny is important.

23 We would urge you to adopt this. A huge number
24 of folks, we've gotten a lot of the cities to support
25 this.

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1 We've got the CSAC to endorse our activities,
2 and CSAC has been helpful in doing that.

3 We've got the League of Cities to participate.
4 They've endorsed this amount.

5 And we feel pretty strongly that many of the
6 actual cost figures can easily be documented if it came
7 to that because they're based upon hard, contemporaneous,
8 actual cost information.

9 So we have no issues with that.

10 CHAIR REYES: Okay, I think there was a motion
11 and a second.

12 MEMBER WORTHLEY: Yes.

13 CHAIR REYES: And there was a second.

14 So are there any further questions or comments?

15 *(No response)*

16 CHAIR REYES: Are you ready for the question?

17 Okay, Mr. Drew?

18 MR. BOHAN: Mr. Alex?

19 MEMBER ALEX: Aye.

20 MR. BOHAN: Mr. Chivaro?

21 MEMBER CHIVARO: Aye.

22 MR. BOHAN: Mr. Glaab?

23 MEMBER GLAAB: Aye.

24 MR. BOHAN: Mr. Lujano?

25 MEMBER LUJANO: Aye.

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1 MR. BOHAN: Ms. Olsen?

2 MEMBER OLSEN: Aye.

3 MR. BOHAN: Mr. Worthley?

4 MEMBER WORTHLEY: Aye.

5 MR. BOHAN: Mr. Reyes?

6 CHAIR REYES: Aye.

7 MR. KAYE: Thank you.

8 CHAIR REYES: And I'd like to point out that
9 everybody was very happy with Mr. Feller's analysis. I
10 was also happy with Ms. Halsey's and Mr. Louie's
11 analysis.

12 MEMBER WORTHLEY: Yes, Mr. Chairman, I was
13 going to say, that Mr. Louie must feel badly. His was
14 a tome. I mean, I've read novels shorter than his
15 analysis.

16 CHAIR REYES: Thank you.

17 Item 9 has been pulled.

18 Item 10 has been pulled.

19 Item 11 was consent, 12 was consent, 13 was
20 consent.

21 I think we're on Item 14.

22 MR. BOHAN: I think that's right.

23 And we're shuffling chairs and bodies here.

24 But Program Analyst Heidi Palchik will be
25 handling this item, along with Senior Staff Counsel

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1 Heather Halsey. It's Item 14. It's adoption of proposed
2 amendments to our regulations. We're calling it the
3 Final Regulations to Implement Mandate Redetermination
4 Process.

5 Heidi?

6 CHAIR REYES: You can join us at the table if
7 you're going to be testifying.

8 Thank you.

9 MS. PALCHIK: Good morning.

10 On November 9th, 2010, the Commission adopted
11 emergency regulations to implement the new mandate
12 redetermination process pursuant to Government Code
13 section 17570.

14 At that time, the Commission also adopted an
15 order to initiate permanent regulations while those
16 emergency regulations were in effect.

17 This Item 14 would implement the permanent
18 regulations for the new mandate redetermination process.

19 Commission staff issued this rulemaking on
20 November 19th, 2010, with a 70-day comment period. And
21 during that time, the California School Boards
22 Association submitted comments urging the Commission to
23 resolve the ambiguity of Government Code section 17570,
24 modify the regulations to add a definition of
25 "materiality," and amend the regulations to say that

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1 the requester has the burden of proof to show by a
2 preponderance of the evidence that the change in law
3 would change the underlying determination.

4 Staff responded to CSBA's comments but
5 continues to recommend the language originally proposed.

6 Pursuant to Government Code section 17527, the
7 adopted permanent regulations must be transmitted to the
8 Office of Administrative Law by May 23rd, 2011, or the
9 emergency language would be repealed by operation of law
10 the following day.

11 Therefore, staff recommends that the Commission
12 find that no alternative would be more effective in
13 carrying out the purpose for which the regulations are
14 proposed, or would be as effective as, and less
15 burdensome to affected private persons than the proposed
16 regulations, and adopt the proposed amendments to
17 sections 1181.1 and 1181.2, and the addition of
18 Article X, effective 30 days after filing with the
19 California Secretary of State, and authorize staff to
20 make any non-substantive, technical corrections requested
21 by the Office of Administrative Law or Barclays Official
22 California Code of Regulations prior to publication.

23 Will the parties please state your name for the
24 record?

25 MS. CAPLAN: Good morning. Deborah Caplan.

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1 I'm with Olson, Hagel & Fishburn. I'm representing the
2 School Boards Association this morning.

3 CHAIR REYES: Thank you.

4 MS. CAPLAN: Thank you.

5 I would like to express my appreciation for the
6 comments provided by the staff in response to our earlier
7 letter.

8 I think that the comments in the response serve
9 to highlight some of the questions and concerns that we
10 raised initially.

