

PUBLIC HEARING
COMMISSION ON STATE MANDATES



TIME: 10:00 a.m.
DATE: Friday, December 7, 2012
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

KEN ALEX
Director
Office of Planning & Research

RICHARD CHIVARO
Representative for JOHN CHIANG
State Controller

FRANCISCO LUJANO
Representative for BILL LOCKYER
State Treasurer

SARAH OLSEN
Public Member

M. CARMEN RAMIREZ
Oxnard City Council Member

DON SAYLOR
Yolo County Supervisor
Local Agency Member



COMMISSION STAFF PRESENT

HEATHER HALSEY
Executive Director
(Items 2, 6, 7, and 10)

JASON HONE
Assistant Executive Director
(Item 8)

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF

continued

CAMILLE SHELTON
Chief Legal Counsel
(Item 9)

MATT JONES
Commission Counsel
(Item 4)

KENNY LOUIE
Staff Counsel
(Item 3)

KERRY ORTMAN
Program Analyst
(Item 5)



PUBLIC TESTIMONY

Appearing Re Item 3:

For San José Unified School District:

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

For Department of Finance:

ELISA WYNNE
Department of Finance
915 L Street, 7th Floor
Sacramento, California 95814

JESSICA PALYO
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 4:

For San Diego Office of Education and Sweetwater Union
High School District:

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

For Department of Finance:

ELISA WYNNE
Department of Finance
915 L Street, 7th Floor
Sacramento, California 95814

CHRISTIAN OSMEÑA
Department of Finance
915 L Street, 7th Floor
Sacramento, California 95814

Appearing Re Item 5:

For County of Santa Clara:

JULIANA F. GMUR
Manager, Financial Services
MAXIMUS
625 Coolidge Drive, Suite 100
Folsom, California 95630

For Department of Finance:

RANDALL WARD
Budget Analyst
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 5:

For Department of Finance:

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

Appearing Re Public Comment

ALLAN BURDICK
CSAC SB-90 Service
2001 P Street, Suite 200
Sacramento, California 95811



ERRATA SHEET

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1 BE IT REMEMBERED that on Friday, December 7,
2 2012, commencing at the hour of 10:00 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:

6 --oOo--

7 *(The gavel was sounded.)*

8 CHAIR REYES: The hour of ten o'clock having
9 arrived, we would like to call the meeting of the
10 Commission on State Mandates for December 7th to order.

11 Would you please call the roll?

12 MS. HALSEY: Mr. Alex?

13 *(No response.)*

14 MS. HALSEY: Mr. Chivaro?

15 MEMBER CHIVARO: Here.

16 MS. HALSEY: Mr. Lujano?

17 MEMBER LUJANO: Here.

18 MS. HALSEY: Ms. Olsen?

19 MEMBER OLSEN: Here.

20 MS. HALSEY: Ms. Ramirez?

21 MEMBER RAMSEY: Here.

22 MS. HALSEY: Mr. Reyes?

23 CHAIR REYES: Present.

24 MS. HALSEY: Mr. Saylor?

25 MEMBER SAYLOR: Here.

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1 CHAIR REYES: Thank you.

2 We have a quorum.

3 Are there any objections or correction to the
4 September 28th minutes?

5 MEMBER LUJANO: Move approval.

6 CHAIR REYES: It's been moved.

7 MEMBER OLSEN: Second.

8 CHAIR REYES: And seconded.

9 Any comments from the public on the minutes?

10 *(No response)*

11 CHAIR REYES: It's been moved and seconded.

12 All in favor, say "aye."

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

14 CHAIR REYES: Opposed?

15 *(No response)*

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

17 MS. HALSEY: The next item is the *Proposed*
18 *Consent Calendar* that consists of Item 6.

19 CHAIR REYES: Is there a motion to approve the
20 consent?

21 MEMBER RAMIREZ: So moved.

22 MEMBER SAYLOR: Second.

23 CHAIR REYES: Any comments from the public on
24 the consent?

25 *(No response)*

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1 CHAIR REYES: Hearing none, all in favor, say
2 "aye."

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

4 CHAIR REYES: All opposed?

5 *(No response)*

6 CHAIR REYES: Abstentions?

7 *(No response)*

8 CHAIR REYES: "Ayes" have it. Thank you.

9 MS. HALSEY: Item 2 is reserved for appeals of
10 the Executive Director's decisions.

11 There are no appeals to consider under Item 2.

12 CHAIR REYES: Thank you.

13 MS. HALSEY: We will move to the Article 7
14 portion of the hearing.

15 Will the parties and witnesses for Items, 3, 4,
16 and 5, please rise?

17 *(The parties and witnesses stood to
18 be sworn.)*

19 MS. HALSEY: Do you solemnly swear or affirm
20 that the testimony which you are about to give is true
21 and correct based on your personal knowledge,
22 information, or belief?

23 *(Parties and witnesses responded
24 affirmatively.)*

25 MS. HALSEY: Thank you.

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1 Commission Counsel Kenny Louie, who his last
2 day with the Commission is today.

3 *(Ken Alex entered the meeting room.)*

4 CHAIR REYES: Heather, hold on a second.

5 The record will show that Mr. Alex has joined
6 us.

7 MEMBER ALEX: Aye.

8 CHAIR REYES: And almost tripped.

9 MS. HALSEY: I don't know if we have any
10 technical assistance, but my microphone isn't working.

11 CHAIR REYES: How about now?

12 MS. HALSEY: Okay, there. Thank you.

13 Commission Counsel Kenny Louie will present
14 Item 3, a test claim on *Parental Involvement Program*.

15 CHAIR REYES: But I interrupted you. You were
16 making a statement about Mr. Louie, whose short time
17 status --

18 MS. HALSEY: Yes, today is his last day. And
19 this is his last item. He is leaving us for the
20 Department of Finance.

21 MR. PETERSEN: Thank you for the parting gift.

22 MS. HALSEY: And he will be sorely missed by
23 the Commission. It's our loss and their gain.

24 So with that, Kenny?

25 MR. LOUIE: Thank you.

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1 This test claim addresses activities associated
2 with parental involvement and rights with regard to
3 education of their children pursuant to various Education
4 Code sections.

5 Staff recommends the Commission approve some
6 of the alleged activities, including the adoption of
7 parental involvement policies, providing information
8 opportunities allowing parental involvement, and
9 providing notice to parents of specific parental rights
10 in education.

11 Staff also recommends the Commission deny some
12 of the alleged activities on the basis that the plain
13 language of the statutes do not impose any activities on
14 the districts, or that the activities are imposed by
15 preexisting law.

16 The claimants disagree with staff's reading of
17 some of the statutes and, thus, the recommendation of
18 the denial of reimbursement for some of the alleged
19 activities. Finance disagrees with the recommendation of
20 approval of making assessments available for parent
21 review, and asserts that the costs, if any, of the
22 remaining activities recommended for approval should be
23 at most minimal.

24 Staff recommends the Commission adopt the staff
25 analysis and proposed statement of decision, to partially

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1 approve the test claim.

2 Also, staff recommends the Commission allow
3 staff to make nonsubstantive technical corrections to the
4 statement of decision following the hearing.

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

7 MR. PETERSEN: Keith Petersen, representing the
8 test claimant.

9 MS. WYNNE: Elisa Wynne, Department of Finance.

10 MS. PALYO: Jessica Palyo, Department of
11 Finance.

12 CHAIR REYES: All right, so we have some
13 agreements and some disagreements.

14 So do you want to take us to the first area, or
15 the first item?

16 Who wants to go?

17 MR. PETERSEN: Well, traditionally, we start,
18 if that's okay.

19 We'll stand on the written submissions. But
20 I'll answer any questions you may have.

21 CHAIR REYES: Are there any questions from
22 board members?

23 MEMBER SAYLOR: I have a question.

24 CHAIR REYES: Mr. Saylor?

25 MEMBER SAYLOR: I have a question of our staff.

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1 There is one of the elements that has been
2 identified as not establishing a new mandate. It has to
3 do with the Chapter 1 ESEA program.

4 And the statement is, as I understand it, that
5 since school districts can voluntarily choose to accept
6 funds or not, requiring the parental involvement in that
7 program is not a mandate.

