

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF

continued

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(Item 4)

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PUBLIC TESTIMONY

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For Department of Finance:

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A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 4:

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Appearing for Item 7

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A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing for Item 7

For County of Los Angeles: *continued*

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ERRATA SHEET

<u>Page</u>	<u>Line</u>	<u>Correction</u>
<u>60</u>	<u>13</u>	<u>“POBR” should be “POBOR”</u>
<u>64</u>	<u>6</u>	<u>“in” should be “on”</u>
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1 BE IT REMEMBERED that on Friday, May 24, 2013,
2 commencing at the hour of 10:00 a.m., thereof, at the
3 State Capitol, Room 447, Sacramento, California, before
4 me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the
5 following proceedings were held:

6 --oOo--

7 CHAIR GILLIHAN: Good morning, everybody.

8 This meeting of the Commission on State
9 Mandates will come to order.

10 Heather, will you please call the roll?

11 MS. HALSEY: Mr. Alex?

12 MEMBER ALEX: Here.

13 MS. HALSEY: Mr. Chivaro -- sorry, Mr. Placet?

14 MEMBER PLACET: Here.

15 MS. HALSEY: Mr. Gillihan?

16 CHAIR GILLIHAN: Present.

17 MS. HALSEY: Ms. Olsen?

18 MEMBER OLSEN: Here.

19 MS. HALSEY: Ms. Ramirez?

20 MEMBER RAMIREZ: Here.

21 MS. HALSEY: Mr. Rivera?

22 MEMBER RIVERA: Here.

23 MS. HALSEY: Mr. Saylor?

24 MEMBER SAYLOR: Here.

25 MS. HALSEY: Item 1, approval of the minutes,

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1 has been postponed to the July 26th hearing.

2 Moving on now to public comment. We'll take up
3 public comment at this time for matters not on the
4 agenda.

5 Please note that the Commission cannot take
6 action on items not on the agenda. However, it can
7 schedule issues raised by the public for consideration at
8 future meetings.

9 CHAIR GILLIHAN: Thank you.

10 Is there any public comment?

11 *(No response)*

12 CHAIR GILLIHAN: Seeing none, we'll move to the
13 next item.

14 MS. HALSEY: The next item is the proposed
15 consent calendar which consists of Items 5 and 8.

16 CHAIR GILLIHAN: Are there any objections to
17 the proposed consent calendar?

18 *(No response)*

19 CHAIR GILLIHAN: Seeing none, what is the
20 pleasure --

21 MEMBER OLSEN: Move adoption.

22 CHAIR GILLIHAN: We have a motion --

23 MEMBER PLACET: Second.

24 CHAIR GILLIHAN: We have a motion and a second.

25 All in favor, say "aye."

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

2 CHAIR GILLIHAN: All opposed?

3 (No response)

4 MS. HALSEY: Moving on to the Article 7 portion
5 of the hearing, will the parties and witnesses for
6 Items 2, 4, and 7 please rise?

7 (The parties and witnesses stood to
8 be sworn.)

9 MS. HALSEY: Do you solemnly swear or affirm
10 that the testimony you are about to give is true and
11 correct based on your information, knowledge, or belief?

12 (Parties and witnesses responded
13 affirmatively.)

14 MS. HALSEY: Thank you.

15 Item 2 is reserved for appeals of Executive
16 Director decisions. There are no appeals to consider
17 under Item 2.

18 Item 3, Senior Commission Counsel Eric Feller
19 will present Item 3, a test claim on *High School Exit*
20 *Examination II*.

21 MR. FELLER: Good morning.

22 This test claim seeks reimbursement for
23 activities related to the California High School Exit
24 Exam and related counseling programs to assist pupils in
25 passing the exit exam.

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1 Staff recommends that the Commission deny the
2 test claim.

3 The test-claim statutes require school
4 districts to perform counseling, instruction, reporting
5 activities as a condition of receiving funds. The
6 statutes do not legally compel school districts to
7 perform the activities, nor is there evidence that the
8 statutes practically compel districts to perform the
9 activities.

10 The 2007 amendment to the test-claim regulation
11 does not impose requirements that constitute a new
12 program or higher level of service.

13 Staff received claimant comments on Monday that
14 do not change the staff analysis. So staff recommends
15 the Commission adopt the proposed statement of decision
16 denying the test claim.

17 Would the parties and witnesses please state
18 your names for the record?

19 MR. PALKOWITZ: Good morning. Arthur Palkowitz
20 on behalf of the claimant, San José District.

21 MS. GEANACOU: Susan Geanacou, Department of
22 Finance.

23 CHAIR GILLIHAN: Thank you.

24 Mr. Palkowitz?

25 MR. PALKOWITZ: Thank you, sir. Good morning,

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1 everyone.

2 On behalf of the San José School District, I'm
3 here to present our comments regarding the staff
4 analysis.

5 What we have before us is the California High
6 School Exit Exam. This exam was implemented by
7 legislation years ago that required every student in the
8 California high-school public system to pass the exam
9 successfully.

10 The test-claim legislation that's before us
11 today deals with intensive instruction for those students
12 who do not pass the exam. The intensive instruction is
13 required by the State, not by the school districts. The
14 instruction is to be implemented to students who do not
15 pass, and also includes students that graduate from
16 twelfth grade but have not successfully completed the
17 exam. Schools are required to provide them intensive
18 instruction and services for a two-year academic period
19 beyond their twelfth-grade graduation.

20 Clearly, it was the State's objective that
21 every high-school student pass the exam; and that for
22 those who do not pass, they be provided as much services
23 that the schools can provide in an effort to have them
24 pass.

25 This academic standard that was imposed by the

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1 State is to enhance the public's academic success for the
2 students that attend public schools. Now, in addition to
3 what the schools have to do as far as this instruction
4 and services that are to be available on weekends or
5 Saturdays, if necessary, it also imposes that the
6 counselors advise the students that do not successfully
7 pass about the availability of the instruction for them
8 to be successful. It also requires that the county
9 superintendents, that generally have oversight for
10 schools, be aware when they visit the sites to inform the
11 students who have not passed, that they have an
12 opportunity to take the instruction services that are
13 offered by the school.

14 The Legislature also discusses how English
15 learners are also to be provided with this instruction,
16 to assure them that they have the opportunity, as all
17 students, to pass the high-school exit exam.

18 The test-claim statute that's before us today
19 came -- part of it -- from a lawsuit that is referred to
20 as the "*Valenzuela* lawsuit." The *Valenzuela* lawsuit went
21 on for a lengthy time, and the settlement included the
22 Legislature passing this legislation. And the
23 legislation took into effect what the *Valenzuela* lawsuit
24 alleged, that all students were not given the same
25 opportunity. In effect, the legislation that was enacted

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1 is forcing the school districts to make this instruction
2 available.

3 This is not an option for school districts to
4 do. If they don't implement this, they, themselves,
5 would be forced to defend legal action. And as a result,
6 they are practically compelled to comply with this
7 statute.

8 The analysis seems to focus in on a decision
9 that the schools apply or not apply for funding. It's
10 our perspective that that is a downstream decision. The
11 decision that they have is mandatory, and that is, to
12 provide that instruction.

13 Whether or not they apply for the funding is
14 the option of the school districts. They contend they
15 are practically compelled to comply with this funding.
16 They are not in a financial position not to comply with
17 this, or apply for the funding, or not to receive it;
18 because the financial consequences for not receiving that
19 funding are very consequential.

20 As we have cited in our comments, the
21 California Supreme Court case, *San Diego Unified versus*
22 *the Commission on State Mandates*, dealt with another
23 activity that was similar, in that they required
24 expulsions under certain circumstances. In that case,
25 the Court also ruled that the hearing that is related --

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1 a downstream activity -- was also a reimbursable
2 activity.

3 That case held that the requirement of having
4 expulsions at hearings was creating an enhanced public
5 safety; and there was a benefit to the schools and to the
6 public at large.