11 I would say the primary one is this issue about
12 whether section 17570 is supposed to be used for any
13 change in liability, meaning, the amount that the State
14 owes to the local governments, or is it only to be used
15 for changes in liability, meaning, the liability for the
16 mandate determination: Ultimately, is there a mandate or
17 is there no mandate?

18 And as I'm sure everybody knows, if the statute
19 or executive order is what is submitted to the Commission
20 for determination under 17514 and also 17556, to find out
21 are there costs that are, by the statute or executive
22 order, imposed that are subject to reimbursement under
23 the Constitution.

24 Both of those decisions under 17514 and 17556
25 are essentially mandate or no mandate. In other words,

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1 the Commission either finds that the statute or executive
2 order imposes duties that are subject to reimbursement;
3 and if they do, then they decide which activities are
4 actually subject to reimbursement and how much those
5 are going to be reimbursed -- the amount of the
6 reimbursement. And under 17556, those are the exceptions
7 to finding the costs imposed by statute or executive
8 order.

9 So if the Commission finds that a statute or
10 executive order fits into those categories, then there
11 is no mandate.

12 So we have acknowledged, I think, in our
13 comments, that the statute itself is somewhat ambiguous.
14 And I think the ambiguity stems from two separate points
15 in the statute.

16 The first is that it says that a new test-claim
17 determination can be made or can be entered whenever the
18 State's liability is modified. And both of those words
19 are used: "Liability" is "modified."

20 So the staff has said: Well, "modified" means
21 any modification. So modification can be a change in the
22 amount owed.

23 And I think that that is -- technically, that's
24 probably correct. But if you look at it as the entire
25 phrase, which is whether the liability under XIII B(6) is

1 modified, then I think that language can and should be
2 read more narrowly to mean anytime the underlying mandate
3 determination is changed, that's when a new test-claim
4 determination is appropriate.

5 The staff does say that if a statute or
6 executive order is changed to add activities, those
7 are -- as I understand it -- and I stand to be corrected,
8 if I'm misreading or misunderstanding it -- that new
9 activities are subject to the new test-claim process,
10 meaning, that a claimant files a new test claim under
11 17551, and it goes through that process.

12 If activities are added or deleted, they could
13 also be subject to an amendment of the parameters and
14 guidelines, because the parameters and guidelines outline
15 which activities are subject to reimbursement.

16 So it seems to me that there is -- the second
17 conflict in the statute is that -- what it says is that
18 a change in law that requires a finding -- meaning, that
19 there's a new test-claim determination is required -- is
20 that a cost that is a cost mandated by the State as
21 defined by 17514, or is not a cost mandated by the State
22 pursuant to 17556, or a change in mandate law.

23 So the first two provisions, the reference to
24 17514 and the reference to 17556, I think, are pretty
25 clear that they go to the underlying ultimate mandate

1 determination.

2 But the third phrase, "or a change in mandate
3 law," possibly opens that up to mean any change in
4 liability, meaning, the amount that the State owes going
5 up or down. And I think that's where the staff comments
6 are largely focused.

7 And if you look at page 4 of the staff's
8 response, they give an example at the bottom of that
9 page, where they say -- they give the example of a
10 mandate that has multiple activities. And the State
11 adopts a statute that provides fee authority to reimburse
12 for the cost of one of the mandates -- one of the
13 activities, I'm sorry, not the mandate -- but one of the
14 activities. And then they say that this would be subject
15 to the new test-claim determination.

16 And then farther down on that page, they say
17 that either the addition or the deletion of activities
18 within a mandated program could trigger a new test-claim
19 determination.

20 I think that this is -- CSBA believes that this
21 is fundamentally inconsistent with the finality that's
22 supposed to attach to mandate decisions. So in other
23 words, unless the underlying mandate is changed in such
24 a way that -- or there's a change in mandate law such
25 that the underlying mandate is going to either be

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1 eliminated or a prior mandate that was denied is going
2 to be granted, that's the point of a new test-claim
3 determination.

4 Additions or deletions of activities within a
5 mandate should either be a new test claim under 17551,
6 or they should be a change in the parameters and
7 guidelines. Because, as I understand it -- and, again,
8 I could be corrected -- but, as I understand it, a change
9 under 17556, whether it's fee authority or additional
10 funding, if those are only partial, if they only go to
11 part of the mandate, they affect the amount to be
12 reimbursed, but they don't affect the underlying mandate
13 itself.

14 The mandate -- for instance, if fee activity
15 were given for one activity out of five, that would be an
16 offset, but it wouldn't eliminate the underlying mandate.
17 So I think that the -- and I understand that the statute
18 creates some of this ambiguity. But I think what we've
19 requested, is that the regulations take a narrow view of
20 the ambiguity and resolve it in a more conservative way
21 from the Commission's point of view, to say that only
22 those determinations that affect the underlying mandate
23 should be subject to the new test-claim determination
24 process.

25 Changes to activities within a mandate that

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1 don't go to the ultimate mandate should either be new
2 test claims under the regular process or they should be
3 changes -- amendments to the parameters and guidelines.
4 So I think that's a critical area of concern and
5 disagreement with the existing proposal.