8 Is that an accurate reading?

9 MR. LOUIE: Yes.

10 MEMBER SAYLOR: Okay, so my question is about
11 practical compulsion. It seems to me that school
12 districts have very little choice in whether they choose
13 to accept ESEA funding, because there are students who
14 require the services, and there is no other funding
15 stream for it.

16 I don't think that any school district that is
17 eligible to receive ESEA funding denies it or refuses to
18 accept it.

19 So it seems to me, that one may be a practical
20 compulsion. It may be that there's a legal reading that
21 says that it's not a mandate. But I think in reality, it
22 is, in my view.

23 How do you respond to that?

24 MR. LOUIE: Well, with the record in front of
25 us, we have no evidence of either any penalty involved

1 with not accepting, if you are eligible, or any certain
2 consequence that would result for failure to receive
3 those funds.

4 On top of that, there are districts that do not
5 receive Title I funding. And one of the code sections,
6 or test-claim statutes provided for instances in which
7 school districts do not receive that funding.

8 So with what's in the record and what's before
9 us here, we don't have any evidence to make a finding of
10 practical compulsion, which is necessary for that
11 finding.

12 MEMBER SAYLOR: Could I ask the claimant to
13 respond to that point?

14 MR. PETERSEN: I certainly agree with you,
15 Mr. Saylor, that there is a practical compulsion to
16 implement the *Parental Involvement Program*.

17 As to some districts not receiving those funds,
18 I believe Title 1 is based on eligibility, on
19 demographics and poverty, those sorts of things.

20 ESEA has been around since 1965. The *Parental*
21 *Involvement* came along with the Hawkins Act. I believe
22 that was 1988, Hawkins-Stafford. That's when they added
23 PIP. So if you were a school district that didn't want
24 to do PIP, you would have to give up all your ESEA money.

25 So it's a matter of giving up a large amount of

1 money, and stop providing services to a large segment of,
2 for instance, the urban district, if you want to take a
3 stand on not doing the *Parental Involvement Program*. And
4 that is the practical compulsion. It's the sheer
5 magnitude of the program.

6 It may be silly to take a photograph and say
7 I'm not going to do PIP. But the concept is, they open
8 up the money, they start a program, and you subsequently
9 keep adding things; and since you're taking the money,
10 you now have to do this, you now have to do this. And
11 the money does not necessarily increase with those
12 additional activities. So we believe that is the
13 coercive scenario.

14 On the other hand, the past practice of the
15 Commission is that if it doesn't meet -- and he alluded
16 to those -- if it doesn't meet specified statutory
17 standards of coercion, there is no coercion.

18 So for the Commission to adopt your position,
19 my position today, they would have to create a new
20 coercive -- a new definition of coercion that's not in a
21 court case.

22 I, for one, do not believe the Commission is
23 limited to court cases. I think you folks have some
24 common sense and practical experience.

25 CHAIR REYES: Ms. Shelton?

1 CAMILLE SHELTON: Let me just kind of dovetail
2 on the general applicability of practical compulsion and
3 what the courts have said.

4 The Commission in the past had gone down that
5 road in a case where it seemed kind of evident from case
6 law and from circumstances that school districts really
7 had no choice but, in that case, to have a police force,
8 given the circumstances of situations that they had.

9 The Court, in that case, said that that might
10 be true; but you have to have evidence in the record of
11 certain and severe consequences or another draconian
12 consequence, or showing that they had no other reasonable
13 alternative.

14 But it can't just be based on speculation or
15 what Commission members believe. You need to see the
16 consequences in the law or you need to see the
17 consequences in evidence.

18 And here, we don't have it in the law. It's a
19 grant program.

20 So you have to show it by way of evidence from
21 a party. And a Commission member cannot be a witness.
22 So you need to get it from the parties.

23 And here, we don't have any evidence or
24 discussion of it, really.

25 MEMBER SAYLOR: So are there any school

1 districts that are eligible to receive Title 1 funding
2 for their schools who don't receive it?

3 MR. PETERSEN: I don't have an answer for that
4 today.

5 I suspect it would be few.

6 MR. BURDICK: I could ask the Department of
7 Finance.

8 CAMILLE SHELTON: Well, and then you would need
9 to show what their circumstances were for their
10 application to get that funding. So you'd need to show
11 a little bit more, because they'd have to show that they
12 have had no reasonable alternative but to apply for that
13 funding, and therefore to comply with the downstream
14 requirements.

15 So they need to show that they are practically
16 compelled in their circumstances to do those acts.

17 It's a tough standard. It really is a tough
18 standard.

19 MR. PETERSEN: I agree that they are not
20 legally compelled to seek out Title 1 funds and,
21 technically, it wouldn't be practically compelled to
22 start Title 1.

23 The situation here is, Title 1 has been going
24 on for decades, with additional requirements layered on.
25 And to stop a program is a lot different from not

1 starting a program.

2 Breaking a rice bowl is a lot different.

3 MEMBER SAYLOR: I think we're in a situation
4 that does not make sense, even if it is constrained by
5 statute or court findings; because school districts with
6 students who are eligible to receive Title 1 funding,
7 they do that because they have the low-income -- high
8 proportions of low-income students. They are not going
9 to refuse the funding -- that, I think is, as a practical
10 matter, they're not.

11 And if we require them to do some additional
12 action, then that's a mandate; and they don't have a
13 choice to avoid it, in my opinion.

14 CAMILLE SHELTON: You're making very good
15 points.

16 And one of the key cases, *Kern* -- it's a
17 California Supreme Court case that dealt with many
18 grant-funded federal programs to lower-income eligible
19 school districts. And the Court said there just because
20 you have a loss of funds, that's not practical
21 compulsion. So it, factually, is very similar to what we
22 have here.

23 You know, we are required to follow the law
24 from the Supreme Court. So that is what our
25 recommendation is based on.

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1 MEMBER SAYLOR: All right.

2 CHAIR REYES: Finance, do you have anything to
3 add?

4 MS. PALYO: Yes.

5 First of all, thank you for accepting our late
6 comments on the draft staff analysis. And we continue to
7 stand by those comments, and are happy to answer any
8 questions you might have.

9 CHAIR REYES: Thank you.

10 Any questions from Board members?

11 *(No response)*

12 CHAIR REYES: Then I'll open it up to comments
13 even before there's a motion.

14 Any comments from the public on any of these
15 issues?

16 MEMBER RAMIREZ: May I? May I just ask a
17 question?

18 CHAIR REYES: Yes.

19 MEMBER RAMIREZ: Could I just have a quick
20 review if any -- just speak it for the record -- if any
21 evidence of the cost, et cetera, that could have been
22 presented, or was presented? Not could have been, but
23 was presented?

24 MR. PETERSEN: Are you asking the cost of the
25 *Parental Involvement Program*?

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1 MEMBER RAMIREZ: Yes.

2 MR. PETERSEN: Okay, this test claim was filed
3 at a time that you merely had to allege a thousand
4 dollars.

5 My experience with my clients -- I do annual
6 claim preparation -- is that the cost is quite
7 significant. That means a lot of things to different
8 people.

9 An urban school district, 20,000 students,
10 with a Title I program and a parental-involvement program
11 at every single site, if you look at the program
12 requirements, it actually encompasses the concept and
13 scope of seven or eight other mandates that were
14 previously reimbursed, or are currently reimbursed.
15 So I would say, it's a major cost.

16 Even not quantifying that, the situation is,
17 ESEA started in 1965.

18 Camille is correct to say that the funds are
19 voluntary.

20 We've reached a point, though, that -- in a lot
21 of programs, not just Title I -- where the tail is
22 becoming larger than the dog. In other words, the
23 program that came out was for a certain level of service,
24 and as the federal government or the state government
25 adds additional activities without additional funding --

1 that's the tail -- it just becomes larger and larger.

2 That's what I meant in my filings about the
3 sheer magnitude of the additional programs.

4 The short answer is, Member Ramirez, it's huge,
5 as far as we're concerned.

6 CAMILLE SHELTON: Can I just indicate to you,
7 that those statutes have now changed? After these '03
8 test claims, they now, with the filing of the test claim,
9 have to show what their costs are for the year, and they
10 also have to estimate a statewide cost.

11 So those analyses that come before you, after
12 these '03 claims, will show you up-front how much they're
13 estimating in more detail, other than to say just a
14 thousand dollars in costs.

15 MEMBER RAMIREZ: Or to say "huge."

16 CAMILLE SHELTON: Or to say "huge."

17 MEMBER RAMIREZ: Or "significant."

18 CHAIR REYES: Mr. Burdick, you've joined the
19 table.

20 MR. BURDICK: Yes, Chairman Reyes.

21 I'm not up here to speak on a test claim --

22 CHAIR REYES: All right, thank you very much.

23 MR. BURDICK: -- but Commissioner Saylor asked
24 the question on this, or you did, whether there was any
25 more discussion on the issue, and I had intended -- it's

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1 funny that the Commission and I are on the same
2 wavelength today -- because I intended during *Public*
3 *Comments* to get up and talk about practical compulsion,
4 and whether or not, if we had a statutory definition.
5 Because we've had a lot of issues related to practical
6 compulsion.

7 And, you know, I understand the attorneys'
8 position. I have some things I challenge Camille on
9 but -- I always lose, but I challenge her, anyway.

10 So I wanted to talk about it. And I didn't
11 know if this is the time, or whether I should wait until
12 *Public Comment* --

13 CHAIR REYES: Yes, let's wait until *Public*
14 *Comment*.

15 MR. BURDICK: Okay, I just want to make sure.
16 I didn't want you to say that I missed my opportunity.

17 CHAIR REYES: No, no. Let's wait for *Public*
18 *Comment* for that particular conversation.

19 *(No response)*

20 CHAIR REYES: Okay, seeing no other questions,
21 is there a motion?

22 MEMBER CHIVARO: I move the staff
23 recommendation.

24 CHAIR REYES: It's been moved --

25 MEMBER OLSEN: Second.

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1 CHAIR REYES: -- and seconded.
2 Any additional comments from the public on this
3 issue?
4 *(No response)*
5 CHAIR REYES: Seeing none, all in favor, say
6 "aye."
7 *(A chorus of "ayes" was heard.)*
8 MEMBER SAYLOR: I'm voting "aye," but I don't
9 agree with the one element that I brought up. So I'm
10 voting "aye" because the balance of the findings I can
11 agree with.
12 CHAIR REYES: Noes?
13 *(No response)*
14 CHAIR REYES: Abstentions?
15 *(No response)*
16 CHAIR REYES: The "ayes" have it. Thank you.
17 MS. HALSEY: Moving on to Item 4, Commission
18 Counsel Matt Jones will present Item 4, three
19 consolidated test claims on *Williams Case Implementation*.
20 MR. JONES: Thank you. Good morning.
21 This test claim alleges increased cost under
22 test-claim legislation enacted in response to the
23 *Williams* class-action lawsuit.
24 The suit and the subsequently enacted test-
25 claim statutes target deficiencies in county and state

1 oversight of schools generally and more specifically,
2 deficiencies in the provision of textbooks and
3 instructional materials, the availability and proper
4 assignment of qualified and credentialed teachers, and
5 the maintenance of safe and adequate school facilities.

6 Staff finds that some of the test-claim
7 statutes impose reimbursable state mandates, specifically
8 with respect to the increased requirements of the school
9 accountability report cards, the increased scope of
10 auditing requirements and review of audit exceptions, new
11 affirmative requirements on school districts to promote
12 county oversight, and a new *Williams* complaint process
13 patterned after the Uniform Complaint Process.

14 Staff finds that all other statutes alleged do
15 not impose reimbursable state mandates, either because
16 they do not impose mandated activities, are not new with
17 respect to prior law, or are funded by an appropriation
18 specifically intended to cover the cost of the mandate in
19 an amount sufficient to cover the cost of the mandate.

20 Staff, therefore, recommends partial approval
21 of this test claim as specified in the analysis.

22 Staff also recommends that the Commission
23 authorize technical non-substantive changes to the
24 statement of decision following the Commission hearing on
25 this matter.

1 Will the parties and their witnesses please
2 state your names for the record?

3 MR. PALKOWITZ: Good morning.

4 Art Palkowitz on behalf of the claimants.

5 MS. WYNNE: Elisa Wynne, Finance.

6 MR. OSMEÑA: Christian Osmeña, Finance.

7 MR. PALKOWITZ: This test claim involves the
8 *Williams* lawsuit.

9 The *Williams* lawsuit was filed as a class
10 action to ensure that safe and adequate facilities,
11 qualified teachers, and sufficient provision of textbooks
12 and materials for poorer districts, especially urban
13 schools, would result in due process, equal protection,
14 and an opportunity to obtain a basic education, because
15 it resulted in unequal access to education based on
16 income and race.

17 To correct those failings, most of the
18 test-claim statute at issue today centered on the
19 condition of facilities.

20 In the decision, staff points out the State has
21 long had the duty to ensure that all students have access
22 to free basic education.

23 I would like to focus in on the issues that
24 deal with facilities. The program for school facilities,
25 emergency repair program that came out of the lawsuit,

1 that was instituted by the Legislature as a result of a
2 settlement of that lawsuit.

3 It is clear that schools have a duty to provide
4 basic education. To look at the law and say there is no
5 requirement to have facilities to provide that is really
6 not following logic.

7 Cases that have been cited by the Commission
8 staff -- for example, the case that talked about police
9 officers; in that case -- and I have to just get that
10 cite in front of me.

11 In that case, the Court held that hiring peace
12 officers was not something that a school district had to
13 do. However, it did say in its language, exercising the
14 expenditures, if it's the only reasonable way to carry
15 out the core mandatory functions, that could be a
16 mandate.

17 Now, the case before us is not hiring peace
18 officers. It's more basic. It's building facilities.

19 The thought that building facilities is some
20 choice that the districts really have, is leaving logic
21 and the obligation that districts have to provide a free
22 education, outside the room.

23 When you combine that mandate, of providing
24 free basic education with the practical compulsion to
25 have facilities, then you have a lawsuit that drives the

1 Legislature to enact new legislation to assure the most
2 needy, the deciles 1 through 3, the most needy students
3 have facilities that are in good repair, that are
4 functioning, that allow them the opportunity to have an
5 education. And to come and say that is not practically
6 compelled is really not logic, and it's not following the
7 law.

8 The law that the Commission staff relied upon
9 was a case that had several educational programs where
10 the Court said, you know, it is not mandatory you have
11 these programs; therefore, we will decide that since
12 there is no severe penalty for not having that program,
13 that is not a practical compulsion.

14 That is not saying that facilities should apply
15 to that same standard.

16 MR. JONES: Mr. Palkowitz raises a good point.

17 CHAIR REYES: Hold on.

18 Were you going to continue, sir, or are you
19 good?

20 MR. BURDICK: He is looking for something.

21 CHAIR REYES: Yes, hold on.

22 MR. PALKOWITZ: And the other part I wanted to
23 comment -- thank you, sir --

24 CHAIR REYES: Not at all.

25 MR. PALKOWITZ: Thank you for the kind words.

1 There's language in the staff analysis that
2 talks about that if carrying on a procedure is to avoid
3 civil liability is not practical compulsion, well, that
4 seems to raise an interesting issue. If the standard is
5 what is liable or not, and you do not perform the
6 standard, that would seem to me you are compelled to
7 perform the standard to avoid civil liability.

8 To me, that is a basis that really reinforces
9 the practical compulsion application.

10 I'd like an opportunity to respond.

11 CHAIR REYES: Thank you.

12 Mr. Jones?

13 MR. JONES: Thank you.

14 This is, of course, roughly the same discussion
15 we were having on the last item in terms of practical
16 compulsion. And it obviously is a commonsense issue in
17 some ways, but we're also bound by the precedent on the
18 issue.

19 But Mr. Palkowitz, I'm afraid his argument is
20 largely premised on the idea that the school districts
21 are being practically compelled to make repairs and to
22 keep their facilities up. And that may be true, but that
23 doesn't mean that they're practically compelled to
24 participate in this program.

25 This program also -- and maybe this is the

1 threshold issue, really -- is that this is a grant
2 program, this is a funding program.

3 And I'm not certain what costs could be alleged
4 on the basis of this program, because the program is to
5 pay for emergency repairs.

6 If we're talking about the costs of applying
7 for the program, as of 2005 amendments to the
8 regulations, the costs of applying for the program are
9 actually covered within the program.

10 The 2005 regulations, which I've got cited --
11 Exhibit C in your record, page 382, section 1859.323 of
12 the regulations provides for up to 2 percent of project
13 costs, or \$5,000, if memory serves, to cover the costs of
14 applying for the grant program.

15 After that, what's left? What costs would be
16 alleged under this -- under whatever practical compulsion
17 might exist?

18 But moreover, the issue isn't whether the
19 school districts are practically compelled to make
20 repairs; it's whether they're practically compelled to
21 seek out funding from this particular program to make
22 those repairs.

23 And then finally, in response to the liability
24 issue, which I think I've addressed in the analysis to
25 some degree, if there is a possibility of incurring

1 liability for failure to make repairs, first, it's not
2 certain and severe, because the *Williams* case was a
3 settlement. It wasn't -- the Court never ruled on
4 whether the school districts were really falling down on
5 the job.

6 I think, of course, we know they were; but
7 there was a settlement. There is no precedent to show
8 that school districts are actually going to incur
9 liability for failing to keep their facilities up.

10 And even so, even if we were to grant that,
11 there is no precedent to show that they would incur
12 liability for failing to participate in this program.

13 MS. HALSEY: I'm sorry, I just wanted to add
14 one thing, backing up.

15 Good repair has been required in la, long
16 before 1975, so it's not new.

17 So actually, whether it's practically compelled
18 or not is irrelevant, because they're required to do it,
19 and they've always been required to do it. And because
20 it's not new, it's not a reimbursable mandate under the
21 law, under the Constitution.

22 CHAIR REYES: Ms. Olsen?

23 MS. OLSEN: This case reminds me, strikingly,
24 of the one that LA County withdrew.

25 Thank you. I don't know, my voice carries so

1 much, I don't even think about having speakers.

2 And it seems to me that there's a difference
3 between the essential nature of a governmental entity,
4 which is essentially a practical compulsion -- I mean,
5 you have to meet the nature of your being, versus
6 practical compulsion.

7 And if you're going to be a government and if
8 you're going to have facilities, it seems to me that
9 there is an implied requirement. It is in the essential
10 nature of the government to keep those facilities in
11 repair.

12 And so I'm having a really hard time with the
13 practical -- I'm very -- you know, I'm very concerned
14 about the first through third deciles. I really would
15 love to have more money going to those kids and improving
16 their schools; but I don't see practical compulsion here,
17 because it seems to me it's in the nature of the
18 organization that they need to keep their facilities
19 repaired. It's not about this program.

20 CHAIR REYES: Finance, do you have anything to
21 add?

22 MR. OSMEÑA: We would just reaffirm the
23 comments we've submitted to the Commission. Thank you to
24 the staff for including those. And we're happy to answer
25 any questions.

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1 CHAIR REYES: Ms. Shelton, you grabbed the
2 microphone?

3 CAMILLE SHELTON: Just to dovetail that the
4 requirement to keep the buildings in repair is actually
5 statutory requirement that exists long before '75. So
6 it's a statutory existing requirement to keep it in good
7 repair -- or to keep it in repair and in common law, yes.

8 And so this program is really just an extra
9 grant-funding program that was part of the settlement to
10 deal with those decile 1 through 3 schools.

11 CHAIR REYES: Okay, you had asked for the
12 opportunity to respond.

13 MR. PALKOWITZ: I guess when I sit here, when
14 the Legislature passes bills, I don't think they pass
15 bills to reiterate what previous bills say.

16 If they pass a bill that you need to take care
17 of facilities and keep them in good repair, I don't think
18 they're doing that to reinforce what was previously done.

19 So I would defer to that statement, that
20 schools have always had a responsibility to have good
21 repair, and keep up the good work, and, here's some new
22 legislation to just rubber-stamp that.

23 So I think there's an intent by the Legislature
24 when they pass a bill. And the intent here is more than
25 just to reiterate what was said years or decades before.

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1 CHAIR REYES: Thank you.

2 Any other comments from Board members?

3 Questions?

4 *(No response)*

5 CHAIR REYES: Any additional comments from the
6 public?

7 *(No response)*

8 CHAIR REYES: Okay.

9 MS. OLSEN: Move staff recommendation.

10 CHAIR REYES: There is a motion to move.

11 MEMBER CHIVARO: Second.

12 CHAIR REYES: Second.

13 Officially, any public comments on the item?

14 *(No response)*

15 CHAIR REYES: Seeing none, all in favor, say
16 "aye."

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

18 CHAIR REYES: Opposed?

19 *(No response)*

20 CHAIR REYES: Abstentions?

21 *(No response)*

22 CHAIR REYES: "Ayes" have it. Thank you.

23 MR. PALKOWITZ: Thank you.

24 CHAIR REYES: Item 5?

25 MS. HALSEY: Item 5, Commission Analyst Kerry

1 Ortman will present Item 5, parameters and guidelines for
2 *Tuberculosis Control*.

3 MS. ORTMAN: Item 5 proposes the adoption of
4 parameters and guidelines for *Tuberculosis Control*
5 program.

6 This program's statutes address the activities
7 required of local detention facilities and local health
8 officers relating to tuberculosis control.

9 Staff recommends that the Commission adopt the
10 proposed statement of decision and parameters and
11 guidelines. Staff also recommends that the Commission
12 authorize staff to make any nonsubstantive technical
13 changes, corrections to the parameters and guidelines
14 following the hearing.

15 The parties to this matter concur with the
16 Commission's proposed parameters and guidelines.
17 However, because of the timing, we were unable to
18 agendize the item.

19 And will the parties and witnesses state their
20 name for the record?

21 MS. HALSEY: Unable to place it on consent,
22 that is.

23 MS. GMUR: Juliana Gmur on behalf of the County
24 of Santa Clara, claimant.

25 MR. WARD: Randall Ward, Department of Finance.

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

3 CHAIR REYES: Thank you.

4 So all disputes have been resolved, and so we
5 could move it to consent except we would not have had a
6 chance to announce it as such.

7 Is that true?

8 MS. GMUR: We concur.

9 CHAIR REYES: Anybody from the audience who
10 wishes to come and speak on behalf of this?

11 *(No response)*

12 CHAIR REYES: Any questions from Board members?

13 *(No response)*

14 CHAIR REYES: Is there a motion?

15 MEMBER RAMIREZ: Moved.

16 MEMBER SAYLOR: Second.

17 MEMBER OLSEN: Second.

18 CHAIR REYES: It's been moved and seconded.

19 Thank you.

20 All in favor, say "aye."

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

22 CHAIR REYES: Opposed?

23 *(No response)*

24 CHAIR REYES: Abstentions?

25 *(No response)*

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1 CHAIR REYES: Thank you.

2 MS. GMUR: Thanks a lot.

3 CHAIR REYES: I enjoyed the debate.

4 MS. HALSEY: Item 6 was on consent.

5 Item 7 is reserved for county applications for
6 a finding of significant financial distress or SB 1033
7 applications. And no SB 1033 applications have been
8 filed.

9 Item 8, Assistant Executive Director Jason Hone
10 will present an update on new commission practices.

11 MR. HONE: In 2010, the Commission began the
12 creation of an e-filing system to make more convenient
13 for the claiming community and State agencies to submit
14 claims and comments. Matters before the Commission and
15 associated filings became available on the Commission's
16 Web site, thus increasing transparency and allowing
17 parties quick and convenient access to those materials.

18 The transition to this system reduced the
19 burden of filing on the parties and shifted service
20 requirements from the parties to Commission staff.

21 While certainly an improvement in service to
22 the parties and the public, this system has resulted in
23 many complex and time-consuming processes behind the
24 scenes.

25 Staff is currently working on a Web-based

1 system to automate many of those processes associated
2 with tracking matters and serving notice.

3 The second phase of the e-filing system will
4 not only improve these internal processes, the public
5 facing features will include real-time searchable
6 information on pending and past matters of the
7 Commission.

8 As for the implementation time-line, it is
9 anticipated that the system will go live for internal use
10 in the first quarter of 2013, and the public facing
11 features will be integrated with the Commission's
12 Web site by the second quarter of 2013.

13 CHAIR REYES: Thank you.

14 Any questions from Board members?

15 MEMBER RAMIREZ: I do.

16 CHAIR REYES: Yes?

17 MEMBER RAMIREZ: I do have a question.

18 I read the report, and also seem to read
19 something about trying to electronically copy/scan all of
20 the work of the past.

21 Did I get that right?

22 MR. HONE: You did. That's kind of the
23 farther-out aspect of this project.

24 MEMBER RAMIREZ: That's kind of scary,
25 considering what we even just see for today's hearing.

1 So could you give some more specifics about how
2 to do that? How long it would take, what personnel, the
3 time it would take?

4 MR. HONE: Yes, we have to explore the options,
5 and definitely the scope and the cost of that. It's
6 going to be a significant undertaking. But it's
7 obviously in the best interest of being transparent and
8 having all of those materials easily accessible to the
9 public, and frankly to our own staff and other State
10 agencies for research purposes. So it is going to be a
11 big job.

12 And I don't have an answer how big just yet,
13 but we're going to be looking at that.

14 MEMBER RAMIREZ: Do we have other agencies in
15 the State who have done this and can provide guidance?
16 I assume we do.

17 MR. HONE: We will be working with records
18 retention people. And, yes, I'm sure we'll investigate
19 that, absolutely.

20 MEMBER RAMIREZ: I just will comment that I
21 have friends in practice who are trying to go paperless
22 for a 20-year history and it's quite time-consuming.

23 CHAIR REYES: It's quite an undertaking,
24 particularly some of the documents.

25 And if you look back at some of the binders

1 that we have had in the past, it was not unusual to have
2 1,200-page binders on some of the more sensitive issues
3 and heavy workload.

4 And now we have, thanks to the electronic stuff
5 we have, we're able to keep track of the reference
6 material. But in the past, a lot of that reference
7 material was also part of the packet.

8 So all the litigation, all the case law, all
9 that other stuff, the historical, was also part of the
10 package.

11 So there is significant, significant paper out
12 there.

13 So this is something that you would have to
14 undertake with a lot of study before we jump into that.

15 MEMBER RAMIREZ: Well, I think it's a terrific
16 idea. And the trees of California will thank us.

17 But caution, in terms of backup and stuff. I
18 just have a friend whose total Web site went down because
19 the servers were --

20 CHAIR REYES: Inundated with that?

21 MEMBER RAMIREZ: -- went on fire.

22 So caution.

23 Thank you.

24 CHAIR REYES: Thank you.

25 MS. HALSEY: Jason, can you comment on that,

1 what we're doing for that backup?

2 MR. ROGERS: For the backup?

3 Yes, we actually have a --

4 CHAIR REYES: Why don't you come up to the mike
5 and identify yourself for the record, please.

6 Thank you.

7 That's all right, but we have a note taker and...

8 MR. ROGERS: Jason Rogers, Commission on State
9 Mandates.

10 Yes, we actually have three methods of backup
11 that we use. We have an offsite backup, and we have two
12 internal backups on two different servers. So there are
13 three different levels of redundancy that we have in
14 place. So I think we're doing a pretty good job on that.

15 MS. HALSEY: Thank you, Jason.

16 CHAIR REYES: Thank you. A valid point.

17 The next item?

18 MS. HALSEY: The next item, Item 9, Chief Legal
19 Counsel Camille Shelton will present the Chief Legal
20 Counsel's report.

21 CAMILLE SHELTON: Nothing really new to report.

22 The hearing on CSBA's motion to amend their
23 complaint is set to be heard on January 17th.

24 And the Department of Finance versus Commission
25 on State Mandates petition on the *Grad Requirements*,

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1 parameters and guidelines, reasonable reimbursement
2 methodology case is set to be heard on February 15th.

3 CHAIR REYES: And just for the record,
4 Mr. Louie will join Finance, but he will not be involved
5 in that case.

6 CAMILLE SHELTON: No. And, in fact, we have a
7 good conflicts list for Mr. Louie, so..

8 CHAIR REYES: Thank you.

9 CAMILLE SHELTON: So we thank him for all of
10 his time and effort in all of the six years of hard work,
11 and we hope the best for him.

12 CHAIR REYES: Thank you. And we're fortunate
13 to have him. I'm glad it was Finance that he went to and
14 not someplace else.

15 Okay, we're going to lose him. Okay.

16 The next item?

17 MS. HALSEY: Item 10 is the Executive
18 Director's report.

19 My written report contains a summary of pending
20 claims, including a breakdown of the items filed and
21 completed this year.

22 After this hearing, the Commission will have
23 28 pending test claims remaining, ten of which are the
24 *Stormwater Permit* claims.

25 The report also indicates the tentative agenda

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1 items for January and April meetings.

2 For the parties that have those items, please
3 note that the time-lines for draft analyses and comments
4 on those analyses for the April meeting will be just as
5 they would have been if it was a March meeting. And this
6 is necessary to enable staff to meet their deadlines for
7 the May meeting. Otherwise, all the year's meetings will
8 be thrown off.

9 I'm requesting all parties to respect those
10 deadlines and use the Commission's processes and the
11 regulations if they're unable to meet them for good
12 cause.

13 And moving on, if you scroll further down, we
14 have a proposed strategic plan. This is an information
15 action item.

16 Early in 2010, Senate Budget Subcommittee No. 4
17 requested the Commission submit its mission statement,
18 strategic plan, among other information to the Budget
19 Subcommittee.

20 At the time, we didn't have a strategic plan;
21 therefore, the Commission adopted an interim strategic
22 plan on March 26th, 2010, for submission to Sub 4, and
23 then adopted a final strategic plan which expires this
24 month, on May 27th, 2010.

25 The Commission's current strategic plan is out

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1 of date, and many of the goals have been met or partially
2 met, and needed to be updated.

3 And also, staff recognized that there was a
4 need to more closely link the goals with implementing
5 objectives, to make sure that we accomplish those goals.

6 Therefore, Commission staff have worked to
7 expand upon and update the proposed strategic plan you
8 have before you.

9 Staff recommends the Commission adopt the
10 proposed strategic plan.

11 CHAIR REYES: Any questions or comments on the
12 Strategic Plan?

13 MEMBER SAYLOR: Yes.

14 CHAIR REYES: Mr. Saylor.

15 Oh, Ms. Ramirez?

16 MEMBER RAMIREZ: It sounded wonderful. It
17 sounded almost too good to be true.

18 I endorse it.

19 CHAIR REYES: Okay.

20 MEMBER SAYLOR: I do have some questions.

21 CHAIR REYES: Okay, please.

22 MEMBER SAYLOR: It strikes me that there are
23 many stakeholders that we would want to have consult us,
24 that we want input from, in forming this plan.

25 And I'm interested generally in understanding

1 how the claimant community perceives other work of the
2 Commission, and then having some mechanism to understand
3 that in a more systematic fashion than just asking the
4 folks who are here. Some kind of a survey or some kind
5 of a customer-service engagement would be interesting
6 to me, as a member of the Commission, to understand if
7 the Commission process, if the State Mandates process is
8 viewed with credibility and integrity by those who need
9 to access it for resolving their issues.

10 So my sense is, that hasn't happened in the
11 formation of the document that's before us today; is that
12 right?

13 MS. HALSEY: No, this document has been
14 distributed to everyone on the mailing list for the
15 Commission. But, no, we haven't done a survey or
16 anything like that. That would be -- I mean, we could do
17 that. That would be a different thing.

18 I mean, it seems like those are two separate
19 things.

20 MEMBER SAYLOR: Right.

21 MS. HALSEY: But I think that's a great idea.

22 MEMBER SAYLOR: So if the Commission is
23 willing, I would be interested in seeing what we might do
24 along those lines.

25 MS. HALSEY: Okay.

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1 MEMBER SAYLOR: Okay, the second point is
2 the -- let's see, I guess it's page 3 of the strategic
3 plan itself, under, "Goals and implementing objectives."
4 On the test claims, "B," "Eliminate caseload backlog,"
5 Item B, it says, "The goal is to hear and decide all test
6 claims filed through 2012 which are not stayed, by
7 December 2015."

8 I'm thinking that the strategic plan that
9 expires this year, that was 2014, and actually our annual
10 backlog report that we sent just in May, said 2014.

11 MS. HALSEY: Yes, I do believe that's true.
12 They also said that we would finish all of 2003 claims by
13 the beginning of this year, and it's December and we
14 still have one left.

15 MEMBER SAYLOR: Pretty close.

16 MS. HALSEY: Yes, we are. But it's 12 months'
17 difference, actually, from what was proposed back then.
18 Honestly, I don't think that prior plan was realistic.
19 I try to be very realistic.

20 Also, I'm considering -- and I don't know if
21 they were considering, but I'm considering -- that the
22 adoption of statewide cost estimate is completion, not
23 the test claim itself. So that's well beyond. But
24 generally, currently, it's anywhere from six months to a
25 year beyond when the test claim is filed. So that date

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1 is after. So 2015, it's like a year after the test claim
2 would have been adopted, that the CE would have been
3 adopted.

4 MEMBER SAYLOR: Heather, did you say that we
5 have 28 test claims remaining --

6 MS. HALSEY: Yes.

7 MEMBER SAYLOR: -- after today's actions?

8 MS. HALSEY: Right. So we expect that we'll
9 hear most of the claims -- almost all of the claims,
10 except for the water claims, filed by the end of 2013.
11 But that's the test-claim portion. We still have
12 parameters and guidelines and statewide cost estimates.

13 And then the water claims -- I mean, that's
14 partially out of our control because it's going through
15 the courts. So it will depend on when the courts make a
16 final determination on those.

17 MEMBER SAYLOR: So the test claims themselves,
18 would we be -- here, we're saying we will not finish
19 these until end of 2013-14. And that's the ones that are
20 not related to the NPDES.

21 MS. HALSEY: Right.

22 MEMBER SAYLOR: Is that about 22 of them?
23 Twenty, 22?

24 MS. HALSEY: I think that's right, they will be
25 done by 2013-14 -- by the end of 2013-14.

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1 MEMBER SAYLOR: Okay, and my question is if
2 we're averaging about 16 a year.

3 MS. HALSEY: That's right.

4 MEMBER SAYLOR: So with about 20 or so.

5 MS. HALSEY: Well, one thing, you're going to
6 see -- and you'll see it actually starting at the next
7 hearing, is that we had a number of outstanding
8 parameters and guidelines, some of them very old. *BIPS*,
9 for example, was recently issued. It's from 2000. It
10 has RRM's in it. And the analyses there are more complex
11 than the test-claim analyses; we are focusing on those
12 now.

13 So the next hearing actually has no test claims
14 scheduled. It has still large agenda items, but they're
15 going to be parameters and guidelines with RRM's proposed.
16 So that is going to partially slow down the analysis of
17 test claims while we're taking those up and prioritizing
18 those.

19 MEMBER SAYLOR: So one of the things you've
20 said -- and thank you for that -- and you're saying that
21 the earlier estimate of completion dates --

22 MS. HALSEY: It was focused on test claims.

23 MEMBER SAYLOR: -- and it was overly ambitious,
24 you say?

25 MS. HALSEY: I'm saying that.

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1 And I don't know if it was incorporating these
2 parameters and guidelines with the RRM's as well, which we
3 are prioritizing.

4 MEMBER SAYLOR: Will we see this again -- will
5 we see the backlog report every Commission meeting?

6 MS. HALSEY: You do.

7 MEMBER SAYLOR: So we'll be able to look at
8 this and kind of test the progress?

9 MS. HALSEY: And you will see what's posted,
10 and you'll be able to see it and determine the progress.

11 I was also trying to underpromise and
12 overdeliver.

13 MEMBER SAYLOR: That's what I thought.

14 MS. HALSEY: I thought it would better if we
15 were ahead of the game by next year when we look at this
16 than behind, and that's kind of my approach.

17 MEMBER SAYLOR: That's what I was thinking that
18 you were doing. Thank you.

19 CHAIR REYES: You don't want to be five months
20 into it by the time -- no, I'm kidding. Okay.

21 MEMBER SAYLOR: Thank you.

22 CHAIR REYES: You raised an issue, though, in
23 terms of other interested parties, should we be
24 coordinating with them.

25 And I'm curious to hear -- I know Commissioner

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1 Ramirez was happy with what it is, but I'm curious what
2 other commissioners think, whether we move forward with
3 this or do we put this on hold pending conversation with
4 other interested parties.

5 The issue with other interested parties is
6 always a workload issue.

7 MS. HALSEY: Also an alternative to that, you
8 could adopt it as an interim and then go forward with
9 another process. Because we do need to submit something
10 to the budget committees, and they will be meeting soon.

11 CHAIR REYES: Okay. Ms. Olsen?

12 MEMBER OLSEN: I mean, I see no problem with
13 adopting this today with a direction to staff that, you
14 know, if it's the Commission's desire, to go and to
15 survey the folks out there and find out what they have.
16 Because there is no reason we can't amend this at some
17 later date, right? There's nothing to keep us from doing
18 that?

19 MS. HALSEY: That's true. The Commission's
20 plan can be amended whenever the Commission wishes.

21 CHAIR REYES: Mr. Alex?

22 MEMBER ALEX: Heather, you said you sent it out
23 to basically a LISTSERV, I suppose.

24 Did you receive any comments and incorporate
25 anything from that?

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1 MS. HALSEY: No, we have not.

2 MEMBER ALEX: Thanks.

3 CHAIR REYES: Okay.

4 MEMBER SAYLOR: Okay, I think there is a place
5 that we can -- I believe that we can amend the language
6 in this document today, if we choose.

7 So I would suggest that we add an item under,
8 "Provide superior customer service," where it says "Meet
9 with parties to gather input on Commission processes," is
10 add an Item D that is, "Seek customer input through
11 survey or other means."

12 MEMBER ALEX: I want a friendly amendment. I
13 think the term "customer" is distressing to me.

14 MEMBER SAYLOR: Claimant community?
15 Stakeholder?

16 MEMBER ALEX: Stakeholder.

17 MS. HALSEY: Stakeholder makes sense.

18 CHAIR REYES: I think stakeholder is more
19 neutral, yes, because that includes all parties.

20 MEMBER ALEX: Yes.

21 CHAIR REYES: Any comments from any of the
22 board members on that amendment?

23 *(No response)*

24 CHAIR REYES: Comments from the public?

25 *(No response)*

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1 CHAIR REYES: Okay.

2 So as amended, is there a motion?

3 MEMBER SAYLOR: So moved. Move approval.

4 CHAIR REYES: It's been moved.

5 MEMBER ALEX: Second.

6 CHAIR REYES: And seconded.

7 All in favor, say -- officially, public
8 comments on that motion?

9 *(No response)*

10 CHAIR REYES: Seeing none, all in favor say
11 "aye."

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

13 CHAIR REYES: Opposed?

14 *(No response)*

15 CHAIR REYES: Abstentions?

16 *(No response)*

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

18 *Public Comment?*

19 *(No response)*

20 CHAIR REYES: And just for new members of the
21 audience, this is an open mike for folks who have
22 comments on any mandates-related issues.

23 MR. BURDICK: Chairman Reyes and Members of the
24 Commission. As I was mentioning earlier, I intended to
25 bring this up --

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1 CHAIR REYES: If you could identify yourself
2 for the record.

3 MR. BURDICK: Oh, I'm sorry. Allan Burdick.
4 And these comments are on behalf of the CSAC SB-90
5 Service.

6 CHAIR REYES: Thank you.

7 And this is obviously the end of the first week
8 of the 2012-13 session. And so it reminded me that, as
9 we move forward next month, particularly when the members
10 come back and we start looking at legislative options,
11 one of the questions, or one of the things that should be
12 fixed and clarified possibly in the process. And one of
13 them on the top of my list, was the one that Member
14 Saylor raised, and that was practical compulsion.

15 And I know we've been leaning over backwards on
16 a series of court cases which may or may not make sense.
17 As a non-attorney, I think it's kind of ridiculous, the
18 position on practical compulsion. But legally, that
19 probably is true.

20 But the issue, it seems to me, that we talked
21 about this process is based on both laws and court cases,
22 that some of these issues we have that, like that, you
23 know, could possibly be clarified statutorily so that
24 we would not get into these discussions about what is
25 practical compulsion and what is not.

1 And so, you know, I am not sure whether the
2 Commission legal staff would agree that that can be done
3 or not. And that was kind of one of the things, can't
4 we -- could we seek legislation to clarify issues where
5 the statute does not deal with, when it talks about
6 what's a mandate and not a mandate, does not deal at all
7 with the issue of "practical compulsion"? I don't think
8 there's anything in statute that has any reference to it.

9 Because I think it's -- you know, today, it was
10 interesting, I think it came up two or three times, and
11 it's been a more significant issue the last few years.
12 And so it seemed to me that that issue, along with issues
13 like the current statute, I think, still says that the
14 process should be completed within 18 months, the bill
15 carried by current administration official Rusty Reyes.
16 And I've been told there is no way now the process can be
17 done in 18 months because of the various times to respond
18 and send something out.

19 I mean, we did the 18 months as a sponsor at
20 that time of the bill. We did it jointly with the
21 Commission staff.

22 And so if that needs to be changed, we just sit
23 down and look at those kinds of things and say, "What
24 should it be? What do we shoot for?" and then do it.
25 And hopefully, based on the strategic plan, we aren't

1 going to get into those situations. But we met yesterday
2 to talk about a mandate that goes back to 1999, 2000,
3 that is going through the process. And what do you do
4 when all of a sudden you pass something, adopt it, and
5 you've got to go back and say, "Well, where are cost and
6 documentation stuff that we had 14 years ago?" And,
7 obviously, most people have a five-year, you know,
8 destroy-records process and don't even have records in
9 some cases going back.

10 So my kind of question was really twofold:
11 One, I think a comment, and this may be for discussion at
12 a later meeting, although January is pretty significant
13 as it relates to legislation when we do spot bills, and
14 that is, the interest in clarifying some of these issues
15 before the Commission in statute, or do we want to
16 continue kind of to rely on court cases doing that; or
17 does -- are we preempted from clarifying things like
18 practical compulsion in statute, and then having -- you
19 know, I guess the question is, can we or can we not.

20 CHAIR REYES: Well, you can certainly seek
21 legislation in any manner you would like. This Board
22 will not prohibit you or can control you seeking
23 legislation. And who is "we," Kemo Sabe, you know? So
24 you can do anything you want. I mean, there is
25 120 members. If you can find a sponsor, have at it.

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1 As the terms of the Commission, if the "we" is
2 involving the Commission, as opposed to stakeholders,
3 then I would have to say that the Commission has been
4 very judicial in the legislation that we seek. And
5 generally, we seek more legislation in the area of
6 administrative clarity, as opposed to policy areas of
7 where the law ought to fall, in terms of whether -- I
8 mean, some folks would say, "Yes, we probably" -- I don't
9 want to say -- never mind. The filter kicks in. The
10 filter kicks in. Political correctness. This is an open
11 mike here.

12 And, you know, if you have the votes here to
13 say, "Yes, the membership of the Commission really wants
14 to pursue this" notwithstanding the advice, then as a
15 representative of the Administration, I would have to
16 abstain from that, because that would have to at some
17 point come, and I would need to advise the Governor on
18 certain areas notwithstanding my role because I can't
19 take that hat off.

20 MR. BURDICK: Yes, I guess my specific question
21 maybe was, moving forward, it would be better if we
22 could have participation at the front end from Commission
23 staff -- maybe unofficially, you don't have to go on
24 record -- in drafting and developing the proposals,
25 instead of submitting something and waiting.

1 And my experience -- obviously, we have a new
2 executive director and staff -- my experience over the
3 years is, while Commission staff and others did not
4 necessarily take positions or get involved with that,
5 somehow, sometimes the legislative staff seemed to have
6 gotten some comments off the record, maybe, that
7 influence them.

8 So what I really was looking at is, does the
9 Commission think that it would be valuable to have their
10 staff participate, and we could identify some issues
11 where, as by practical compulsion, where there is no
12 statutory provisions, it's a little unclear as to, you
13 know, what does it mean or not, and some of these other
14 things, and drafting and moving forward on some issues,
15 and maybe they have some issues as well as the locals
16 have some issues and others, and seek, and say, "Well,
17 what are the issues we think need to be clarified?"

18 And so there are two things.

19 One is going to the staff, and saying -- the
20 legal staff -- do you think these are things that we
21 could do statutorily, or is that, you know, the
22 constitutional provisions don't allow for the Legislature
23 to better define that or not? And are there things that
24 they agree are, you know, not in statute that, you know,
25 should be, that would be helpful to them sometimes in

1 making those decisions?

2 Because I know there are times when the staff
3 gets in there and they kind of feel one another, but
4 they're saying, "Well, it's not clear," or "We don't know
5 what the intent was or is." And, therefore, you know,
6 they're going to have a decision of having to look more
7 at the court law versus statute.

8 And I think, to me, it's preferable to look at
9 statute than to somebody to say, "Well, go back and
10 review all the court cases and look, and where do they
11 apply or not apply," I think it's nice to have it clear.

12 And so I guess my question is, whether the
13 Commission has any feeling that they'd have an interest
14 in participating with the local government community.
15 And then I can only represent -- you know, discuss the
16 interests of CSAC and the League in looking at defining
17 some of the areas that I think need clarification, such
18 as -- and practical compulsion was, you know, the best
19 example I thought that was out there, where, you know,
20 it's a very difficult issue to you. And I think, you
21 know, if we could have some clarification.

22 Now, I understand the Administration's problem,
23 where something could relate to possible costs that
24 they'd look at, the question about, I know that doesn't
25 influence them overly, but it's something they've taken a

1 lot into consideration of.

2 But the Commission staff's position would be
3 simply trying to clarify the issue.

4 So that's really why I'm looking at this, is
5 because at the time where we're at right now, I would
6 submit this or talk to staff. We had our committee
7 meeting yesterday, and I just thought about: Oh, here we
8 are. We really need to see whether we should move
9 forward on this or not, whether I should seek out a
10 member to, you know, at least introduce some spot bills
11 so that we could do this; or, you know, whether this is
12 not a good idea.

13 CHAIR REYES: Do you want to comment or do you
14 want me to continue? Your call.

15 CAMILLE SHELTON: Do you want me to comment?

16 MS. HALSEY: I was leaving it to you, Pedro.

17 I was leaving it to you. Would you like to
18 comment?

19 MEMBER ALEX: I'll make a comment.

20 CHAIR REYES: Go ahead.

21 MEMBER ALEX: So I think there are two separate
22 issues.

23 One is an issue of clarity, which I think we
24 would think of in some ways as procedural. We're having
25 trouble figuring out how to interpret something.

1 The other is policy. And I actually am a
2 lawyer. So when I read the California Supreme Court
3 case, for me, that is at least as good as a statute
4 because it is the law.

5 And so *Kern* is the case that it's actually
6 pretty clear on these issues, as I think we heard today.
7 We may not agree with it in all circumstances. That's a
8 separate question that becomes a question for whether
9 those who have a view want to go to the Legislature and
10 get the law changed.

11 In terms of the clarity as a lawyer, the
12 Supreme Court case and interpretation is at least as good
13 as the statute.

14 So I think there are two separate things going
15 on here:

16 Where the staff or where stakeholders have an
17 interest and a need for clarity, we may be able to
18 participate in that.

19 Where it's more of an issue of policy, what
20 constitutes, you know, practical compulsion, that seems
21 to me to be a different set of issues for the Commission.
22 It would be a very difficult thing to get involved in
23 that in more than a technical way.

24 MR. BURDICK: Let me ask a question, because
25 I don't disagree obviously with what the Supreme Court

1 says; although I very often disagree with their findings.

2 But we talked today about practical compulsion,
3 and the issue was coercion, or coercion of -- you know,
4 what does it mean? And that's kind of the discussion.

5 So someone was saying that we got back, and it
6 said, "Well, this is how we define it." So if you are a
7 local government person filing a test claim, and you
8 think your argument is practical compulsion because you
9 know that based on the Supreme Court decision that you
10 need practical compulsion to win, and the Commission is
11 saying, "Well, because that's not really defined, we
12 don't know how to apply it," I'm saying, well, let's take
13 that, and let's see if we can define what does that mean
14 as it relates to mandates, so that when you file test
15 claims, you will know do we think this meets the standard
16 or not.

17 So Camille was starting to get into the
18 discussion about cost. And how we got into this whole
19 process about practical compulsion, other things, was
20 because of the costs for a 1978 unemployment insurance
21 case, the *City of Sacramento* case was the original case,
22 which raised the question of the draconian consequences,
23 and that was based on when it put state and local
24 government under unemployment insurance, and at that
25 time, and at that time it was heard twice. And the

1 second time the Court came around and said, "Well, the
2 penalty, because if you don't adopt unemployment
3 insurance, employers are going to be paying so much more
4 tax because they will no longer get some tax breaks."
5 That became the draconian consequence.

6 Well, I think some of those things -- you know,
7 what does "draconian consequences" mean, what does
8 "coercion" mean, some of those other things, and the
9 various things? They need to be defined in terms of
10 helpful for the -- so the test claimant, when you move
11 forward -- because this is a very long, time-consuming,
12 laborious process for everybody, to say, "Let's see if we
13 can define some of these things. Let somebody figure
14 some of these things out."

15 The other kinds of policy issues, I think,
16 like, you know, that we might want to get into, I think
17 that's a separate discussion.

18 What I'm really saying is, can we address --
19 and can the local and the Commission staff, because
20 they're the experts going forward and making
21 recommendations -- can we look at things like that? And
22 maybe I'm wrong, but defining those terms, it seems to
23 me, that's not policy to me. That's just saying, "I want
24 to know what the rules of the game are when I file a test
25 claim."

1 If I think people are practically compelled to
2 do this and I got to get in, and then the question is,
3 "Well, how much coercion is there?" and "We don't really
4 know what that means," I think that puts everybody at a
5 disadvantage.

6 So I guess my question again, is that
7 something -- I don't know, maybe the Commission staff
8 would then say, "Hey, we like it just the way it is, and
9 we like to look at the 25 or 30 court cases, and pick and
10 choose, and figure out which ones are going to apply,
11 because if they're maybe not directly on point versus
12 going in and saying, "Well, here are issues that need to
13 be resolved."

14 And I'm sure if we talked to the two school
15 presenters that are here today and the local folks, I
16 think we could probably come up with a list of issues
17 that said we would appreciate having clarity and
18 definition on these statutorily, so we know, you know,
19 what the rules of the game are.

20 So, you know, as I say, it really kind of got
21 to me on practical compulsion, because we've had this
22 discussion in the last couple of years, whether it was
23 Commissioner Worthley or now Commissioner Saylor and
24 others who have raised this issue. And, you know, we
25 keep going over this issue and, you know, where's the

1 line? And I'd like to see if we could define the line.

2 CHAIR REYES: Ms. Shelton, you keep looking at
3 that microphone.

4 MS. HALSEY: We're now ready to add something.

5 CAMILLE SHELTON: Just real briefly, because
6 he's raising a million issues.

7 One, there is two points to having a statutory
8 process. One is to implement an administrative
9 procedure, and one is to interpret the constitutional
10 requirement.

11 Most of 17500 implements a procedure. The only
12 difference may be 17556, which is interpretative.

13 The Court analyses and conclusions on what
14 "practical compulsion" means do define what it is. But
15 it's based on a case-by-case basis. And so it gives
16 you a bunch of factors to look at to determine on a
17 case-by-case basis whether or not this would be the case
18 for practical compulsion. If the Legislature were to
19 enact a statute, it would have to be consistent with what
20 the Court has already said the constitutional provision
21 in Article XIII B, Section 6 means.

22 So it can't be different unless you change the
23 Constitution.

24 MR. BURDICK: And I think that's -- I don't
25 have a problem, although I do want to change the

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1 Constitution, to go back to where it belongs and before,
2 before Rose Byrd's final case and everything else and,
3 you know, the holes that the courts put in the --

4 CHAIR REYES: Okay, we're going way off on a
5 tangent now. I've given you a lot of latitude. And this
6 is an important issue, but I think we're --

7 MR. BURDICK: I think the only thing on this,
8 Pedro -- and I'm sorry, Commissioner Reyes --

9 CHAIR REYES: Yes, we've known each other for
10 years. Yes, go ahead.

11 MR. BURDICK: All right, let's go back to
12 practical compulsion, and she said, well, there were a
13 number of court cases that have looked at it and defined
14 and dealt with it, take those, and say, "What does that
15 really mean?" and allow that, so you don't have to come
16 in and say, "Okay, there's 13 cases over here, and this
17 is what they said, and how do we interpret it today?"
18 But to take those 13 and to try to put it in one place so
19 you understand what it is.

20 Now, maybe I'm being too simplistic as a
21 non-attorney, but it seems to me, that would be really
22 helpful and save time of both Commission staff and of the
23 local staff if we could take some of that, say, "Well,
24 here's what the Court said," whatever, other things, and
25 "This is what we interpret it to be."

1 So, you know, I'm not trying to get around the
2 court. I'm just saying, I think the court, because of
3 the different cases, sometimes, you know, it doesn't
4 allow for somebody to try to figure out, "Well, what do
5 all those court cases mean?" And maybe we can do that
6 and maybe we can't.

7 But I'm just saying, is this something worth
8 doing? Because we have these problems of going in and
9 saying, "Well, we've just got to wait and see," when it
10 comes up and after everybody has done a whole bunch of
11 analysis and spent a whole lot of time, is to figure out
12 whether we should have gone through this process in the
13 first place or not.

14 CHAIR REYES: So I heard staff say that --
15 well, let me go back.

16 You talk about staff picking and choosing what
17 cases make their argument. I think that's what attorneys
18 do.

19 I think when Mr. Petersen looks at a case, or
20 anybody else goes, or you even come here --

21 MR. BURDICK: Absolutely.

22 CHAIR REYES: -- you look at those relevant
23 cases that make your point.

24 And so they look at those relevant -- because
25 there are various programs that fit under this category

1 that we're discussing. So it is what it is.

2 You talk about, you know, how do we simplify
3 this, or how do we do it so there's a bright line? And
4 I submit to you that CSAC and the League of Cities has
5 attorneys, that you guys can take a stab at it and find
6 yourself a member who is willing to carry this issue.
7 And that's your thing. If you want to pursue that,
8 that's on you.

9 I don't want to have our folks commit resources
10 to try to find that bright line for you to simplify it
11 for you. I mean, that's not their role, I don't think.

12 MEMBER ALEX: I mean, it sounds more like -- to
13 me -- like, potentially guidance than a statute. And it
14 may be something that is worth exploring over time. I
15 mean, that's -- it's a very difficult process. It's an
16 APA process that you would have to go through to provide
17 that guidance. And there's a public process, which makes
18 some sense. But, you know, it may be something worth
19 exploring on some key issues.

20 And, you know, we can talk to staff about if
21 they have thoughts and recommendations.

22 So, I mean, it's something that I think we
23 could talk about.

24 But as the Chair just said, you know, your
25 organization can take a stab at that as well in terms of

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1 providing guidance to its members. I think that would
2 probably be a helpful start as well.

3 CHAIR REYES: Okay, thank you.

4 MR. BURDICK: Thank you, Mr. Reyes and Members
5 of the Commission and staff.

6 CHAIR REYES: Okay. We now go into closed
7 session.

8 Pursuant to a section of the Government Code
9 that I'm sure everybody's familiar with, we can go into
10 closed session for legal and for government -- and for
11 personnel issues.

12 So I'm citing personnel issues -- and legal,
13 too?

14 CAMILLE SHELTON: And legal.

15 CHAIR REYES: And legal, too.

16 CAMILLE SHELTON: Government Code section
17 11126(e) and 11126(a)(1).

18 CHAIR REYES: Okay, thank you.

19 If you would clear the room, please.

20 MEMBER OLSEN: And will the Chair indulge a
21 five-minute break?

22 CHAIR REYES: Yes. And happy holidays, and
23 happy New Year, everybody, if I don't see you when we
24 come back.

25 //

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 28th of December 2012.



Daniel P. Feldhaus
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Registered Diplomate Reporter
Certified Realtime Reporter