7 This is similar to the test claim in front of
8 us, allowing -- or requiring, rather -- that students
9 participate and successfully complete the exit exam, is
10 creating, for the public, a higher academic standard.

11 Part of the analysis done by staff included a
12 review of regulations. Staff has recommended to the
13 Commission that the regulations that were not included,
14 they do not have jurisdiction. Staff, in that
15 analysis -- well, let me strike that.

16 What staff has done is, in conducting that
17 analysis, they used -- or they didn't use, rather -- was
18 the doctrine of judicial notice. When the staff analysis
19 first came out regarding this test claim, it was
20 concluded that the test claim was not timely filed. It
21 was brought to the attention that the test claim was
22 filed subsequent to the one-year requirement due to the
23 anniversary date falling on a weekend and a business
24 holiday.

25 The law is clear that when that happens, the

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1 public of California is given an opportunity to file
2 documents at the next available business day. And staff
3 noted that in their final comments.

4 And in effect, what staff did is they looked
5 at the calendar, back in 2008, and determined the
6 anniversary date was on a weekend; and then the following
7 day was Columbus Day, a holiday. And so they took common
8 knowledge of information from a calendar that is really
9 up to no dispute. And what we're saying here is, the
10 regulations are the same thing. The Evidence Code allows
11 a quasi-judicial body to use the doctrine of judicial
12 notice to consider when making their decisions.

13 The Title 5 regulations, that was not part of
14 this test claim, falls under that same doctrine. And we
15 urge that that information from the Title 5 regulation be
16 included in your analysis and that the Commission does
17 have jurisdiction over that.

18 There is nothing in the analysis that says
19 there's any dispute or it's unclear what the Title 5
20 regulation says. Rather, there has been the
21 non-application of the judicial notice doctrine; and,
22 therefore, that regulation has been barred. And it's
23 recommended to you that it not be considered in your
24 decision.

25 There was discussion in the comments regarding

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1 funding as in other mandates if the districts do receive
2 funding, or partial funding for the activities related to
3 the test claim, that would be deducted from any filing or
4 claim form they find, and that should not be the basis of
5 denying this test claim.

6 I'd like to reserve any time to respond to any
7 other comments.

8 Thank you.

9 CHAIR GILLIHAN: Thank you.

10 Ms. Geanacou?

11 MS. GEANACOU: Yes, thank you. Good morning.

12 The Department of Finance supports the final
13 staff analysis of the Commission staff.

14 The alleged statutory requirements, we believe,
15 attach as a result of the condition of the district's
16 choosing to take the money that is available to them.

17 I too am available for questions if members
18 have any.

19 CHAIR GILLIHAN: Thank you.

20 Do any members have questions?

21 Ms. Ramirez?

22 MEMBER RAMIREZ: Thank you.

23 I'd like to ask staff to respond to the
24 jurisdictional issue. I'm a little confused now where
25 we're at with that in terms of the statute of

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1 limitations.

2 MR. FELLER: Okay, yes, the statute of
3 limitations in this case is jurisdictional.

4 The claimant wants us to take judicial notice
5 of regulations prior to the 2007 amendments; but that
6 is a jurisdictional issue for us, because we don't have
7 jurisdiction on anything that was filed over a year --
8 that was enacted over a year prior to filing.

9 So because we had jurisdiction -- this was a
10 2008 claim, we had jurisdiction over the 2007 amendments
11 to the regulations, and those are what we analyzed.
12 But any prior amendments -- and this regulation goes back
13 to, I believe, 2004. So prior amendments, we did not
14 have jurisdiction over and that's why we found that those
15 were outside the statute of limitations.

16 MS. SHELTON: Let me just also add that
17 judicial notice is a doctrine that allows you to admit
18 into evidence something that would support your
19 allegations or your pleading. Here, Mr. Palkowitz is
20 trying to use it to be the pleading. And the
21 Government -- it doesn't allow it that way.

22 The mandates statutes require specifically that
23 you plead what specific registers in the statutes that
24 you are requesting reimbursement for and that you plead
25 within the statute of limitations. And if you haven't

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1 pled them properly within the statute of limitations,
2 then the Commission does not have jurisdiction.

3 And we've used -- the Commission has used
4 judicial notice many times to support an allegation for a
5 request for reimbursement.

6 MEMBER ALEX: Well, a couple of things. Since
7 I'm a lawyer, it's actually administrative notice since
8 we're not in a judicial proceeding.

9 MS. SHELTON: Right.

10 MEMBER ALEX: But that aside, is the point that
11 you're not able to look at the pre-2007 regs because --
12 I mean, you could use them to see intent, for example,
13 right? I mean, you could evaluate that?

14 MS. SHELTON: Right.

15 MEMBER ALEX: So, I take it, there is something
16 else that they are asking you to use this for here.

17 MS. SHELTON: Let me try to articulate that a
18 little bit better.

19 Of course, you can look at whatever the law is
20 there to analyze what you have before you and what has
21 been pled. But when you're asking for reimbursement for
22 changes made by a 2004, 2005, or 2006 register as
23 implementing a new mandated activity, that's a
24 jurisdictional requirement. And under the Government
25 Code, it requires that you specifically plead those

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1 within the statute of limitations.

2 MEMBER ALEX: If I may?

3 CHAIR GILLIHAN: Go ahead.

4 MEMBER ALEX: If I can ask staff to briefly
5 respond on the practical-compulsion issue as well.

6 MR. FELLER: Right. We looked at the statutes,
7 the two counseling programs that were pled, not finding
8 legal compulsion because they were based on as a
9 condition of funds. Practical compulsion requires
10 evidence in the record of -- what's the phrase?

11 MS. SHELTON: Certain and severe.

12 MR. FELLER: -- certain and severe penalties.
13 Thank you.

14 We didn't find any evidence in this record of
15 certain and severe penalties for not enacting these
16 counseling programs. And we have case law that says the
17 record has to include that, so that's the reason.

18 MS. SHELTON: Let me also add too a couple
19 things.

20 One, we did receive Mr. Palkowitz's late
21 filing. And we looked at it again; and, you know, there
22 is citation to regulations in this record under 1204.5.
23 And that section, if you read the whole thing -- I think
24 it's on page 35 of the analysis, the last sentence says
25 that those services should be offered to students that

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1 don't pass. And it's not a legal compulsion for them to
2 provide the intensive instruction and services. And that
3 regulation is the authority and reference -- or states
4 the authority and reference as the statute that
5 Mr. Palkowitz has been referring to.

6 The other issue too even if we were to find --
7 or you were to find this to be -- those activities to be
8 mandated, there has been funding appropriated with the
9 intent that the funding would pay for all of those
10 services per pupil. It's a per-pupil funding
11 appropriation based on the application from the school
12 district, identifying the number of students. So there
13 is no evidence that they have incurred any increased
14 costs.

15 In the past, the Commission has denied test
16 claims for no showing of increased costs because the
17 burden is on the claimant to show that they have incurred
18 those costs when it's been intended, based on the
19 statutory scheme, that the Legislature wanted to pay for
20 the whole thing.

21 MR. PALKOWITZ: I believe when we submitted
22 our -- I'm sorry.

23 CHAIR GILLIHAN: Before you go, I was remiss in
24 asking, is there any public comment on this item?

25 *(No response)*

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1 CHAIR GILLIHAN: Seeing none...

2 MR. PALKOWITZ: I believe when we filed the
3 claim, there was a declaration that there have been
4 increased costs filed in this matter.

5 Once again, the focus is on that there may or
6 may not be funding available. But that's not the
7 question. The question is, are these activities
8 required? If the funding is available, then there's no
9 claim form. If there is funding not available or not
10 enough funding, then there is a claim. And that has
11 historically been held as the basis of how these mandates
12 are decided.

13 There are other mandates out there that are
14 reimbursable, but there are no claims submitted because
15 the funding is adequate. The decision to do the
16 activities is not paramount on whether you have the
17 funding or apply for it.