6 The second area is the questions about the
7 burden of proof and the difference between the first
8 hearing and the second hearing.

9 CHAIR REYES: Can I stop you for a second?

10 MS. CAPLAN: Sure.

11 CHAIR REYES: Can I ask Ms. Shelton to address
12 the first issue? That way, we can follow it.

13 CAMILLE SHELTON: Thank you.

14 This is a complicated area. And I think, for
15 the most part, we agree with what CSBA is saying.

16 But I think -- we had a difficult time
17 understanding the comments. Because I think where the
18 breakdown of communication is occurring here is that CSBA
19 is talking about a decision, a prior decision on a whole
20 mandated program; but it doesn't work that way.

21 When a test claim is filed, there has to be
22 whole analysis on each mandated activity, so that there
23 is no one whole mandated program. You're analyzing
24 whether an activity that is mandated by the State does
25 impose a state-mandated program, whether that activity

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1 constitutes a new program or higher level of service, and
2 whether that activity imposes costs mandated by the
3 State.

4 So on many occasions, when we get a test claim
5 in, the Commission only partially approves the test claim
6 for certain specific state-mandated activities that meet
7 all the mandate's analysis.

8 And when this bill was enacted, they enacted
9 it -- not only the 17570 series, but also the change to
10 17557, which clarified when a P's & G's amendment could
11 occur.

12 And you can only amend parameters and
13 guidelines when the amendment does not conflict with the
14 underlying decision. In other words, you can only amend
15 the P's & G's when it won't delete a state-mandated
16 activity. So that if it reduces the costs of a
17 state-mandated activity, that would be valid under a
18 P's & G's amendment.

19 That would not be valid under a request for
20 redetermination. Because in order to file a request
21 for redetermination, the party has to show that there
22 is a change in liability of the underlying mandate
23 determination for that reimbursable state-mandated
24 activity.

25 Do you see what I'm saying?

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1 MS. CAPLAN: Yes, except I guess -- I think
2 I understand, but I think I disagree on one point; and
3 that is, that when the test claim is filed, it's filed
4 as to the entire -- well, when you see the test claims
5 identified, they're identified by the statutes that
6 enacted them. They're not identified by each activity
7 within the statute.

8 So the test claim embraces -- often embraces --
9 more than one activity.

10 CAMILLE SHELTON: Correct.

11 But what happens is, the pleading is up to the
12 test claimant. And oftentimes, a test claimant will not
13 file every single statute under a -- when you're looking
14 at the code, under an article or a chapter. They pick
15 and choose.

16 And, for example, the one that we had earlier
17 on *Discrimination Complaint Procedures*, that was from
18 many different areas; and the claimant titled the test
19 claim the way they wanted to title the test claim.
20 But you can't go to the regulations and say, "Oh, it's
21 under this article." It was under very many, many
22 articles.

23 So they choose how they file their test claim.
24 That is not within the control of the Commission.

25 So it's not one mandated program. It's many

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1 requests for reimbursement of several activities, within
2 several different articles and chapters of the code and
3 regulations.

4 MS. CAPLAN: Well, could I ask you for this
5 clarification then?

6 CAMILLE SHELTON: Yes.

7 MS. CAPLAN: Are you saying that when you refer
8 to an activity in here and a change in the activity
9 affecting the State's liability, are you talking about an
10 activity where the entire -- the scope of the mandate is
11 the activity? In other words, the activity is
12 coextensive with the mandate as opposed to a mandate that
13 includes multiple activities, and perhaps one of those
14 activities -- that the liability for one of those
15 activities is affected?

16 CAMILLE SHELTON: If the liability of one of
17 those activities has gone through a full mandates
18 analysis and that activity has been found to be
19 state-mandated, a new program or a higher level of
20 service, and it does impose costs mandated by the State,
21 and the State subsequently enacts the statute which the
22 State comes forward and says, "We want a redetermination
23 because now we believe that one activity is no longer
24 reimbursable," that would be the subject of a
25 redetermination.

1 But it would have to conflict -- that statute
2 would have to cause the creation -- or the Commission to
3 come to a different conclusion with respect to that
4 previously mandated activity.

5 You would have to allege that, for example,
6 in that fee-authority example, that now, when you apply
7 17556, and a fee authority, subdivision (d), I think,
8 to that activity, it is no longer reimbursable because
9 now the State has enacted a fee-authority statute which
10 is sufficient to cover the costs of the mandate, and
11 intended to cover that mandated activity.

12 So we're using the word "mandate" loosely.
13 When it's not one whole program, you've got to focus --
14 every analysis that we do here is focused on individual
15 activities. And each element has to apply to each
16 activity that is approved in the Statement of Decision.

17 MS. CAPLAN: But it's common -- I mean, I've
18 read the statements of decision. It's common for one
19 mandate determination, one statement of decision to
20 include many activities that are subject to
21 reimbursement.

22 CAMILLE SHELTON: That's correct. But each one
23 of those activities has gone through the full-blown
24 analysis of each element of what's required under the
25 Constitution. Not the whole program. It's required to

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1 do it activity by activity.

2 And the courts have --

3 MS. HALSEY: Each activity is mandated
4 individually, and we often will have analysis where we'll
5 find that some of the activities are mandated and other
6 activities are not mandated. And their law could change
7 to affect one of those activities and not another
8 activity.

9 MS. CAPLAN: Well, I understand that.

10 But then it seems to me then, that the --
11 so then what you're actually saying is that every --
12 because -- the mandate determination, the statement of
13 decision, in many instances, sup- -- I don't know what
14 the right word is -- it encompasses so many different
15 activities.

16 And so what you're suggesting is, by the
17 regulations, that anytime -- that only that activity
18 would be separated out and it wouldn't affect the balance
19 of the mandated activities; is that what -- I mean...

20 CAMILLE SHELTON: Well, let me just explain
21 that the activities that are listed in the statement of
22 decisions are those that are mandated by the plain
23 language of the statute. The Commission does not
24 exercise discretion on those activities. It's a question
25 of law, okay.

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1 So they're not necessarily the same activities
2 as those that are listed in the P's & G's. Because in
3 the P's & G's, the Commission has discretion to add more
4 activities that are reasonably necessary to comply with
5 the mandated activities.

6 It would not be appropriate for a request for
7 redetermination to be filed if somebody was trying to
8 change one of those extra activities that the Commission
9 found to be reasonably necessary because that's
10 discretionary. They do that for a P's & G's amendment.

11 It would only be appropriate to file a
12 redetermination if the subsequent change in the law
13 changes one of those activities that was -- or continues
14 to be, or maybe no longer is -- mandated by the statute.

15 Do you see what I'm saying?

16 MS. CAPLAN: Yes, except that then you're
17 saying that each statement of determination actually
18 encompasses, in most instances, many, many substatements
19 of decision. So if you were to refer to a particular
20 mandate, it would not accurately reflect the number of
21 mandates found in that statement of decision.

22 CAMILLE SHELTON: Correct.

23 MS. CAPLAN: Or statement of determination.

24 CAMILLE SHELTON: That's absolutely correct,
25 except a lot of times, the title of it does incorporate

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1 kind of the whole topic of what we're talking about.
2 But you're absolutely right, each one is individual, each
3 activity goes through a full-blown analysis.

4 MS. CAPLAN: Well, I guess I would just say
5 that from the point of view of being on the outside of
6 this, to some extent, that doesn't appear to be the way
7 the mandate process really works because -- well, I'm
8 saying in the sense that the statewide estimate is for
9 all the activities found within the statement of
10 determination.

11 CAMILLE SHELTON: That's correct; but it's
12 based on how test --

13 MEMBER ALEX: Can I interrupt here?

14 CAMILLE SHELTON: Sure.

15 MEMBER ALEX: I'm sorry. This seems like a
16 staff discussion that probably is not appropriate for the
17 board hearing.

18 I wonder, either if you could have this
19 discussion, maybe we take a break or something, or if
20 you can state very crisply exactly what your concern is
21 as to why you want the change that you've discussed.

22 MS. CAPLAN: Thank you, and I apologize for
23 getting sidetracked. But I think you can see why
24 there's, I think, some difficulty in understanding how
25 this regulation would be applied and would actually work.

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1 And what I'm hearing actually confirms, I
2 think, the concerns, which is, the way that the
3 mandates -- at least from -- again, externally, to the
4 outside world -- you say, you know, people refer to the
5 mandate reimbursement process mandate, or the Open
6 Meetings Act mandate.

7 Now, within those mandates, there may be a
8 number of reimbursable activities. And what I understand
9 Ms. Shelton to be saying -- perhaps correctly -- is that
10 each of those activities is technically considered a
11 separate mandate. I don't think that's how we normally
12 talk about them, but perhaps that's technically true.

13 When we talk about funding for them in the
14 annual budget, it's not treated as separate activities;
15 it's treated as the collection of activities under Open
16 Meetings Act or the collection of activities mandated
17 under MRP, whatever it is. That's the way we typically
18 talk about them.

19 So if the intent of the statute and the
20 regulations is to allow for a new test-claim
21 determination process to be commenced anytime one of
22 those activities within any one of those dozens and
23 dozens of mandates has changed in some way -- either
24 to become more expensive or less expensive -- what I hear
25 is that the regulations allow for the commencement of a

1 new test-claim determination. And I think that's
2 fundamentally problematic, because -- well, because if
3 each activity is considered its own mandate, then any
4 change to the State's liability, whether it's up or down,
5 is going to affect that mandate determination, quote,
6 unquote, because it's considered a separate mandate.

7 MEMBER WORTHLEY: Mr. Chair, that's not what
8 I heard. Because I think the change would require a
9 fundamental change to determine whether or not there is
10 still a mandate or not.