18 CHAIR GILLIHAN: Mr. Saylor?

19 MEMBER SAYLOR: I appreciate this phrase,
20 "certain and severe consequences."

21 Have we had examples of those? And what might
22 they be in other cases?

23 MR. FELLER: Yes.

24 Help me out, Camille.

25 MS. SHELTON: Well, there has never been a case

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1 that has been proved to be certain and severe. And the
2 Courts have said the receipt of money -- doing something
3 because the receipt of money is not certain and severe.

4 MR. FELLER: Yes, I think we have the *City of*
5 *Sacramento* case, where the California Supreme Court was
6 looking at California's unemployment insurance program,
7 and they found that the federal government's imposition
8 of double-taxation and other severe economic consequences
9 resulted in a practical compulsion for the state to
10 comply with that. So that's about the closest example we
11 have in case law. Other than that, we pretty much just
12 have a description of it in that case.

13 MEMBER SAYLOR: So there have been several
14 cases or several claims that have come before the
15 Commission in the time that I've served, where it strikes
16 me on sort of a non-evidentiary but practical-knowledge
17 basis, that there is a practical compulsion in play.

18 So I'm wondering what kind of guidance we give
19 to claimants for how they can complete their claims to
20 reflect the materials that we would require to make a
21 determination that such a thing would be in place?

22 Because on several occasions, we've got statements that
23 the evidence doesn't show, the record doesn't have this
24 material in it, even if the material might be available
25 if someone had the right writing skills.

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1 So how do we instruct claimants to bring
2 forward the evidence that we would require to make a
3 determination of a practical compulsion?

4 MS. SHELTON: Well, historically what has
5 happened, the Commission did take the same view that
6 you're expressing now in a case on *Peace Officer*
7 *Procedural Bill of Rights*, which imposed requirements on
8 all local government peace officers. And so the
9 Commission originally improved reimbursement for school
10 district and certain special district offices for
11 reimbursement for that program, kind of saying the same
12 thing that, of course, they've established, you know,
13 police departments; and they are, by the plain language,
14 required to comply with these programs.

15 There, the Third District Court of Appeals
16 said, "Well, but you haven't looked back far enough."
17 And here, it's very clear that the school districts have
18 discretion whether or not to form a police department or
19 not. And if they don't, they have alternatives. So they
20 said the only way for you to show or to find practical
21 compulsion would be if the claimant had evidence in the
22 record showing they had no reasonable alternative but to
23 comply with this program.

24 Here, this program is getting money for
25 providing these services. So they would have to show

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1 here that they did not receive enough money for the
2 number of pupils because under the program, they apply
3 specifically for the number of pupils that have not
4 passed.

5 The money is intended to pay for that
6 instruction and services; and there's been no showing
7 that they didn't have enough money to pay for that.

8 MEMBER SAYLOR: So notwithstanding this
9 particular claim and how that plays out, do we give
10 claimants a manual or guidelines or instructions on how
11 to complete these claims?

12 MS. SHELTON: It would be very difficult to do
13 that because each case is individual, and based on the
14 facts of each individual case, the evidence is going to
15 be different. But the law is clear, the case law is
16 clear they have to show they have no reasonable
17 alternative but to comply, or that certain and severe
18 penalties would occur if they don't comply with the
19 program. And they have to describe what those are, and
20 describe what their alternatives are.

21 MS. HALSEY: And I would just add to that,
22 we're actually not sure what it's going to look like. So
23 far, the Commission -- when the Commission has found the
24 Court has found against us when we've been sued, we
25 haven't really found a case where it exists yet.

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1 MR. FELLER: May I just add one thing?

2 MEMBER SAYLOR: Then it's a pretty tough bar to
3 reach.

4 MS. HALSEY: It is.

5 MR. FELLER: As far as the alternatives that
6 the claimant has in this case, they're outlined in the
7 statute itself. The definition of "intensive instruction
8 and services" on page 2 of your analysis, "may include
9 but are not limited to," and it has a list of A through
10 H, of things that school districts can do. So they do
11 have alternatives. They have to provide it, but they
12 have the alternatives in the manner of how they provide
13 it, intensive instruction services.

14 MS. SHELTON: They have to provide it.

15 MR. FELLER: They have to provide it as a
16 condition of funding.

17 Pardon me for leaving that out.

18 MEMBER SAYLOR: One more question.

19 CHAIR GILLIHAN: Certainly, Mr. Saylor.

20 MEMBER SAYLOR: Has anybody alleged that the
21 funding is insufficient to cover the cost that's
22 identified for these activities?

23 MR. PALKOWITZ: I believe it's in numerous
24 documents that we filed includes that. We don't really
25 know -- you know, the way the process works, is that --

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1 districts are in a bind. Because for them to maintain
2 records of the activities before it's approved is
3 something that districts are reluctant to do because it
4 may not be approved.

5 So when you have the period of time of four or
6 five years for when the test claim is filed until we
7 sit here today, making this decision, the record-keeping
8 is not at the level it would be once it's approved.

9 And I think your points are well taken; but
10 whether we are -- the districts are fully paid the
11 amounts for the activities -- I mean, in the analysis, it
12 talks about seventy-something million dollars -- and
13 whether that's enough or not, I don't really think that's
14 the core issue. Because the core issue is, are the
15 activities required? Because if tomorrow the funding
16 doubles or if the funding disappears, what is a district
17 to do, okay.

18 And so the analysis that is referred to as
19 "double taxation" or "severe consequences," as you
20 astutely point out, it's hard to articulate to a
21 layperson. But I think it's clear that millions
22 of dollars to a school district is a serious financial
23 consequence. And whether that meets what we believe the
24 interpretation should be, I think it falls under your
25 decision if millions of dollars is a severe consequence.

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1 I submit to you, it is. That a school that
2 is required to provide an activity that came out of a
3 lawsuit, that came out of a legislation, where the
4 Legislature said, "Even after they graduate, we need to
5 make sure they pass this exam." I mean, this is a core
6 requirement of schools: We want to have students pass
7 this test. And when they complete high school, we know
8 that they have reached a certain level of academic
9 performance.

10 MS. SHELTON: Could I clarify the record, what
11 was pled in the test claim as far as funding? The test
12 claimant identified a thousand dollars of costs, because
13 they had to do that under Government Code section 17564;
14 and then they said the whole thing would cost about
15 \$375,000, but they didn't allocate that, so I don't know
16 what that is from. They identified an appropriation
17 that -- I believe that's the one that we're talking about
18 for the intensive instruction and services -- but then
19 said none of the funds have been specifically identified
20 as applicable to the increased activities required by
21 Statutes 2007. And by law, that funding applies to this
22 program, and by the plain language, is intended to pay
23 for every pupil in that situation.

24 So there hasn't been -- the burden is on the
25 claimant to show that they have increased costs.

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MEMBER SAYLOR: Right.

MS. SHELTON: And it hasn't been shown here.

MR. PALKOWITZ: Let me also say here that I believe due to the severe financial crisis, the funding for this program got lumped in with other programs to schools into the general fund; and that general fund money was to give schools flexibility to use the money they want to. And, therefore, what is happening is that it is not easily earmarked for schools to take the money for this program and spend it on these specific activities. The State did this with various programs because they were dramatically reducing fundings; and so instead of having this earmarked as they intended when they passed this, they then said, "Look, here's this money for this program and here's other programs, and you get to decide locally how to use the money."

And that is the example that shows that the focus is on the activities, not the funding. Because as we go through highs and lows through our economy, over the past decades and upcoming decades, this will be a moving target.

And I would like the record to reflect on the judicial notice, because the Ed. Code section of -- Evidence Code section 452, section B, states that, "The following matters may be identified for judicial notice,

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1 and that would include regulations and legislative
2 enactments by the public entity." And I haven't really
3 heard why these regulations don't fall under that
4 Evidence Code section.

5 MR. FELLER: Because they're not evidence. The
6 regulations are part of the pleading, and they're
7 jurisdictional for us in what needs to be reimbursed --

8 MR. PALKOWITZ: But what you're saying is that
9 they weren't --

10 MR. FELLER: -- but they aren't used as
11 evidence.

12 MR. PALKOWITZ: -- part of the test claim, and
13 so you can't include them.

14 And judicial notice allows admissibility of
15 evidence, even though it wasn't properly admitted at the
16 time required.

17 MR. FELLER: But we don't use that regulation
18 as evidence; we use it as what the Commission has
19 jurisdiction over. So it doesn't tend to prove anything
20 other than what's reimbursable; and that's jurisdictional
21 for us. So that's why it's not really evidence in this
22 case.

23 MS. SHELTON: If the Commission were to take
24 judicial notice of those regulations, and then by doing
25 that, taking jurisdiction, then you would be violating

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1 the statute of limitations.

2 MEMBER ALEX: I think that another way to say
3 it is that we can take judicial or administrative notice
4 of the existence of them and what's in them, but not to
5 take notice of them for purposes of the claim for which
6 the jurisdiction does not exist. Those are two different
7 things, I think.

8 MR. PALKOWITZ: But also Government Code
9 section 17554 allows an equitable amendment of a claim.
10 And that could be another way for the regulations to be
11 part of the test claim.

12 MS. SHELTON: That allows a stipulation to
13 waive any procedural requirement, and jurisdiction is not
14 procedural.

15 MR. PALKOWITZ: Well, procedural would be the
16 filing of something timely. That, to me, is not a
17 substantive; that's a procedural requirement.

18 MS. SHELTON: The law is pretty clear on that
19 point, and the example --

20 MR. PALKOWITZ: I agree, it is clear.

21 MS. SHELTON: -- and the example provided in
22 17554 is talking about setting matters for hearing or
23 consolidating existing claims. Those are procedural
24 matters, not dealing with issues that are jurisdictional
25 and dealing with issues related to the statute of

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1 limitations.

2 CHAIR GILLIHAN: With that, is there any more
3 questions?

4 Ms. Olsen?

5 MEMBER OLSEN: I want to go back to the issue
6 of compulsion.

7 So in the absence of funding being provided by
8 the Legislature, is it your contention that the school
9 districts must still comply with this requirement for
10 remediation?

11 MR. PALKOWITZ: Correct.

12 MEMBER OLSEN: And where does that compulsion
13 come from? Does it come from the law or from
14 practicality?

15 MR. PALKOWITZ: Both. I believe the statute,
16 as it reads, the districts -- on page --

17 CHAIR GILLIHAN: While he is looking that up,
18 though, isn't it true that funding has been provided?

19 MR. PALKOWITZ: There has been funding
20 provided, correct.

21 Once again, the funding has been provided. And
22 I think they refer to it as a tier 3, where it is
23 provided with other funding, and the district decides
24 locally how to spend that money. Whether that funding is
25 adequate or not has not been shown here. It hasn't been

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1 shown that it's inadequate.

2 CHAIR GILLIHAN: But if funding is provided for
3 a specific purpose but the school district has
4 flexibility to use that funding in discretionary ways,
5 doesn't that sort of undercut your case, that money was
6 given, but the districts chose to use it for other
7 purposes, even though it was provided for this purpose?
8 So it seems as though the funding test has been met; and
9 what the District chose to do with it was a discretionary
10 decision on the district.

11 MR. PALKOWITZ: And that could be correct as
12 far as the district is not going to have a claim for any
13 reimbursement during that period.

14 MEMBER OLSEN: The issue for me is, is this an
15 issue for a finding of a reimbursable claim, or is this
16 an issue for a P's & G's? Because we have had ones
17 before that are in this sort of murky area. And I'm just
18 trying to find out, how murky is the murky area?

19 MR. PALKOWITZ: And to follow up in a question
20 you asked before, on page 8, the subdivisions require
21 school districts to perform the following activities:
22 Ensure that pupils receive intensive instruction, ensure
23 that they pass both parts, ensure that if they don't pass
24 it by grade 12, it's up to two years of additional --

25 MEMBER OLSEN: But, Mr. Palkowitz --

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1 MR. PALKOWITZ: Yes.

2 MEMBER OLSEN: -- if you go to the very top
3 line of that, of page 8, it says, "as a condition of
4 receiving funds."

5 MR. PALKOWITZ: Right. But, see, it's
6 flowing through the tier 3. So they're giving that
7 money, anyway.

8 MS. SHELTON: This statute was enacted before
9 the administration relieved or took away the categorical
10 restrictions. So you're talking about current budget,
11 not what was occurring when they enacted this statute.

12 MR. FELLER: And the statute that takes away
13 the categorical restrictions, I believe, sunsets in 2015.
14 It's a temporary.

15 MS. SHELTON: And it's not really relevant.
16 Because the issue -- when you're talking about mandates,
17 you're talking about what the Legislature intended when
18 they wrote the statute and when they appropriated the
19 money for the particular purpose; not necessarily how the
20 school district decides to spend the money.

21 CHAIR GILLIHAN: Okay, what is the pleasure of
22 the Commission?

23 MEMBER ALEX: I move the staff recommendation.

24 MEMBER SAYLOR: Second.

25 CHAIR GILLIHAN: We have a motion and a second.

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1 Heather, please call the roll.

2 MS. HALSEY: Mr. Alex?

3 MEMBER ALEX: Aye.

4 MS. HALSEY: Mr. Placet?

5 MEMBER PLACET: Aye.

6 MS. HALSEY: Mr. Gillihan?

7 CHAIR GILLIHAN: Aye.

8 MS. HALSEY: Ms. Olsen?

9 MEMBER OLSEN: Aye.

10 MS. HALSEY: Ms. Ramirez?

11 MEMBER RAMIREZ: Aye.

12 MS. HALSEY: Mr. Rivera?

13 MEMBER RIVERA: Aye.

14 MS. HALSEY: Mr. Saylor?

15 MEMBER SAYLOR: Aye.

16 CHAIR GILLIHAN: The motion carries.

17 MS. HALSEY: Item 4, Senior Commission Counsel

18 Tyler Asmundson will present Item 4, a test claim on

19 *Immunization Records - Pertussis.*

20 *(Off record from 10:36 a.m. to 10:37 a.m.)*

21 MR. ASMUNDSON: Good morning.

22 This test claim requests reimbursement for

23 cost incurred by school districts for activities

24 pertaining to a new pertussis or whooping-cough

25 immunization requirement for adolescent students.

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1 As discussed in the final staff analysis, staff
2 recommends that the Commission deny this test claim. The
3 only statutes pled in this test claim are Health and
4 Safety Code sections 120325 and 120335. These code
5 sections do not mandate school districts to engage in any
6 activity or task. Although the activities identified by
7 the claimant are addressed in emergency regulations
8 adopted by the Department of Public Health in June 2011,
9 those regulations were not identified or specifically
10 pled in the test claim as required by Government Code
11 sections 17521, 17551, and 17553.

12 In addition, the claimant's subsequent requests
13 to amend the test claim to add the DPH regulations was
14 not timely filed.

15 Staff recommends that the Commission adopt the
16 proposed decision to deny the test claim.

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

19 MR. PALKOWITZ: Good morning. Arthur Palkowitz
20 on behalf of the claimant, Twin Rivers School District.

21 MS. MALLORY: And Bonita Mallory, coordinator
22 of Student Health, Wellness, and Prevention, Twin Rivers.

23 MR. ROACH: Robert Roach, mandated cost analyst
24 for Twin River Unified School District.

25 MS. GEANACOU: Susan Geanacou for the

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1 Department of Finance.

2 CHAIR GILLIHAN: Thank you.

3 Mr. Palkowitz?

4 MR. PALKOWITZ: Yes, thank you.

5 The test claim before you is an *Immunization*
6 *Records* test claim. There have been several before the
7 Commission over the years that have been approved. This
8 immunization is for what is described as whooping cough.

9 What this test-claim legislation requires as
10 previous *Immunization Records* test claim, is that the
11 districts of California are to take safeguards to protect
12 the students from catching whooping cough while in a
13 school environment.

14 That requirement of safeguarding children has
15 been going on for decades in California; and that burden
16 has been on school districts during that period of time.

17 The test claim requires that the district
18 inform parents regarding this requirement of immunization
19 for whooping cough. The test claim requires schools to
20 train staff, to have the ability to review the records;
21 if necessary, provide the immunization, and to exclude
22 students that are not fully vaccinated.

23 Ms. Mallory has been kind enough to come today
24 and explain to you how this has worked in her district.

25 CHAIR GILLIHAN: Mr. Alex?

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1 MEMBER ALEX: I wonder if we can get you to
2 respond directly to the specific staff determinations by
3 particular provisions, so it's a very clear-cut
4 determination that was made. One that 120325 simply
5 does not mandate any activity, and that 120335 is a
6 prohibition and not a mandate. If you could just go
7 directly to those, I think we can kind of move to the
8 issues here.

9 MR. PALKOWITZ: Are you referring to me here,
10 sir?

11 MEMBER ALEX: Whoever wishes to proceed, but
12 I'd like you to address the staff report.

13 MR. PALKOWITZ: Go ahead.

14 MS. MALLORY: Should we just do my stuff?

15 MR. PALKOWITZ: Yes.

16 Can you phrase or repeat what you just said,
17 sir, so we are clear on what you are asking?

18 MEMBER ALEX: Sure. The staff report is, in my
19 view, very clear that there were two provisions pled from
20 the legislation.

21 The first one, section 120325, the staff has
22 determined that it does not contain a mandate; and the
23 second is section 120335, and that the staff has
24 determined that it contains a prohibition, not a mandate.

25 And those are -- you know, in terms of the

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1 jurisdiction of this Commission, that would be the
2 beginning and end of our inquiry. So I just want to see
3 where we are.

4 MR. ROACH: Can I answer that question for you?

5 The Assembly bill that brought about this new
6 law is AB 354. That law basically says that before a
7 student can enter seventh, eighth, ninth, tenth,
8 eleventh, and twelfth grades in the fiscal year 2011-12,
9 the student must have a Tdap immunization. What that
10 essentially meant for our school district is that we had
11 to review 14,000 cum. files and immunization records for
12 our students. That means in the '10-11 school year and
13 the '11-12 school year, that physically 14,000 files were
14 reviewed, if not more.

15 Now, as far as the staff analysis of whether
16 the law -- the way the law is written, it was written
17 to say that the students could not enter school after
18 July 1st. That, of course, would be when we're in our
19 summer break.

20 However, subsequent to AB 354, SB 614 was
21 enacted, which caused school districts to have a 30-day
22 grace period. In other words, students returned to
23 school for 30 days, and then school districts had to make
24 the assumption that they could either allow the students
25 to attend or we had to exclude them.

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1 Now, I will add that these students that were
2 excluded from our district were not eligible for ADA,
3 average daily apportionment. So we're at the situation
4 where we either provide the service as required by law or
5 we lose those students.

6 And this was a very, very significant loss to
7 our district. We had to exclude 290 students. We lost
8 \$1.6 million due to ADA loss.

9 MS. MALLORY: Do you want me to talk about
10 process?

11 MR. PALKOWITZ: Yes, I would like you to cover
12 the activities and the process that the district has gone
13 through since implementing this statute.

14 MS. MALLORY: Okay, in implementation of the
15 Tdap 7/12 requirement for 2010 and 2011, like Mr. Roach
16 said, that meant that we had to ensure that 14,000
17 students were vaccinated for Tdap. And in the spring
18 of 2011, we conducted multiple tele-parent messages from
19 the district and individual school sites in a variety
20 of languages to all seventh through twelfth grade homes.
21 Information was provided on our district Web site, school
22 loop. Health assistants and nurses checked the
23 California immunization registry. And coincidentally,
24 when we go to that California immunization registry, a
25 significant percentage of our students are not in that

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1 registry. Either they haven't obtained the vaccine or
2 the providers aren't entering their records. So it's not
3 a great resource for us in tracking down student
4 immunizations.

5 Maintaining and tracking spreadsheets, and we
6 provide individual notice to parents, also phone notice
7 regarding noncompliance.

8 I personally work closely with the district
9 attendance in tracking personnel, monitoring the Tdap
10 compliance, and following up with the site health
11 assistants and nurses. And our health staff, we have
12 12 RN credentialed school nurses for 30,000 students, and
13 we have 23 health assistants.

14 During that process, we were a new district.
15 We had only been organized for two years. We became a
16 district July 1st, 2008. So consequently, we didn't have
17 the resources that established districts have as far as
18 our own immunization clinics, and so that was not part of
19 our resource base. But we did work closely in providing
20 five clinics for our students specifically related to the
21 Tdap requirement in conjunction with Sacramento County
22 Health Department.

23 We did joint staffing with my staff, including
24 health assistants, nurses, and also some of their staff
25 and volunteers.

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1 So this was a tremendous burden, in that trying
2 to get that many students compliant in that short amount
3 of time was overwhelming for our staff. And we worked
4 on that for the entire fall part of that school year.
5 And then beginning on July 1st, 2012, students entering
6 just seventh grade were required to have that.

7 And based on my experience -- 35 years as an
8 R.N. in California, and I worked for Sacramento County
9 Public Health for 11 years as a public health nurse,
10 and I've been a credentialed school nurse for 23 years,
11 and I've been coordinator in my district since the
12 inception -- knowing that requirement was coming, I knew
13 it was going to be a tremendous task for us to undertake.
14 And getting 2,000 students compliant was a much easier
15 task than getting 14,000 students compliant.

16 I think our registration process in our
17 district, we do not have central registration, like some
18 districts. And we have a variety of school
19 configurations: We have K-8s, 5-8s, 6-8s, 7-8s, and
20 9-12s. So we have school secretaries, office assistants,
21 or registrars who receive immunization records. So there
22 is no central registration.

23 Immunization records vary. When students and
24 parents bring them in, they can be on the California
25 immunization card or an out-of-state immunization card

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1 or an out-of-country immunization card. Sometimes
2 translation is necessary. And those services have been
3 cut in our district to where it's really difficult to get
4 a translator.

5 And historically, we would send the parents
6 to providers in the community and, you know, have them
7 translate. And some of those resources have gone as
8 well.

9 When immunization records come in from out of
10 country, usually those are incomplete. They do not meet
11 California requirements. So those students, nine times
12 out of ten, will have to be referred to area resources to
13 become compliant. So if their immunizations are
14 incomplete, the student cannot start school. They are
15 referred to their private provider, the Child Health
16 Disability Prevention Program or the County Immunization
17 Program.

18 We also provide a county resource list. And
19 for your information, these services have declined over
20 the last five to ten years.

21 Our two area county clinics, the one at Rusch
22 Park in Citrus Heights and also the one in North
23 Sacramento, the Del Paso Health Center, have both closed.

24 Our families, we have about 40 to 50 percent
25 of our families receive Medi-Cal or are eligible and

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1 they meet the requirements for eligibility. And our
2 free and reduced-meal rate is 90 percent. And that
3 results in approximately 40 to 45 percent of our students
4 are probably uninsured, so they have no primary-care
5 provider.

6 So with the cuts in the county programs, these
7 families --

8 CHAIR GILLIHAN: Ms. Mallory?

9 MS. MALLORY: Yes.

10 CHAIR GILLIHAN: Thank you for that explanation
11 of the process you're going through, but I don't think
12 that's necessarily on topic with the decision before the
13 Commission today. So we do appreciate the background on
14 that.

15 Before we move on, is there anything you'd like
16 to add in closing?

17 MR. PALKOWITZ: Myself?

18 CHAIR GILLIHAN: No, I was talking to
19 Ms. Mallory.

20 MS. MALLORY: Well, I just think -- and
21 students, when they are excluded -- you know, if we
22 exclude students, often parents will just keep them
23 home. It's not like they go and get the shot. They will
24 keep them home so students are missing school, and also
25 they become behind academically. So that's another

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1 issue, that truancy becomes an issue.