11 If there's an up or down liability issue, that
12 can be handled in the P's & G's. That's what I heard
13 counsel saying, and I think that's how it works.

14 So you don't go back to the underlying question
15 just because the cost went up or it went down. You don't
16 go back to determine is there still a mandate or not a
17 mandate; the mandate language hasn't changed.

18 So you don't go back and seek a redetermination
19 of mandate. You'd go back and say, for a P's & G's
20 request modification because of changed circumstances,
21 not to the mandate itself but to the actual costs, up or
22 down.

23 CAMILLE SHELTON: Can I -- I'm sorry. I was
24 just going to say, the proposed regulations do require
25 Commission staff to go through a completeness review when

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1 a request for redetermination is filed.

2 Part of that completeness review would be to
3 review the request to see if there is a subsequent change
4 in the law and there's an allegation that the State's
5 liability has changed.

6 If it really looks to staff that it really is
7 not a proper request for redetermination but is a proper,
8 maybe, P's & G's amendment, we'll send it back. So
9 there's a checks-and-balances at the early stage to
10 determine that.

11 If the parties don't like the Commission staff
12 review or the decision on completeness, somebody can
13 appeal the ED decision and take it to the Commission.
14 So there are checks and balances along the way.

15 You know, I will say that CSBA has filed a
16 petition for writ of mandate to challenge the underlying
17 statutes. We are complying with the underlying statutes
18 to initially adopt the emergency regs and now to make
19 those emergency regs permanent. That, the Commission
20 doesn't have a choice about.

21 CHAIR REYES: Mr. Burdick, do you want to..

22 MR. BURDICK: Yes, Chairman Reyes and Members,
23 Allan Burdick. I provide staff both to CSAC and
24 California League of Cities advisory committee on state
25 mandates.

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1 And I want point out that the League and CSAC
2 attorneys have been working closely with the School
3 Boards Association on this issue.

4 And I think that based on the discussion today,
5 it sounds to me like -- I thought we had understood what
6 was happening, but I'm not sure we do. And I don't know
7 whether these have to be -- as emergency -- have to be
8 adopted today or whether they could -- oh, do they?

9 Because this discussion is becoming a little
10 problematic in terms of whether we have an understanding
11 of what it's really doing.

12 I think we all acknowledge that the underlying
13 statute was a problem. The language in that was not as
14 clear as we wanted. We worked with the authors on that,
15 and were unable to get the LAO to take some amendments we
16 had requested.

17 So I guess if there isn't time, but I think
18 that this sounds like -- this discussion is something
19 where -- it's a little bit different than I think both
20 CSAC and the League and their attorneys had discussed.
21 I don't know. And so I just was going to see whether
22 we could put it over, delay it; but it looks like from
23 Camille's standpoint, maybe there was --

24 MS. HALSEY: There would be a lapse in the
25 regulations. And if anybody were to file a

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1 redetermination request, we'd have to just use the
2 statutes and not have any procedures of the Commission's
3 to deal with. We would just have to deal with it kind
4 of haphazardly, which wouldn't be good.

5 CAMILLE SHELTON: It would create problems with
6 whatever procedure we use, because it could be seen as an
7 underground regulation.

8 CHAIR REYES: And you're saying, the statute is
9 ambiguous?

10 I'm kidding.

11 MS. CAPLAN: CSBA --

12 MS. HALSEY: It doesn't say how you have to
13 file what needs to be included in the filing, those kinds
14 of things, and so..

15 CHAIR REYES: Okay, so it would be my
16 understanding that you went through the process, comments
17 were received, you responded to those comments; where
18 appropriate, you reflected those comments.

19 And now, we have this regulation before us.
20 We have to either -- if we postpone for a month to give
21 you more time to go and discuss, we are then with a lapse
22 in regulations because the emergency regulations would
23 have lapsed; or we take the regulations, the staff
24 recommendation now, which is to adopt the regulations
25 proposed, that folks have concerns with that.

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1 If we adopt these regulations, can they be
2 amended in the future to try to address some of the
3 issues that are being raised now?

4 CAMILLE SHELTON: Absolutely. Under the
5 Commission's regulations now, any party may request that
6 the Commission start a new regulatory package.

7 CHAIR REYES: Okay. I just wanted to make sure
8 I understand what our options are.

9 You say you had a second issue that you wanted
10 to raise; but I prefer that we don't go back and forth.

11 MS. CAPLAN: I understand.

12 CHAIR REYES: Okay.

13 MS. CAPLAN: I understand. And I did want to
14 just -- just on one point, to finish it -- just to
15 respond to Commissioner Worthley. The way, as I
16 understand what you've indicated and the staff, if a
17 mandate -- an Open Meetings Act, some broad mandate,
18 what we talk about as a mandate, it consists of several
19 different activities, and the State provides fee
20 authority for one of those activities, and it's enough to
21 cover the entire activity, then that's my understanding,
22 is that that would be subject to the new test-claim
23 determination.

24 But then that activity would be taken out of
25 the rest of the mandate and not affect the underlying

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1 State liability for the rest of the mandate. So you
2 would actually be seeking a new test-claim determination
3 for each -- for a particular activity within a mandate.
4 Just to be clear, I think that's what you were saying.
5 So I think that's -- whether that's problematic or not,
6 I think that's what the understanding is.

7 The second point I wanted to get to is, the two
8 hearings and the burden of proof -- and the Commission
9 has -- the staff has indicated that the substantial
10 evidence pretty much covers that.

11 I would disagree only to the extent that they
12 cite the *NRDC* case. The *NRDC* case had a two-phase
13 process, but the first phase, you had to produce
14 scientific evidence to show that a particular species
15 was endangered or not endangered.

16 If you made the *prima facie* showing -- and
17 there was an evidentiary standard that you had to meet
18 for that, then the second phase was, you got -- the *NRDC*
19 would actually conduct a yearlong scientific exploration.
20 So it was a very different process.

21 Because here, all you have to do is show a
22 substantial possibility -- not even a probability -- that
23 the underlying statute is -- liability has been changed,
24 and then the second hearing is exactly the same thing, so
25 there is no difference between the second hearing and the

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1 first hearing. And there's no burden of proof on the
2 requester in the first hearing except to show that they
3 are likely to get to the second hearing. So that's not
4 really a substantive burden of proof.

5 The NRDC case itself talks about the burden of
6 proof or the evidentiary standard that's imposed on the
7 petitioner or on the requester is different from the
8 ultimate legal standard that the Commission's decisions
9 have to meet if they're reviewed in court. That's
10 substantial evidence.

11 So substantial evidence doesn't really tell you
12 what the burden is on the person who is actually bringing
13 the petition or the new test-claim determination request
14 in this case.

15 So, again, I understand the time concerns and
16 the time constraints; but we wanted to point out, I
17 think, that that's something that is lacking in the
18 current regulations and perhaps needs to be remedied.

19 CHAIR REYES: Okay. How does the Commission
20 wish to proceed?

21 Is there any other additional comments or
22 questions from anybody?

23 *(No response)*

24 CHAIR REYES: What is the will of the
25 Commission? Do we accept this staff recommendation of

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1 the regulations? Do we postpone and pray that the
2 statute is clear enough when we know it's not? Or hold
3 it off, or try to amend it here?

4 MEMBER OLSEN: Well, I would suggest that --
5 I mean, I'm willing to move the regulatory package as it
6 now stands.

7 However, I do think that the Board's second
8 argument, second issue is a kind of compelling issue.
9 And I just would want that statement out there, that
10 I actually find that to be a compelling issue.

11 But I will move the regulatory packet so that
12 we're not in a gap.

13 MEMBER CHIVARO: I'll second.

14 CHAIR REYES: It's been moved and seconded.
15 Any additional comments?

16 *(No response)*

17 CHAIR REYES: Okay, Drew?

18 MR. BOHAN: Mr. Alex?

19 MEMBER ALEX: Aye.

20 MR. BOHAN: Mr. Chivaro?

21 MEMBER CHIVARO: Aye.

22 MR. BOHAN: Mr. Glaab?

23 MEMBER GLAAB: Aye.

24 MR. BOHAN: Mr. Lujano?

25 MEMBER LUJANO: Aye.

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1 MR. BOHAN: Ms. Olsen?

2 MEMBER OLSEN: Aye.

3 MR. BOHAN: Mr. Worthley?

4 MEMBER WORTHLEY: Aye.

5 MR. BOHAN: And Mr. Reyes?

6 CHAIR REYES: Aye.

7 Item 15 is consent.

8 Item 16 is County Applications for Findings of
9 Significant Financial Distress. There are none.

10 Item 17, staff report on legislation.

11 Nancy?

12 MS. PATTON: There are three bills that affect
13 the mandates process right now.

14 AB 202, by Assembly Member Brownley, is a spot
15 bill right now sponsored by the Assembly Education
16 Committee. So I don't really know what they have planned
17 for that bill at this point.

18 SB 64 by Senator Liu is sponsored by the
19 California Association of School Business Officials,
20 California School Boards Association, and School
21 Innovations and Advocacy.

22 And this bill proposes to revise the process
23 for how school districts file test claims. And we met
24 with the staff from the sponsors' and the author's office
25 and just talked to them about how it would work. And at

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1 this point, they are going to go back, and they're
2 contemplating amendments. So I am not doing any analysis
3 on this yet because I think it's going to change.

4 And the final one is SB 112, also by Carol Liu.
5 This bill is sponsored by the State Controller's Office.
6 It would do a couple of things.

7 It would provide the State Controller with
8 30 additional days to issue claiming instructions. And
9 it would clarify that when we adopt amendments to the
10 boilerplate language in P's & G's and those amendments do
11 not result in any increase or decrease in costs, it would
12 limit the period of reimbursement and make it prospective
13 only. So that when there's no cost involved and these
14 are just technical amendments, you couldn't go back and
15 re-file and open up the claiming period again.