2 CHAIR GILLIHAN: Thank you.

3 Ms. Olsen?

4 MEMBER OLSEN: It seems to me that when I
5 listen to this -- I mean, it's troubling, but much of it
6 doesn't have to do with the issue of does a mandate
7 exist. But I am somewhat swayed by the idea that the
8 prohibition does not necessarily mean that there isn't --
9 that a prohibition can almost be a program.

10 And it seems to me that prohibiting the
11 unconditional -- oh, I just lost my screen -- the
12 unconditional advancement of a student suggests that you,
13 therefore, have created a program -- a requirement for
14 some sort of conditional evaluation, which I'm somewhat
15 swayed by what's being said, has costs related to it.
16 So I would like staff to address why that wouldn't be a
17 mandate.

18 MS. SHELTON: Well, we certainly discussed that
19 at our office. You know, a lot of us are parents with
20 junior-high kids who had to very much go through this
21 program when it was urgency and for those first group of
22 kids that had to submit their immunizations into their
23 school.

24 All of the activities that were discussed are
25 required by the regulations that have not been pled.

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1 And in the past, the Commission has approved a mandate
2 when statutory language is written in a prohibitory
3 manner. But in those cases, the State had not yet acted
4 on what it meant. So it was up to the Commission to
5 determine, "Okay, what does this really mean?"

6 Here, the State has acted. And those
7 regulations were adopted three months before the test
8 claim was filed. And when you look at the leg. history,
9 the leg. history itself says the statutes don't create
10 the mandate; the regulations would create the mandate.

11 And so because we have very specific statutory
12 requirements on test-claim filings, that you are required
13 to specifically plead your statute, regulations, and
14 register numbers for each one of those regulations and
15 they have not been filed, we presented the conservative
16 view, which is legally correct, that the Commission does
17 not have jurisdiction over regulations that have not been
18 pled. It is, I think, a mistake in pleading.

19 I do think that if this were a court, you could
20 file a motion to get relief from that mistake. But the
21 courts have statutory authority to grant that relief, and
22 the Commission doesn't have that authority.

23 MEMBER OLSEN: So, really, the option for this
24 is to wait for the Commission to decide against the
25 mandate and then go to court?

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1 MS. SHELTON: Yes, they can do that.

2 It's a different case presented with this
3 prohibition because there are requirements that do
4 implement it. Where, in the past, when we've approved a
5 prohibition, there haven't been any requirements in law
6 stated. Here, you do have stated requirements, and
7 they're very specific.

8 And the two prior test claims that
9 Mr. Palkowitz was referring to pled the regulations.
10 Here, there's just been a mistake in pleading.

11 CHAIR GILLIHAN: Mr. Alex?

12 MEMBER ALEX: Camille, can I ask on this
13 one, since we were having a lesson in judicial and
14 administrative notice today, this seems closer to the
15 idea that you can take into account the existence of
16 regulations.

17 Any thoughts on that?

18 MS. SHELTON: Well, let me just say -- you
19 know, Tyler and I have talked about this a lot. We
20 presented the view that I think is legally defensible,
21 okay. If we wrote it -- we can certainly, if the
22 Commission wants to go that direction to approve this
23 claim, we would have to write it that way. That, you
24 know, the actual prohibition makes you do something to
25 comply with the prohibition and that you would take

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1 notice of those activities. You can do that. It's less
2 legally defensible than the other position. It's up to
3 the Commission.

4 It's gray.

5 CHAIR GILLIHAN: Ms. Ramirez?

6 MEMBER RAMIREZ: I also find it painful,
7 actually, to hear what the district personnel went
8 through.

9 I'm very concerned about if we were to go
10 ahead and approve the claim, what would be the precedent
11 for other organizations, other claims that would come
12 forward? Because, you know, if this was the only case,
13 I could say, "Yes, let's do it."

14 MS. SHELTON: It's happened a lot where they
15 have missed a statute or something. And we have
16 routinely said we don't have jurisdiction over those
17 because the Government Code statute requires specific
18 pleading.

19 So it is really gray. And if you do that for
20 one case, then what happens on the future cases? And
21 you really need to be very specific in your pleading.

22 CHAIR GILLIHAN: Ms. Olsen?

23 MEMBER OLSEN: So can we go completely to the
24 hypothetical now? Not talking about this case, but
25 talking about a hypothetical similar case. And if we

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1 find against the mandate, we deny the mandate, and let's
2 say this hypothetical claimant then goes to the court
3 and asks for some sort of relief, then does the case come
4 back here, or is it decided in the courts?

5 I'm just fascinated by the procedural issues
6 here.

7 MS. SHELTON: I don't know, it would be really
8 up to the judge's discretion. I mean, I could argue that
9 it would have to come back to the Commission, because the
10 Commission has exclusive jurisdiction to make those
11 determinations.

12 The courts have, though, if it's a
13 public-policy issue that's significant enough, could take
14 it, too. But the mistake wasn't made in court; the
15 mistake was made before the Commission. And I think the
16 Court would look to see: Does the Commission have any
17 authority to grant relief? We don't have those -- the
18 Commission doesn't have those equitable powers that a
19 court would have.

20 MS. HALSEY: The Court has found that we don't.

21 MS. SHELTON: Right. And the Court has found
22 that a mandate determination is not an equitable
23 proceeding, so...

24 CHAIR GILLIHAN: Mr. Saylor?

25 MEMBER SAYLOR: Just practically speaking, in

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1 this case where there is a prohibition of unconditionally
2 admitting or advancing any pupil, doesn't that
3 practically require some activity on the part of a
4 district to fulfill that statutory obligation?

5 MS. SHELTON: I think you can absolutely, yes,
6 make that argument. And as I've said, the Commission has
7 approved test claims with prohibitions before and has
8 defined it when the State has not defined it.

9 Here, the State has defined it, and those
10 regulations have not been pled.

11 MEMBER OLSEN: It really is gray.

12 MEMBER RAMIREZ: May I ask a question, a
13 follow-up?

14 CHAIR GILLIHAN: Yes, Ms. Ramirez?

15 MEMBER RAMIREZ: If it's appropriate, what
16 would be the alternative for the District if we were to
17 deny? Is there any alternative out there? I'd just like
18 to know. This may be a little bit beyond topic, but...

19 MS. HALSEY: No, I don't think Commission staff
20 is arguing that these aren't things required, or even
21 that there wouldn't be a mandate if it had been properly
22 pled. They are required. It just would mean that the
23 school districts would be out a lot of money.

24 CHAIR GILLIHAN: Mr. Alex?

25 MEMBER ALEX: Is there any ability to either

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1 amend or re-file? Or are we past the time for that?

2 MS. SHELTON: That is the problem.

3 They were working on timing when all these laws
4 changed in the statute and the regulations that do
5 require that all your pleadings, including amendments, be
6 filed within the statute of limitations. And I think
7 I noted that the regulations were adopted three months
8 before the first test claim was filed, so we're beyond
9 the statute of limitations.

10 CHAIR GILLIHAN: Ms. Geanacou, does the
11 Department of Finance have any comments?

12 MS. GEANACOU: Yes, thank you.

13 Number one, we support the staff's analysis
14 with regard to recommendation of the finding of
15 non-existence of a statutory mandate; and we also support
16 the staff analysis as it regards the jurisdiction over
17 the regulations at issue here.

18 CHAIR GILLIHAN: Thank you.

19 MR. PALKOWITZ: May I respond briefly?

20 CHAIR GILLIHAN: Certainly, Mr. Palkowitz.

21 MR. PALKOWITZ: Thank you.

22 Just to refresh the Commission's information
23 on this, this statute, the test-claim legislation refers
24 to the amended regulation. So it is included in the
25 test-claim statute in the filing.

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1 Second of all, the test-claim form that was
2 adopted by the Commission in accordance with Government
3 Code sections, Section 7 states, "Documentation to
4 support the written narrative, with copies of all the
5 following: test-claim statute, bill number, executive
6 order, relevant portions of provisions, federal statutes,
7 executive orders, administrative decision, court
8 decisions." It nowhere mentions regulations.

9 That form is guidance for the public in moving
10 forward on filing test claims.

11 MEMBER ALEX: I'm sorry, that's -- at least for
12 me, that doesn't grab me. But, okay, understood.

13 MR. ASMUNDSON: If I may respond?

14 The regulations are executive orders. And in
15 addition, his first comment that the regulations are
16 cited, they're not. Section 120335 says, "The Department
17 may adopt emergency regulations." It does not
18 specifically refer to any regulations.

19 MR. PALKOWITZ: But the regulations we're
20 talking about are emergency regulations, correct?

21 MR. ASMUNDSON: Yes. And they were not pled,
22 and the Commission doesn't have jurisdiction over those
23 regulations.

24 CHAIR GILLIHAN: Is there any public comment on
25 this item?

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(No response)

CHAIR GILLIHAN: Seeing none, what is the pleasure of the Commission?

MEMBER SAYLOR: I would like to move staff recommendation for the first section, 120325, but to change the recommendation on the second code section, 120335, to find that the statute does, in fact, contain a mandate.

CHAIR GILLIHAN: We have a motion --

MEMBER OLSEN: I'll second. I just can't get my button to work.

CHAIR GILLIHAN: We have a motion and a second.

MS. SHELTON: Can I just -- if the Commission goes that direction, I would recommend that we bring that decision back to be adopted at a second hearing, because it's not written that way.

MEMBER SAYLOR: I accept that as the maker of the motion.

MEMBER RAMIREZ: Could I ask for more information from the maker of the motion?

MEMBER SAYLOR: Based on the testimony provided here and the discussion, it is my conclusion that to implement the statute requires activities that are mandated.

MS. GEANACOU: May I ask a question, please?

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1 What would the mandated activities be? Would
2 they be those that are contained in the emergency
3 regulations?

4 MEMBER SAYLOR: Whether or not there are
5 regulations, in order to achieve the determination that
6 a student has been properly and fully immunized requires
7 an action by the district. The regulations are
8 irrelevant whether they happened or not. In order to
9 comply with the statute, actions had to be taken.

10 MEMBER RIVERA: And just another question.
11 As far as reimbursement of those costs, are we talking
12 about -- because I know we mentioned there was 290
13 students that --

14 MS. SHELTON: It was 12,000, I think.

15 MEMBER RIVERA: Well, there was 290, I think --

16 MR. ROACH: No, no, that -- may I respond to
17 that?

18 MEMBER RIVERA: Sure.

19 MR. ROACH: The 290 students that we had to
20 back out ADA on, those are students that -- those are not
21 costs that we are alleging in this claim.

22 MEMBER RIVERA: Okay, that's what I wanted to
23 find out.

24 MR. ROACH: Yes. Yes, we are alleging that is
25 down-the-stream cost to us.

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1 MEMBER RIVERA: Okay, that's what I want to be
2 clear about.

3 MR. ROACH: Okay.

4 MEMBER ALEX: Camille, I have another question,
5 which is, if the Commission were to turn it back to
6 staff, I guess I want to know -- I mean, there may be a
7 number of options. For example, we could say, we think
8 there is a mandate in the statute, we could also ask for
9 further evaluation of that. Is that true, and also the
10 implications of what it would mean to find a mandate in
11 the statute, as opposed to the emergency regs?

12 MS. SHELTON: Well, let me touch on the second
13 point first, because we sort of talked about that, too.

14 I mean, the regs are very specific. Yes, I
15 mean, you'd have to really ignore them, I think, and then
16 just look at the statute, and say, "What is minimally
17 mandated here just to comply with this prohibition?"
18 So you'd have to take a look at that and do it that way.
19 It would be a little bit squirrely, I think.

20 The option, though, going to your first point,
21 there are -- there is a motion on the table, and you need
22 to decide on that motion. If it fails for whatever
23 reason, you have opportunities to send the whole thing
24 back to the staff.

25 In the past, we could do something similar to

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1 what we've done, where we present both options for you to
2 decide, this one and a next one, and then you can do that
3 as well, if you don't feel comfortable with maybe what it
4 would look like now.

5 MEMBER ALEX: We could ask staff to provide
6 some different options.

7 MS. SHELTON: Yes, absolutely.

8 MEMBER ALEX: Okay, so what I would say about
9 the pending motion is that I'm uncomfortable finding,
10 as we sit here, that there is a statutory mandate. But
11 I would like -- I share the same distress that everybody
12 on the Commission has expressed, and I'd like to see if
13 there are different options, whether they're in
14 conjunction with recognizing the emergency regulations or
15 the statute itself, to at least explore that. That would
16 be -- that's my position.

17 MEMBER SAYLOR: Do you want to make a
18 substitute motion?

19 MEMBER ALEX: I would -- can I do that, or do
20 we have to --

21 MS. SHELTON: There is a second. There's a
22 second on the motion, so you need to vote on that.

23 MEMBER OLSEN: We need to vote on that.

24 MEMBER SAYLOR: Do we have procedures that
25 prohibit substitute motions?

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1 MS. SHELTON: No.

2 MEMBER SAYLOR: So you could do that.

3 MEMBER RAMIREZ: Withdraw your second.

4 MEMBER OLSEN: I can withdraw my second, if
5 that's a problem, yes.

6 MEMBER ALEX: Do you want to?

7 MEMBER OLSEN: Sure. Go ahead.

8 MEMBER ALEX: Okay, so I would make a
9 substitute motion that we remand the entire proceeding,
10 both parts of it, to staff, to evaluate options for a
11 potential mandate, either in connection with the statute
12 or the possibility of including incorporation of the
13 regulations to determine if that's a possibility.

14 MEMBER SAYLOR: Second.

15 CHAIR GILLIHAN: We have a motion and a second.
16 Is there any more discussion?

17 *(No response)*

18 CHAIR GILLIHAN: Heather, please call the roll.

19 MS. HALSEY: Mr. Alex?

20 MEMBER ALEX: Aye.

21 MS. HALSEY: Mr. Placet?

22 MEMBER PLACET: Aye.

23 MS. HALSEY: Mr. Gillihan?

24 CHAIR GILLIHAN: Aye.

25 MS. HALSEY: Ms. Olsen?

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MEMBER OLSEN: Aye.

MS. HALSEY: Ms. Ramirez?

MEMBER RAMIREZ: Aye.

MS. HALSEY: Mr. Rivera?

MEMBER RIVERA: Aye.

MS. HALSEY: Mr. Saylor?

MEMBER SAYLOR: Aye.

CHAIR GILLIHAN: The motion carries.

MR. PALKOWITZ: Thank you.

MS. MALLORY: Thank you.

MR. ROACH: Thank you.

MS. HALSEY: Item 6, parameters and guidelines for *POBR II* has been postponed to January 2014 at the request of claimant.

Item 7, Chief Legal Counsel Camille Shelton will present Item 7, a request for reconsideration of statement of decision and parameters and guidelines on the *California Public Records Act*.

MS. SHELTON: Good morning. This is request for reconsideration filed by the California Special Districts Association on the statement of decision and parameters and guidelines that were adopted April 19th, 2013, for the *Public Records Act* program.

The Association contends that the decision and the parameters and guidelines contain an error of law

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1 with respect to the description of eligible claimants
2 which omits special districts required to comply with the
3 Public Records Act.

4 Pursuant to the Commission's regulations,
5 reconsidering a statement of decision is a two-step
6 hearing process. The first step is to determine whether
7 to grant the request for reconsideration and schedule the
8 matter for a hearing on the merits. Five affirmative
9 votes are required to grant the request or
10 reconsideration.

11 Staff recommends that the Commission grant the
12 request in this case. Except for certain provisions
13 relating only to school districts, the activities
14 mandated by the Public Records Act apply equally to all
15 levels of government. The test-claim statement of
16 decision correctly acknowledges that local agencies are
17 eligible for reimbursement under the program. And local
18 agencies are defined in the mandate statutes to include
19 special districts.

20 The decision on the parameters and guidelines,
21 however, authorized reimbursement for cities, counties,
22 and school districts only, but did not address the issue
23 of special districts, which will require further legal
24 analysis. Not all special districts are eligible to
25 claim reimbursement under the Constitution because they

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1 receive their revenues from fees, and are not subject to
2 the tax-and-spend provisions of the Constitution.

3 Staff recommends that the Commission grant the
4 request for reconsideration and direct staff to schedule
5 a second hearing on the merits of the request.

6 Will the parties please state your names for
7 the record?

8 MS. HOLZEM: Good morning. Dorothy Holzem with
9 the California Special Districts Association.

10 MR. KAYE: Good morning. Leonard Kaye with the
11 County of Los Angeles.

12 MR. WARD: Randy Ward, Department of Finance.

13 CHAIR GILLIHAN: Thank you.

14 Ms. Olsen?

15 MEMBER OLSEN: I'd love to move the staff's
16 recommendation.

17 CHAIR GILLIHAN: We have a motion on the staff
18 recommendation.

19 Is there a second?

20 MEMBER RIVERA: Second.

21 CHAIR GILLIHAN: We have a motion and multiple
22 seconds.

23 Is there any public comment on this item?

24 *(No response)*

25 CHAIR GILLIHAN: Seeing none, Heather, please

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1 call the roll.

2 MS. HALSEY: Mr. Alex?

3 MEMBER ALEX: Aye.

4 MS. HALSEY: Mr. Placet?

5 MEMBER PLACET: Aye.

6 MS. HALSEY: Mr. Gillihan?

7 CHAIR GILLIHAN: Aye.

8 MS. HALSEY: Ms. Olsen?

9 MEMBER OLSEN: Aye.

10 MS. HALSEY: Ms. Ramirez?

11 MEMBER RAMIREZ: Aye.

12 MS. HALSEY: Mr. Rivera?

13 MEMBER RIVERA: Aye.

14 MS. HALSEY: Mr. Saylor?

15 *(No response)*

16 CHAIR GILLIHAN: The motion carries.

17 Thank you.

18 MS. HOLZEM: Thank you.

19 MR. KAYE: Thank you.

20 MS. HALSEY: Item 9 is reserved for County

21 applications for a finding of significant financial

22 stress, or SB 1033. No SB 1033 applications have been

23 filed.

24 Item 10, Assistant Executive Director Jason

25 Hone will present Item 10, the Legislative Update.

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1 MR. HONE: Good morning. Staff has identified
2 two bills introduced this session related to the mandates
3 process, and those are AB 392 and AB 1292.

4 AB 1292 is a spot bill, and staff will continue
5 to monitor the legislation. There has been no updates
6 to this bill since it was first read on the floor in
7 February 25th.

8 AB 392 is sponsored by the State Controller and
9 proposes changes to the allocation method and reporting
10 requirement for prorated state mandate claims. This bill
11 has passed the Assembly, and just yesterday was referred
12 to the Senate Governance and Finance Committee.

13 CHAIR GILLIHAN: Thank you.

14 MS. HALSEY: Item 11, Chief Legal Counsel
15 Camille Shelton will present the Chief Legal Counsel
16 report.

17 MS. SHELTON: Just a report that that hearing
18 case on the *Water Permit* matter for L.A. County, the
19 Court this week, on its own motion, moved that up to
20 July 24th.

21 Also, to report in the *Grad Requirements*
22 litigation, there were no appeals filed. So that became
23 a final decision.

24 CHAIR GILLIHAN: Thank you, Heather.

25 MS. HALSEY: Item 12 is the Executive

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1 Director's report. And I have an update on workload,
2 budget, and our tentative agenda items for next meeting.

3 The written report contains a summary of
4 pending claims, including a breakdown of the claims filed
5 and completed this fiscal year.

6 After this hearing, the Commission will have
7 25 -- is that right? No, sorry, 26 pending test claims
8 remaining, ten of which are *Stormwater Permit* test
9 claims.

10 The budget update on the Assembly and Senate
11 Sub 4 committees both met in May and unanimously approved
12 the Commission's BCP for one new attorney III and a
13 senior legal analyst. We're currently in the recruitment
14 process, and will fill these positions effective July 1st
15 upon budget approval.

16 These new positions will help the Commission to
17 work the backlog more quickly and come closer to meeting
18 the statutory deadline for adoption of statewide cost
19 estimates.

20 Also, in the budget, the subcommittees took up
21 suspension of mandates. The Senate Sub 4 committee voted
22 to suspend all of the mandates proposed for suspension by
23 the Governor, and the Assembly Sub 4 did likewise, except
24 for the four mandates that were proposed for suspension,
25 for which there was no adopted statewide cost estimate.

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1 And those include the *California Public Records Act*,
2 *Local Agency Ethics*, *ICAN*, and *Tuberculosis Control*
3 mandates.

4 And then on May 21st, Assembly Sub 4 voted to
5 reject the suspension of the four mandates without
6 statewide cost estimates, and also conform with the
7 Subcommittee 1 action to reject suspension of the *ICAN*
8 mandate and establish a working group to evaluate *ICAN*.

9 On May 22nd, the Senate Sub 4 rescinded its
10 vote on *ICAN*, to rescind the suspension and conform to
11 the Assembly actions. So they're creating a working
12 group on *ICAN* reform.

13 At the end of my report, you can see the
14 tentative agenda items for July and September. If you
15 represent any of the parties in these matters, please
16 review the claims and comments on file which you can find
17 on our Web site, and make sure they're complete. If you
18 have anything you want to add, the sooner the better, so
19 that staff can consider that in their analysis.

20 And if you have any questions or need help
21 finding anything, just give us a call.

22 Thank you.

23 CHAIR GILLIHAN: Thank you.

24 So we're on to the closed-session item?

25 MS. HALSEY: Yes.

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1 All right, moving on to closed-session.

2 CHAIR GILLIHAN: Okay, the Commission will meet
3 in closed executive session pursuant to Government Code
4 section 11126(e) to confer and receive advice from legal
5 counsel for consideration and action, as necessary and
6 appropriate, upon the pending litigation listed on the
7 published notice and agenda; and to confer with and
8 receive advice from legal counsel regarding potential
9 litigation.

10 The Commission will also confer on personnel
11 matters pursuant to section 11126, subdivision (a)(1).

12 We will reconvene in open session in
13 approximately 15 minutes.

14 *(The Commission met in closed executive*
15 *session from 11:14 a.m. to 11:22 a.m.)*

16 CHAIR GILLIHAN: The Commission met in closed
17 session pursuant to Government Code section 11126(e)(2)
18 to confer with and receive advice from legal counsel for
19 consideration and action, as necessary and appropriate,
20 upon the pending litigation listed on the published
21 notice and agenda, and to confer with and receive advice
22 from legal counsel regarding potential litigation, and
23 pursuant to Government Code section 11126, subdivision
24 (a)(1), to confer on personnel matters.

25 With no further business to discuss, I'll

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entertain a motion to adjourn.

MEMBER PLACET: So moved.

CHAIR GILLIHAN: We have a motion --

MEMBER OLSEN: Second.

CHAIR GILLIHAN: We have a motion and a second.

All in favor, say "aye."

(A chorus of "ayes" was heard.)

CHAIR GILLIHAN: All opposed?

(No response)

CHAIR GILLIHAN: No?

(No response)

CHAIR GILLIHAN: Appearing none, the meeting is
adjourned.

(The meeting concluded at 11:23 a.m.)

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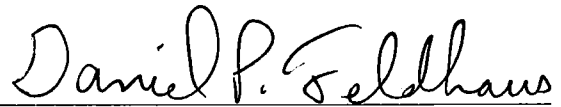
REPORTER' S CERTIFICATE

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 15th of June 2012.



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