16 And those are the three bills that are pending
17 right now in the mandates process.

18 CHAIR REYES: Thank you.

19 Ms. Shelton, Chief Counsel's Report?

20 CAMILLE SHELTON: Thank you.

21 Just a couple of new filings.

22 As I mentioned earlier, CSBA has filed a
23 lawsuit challenging the redetermination statutes in
24 addition to the budget trailer bills that were enacted
25 for this last budget. They are also challenging actually

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1 all of Government Code section 17500 with respect to the
2 school districts.

3 The second case is a cross-petition filed by
4 the County of Los Angeles and the cities on that water
5 permit that we just discussed earlier. They are
6 challenging the activities that were denied by the
7 Commission.

8 One case has been dismissed. The County of
9 Santa Clara, their IRC on *Handicapped and Disabled*
10 *Students*. Their IRC is scheduled for the Commission's
11 May hearing calendar.

12 There is a hearing scheduled for tomorrow on
13 the cross-petition for the County of San Diego on their
14 water permit. There is a demurrer filed by the State,
15 and the Court will conduct a hearing on that issue
16 tomorrow.

17 Just a couple of cases of interest that I
18 wanted to highlight.

19 The first one, a published opinion issued by
20 the Fourth District Court of Appeal in *CSBA vs. State*.
21 That case dealt with the deferral of mandates for school
22 districts. And the Court found that the deferral was not
23 appropriate and unconstitutional to do that. But the
24 remedy is provided in statute in 17612, to allow the
25 local government to go file a dec relief action in

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1 Sacramento County Superior Court to enjoin the
2 enforcement of that statute. And that remedy is
3 appropriate.

4 So the claimants in that case were trying to
5 get the Court to direct an appropriation, and the Court
6 did not do that.

7 On the back, on page 4, another school --
8 *California School Boards Association vs. Arnold*
9 *Schwarzenegger*, challenging the blue-pencil appropriation
10 for *Handicapped and Disabled Students*. And the
11 allegation there was that the Governor -- there was
12 a separation of powers violation with the Governor
13 actually suspending the program. The Court disagreed
14 with that petition and denied that petition, saying that
15 the Governor wasn't exercising suspension authority but
16 was exercising appropriately the blue-pencil authority,
17 and found that to be appropriate.

18 Those are two published decisions.

19 And that's all I've got.

20 CHAIR REYES: Thank you.

21 Drew, Executive?

22 MR. BOHAN: The Executive Director report is in
23 your binder. I just want to highlight one thing that's
24 not in it and one thing that is.

25 The first is, you may have noticed, those of

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1 you that have been on the Commission for a little while,
2 some changes to the test claims and some of the other
3 documents. We've beefed up the executive summaries a
4 bit and have added in a claims chart as a reference tool;
5 and would welcome your feedback on whether those are
6 good, bad, or indifferent. You, obviously, can call us
7 anytime you want or we can talk after or if you want to
8 talk during the session.

9 The second thing I want to highlight is the
10 backlog reduction plan that we've been working on. Staff
11 has a draft. And what this is, is in your September 15th
12 report to the Director of Finance last year, in 2010,
13 you indicated that you were going to prepare a backlog
14 reduction plan for incorrect reduction claims. And staff
15 got to talking about this and sketching it out a little
16 bit; and it seemed to us that it made sense. And we
17 wanted to propose this to you this morning to really look
18 at the whole package. Because every minute we shift from
19 test claims to focus on IRCs is a minute lost on our
20 test-claim work. And literally staff, here, we're going
21 to go to lunch together and we're going to go back to the
22 office, and we're focusing on next meeting, which has a
23 due date of a week from today, to make sure that all of
24 our test claim IRC and P's & G's draft staff analyses are
25 done, and folks from the outside can review them.

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1 So we wanted to propose that to you. And if
2 I don't hear any response, we'll assume that that's --
3 silence is agreement, and we'll package a plan to try
4 to deal with the entire backlog that's identified in
5 specific numbers in the report.

6 And just a quick highlight on it.

7 The test claims, most of you know this, but
8 very briefly, we've got about 15. We've knocked off a
9 couple today, so I'm not sure of the exact number, but
10 about 15 test claims from 2002. These were when, before
11 the statute was amended, to narrow the time frame within
12 which you could make claims going back. And so we
13 have -- you know, I think our documents cite 400 statutes
14 and 500 regs that are cited in these 2002 test claims.

15 Our plan contemplates completing these all by
16 the end of this calendar year at best; and at worst, this
17 next fiscal year. And then we'll be able to move on, and
18 we get into when we think we can get up to speed, and
19 it's in a couple years. So we'd get rid of '02, let's
20 say, at the end of this year, if all went perfectly.
21 In calendar year '12, we'd get rid of '03, '04, '05; and
22 the next year, '06, '07, and '08, and by 2013 or so, and
23 the plan will spell that out, we'd be up to speed.

24 Also I wanted to just point out in terms of
25 IRCs, the oldest one was completed today. It was

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1 withdrawn, but we had the staff rec prepared. So we got
2 rid of the oldest one. We're working diligently on the
3 next oldest one. And so we'll proceed with our standard
4 approach of dealing with the oldest things first.

5 However, we met with the claimant community as
6 was recommended by the Commission at the last meeting,
7 and we pitched some of the ideas that I've just spelled
8 out, and we got, I think, very positive feedback on that.

9 We did get a suggestion, though, that we
10 don't necessarily take everything in order. There are
11 times when, because those 2002 claims are largely
12 education-related claims, that we bring in -- we mix and
13 match a little bit. But we'll stay to the spirit of
14 trying to do things in order, in the spirit of fairness.

15 And finally, I just wanted to point out of the
16 363 IRCs that are pending, about 102 of them focus on
17 just two programs. And we've been working closely with
18 Mr. Spano at the Controller's office and the other
19 claimants and others to try to see if we can't resolve
20 some of the issues that would resolve all of those or a
21 good chunk of them in one fell swoop.

22 And that's all I have.

23 Thank you.

24 CHAIR REYES: Thank you.

25 Public Comment time.

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1 I see Mr. Hamilton up front, at the table.

2 Welcome.

3 MR. HAMILTON: Thank you.

4 Richard Hamilton, Director of CSBA Education
5 Legal Alliance.

6 I just wanted to follow up on Ms. Shelton's
7 representations as to the status of litigation.

8 We did file a petition for review with the
9 California Supreme Court of the decision relating to the
10 deferral of payment on mandates.

11 The problem with the Court of Appeals'
12 decision, from our perspective, after having found that
13 this practice of putting a thousand dollars towards each
14 of the education mandates is unconstitutional, is that
15 the Court found that we were not entitled to an
16 injunction that held the Legislature and the Governor to
17 the task of putting into the budget fully funding the
18 mandate, and then making a conscious decision whether to
19 zero it out or to fully fund it, or actually suspend the
20 mandate expressly in a statute.

21 That's the process that's outlined in the code.
22 And this deferral practice allows the Legislature to
23 bypass that process.

24 We want the Legislature to say that that
25 mandate needs to be performed or not performed. They put

1 it in place in the first place.

2 The business about trying to get payment,
3 that's what's commonly referred to as the Mandell
4 [phonetic] relief, where there is previously appropriated
5 money and allocated that is not used, and are claimants
6 entitled to have that money used to fund the backlog of
7 the mandates.

8 Secondly, with regard to the AB 3632 case,
9 dealing with Mental Health services, that's a mandate
10 on the counties. The Governor went into the budget --
11 it wasn't a line item -- picked out the amount of money
12 that was going to the counties to fund that effort,
13 zeroed it out, and said, "I'm suspending that mandate."
14 That was his proposal in the Legislature, that was
15 rejected by the Legislature.

16 So the question here is: Is that as far as the
17 Governor can go with that line-item veto?

18 And there will be a petition for review of the
19 decision filed as well.

20 Thank you for listening.

21 CHAIR REYES: I think you should recall that
22 Governor.

23 MR. HAMILTON: Thank you.

24 CHAIR REYES: Okay, we will go in closed
25 session on some legal matters.

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1 I need to read a statement.

2 MEMBER OLSEN: And could we take a five-minute
3 break?

4 CHAIR REYES: Yes, we will do that.

5 I will read this statement.

6 The Commission will meet in closed executive
7 session pursuant to Government Code section 11126,
8 subdivision (e), to confer and receive advice from legal
9 counsel for consideration and action, as necessary and
10 appropriate, upon the pending litigation listed on the
11 published notice and agenda; and to confer with and
12 receive advice from legal counsel regarding potential
13 litigation.

14 I know nobody's interested.

15 We will reconvene in open session in
16 approximately ten to 15 minutes.

17 *(A brief break was taken, and the*
18 *Commission on State Mandates met in*
19 *closed executive session from*
20 *11:43 a.m. to 11:55 a.m.)*

21 CHAIR REYES: Okay, we're back.

22 The Commission met in closed-session pursuant
23 to Government Code section 11126, subdivision (e), to
24 confer with and receive advice from legal counsel on
25 for the consideration and action, as necessary and

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1 appropriate, under the pending litigation listed on the
2 published notice and agenda; and to confer with and
3 receive advice from legal counsel regarding potential
4 litigation.

5 With no further business to discuss, I'll
6 entertain a motion to adjourn.

7 MEMBER GLAAB: So moved.

8 MEMBER OLSEN: Second.

9 CHAIR REYES: All those in favor, say "aye."

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

11 CHAIR REYES: The meeting is adjourned.

12 Thank you, everybody.

13 *(The meeting concluded at 11:56 a.m.)*

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REPORTER'S CERTIFICATE

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified; and

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer-aided transcription.

In witness whereof, I have hereunto set my hand on the 12th of April 2011.

Daniel P. Feldhaus

Daniel P. Feldhaus
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter