

## MINUTES

### COMMISSION ON STATE MANDATES

State Capitol, Room 126  
Sacramento, California  
March 25, 2004

Present: Chairperson James Tilton  
Representative of the Director of the Department of Finance  
Member William Sherwood  
Representative of the State Treasurer  
Member Walter Barnes  
Representative of the State Controller  
Member Jan Boel  
Acting Director of the Office of Planning and Research  
Member John Lazar  
City Council Member

Vacant: Local Elected Official  
Public Member

### CALL TO ORDER AND ROLL CALL

Chairperson Tilton called the meeting to order at 9:36 a.m.

### APPROVAL OF MINUTES

Item 1 January 29, 2004

Upon motion by Member Barnes and second by Member Lazar, the minutes were unanimously adopted.

### PROPOSED CONSENT CALENDAR

HEARING TO SET ASIDE PRIOR STATEMENTS OF DECISION, PARAMETERS AND GUIDELINES, AND STATEWIDE COST ESTIMATE PURSUANT TO COURT ORDERS (Gov. Code, § 17559, subd. (b).) (action)

- Item 13 *Order to Set Aside Statement of Decision and Adopt New Decision: Medically Indigent Adults*, No. CSM R-S046843 (On Remand from the California Supreme Court, *County of San Diego v. State of California* (1997) 15 Cal.4th 68); (Peremptory Writ of Mandamus from the Superior Court, *County of San Diego v. Commission on State Mandates* (GIC 762953))
- Item 14 *Order to Set Aside Statement of Decision Adopted on July 29, 1999 and Vacate Applicable Parameters and Guidelines and Statewide Cost Estimate: School Bus Safety II*, 97-TC-22 (Peremptory Writ of Mandamus from the Superior Court, *Department of Finance v. Commission on State Mandates* (02CS00994)) Education Code Sections 38048, 39831.3, and 39831.5, Vehicle Code Section 22112 Statutes 1994, Chapter 831 (SB 2019) Statutes 1996, Chapter 277 (SB 1562) Statutes 1997, Chapter 739 (AB 1297)

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS,  
TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF AMENDMENTS TO PARAMETERS AND GUIDELINES

- Item 15      Amendment to Vacate *School Bus Safety II* Parameters and Guidelines, 03-PGA-04, as described in Item 14 above, as adopted on November 30, 1999 and amended on January 23, 2003, from *School Bus Safety I* Parameters and Guidelines, CSM-4433  
Education Code Sections 38048, 39831.3, and 39831.5  
Vehicle Code Section 22112  
Statutes 1992, Chapter 624 (AB 3144)  
Statutes 1994, Chapter 831 (SB 2019)  
Statutes 1996, Chapter 277 (SB 1562))  
Statutes 1997, Chapter 739 (AB 1297)  
Statutes 2002, Chapter 1167 (AB 2781)

ADOPTION OF PROPOSED STATEWIDE COST ESTIMATE

- Item 16      *Presidential Primaries*, 99-TC-04  
County of Tuolumne, Claimant  
Elections Code Sections 15151 and 15375  
Statutes 1999, Chapter 18 (SB 100)

Member Barnes moved for adoption of the consent calendar, which consisted of items 13, 14, 15, and 16. With a second by Member Sherwood, the consent calendar was unanimously adopted.

**HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)**

Paula Higashi, Executive Director, swore the parties and witnesses participating in the hearing of the agenda items.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

- Item 2      Return of "Test Claim" on *Transit Trash Receptacles*, 03-TC-04  
California Water Quality Control Board Executive Order Number 01-182, December 13, 2001 [Permit Number CAS004001, Part 4, Section F.5.c.].  
Filed on September 5, 2003 by County of Los Angeles, Claimant and Appellant.
- Item 3      Return of "Test Claim" on *Inspection of Industrial/Commercial Facilities*, 03-TC-19; California Water Quality Control Board Executive Order Number 01-182, December 13, 2001 [Permit Number CAS004001, Part 4, Section C.2.a. & b.]. Filed on September 29, 2003, by County of Los Angeles, Claimant and Appellant.

Camille Shelton, Senior Commission Counsel, presented items 2 and 3. She noted that in September 2003, the County of Los Angeles filed two test claims on orders issued by the California Regional Water Quality Control Board, Los Angeles Region. However, in October 2003, the Executive Director returned the filings because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to article XIII B, section 6 of the California Constitution.

Ms. Shelton stated the county's argument that the Commission cannot rely on the plain language of Government Code section 17516 since it limits the right to reimbursement under article XIII B, section 6. Staff concludes that the Executive Director correctly returned these filings because article III, section 3.5 of the Constitution prohibits the Commission from declaring Government Code section 17516 unenforceable or unconstitutional.

Staff recommended that the Commission deny the county's appeals.

Parties were represented as follows: Leonard Kaye, on behalf of the County of Los Angeles; and Michael Lauffer, with the State Water Resources Control Board.

Mr. Kaye indicated that item 2 involved the activities of developing, installing, maintaining, and servicing transit trash receptacles. He argued that there was no other entity in the county that was required to perform these activities and it was not required under prior law. He also argued that the county did not receive funding, that this was not a law of general application, and that nothing in federal law states that trash receptacles needed to be provided at all transit stops in Los Angeles County. Mr. Kaye urged the Commission to at least consider the merits of the test claims before making a determination.

Mr. Lauffer agreed that the Commission was obliged to follow the Government Code and noted that there was ongoing litigation involving the issue of the Regional Board's authority to issue the permit.

Mr. Lauffer explained that the Regional Water Quality Control Board was compelled to issue the municipal stormwater permit pursuant to federal law, and that permits could only be issued to municipalities. To the extent that stormwater quality continues to be a problem, each permit under federal law is required to get more stringent.

Moreover, regarding the issue of inspections and the concern that the state is shifting its responsibility, Mr. Lauffer contended that the state continues to carry out its own inspection obligations. Under federal law, cities and counties are required to have an inspection program for their facilities and they are required to develop ordinances to regulate municipal stormwater runoff.

Mr. Lauffer encouraged the Commission to uphold the staff recommendation.

Chairperson Tilton stated that the issue before the Commission was whether Government Code section 17516 was applicable.

Mr. Kaye noted that the Commission's practice when a funding disclaimer is identified is to consider the merits of the matter. Regarding the issue of the federal mandate, he asserted that the state and regional boards had a great amount of discretion. He added that under the *Hayes* case, a state-mandated program becomes reimbursable if the state voluntarily assigns duties to the cities and counties.

Ms. Shelton agreed that when there were disclaimers in the legislation, the Commission would go through an analysis of the merits of the claim. However, in this case the test claim was filed on a permit issued by a water quality control board, and thus, Government Code section 17516 was being applied for the first time. Therefore, staff's position was that the Commission did not have jurisdiction over this claim and cannot analyze its merits.

Member Sherwood stated his belief that staff's recommendation was correct in this case.

Member Barnes made a motion to adopt the staff recommendations for items 2 and 3 to deny the county's appeals. With a second by Member Sherwood, the motion carried unanimously.

- Item 4            Return of “Test Claim” on *Waste Discharge Requirements*, 03-TC-20 California Regional Water Quality Control Board, Los Angeles Region Executive Order Number 01-182, NPDES Permit (CAS004001), Dated December 13, 2001, Parts 4.B.4, 4.C.2.a, 4.C.2.b, 4.C.2.c, D, E, F, and G. Filed on September 30, 2003, by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village, Claimants and Appellants.

Camille Shelton, Senior Commission Counsel, presented this item. She noted that as in the previous items, the Executive Director returned this filing because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to article XIII B, section 6 of the California Constitution.

Ms. Shelton stated the cities’ contention that the Commission cannot rely on the plain language of Government Code section 17516 because it was unconstitutional as applied to this claim. The cities also argue that the California Regional Water Quality Control Board implemented the new requirements through underground rulemaking in violation of the Administrative Procedures Act.

Staff concludes that the Executive Director correctly returned this filing for the following reasons:

- 1) The Commission does not have authority to determine if the requirements issued by the California Regional Water Quality Control Board are underground regulations, and
- 2) Article III, section 3.5 of the Constitution prohibits the Commission from declaring Government Code section 17516 unenforceable or unconstitutional. Therefore, the Commission is required by law to enforce Government Code section 17516, and find that the document issued by the California Regional Water Quality Control Board is not an executive order subject to article XIII B, section 6 of the California Constitution.

Staff recommended that the Commission deny the cities’ appeal.

Parties were represented as follows: Evan McGinley, on behalf of the test claimants; and Michael Lauffer, with the State Water Resources Control Board.

Mr. McGinley incorporated into his testimony the comments made by Mr. Kaye in the previous items. He added that the plain language of article XIII B, section 6 did not reference any kind of exemption for orders issued by the California Regional Water Quality Control Board.

Further, Mr. McGinley argued that even if the Commission accepted that it was constrained by the Government Code, it was still possible to find that this was an unfunded mandate being imposed upon local governments. He outlined three points for the Commission’s consideration:

- 1) Regional boards have choices as to how they will meet their obligations under the Clean Water Act. They have chosen to meet their obligations in a way that shifts the burden of certain programmatic responsibilities onto local governments.
- 2) The permit adopted by regional boards have been issued across the state, and thus, resemble a rule of general application. Under the state’s Administrative Procedures Act, a rule of general applicability should be formally adopted through the rulemaking provisions. This was not the case here, and hence, the provision under Government Code section 17516 is not applicable.

- 3) The definition of “executive order” references an exemption for actions that have been taken by the Regional Water Quality Control Board because it exempts publicly-owned treatment works.

Mr. Lauffer incorporated into his testimony the comments he made in the previous items. In response to Mr. McGinley’s three arguments, Mr. Lauffer maintained that none altered the analysis conducted by staff under Government Code section 17516. Regarding the reference to publicly-owned treatment works, he asserted that it was precatory language. He added that California courts have consistently held that such language was not directory to an agency, and therefore, it was not binding on the Commission.

Ms. Shelton agreed with Mr. Lauffer’s comments. She added that the definition of an executive order goes beyond a regulation. Thus, whether or not the permit goes through the regulatory process has no bearing on whether or not it is an executive order. She maintained that the plain language of Government Code section 17516 clearly applies to permits issued by the Regional Water Quality Control Board.

Member Sherwood made a motion to adopt the staff recommendation to deny the cities’ appeal. With a second by Member Barnes, the motion carried unanimously.

Member Lazar indicated that he sympathized with the local governments. However, he stated that he had to follow the recommendations he felt were appropriate.

- Item 5      Return of “Test Claim” on *Stormwater Pollution Control Requirements*, 03-TC-21  
California Regional Water Quality Control Board, Los Angeles Region Executive Order Number 01-182, NPDES Permit (CAS004001), Dated December 13, 2001, Parts 1 and 2, pages 16-18; Part 4 C and E, pages 27-34, and pages 42-45; and Part 4 F, sections 5 and 6, pages 48-5. Filed on September 30, 2003, by Cities of Arcadia, Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina, Claimants and Appellants<sup>1</sup>
- Item 6      Return of “Test Claim” on *Stormwater Pollution Control Requirements*, 03-TC-22  
California Regional Water Quality Control Board, Los Angeles Region Executive Order Number 01-182, NPDES Permit (CAS004001), Dated December 13, 2001, Parts 1 & 2, Pages 16-18; Part 4C & E, Pages 27-34, and Pages 42-45; and Part 4F (5) & (6), Pages 48-51. Filed on September 30, 2003, by the City of San Dimas, Claimant and Appellant

Camille Shelton, Senior Commission Counsel, presented these items. She noted that as in the previous items, the test claimants here alleged a reimbursable state-mandated program for requirements issued by the California Regional Water Quality Control Board. The Executive Director returned these filings because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to article XIII B, section 6 of the California Constitution.

Ms. Shelton stated the cities’ argument that the Commission cannot rely on the plain language of Government Code section 17516. Staff concludes that the Executive Director correctly returned these filings based on the plain language of Government Code section 17516, and because

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<sup>1</sup> The City of Arcadia is not an appellant.

article III, section 3.5 of the Constitution prohibits the Commission from declaring Government Code section 17516 unconstitutional.

Staff recommended that the Commission deny the cities' appeals.

Parties were represented as follows: Ken Farfsing, on behalf of the test claimants; and Michael Lauffer, with the State Water Resources Control Board.

Mr. Farfsing incorporated into his testimony the comments made in the previous items. He also stated his belief that there were three unfunded mandates in this case that are subject to reimbursement under state law and the California Constitution: placing trash receptacles at all transit stops in the cities, inspecting state-permitted industrial facilities in construction sites, and doing what was necessary to prevent accedence of water quality standards. He contended that prior to the adoption of the stormwater permit in December 2001, none of the three activities were required.

Mr. Farfsing argued that these requirements were not appropriately a part of the stormwater permit. He indicated that this mandate literally required cities to collectively expend billions of dollars to comply with its terms. He added that this was not required by federal law, was not permitted by state law, and was the most expensive mandate that cities had to comply with.

Mr. Lauffer incorporated into his testimony the comments he made in the previous items. He disagreed with Mr. Farfsing as to his characterizations and fiscal analysis of the stormwater permit. He maintained that none of the arguments raised altered the analysis conducted by the Commission staff under Government Code section 17516.

Member Barnes made a motion to adopt the staff recommendations for items 5 and 6 to deny the cities' appeals. With a second by Member Boel, the motion carried unanimously.

#### TEST CLAIMS AND PROPOSED STATEMENTS OF DECISION

Item 7        *Integrated Waste Management*, 00-TC-07  
Santa Monica and South Lake Tahoe Community College Districts,  
Co-Claimants  
Public Resources Code Sections 40148, 40196.3, and 42920-42928  
Public Contract Code Sections 12167 and 12167.1  
Statutes 1992, Chapter 1116 (AB 3521)  
Statutes 1999, Chapter 764 (AB 75)  
Manuals of the California Integrated Waste Management Board

Eric Feller, Commission Counsel, presented this item. He noted that among other related activities, the claimants sought reimbursement for the costs of community colleges to divert at least 25 percent of all solid waste generated on campus from landfill or transformation facility disposal by January 2002, and at least 50 percent by January 2004. Staff found a partially reimbursable state mandate for the following activities:

- complying with the board's model integrated waste management plan;
- designating a solid waste reduction and recycling coordinator;
- diverting 25 percent of waste from landfills by January 2002, and 50 percent by January 2004;
- requesting a time extension or alternative requirement, if necessary, with all the accompanying requirements; and

- submitting annual reports to the board on the progress in reducing solid waste and submitting recycled material reports to the board.

Staff further found that the remaining activities alleged by the claimant did not constitute reimbursable activities. Mr. Feller stated that also at issue was whether the community colleges had fee authority to fund the waste reduction program. Staff found that they did not.

Staff recommended that the Commission partially approve the test claim for the identified activities.

Parties were represented as follows: Keith Petersen, on behalf of the test claimants; Deborah Borzelleri and Trevor O'Shaughnessey, with the Integrated Waste Management Board; and Michael Wilkening, with the Department of Finance.

Mr. Petersen stood with his written submissions but had two points of clarification. First, he stated his understanding of staff's conclusion that "a community college must comply with the board's model integrated waste management plan," to mean that regardless of whether a college adopts its own plan, it had to follow the state plan. However, quoting Public Resources Code section 42920, subdivisions (b)(1) and (b)(2), he argued that the plain meaning of the sentence is that community colleges shall adopt an integrated waste management plan.

Mr. Feller explained that subdivision (b)(3) states that if a college fails to adopt a plan, then the state's model plan governs. Therefore, staff took the position that community colleges were not actually required to develop their own plan.

Mr. Petersen argued that the staff conclusion was pertinent only to those colleges that did not adopt their own plan, and that there was no authorization for such a conclusion.

Chairperson Tilton clarified Mr. Petersen's issue. Mr. Petersen added that there was no penalty if colleges do not adopt their own plan.

Paul Starkey, Chief Legal Counsel, stated that in reading the provisions together, staff concluded that at a minimum, the state's model plan must be adopted. Mr. Petersen asserted it was a misstatement of law because each sentence should be read separately. He maintained that the law did not give colleges discretion, either they adopted their own plan or the state forced its plan upon them.

Member Boel requested Ms. Higashi's comments. Ms. Higashi indicated that there was a difference between what the law mandated and what was reimbursable. She stated that Mr. Petersen was arguing that all should be reimbursable, whereas staff's conclusion limits reimbursement to what the state adopted for the community college districts.

Mr. Petersen reiterated that staff had no legal basis for its conclusion and maintained that reimbursement for the plan should either be the community colleges' plan or the state plan.

Mr. Starkey disagreed with Mr. Petersen, explaining that staff interpreted the statutory scheme to mean that there was no mandate with respect to the district voluntarily opting to adopt its own plan as opposed to adopting the state's plan.

Ms. Borzelleri agreed with Mr. Starkey and the staff analysis.

Member Barnes commented that the imposition of the state's model plan appeared to be more a consequence rather than a requirement. He requested clarification as to the requirements of the plan. Mr. O'Shaughnessey explained that the state's model plan outlined what needed to be submitted – what the district planned to do in its location for recycling and diversion of materials from California landfills. He clarified that the minimum level of compliance was either to adopt

the model plan or submit information covering the requirements. Anything above the requested information was discretionary.

Mr. Petersen asserted that there was nothing in the law saying it was discretionary. He added that this law went into effect four years ago and the maintenance and operations directors were not aware that they could wait and do nothing until the state plan was forced upon them.

Member Boel asked if as a jurisdiction, a community college district could file the state plan as its own plan. Mr. Petersen responded that legally, there was nothing that prevented a district from doing so. But he argued that there was also no requirement that districts adopt the state plan.

As to his second issue, Mr. Petersen asked for clarification regarding the staff recommendation to divert solid waste. Mr. Feller clarified that staff's intent was to allow reimbursement for actually diverting solid waste rather than just planning the diversion.

Member Barnes raised a concern about the designation of a solid waste reduction and recycling coordinator. He noted that the bill referenced the use of existing resources to cover the duties assigned to the designated solid waste reduction and recycling coordinator. He stated his understanding that the intent of the legislation was that there would be no additional staffing. Further, since this was applied across the board to all state agencies, it should also be applied with regard to community colleges. Therefore, Member Barnes believed that this designation should not be a reimbursable activity.

Mr. Feller explained that community colleges are treated differently as far as mandate reimbursement is concerned because they are subject to article XIII B, section 6 of the California Constitution. Additionally, he noted that in past cases, the courts have rejected language saying that local agencies have to absorb costs within their existing resources. Mr. Petersen agreed, adding that legislative disclaimers were ineffectual.

In terms of mandate determination, Mr. Starkey stated that the Commission could not rely upon legislative intent as limiting language.

Member Barnes raised another concern. He stated that the annual report should contain information about savings that could be used to offset the costs of the mandate. Acknowledging that this may be a parameters and guidelines issue, he wanted some agreement from the members that offsetting savings language should in fact be included in the parameters and guidelines. Member Sherwood agreed.

Mr. Petersen added that revenues received by the districts, including recycling income, would be offset against the costs of the mandate.

Member Barnes stated that all offsetting savings factors need to be included so that only net costs are reimbursed.

Ms. Borzelleri made three points. First, she saw a problem with community colleges being allowed to claim for reimbursement as a local entity since they were not subject to this law under the originating statute, Assembly Bill 939. Second, she disagreed with the staff analysis regarding the applicability of Government Code section 17556, subdivision (d), and the fee authority of community colleges. She believed that community colleges did have optional fee authority to recover the costs of implementing the program. Finally, she indicated that the Integrated Waste Management Board would like to participate in the parameters and guidelines process because they believed that many diversion programs were already in place prior to the enactment of Assembly Bill 75. Pursuant to Government Code section 17565, reimbursement is

allowed only for costs incurred after the operative date of the mandate.

Chairperson Tilton noted that it was not clear to him why this type of service was not included as part of maintaining the basic program of providing education. He inquired whether this program was already covered by the state and local funding that community colleges received as a normal cost of doing business to provide educational activities. He also asked about their ability to raise fees in the case that they were not receiving funding.

Mr. Feller indicated that there was no evidence in the record about funding already being received by community college districts, and staff found it to be a new requirement. As to the issue of the fee authority, he stated that the community college Chancellor's Office stated that "...districts may not charge students a fee for use of a service which the district is required to provide by state law...."

Also, in response to Ms. Borzelleri, Mr. Feller stated that if a community college was already implementing a program prior to the effective date of the legislation, Government Code section 17565 does not preclude the existence of a reimbursable state-mandated program.

Mr. Petersen added that the entire body of fee law in public education pertained to providing services directly to students, and recycling was not such a service. He also argued that a community college could not charge on its own authority a fee for something the state mandated. Moreover, he agreed with Mr. Feller regarding Government Code section 17565.

Mr. Wilkening stated that he had no expertise in the community college budget but offered to have someone from the Department of Finance address the issue.

Ms. Higashi recommended that the Commission take a short break.

[At this time, a short break was taken.]

Chairperson Tilton indicated that he was not able to demonstrate for the record that this mandate was in fact being funded.

Member Boel made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried unanimously.

Item 8 Proposed Statement of Decision: *Integrated Waste Management*, 00-TC-07, as described in Item 7.

Eric Feller, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the decision just made in item 7. He requested that the Commission allow minor changes to be made, including those to reflect the hearing testimony and vote count.

Chairperson Tilton asked if a stronger reference for identifying savings would be included.

Mr. Feller responded that offsetting savings would be identified in the parameters and guidelines.

Mr. Petersen requested clarification as to the Commission's decision regarding reimbursement for the colleges' plans versus the state plan. Chairperson Tilton clarified that whether or not a college adopts its own plan, the state plan describes reimbursement.

Member Lazar made a motion to adopt the proposed Statement of Decision. With a second by Member Boel, the motion carried unanimously.

- Item 9      *School Accountability Report Cards II and III*, 00-TC-09, 00-TC-13, and 02-TC-32  
Empire Union School District, Sweetwater Union High School District, and Bakersfield City School District, Claimants  
Education Code Sections 33126, 33126.1, 41409  
Statutes 1997, Chapter 912 (AB 572); Statutes 2000, Chapter 996 (SB 1632)  
Statutes 2001, Chapters 159 (SB 662) and 734 (AB 804)  
Statutes 2002, Chapter 1168 (AB 1818)

Katherine Tokarski, Commission Counsel, presented this item. She noted that California voters approved Proposition 98 in 1988, amending the California Constitution and adding the Education Code sections on the school accountability report cards. Before the Commission were consolidated test claims that alleged new reimbursable activities required for including new components in the school accountability report card, as well as for training school personnel to either use the optional state template or the template regarding standard definitions to be used when preparing the school accountability report card.

Further, Ms. Tokarski noted that Empire Union School District also alleged new activities from the amendment of Education Code section 33126 by Statutes 1997, chapter 912. Staff asserts that the statutory amendment was part of the original *School Accountability Report Cards (SARC)* Statement of Decision, and therefore, no further issues on the merits may be raised before the Commission at this time.

Staff found that to the extent the claimed amendments to the Education Code were a restatement of what was required by the voters in enacting Proposition 98, no new program or higher level of service could be found. Staff recommended that the Commission adopt the final staff analysis, which denies the consolidated test claims.

Parties were represented as follows: David Scribner, on behalf of the Empire Union School District; and Michael Wilkening and Lenin Del Castillo, with the Department of Finance.

Mr. Scribner noted that what was added to Education Code section 33126 by the electorate was the language “but is not limited to” and that under Proposition 98, 13 specific activities were required. He stated that the “but is not limited to” language, in staff’s opinion, gave the Legislature the authority to change the original 13 activities without imposing new costs or activities upon districts. Mr. Scribner questioned the legal support for staff’s opinion and offered his opinion of what the “but is not limited to” language meant. Rather than being able to change the original 13 activities, his interpretation of the language was that it allowed districts to provide additional information to parents or guardians.

While acknowledging that Commission decisions had no precedential value, Mr. Scribner pointed out that if staff’s recommendation was adopted, there would be a huge inconsistency between the original *SARC* and *SARC II*. He argued that the original *SARC* test claim and the *SARC II* test claim had the same fact pattern; and that there was no change in the Education Code, Government Code, or case law. He indicated that the claimant provided a declaration signed under penalty of perjury that the new information was only added to the school accountability report card when the Legislature mandated it upon the districts.

Mr. Scribner’s second issue related to the argument about costs mandated by the state. He disagreed with staff’s reliance on the *Department of Finance* case to support its position that the *School Accountability Report Cards II* program was tied to Proposition 98. He argued that

Proposition 98 was a funding guarantee, not an appropriation. Also, he asserted that there were fundamental factual differences between the case here and the *Department of Finance* case because it dealt with a program that had a specific line item in the budget, where in this case, there was no line item in the budget. Therefore, the case was inapplicable. He requested that the Commission deny the staff analysis.

Ms. Tokarski explained that the staff analysis did not hinge on the “but is not limited to” language. Rather, it focused on the issues of whether it was a new program or higher level of service. She indicated that many of the so-called new items added by the Legislature dealt specifically with testing results of particular tests currently required. Staff’s assertion was that activities were specifically related to providing information on student achievement and progress towards meeting reading, writing, arithmetic, and other academic goals.

As to the issue of costs mandated by the state, Ms. Tokarski maintained that staff relied on both old and new case law. She noted that the staff analysis also cited the *County of Sonoma* and *Redevelopment Agency* cases, which help analyze the issue of Proposition 98 funding versus a budget line item. She stated that providing a school accountability report card was part of the Proposition 98 funding guarantee. Staff’s position was that the claimant had not shown that those state funds were not available to cover any incremental increased costs incurred in compliance with the new language added by the Legislature.

Mr. Del Castillo concurred with the staff analysis.

Mr. Scribner contended that the Legislature, by its actions, took away the discretion to determine whether or not districts wanted to include information in the school accountability report card. He argued that the original 13 activities were expanded to well over two dozen, and therefore, he disagreed that there was no higher level of service being imposed.

Member Barnes made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried 4-1, with Member Boel voting “No.”

Item 10 Proposed Statement of Decision: *School Accountability Report Cards II and III*, 00-TC-09, 00-TC-13, and 02-TC-32, as described in Item 9.

Katherine Tokarski, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the decision just made in item 9. She noted that minor changes would be included in the final Statement of Decision to reflect the hearing testimony and vote count.

Member Sherwood made a motion to adopt the proposed Statement of Decision. With a second by Member Lazar, the motion carried unanimously.

Item 11 *High School Exit Examination*, 00-TC-06  
Trinity Union High School District, Claimant  
Education Code Sections 60850, 60851, 60853, 60855  
Statutes 1999x, Chapter 1 (SBX1 2)  
Statutes 1999, Chapter 135 (AB 584)  
California Code of Regulations, Title 5, Sections 1200-1225, in effect as of  
March 2003

Eric Feller, Commission Counsel, presented this item. He noted that the claimant sought reimbursement for costs of school districts performing various activities in administering the high school exit examination. Staff found a partially reimbursable state mandate for the following activities:

- providing and documenting notice of the exam;
- determining whether English-learning pupils have sufficient skills to be assessed with the exam;
- administering the exam, including the activities as required by regulations;
- maintaining test security, including activities as required by regulations; and
- reporting data to either the Superintendent of Public Instruction or its designee.

Staff further found that the claimant's remaining alleged activities did not constitute reimbursable activities. Mr. Feller stated that also at issue was whether the \$3 administration fee apportioned to districts was sufficient to meet the costs of the program. He noted that the state was afforded a presumption that this amount was sufficient; however, the claimant successfully rebutted the presumption by submitting sworn declarations. Therefore, staff found that the \$3 apportionment per exam administration was insufficient to cover the costs of the program.

Staff recommended that the Commission partially approve the test claim for the identified activities.

Parties were represented as follows: David Scribner, on behalf of the claimant; Michael Wilkening and Lenin Del Castillo, with the Department of Finance; Juan Sanchez, with the California Department of Education; and Paul Warren, with the Legislative Analyst's Office.

Mr. Scribner concurred with the staff recommendation. He indicated that there was one issue outstanding about who was required to actually submit the results to the parents or guardians; however, he could not provide any legal support for the position that schools were submitting the information. He noted that if the claimant received some sort of management advisory within the time frame for reconsideration, he would be putting forth a request.

Mr. Wilkening outlined the following three issues:

- 1) He disagreed with staff's assertion that the No Child Left Behind program was not a federal mandate. He indicated that funds in excess of two billion dollars were being provided pursuant to that statute, and thus, there was no real choice. The state had to take that money and comply with the federally imposed mandate.
- 2) He disagreed with the assertion that the *High School Exit Exam* was not a federal mandate. He stated his belief that it was a federal mandate for tenth graders because No Child Left Behind requires the state to have a cumulative assessment in the tenth grade. He asserted that the high school exit exam was the state's test used to comply with the federal requirement.
- 3) He believed that the standard for determining whether or not a mandate will reach the \$1000 threshold should be more stringent than an assertion. He argued that data should be submitted along with the assertion. Thus, he disagreed that \$3 was inadequate to cover the costs of the program because there was no data to support the contention.

In response to Mr. Wilkening's third point, Mr. Scribner responded that declarations were submitted under penalty of perjury and were developed based on data the districts had. He asserted that Mr. Wilkening's recommendation would be a new mandated program.

As to the No Child Left Behind issues, Mr. Scribner agreed with staff that it was not a requirement, but a choice. It was an incentive program because districts that wanted to continue receiving Title 1 funding had to submit a state plan. He argued that No Child Left Behind was a

non-issue in this test claim.

Mr. Wilkening contended that No Child Left Behind was coercive. A state that does not participate forgoes a large amount of funding for schools. He explained that No Child Left Behind did not allow districts discretion in doing assessments. No Child Left Behind required that an assessment be chosen.

Mr. Scribner argued that there was no clear delineation in No Child Left Behind as far as *High School Exit Exam* was concerned. He stated that No Child Left Behind had very broad statements about assessments and accountability. In addition, he noted that *High School Exit Exam* was imposed by the state before No Child Left Behind was established.

Mr. Feller stated that No Child Left Behind and the predecessor statute, Improving America's Schools Act of 1994, were funding statutes that the state was not required to participate in. After quoting a portion of the statute, he maintained that they were also not federal mandates.

Member Barnes wanted technical clarification about the \$3 per student funding source. There was some discussion among Member Barnes, Mr. Wilkening, and Mr. Sanchez. Member Barnes then asked what the relationship was between the federal funding and the \$3. Clarification was provided by Mr. Warren and Mr. Scribner.

Member Barnes explained that he was trying to ascertain whether there was funding to cover the costs of the mandate. He added that the \$3 per student was an amount that needed to be offset from the costs.

Mr. Wilkening reiterated that the \$3 per pupil was adequate. To the extent that there were costs beyond the \$3, he maintained that funding provided under No Child Left Behind was available to cover those costs.

Mr. Scribner argued that there was no evidence in the record from state agencies to support Mr. Wilkening's contention. He indicated that it may be worthwhile to request additional information from the claimants and state agencies to determine at what level No Child Left Behind provided funding that could be applied to the *High School Exit Exam*.

Member Barnes asked staff and those involved in developing the parameters and guidelines to specifically address the issue of the federal funding and whether any or all of it should be identified as offsetting savings. Chairperson Tilton added that specifics should be provided as to what is submitted to the federal government in order to obtain the funding.

Member Barnes specifically requested the active participation of the California Department of Education. Mr. Sanchez responded positively.

Mr. Warren noted that there was another mandate adopted prior to 1975, which required districts to test students for proficiency before graduation. He stated that this should also be considered as offsetting savings.

Mr. Feller indicated that he outlined in the staff analysis some of the offsetting savings.

Member Sherwood commented that he was happy to see the involvement from state agencies because he felt that such participation was important in order to get to the bottom line, to resolve the issues, and to make fair determinations.

Member Barnes made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried unanimously.

Item 12 Proposed Statement of Decision: *High School Exit Examination*, 00-TC-06, as described in Item 11.

Eric Feller, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the decision just made in item 11. He noted that minor changes would be included in the final Statement of Decision to reflect the hearing testimony and vote count.

Member Lazar made a motion to adopt the proposed Statement of Decision. With a second by Member Barnes, the motion carried unanimously.

## **STAFF REPORTS**

Item 17 Chief Legal Counsel's Report  
Recent Decisions, Litigation Calendar

Mr. Starkey reported the following:

- *New Filings.* There was one new filing from the County of Los Angeles, a writ to the Commission's decision on *Animal Adoption*. A writ filed by the Department of Finance on the Commission's decision for *Animal Adoption* is also pending in the Sacramento Superior Court.

Item 18 Executive Director's Report  
Budget, Workload, Legislation, Next Hearing

Ms. Higashi noted the following:

- *Budget.* Hearings are scheduled for the Commission's budget with the Senate Budget Sub-committee and the Assembly Budget Sub-committee.
- *Legislation.* There have been a number of updates on the legislative report. Also, there are an unprecedented number of bills addressing mandate issues. The Assembly Special Committee on State Mandates is in the midst of completing its review of the education mandates. Commission staff continues to attend the meetings and provides assistance to committee staff and the members during the hearings. Committee discussions focusing on the mandates process are expected to start sometime in April. There has also been interest from the Governor's Office, the Education Secretary's Office, on mandate issues. Chairperson Tilton mentioned that there was also some discussion in Finance's front office about mandates.
- *Next Agenda.* There are four test claims scheduled for the next hearing.

## **CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.**

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *San Diego County v. Commission on State Mandates, et al.*, Case Number GIC 762953, on remand, in the Superior Court of the State of California, County of San Diego. CSM Case No. 01-L-12 [*San Diego MIA*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 02CS00994, in the Superior Court of the State of California, County of Sacramento. CSM Case No. 02-L-01 [*School Bus Safety II*]

3. *San Diego Unified School District v. Commission on State Mandates, et al.*, Case Number S109125, in the Supreme Court of the State of California. CSM Case No. 02-L-02 [*Pupil Expulsions*]
4. *San Diego Unified School District and San Juan Unified School District v. Commission on State Mandates, et al.*, Case Number C044162, in the Appellate Court of the State of California, Third Appellate District. CSM Case No. 02-L-05 [*Physical Performance Tests*]
5. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 03CS01069 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-01 [*Animal Adoption*]
6. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 03CS01432 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
7. *San Diego Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01401 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-03 [*Graduation Requirements IRC*]
8. *Castro Valley Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01568 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-04 [*Graduation Requirements IRC*]
9. *San Jose Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01569 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-05 [*Graduation Requirements IRC*]
10. *Sweetwater Union High School District v. Commission on State Mandates, et al.*, Case Number 03CS01570 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-06 [*Graduation Requirements IRC*]
11. *Clovis Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01702 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-09 [*Graduation Requirements IRC*]
12. *Grossmont Union High School District v. Commission on State Mandates, et al.*, Case Number 04CS00028 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-10 [*Graduation Requirements IRC*]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

#### PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a), and 17526.

Discussion and action, if appropriate, on report from the Personnel Sub-Committee.

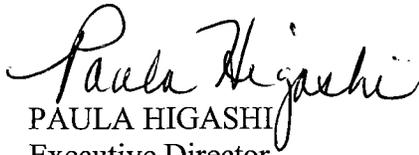
Hearing no further comments, Chairperson Tilton adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

#### **REPORT FROM CLOSED EXECUTIVE SESSION**

Chairperson Tilton reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

#### **ADJOURNMENT**

Hearing no further business, Chairperson Tilton adjourned the meeting at 12:51 p.m.

  
PAULA HIGASHI  
Executive Director

**RECEIVED**

APR 16 2004

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

**COMMISSION ON STATE MANDATES**

--oOo--

**TIME:** 9:36 a.m.

**DATE:** Thursday, March 25, 2004

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

**ORIGINAL**

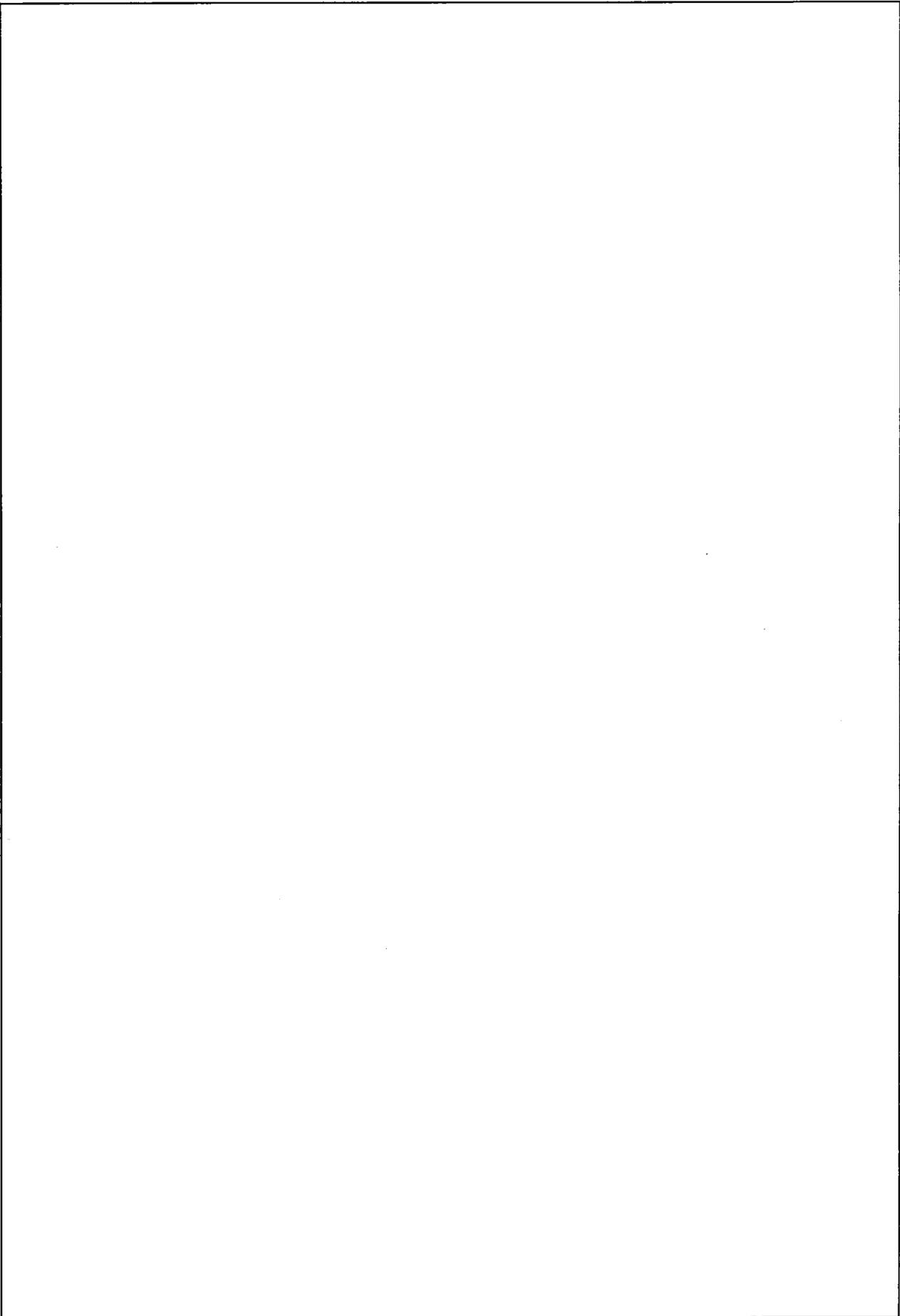
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REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

Reported By:

DANIEL P. FELDHAUS  
CSR #6949, RDR, CRR



A P P E A R A N C E S

COMMISSIONERS PRESENT

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

WILLIAM SHERWOOD  
(Commission Vice Chair)  
Representative for PHILIP ANGELIDES  
State Treasurer

WALTER BARNES  
Representative for STEVE WESTLY  
State Controller

JAN BOEL  
Acting Director  
State Office of Planning and Research

JOHN S. LAZAR  
City Council Member  
City of Turlock

COMMISSION STAFF PRESENT

PAULA HIGASHI  
Executive Director

PAUL M. STARKEY  
Chief Legal Counsel

CAMILLE SHELTON  
Senior Commission Counsel

KATHERINE TOKARSKI  
Commission Counsel

ERIC FELLER  
Commission Counsel

NANCY PATTON  
~~Legislative Coordinator~~  
Assistant Executive Director

PUBLIC TESTIMONY

**Appearing Re Item 2 and Item 3:**

For Claimant, County of Los Angeles:

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

For the Los Angeles Regional Water Quality Control Board:

MICHAEL A. M. LAUFFER  
Staff Counsel  
State Water Resources Control Board  
Office of Chief Counsel  
1001 I Street  
Sacramento, California

**Appearing Re Item 4:**

For the ~~Applicants~~<sup>Appellants</sup>, the cities of Beverly Hills,  
Carson, Monrovia, Norwalk, Rancho Palos Verdes,  
West Lake Village:

EVAN J. MCGINLEY  
Richards, Watson, Gershon  
355 South Grand Avenue, 40th Floor  
Los Angeles, CA 90071-3101

For the State Water Resources Control Board:

MICHAEL A. M. LAUFFER  
Staff Counsel  
State Water Resources Control Board  
Office of Chief Counsel  
1001 I Street  
Sacramento, California

PUBLIC TESTIMONY

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

For Claimants/Appellants cities of Baldwin Park,  
Bellflower, Cerritos, Covina, Downey, Monterey Park,  
Pico Rivera, Signal Hill, South Pasadena, West Covina

KEN FARFSING  
City Manager  
City of Signal Hill  
2175 Cherry Avenue  
Signal Hill, CA 90755-3799

For the State Water Resources Control Board:

MICHAEL A. M. LAUFFER  
Staff Counsel  
State Water Resources Control Board  
Office of Chief Counsel  
1001 I Street  
Sacramento, California

**Appearing Re Item 7:**

For Test Claimants Santa Monica and South Lake Tahoe  
Community College Districts:

KEITH B. PETERSEN, MPA, JD  
President  
SixTen and Associates  
5252 Balboa Avenue, Suite 807  
San Diego, CA 92117

For the California Integrated Waste Management Board:

DEBORAH BORZELLERI  
Staff Counsel  
California Integrated Waste Management Board  
Legal Office  
1001 I Street  
Sacramento, CA 95814

PUBLIC TESTIMONY

**Appearing Re Item 7: *continued***

For the California Integrated Waste Management Board:

TREVOR O'SHAUGHNESSY  
Section Supervisor  
California Integrated Waste Management Board  
State and Local Assistance Board  
1001 I Street  
Sacramento, CA 95814

For the Department of Finance:

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

**Appearing Re Item 9:**

For Claimant Empire Union School District:

DAVID E. SCRIBNER  
Executive Director  
Schools Mandate Group  
One Capitol Mall, Suite 200  
Sacramento, CA 95814

For the Department of Finance:

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

LENIN DEL CASTILLO  
Finance Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

A P P E A R A N C E S

Appearing Re Item 11:

For Claimant Trinity Union High School District:

DAVID E. SCRIBNER  
Executive Director  
Schools Mandate Group  
One Capitol Mall, Suite 200  
Sacramento, CA 95814

For the Department of Finance:

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

LENIN DEL CASTILLO  
Finance Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

For the California Department of Education

JUAN SANCHEZ  
California Department of Education.

For the Legislative Analyst's Office:

PAUL WARREN  
Legislative Analyst's Office  
~~5252 Balboa Avenue, Suite 807~~ 925 L STREET  
~~San Diego, CA 92117~~ SACRAMENTO, CA 95814

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ERRATA SHEET

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<u>2</u>	_____	CHANGE "LEGISLATIVE COORDINATOR" TO "ASSISTANT EXECUTIVE DIRECTOR"
<u>3</u>	_____	CHANGE "APPLICANTS" TO "APPELLANTS"
<u>6</u>	_____	CHANGE PAUL WARREN'S ADDRESS TO "925 L STREET SACRAMENTO, CA 95814"
<u>43</u>	<u>12</u>	CHANGE "NOT" TO "CANNOT"
<u>60</u>	<u>20</u>	CHANGE "DISCRETIONARYL=" TO "DISCRETIONARY"
<u>62</u>	<u>15</u>	INSERT "IF"
<u>74</u>	<u>16</u>	REPLACE "CHAIR TILTON" WITH "MEMBER BARNES"
<u>92</u>	<u>6</u>	CHANGE "INVOKE" TO "VOTE"
<u>92</u>	<u>4</u>	INSERT "AND"
* <u>58</u>	<u>18</u>	CHANGE "MIKE" TO "MICROPHONE"
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1 BE IT REMEMBERED that on Thursday, March 25, 2004,  
2 commencing at the hour of 9:36 a.m., thereof, at the  
3 State Capitol, Room 126, Sacramento, California, before  
4 me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the  
5 following proceedings were held:

6 --oOo--

7 CHAIR TILTON: The time of 9:30 is upon us. Let me  
8 open up and establish today's meeting, March 25th, for  
9 the meeting of the Commission on State Mandates.

10 Paula, could you call the roll, please?

11 MS. HIGASHI: Mr. Barnes?

12 MEMBER BARNES: Here.

13 MS. HIGASHI: Ms. Boel?

14 MEMBER BOEL: Here.

15 MS. HIGASHI: Mr. Lazar?

16 MEMBER LAZAR: Here.

17 MS. HIGASHI: Mr. Sherwood?

18 VICE CHAIR SHERWOOD: Here.

19 MS. HIGASHI: Mr. Tilton?

20 CHAIR TILTON: Here.

21 MS. HIGASHI: The first order of business is  
22 *Approval of the Minutes, Item 1.*

23 CHAIR TILTON: Has everyone had a chance to review  
24 the minutes?

25 Do I have a motion?

1 MEMBER BARNES: Move for approval.

2 MEMBER LAZAR: Second.

3 CHAIR TILTON: I have a motion and second.

4 All those in favor of approving the minutes, signify  
5 by saying "aye."

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

7 CHAIR TILTON: All those opposed?

8 (No audible response was heard.)

9 CHAIR TILTON: The motion passes.

10 MS. HIGASHI: We're now at the consent calendar.

11 The *Proposed Consent Calendar* today is the green sheet,  
12 that should be in front of you. It consists of Items 13,  
13 14, Item 15 -- and I just wanted to note for the record,  
14 that there's a revised exhibit in that, which all of you  
15 should have in your binders -- and Item 16.

16 MEMBER BARNES: Move approval.

17 CHAIR TILTON: I have a motion --

18 VICE CHAIR SHERWOOD: Second.

19 CHAIR TILTON: -- and a second to approve the  
20 consent calendar.

21 Any discussion?

22 (No audible response was heard.)

23 CHAIR TILTON: Any comments from the audience?

24 (No audible response was heard.)

25 CHAIR TILTON: All those in favor of approving the

1 consent calendar, please signify by saying "aye."

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

3 CHAIR TILTON: Opposed?

4 (No audible response was heard.)

5 CHAIR TILTON: The motion carries for approval of  
6 the consent calendar.

7 MS. HIGASHI: We've now reached the hearing portion  
8 of our meeting. And as is customary for us, I'd like to  
9 ask all of the persons who are here today, who will be  
10 participating in the hearing for Items 2 through 12, if  
11 they would please stand.

12 (*Several people stood up.*)

13 MS. HIGASHI: Would you please raise your right  
14 hand?

15 Do you solemnly swear or affirm that the testimony  
16 which you are about to give today is true and correct,  
17 based upon your personal knowledge, information or  
18 belief?

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

20 MS. HIGASHI: Thank you.

21 The first items that we're calling today are Items 2  
22 and 3, Senior Commission Counsel, Camille Shelton will  
23 present these items.

24 CHAIR TILTON: Camille, do you want to introduce the  
25 item for us?

1 MS. SHELTON: Yes. Thank you.

2 Items 2 and 3 involve appeals by the County of  
3 Los Angeles of the Executive Director's decision to  
4 return two test claim filings. The County of Los Angeles  
5 filed two test claims in September 2003, on orders issued  
6 by the California Regional Water Quality Control Board,  
7 Los Angeles Region. In October, the Executive Director  
8 returned the filings to the County because the plain  
9 language of Government Code section 17516 provides that  
10 requirements or rules issued by the California Regional  
11 Water Quality Control Board are not executive orders  
12 subject to Article XIII B, section 6, of the California  
13 Constitution.

14 The County argues that the Commission cannot rely  
15 on the plain language of Government Code section 17516  
16 since it limits the County's right to reimbursement  
17 under Article XIII B, section 6, of the California  
18 Constitution.

19 Staff concludes that the Executive Director  
20 correctly returned these filings. Article III,  
21 section 3.5, of the Constitution, prohibits the  
22 Commission from declaring Government Code section 17516  
23 unenforceable or unconstitutional, as asserted by the  
24 County.

25 Thus, the Commission is required by the law to

1 enforce the plain language of Government Code 17516 and  
2 find that the documents issued by the California Regional  
3 Water Quality Control Board are not executive orders  
4 subject to Article XIII B, Section 6, of the California  
5 Constitution.

6 Staff recommends that the Commission deny the  
7 County's appeals.

8 Will the parties or representatives please state  
9 your names for the record?

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

11 MR. LAUFFER: Michael Lauffer with the State Water  
12 Resources Control Board's Office of Chief Counsel,  
13 counsel for the Los Angeles Regional Water Quality  
14 Control Board.

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

16 MR. KAYE: Oh, thank you.

17 I am pleased to be here this morning because this is  
18 a new area of the law for the Commission. I believe this  
19 is a case of first impression. I don't think we  
20 previously handled or dealt with an executive order from  
21 the California Regional Water Quality Control Board. And  
22 I'm very pleased that we have a representative from the  
23 Board with us this morning to fill us in on some of the  
24 detail, the substantive aspects of the law.

25 The two matters which I believe are our two test

1 claims, as I believe, as I understand from Camille, will  
2 be voted on separately. But you would prefer a  
3 discussion that combines both, rather than to repeat  
4 ourselves, and I know that time is of the essence. So  
5 I will try and limit my remarks to those test claims.  
6 But I would say that the other test claimants before  
7 you -- or I guess were not officially test claimants, I  
8 guess we're hoping to walk through that door -- have  
9 similar arguments. And we would certainly incorporate  
10 a lot of what they've said by reference. But we feel  
11 it is better said by them; and that the Commission has  
12 studied their remarks, and I'm sure they've influenced  
13 the staff in coming up with their general  
14 recommendations.

15 So we just have a few brief comments.

16 First of all, the *Transit Trash Receptacles* was  
17 marked as CSM number 03-TC-04. And, again, "TC," I  
18 believe, stands for "test claim." But this is sort of  
19 a pre-test claim. This is what we're trying to decide  
20 here.

21 And the other test claim is regarding *Inspection of*  
22 *Industrial/Commercial Facilities*, CSM number 03-TC-19.

23 And the first thing that I would note is, we studied  
24 in great detail the February 25th, 2004, analysis by the  
25 State Water Resources Control Board, I believe prepared

1 by Mr. Lauffer and so forth, beside me. And in that very  
2 detailed analysis, where he considers whether it's a  
3 federal mandate and all these other issues, and whether  
4 it's a law of general application applied to all entities  
5 up and down the state or whether it applies just to the  
6 County, he really goes into some depth. And it's more  
7 than just saying, "No, this section of the Government  
8 Code prohibits the Commission from even thinking about  
9 this. He really thinks about it, which we really  
10 appreciate it.

11 But the one thing we'd like to note is that in his  
12 analysis -- I don't know whether perhaps it was an  
13 oversight -- but he doesn't include -- or maybe I'm just  
14 not reading the heading right -- he doesn't include our  
15 analysis -- test claim on *Inspection of*  
16 *Industrial/Commercial Facilities*, 03-TC-19.

17 MR. LAUFFER: Merely a typographical error.

18 MR. KAYE: Okay, thank you.

19 MR. LAUFFER: My regrets.

20 MR. KAYE: Thank you, okay.

21 So assuming that that's the case, then I can go  
22 ahead and talk a little bit about those.

23 And just to, again, without going greatly into the  
24 merits, we've filed very, very detailed test claims in  
25 all these areas, we've detailed our costs and so forth.

1 But the first claim involves developing and installing  
2 and maintaining and servicing transit trash receptacles.  
3 There's no other entity in the county that was asked to  
4 do this.

5 This is not a law of general application. We don't  
6 get any money for this. It wasn't a bargained-for  
7 agreement. We just were told to do it. It is, we  
8 believe, among the other things within the permit, we  
9 identified this particular mandate because it is clearly,  
10 under traditional -- and, again, this is a case of first  
11 impression for the Commission -- it is a case whereby it  
12 otherwise would be a perfectly reimbursable mandate.  
13 There is no defense. There is nothing in federal law  
14 that says we need to provide trash receptacles at all the  
15 transit stops in L.A. County. I mean, it's kind of  
16 clear.

17 So what we think we have is sort of like a Trojan  
18 horse. We have a large body of "it may or may not be  
19 unreimbursable"; but within that framework, hiding,  
20 lurking within, are specific elements which are, I think,  
21 traditionally, based upon the Commission that I've been  
22 practicing before this Commission for 12 or 14 years, I  
23 think traditionally, you would find that they are  
24 reimbursable mandates.

25 And we ask not merely that you would, you know,

1 just dismiss it without giving us an opportunity to  
2 exhaust this administrative remedy, but go to the merits.  
3 At least give us a chance to discuss whether, in fact,  
4 this would be reimbursable or not. And so that's what  
5 we're asking for today.

6 Now, I will say a little bit more for the case. I  
7 talked a little bit about *Transit Trash Receptacles*. We  
8 have to inspect now a large number of industrial types of  
9 industrial and commercial facilities in Los Angeles  
10 County. Again, that was not required under prior law.  
11 It was not and is not -- as inspectors, there's no other  
12 entity that has to do this within Los Angeles County.  
13 But even more egregious in this case is the fact that the  
14 State was performing these inspections and these  
15 facilities that we're inspecting, we're sending  
16 inspection fee money to the State. And it's my  
17 understanding that the State is keeping the fee money  
18 and making us do this new work.

19 And I think that under any type of analysis -- and I  
20 know this is not a court of equity, this is a highly  
21 specialized area -- but I would strongly urge you to vote  
22 to at least consider the merits of specific components  
23 within our test claims.

24 And I appreciate that. Thank you.

25 CHAIR TILTON: Mr. Lauffer?

1 MR. LAUFFER: Good morning, Commissioners.

2 As I stated on the record, my name is Michael  
3 Lauffer. I'm an attorney with the State Water Resources  
4 Control Board; and I represent the Los Angeles Regional  
5 Water Control Board.

6 Based on the test claims that have been filed with  
7 this Commission, you are probably well aware that there  
8 is a strong history between the Los Angeles Regional  
9 Water Quality Control Board and these test claimants with  
10 respect to this permit. There is ongoing litigation that  
11 involves whether or not the Regional Board has the  
12 authority to even issue the permit and to specify some of  
13 the requirements here.

14 The exercise that the Commission has to go through,  
15 I think, has been accurately described, summarized; and  
16 the resolution thereof has been stated by your staff.

17 And in our February 25th, 2004, submittal, I think  
18 we go out of our way to make it clear that pursuant to  
19 the Constitution, this Commission is obliged to follow  
20 the Government Code. And pursuant to Government Code  
21 section 17516, the test claim should be returned because  
22 the permit represents an executive order. I really do  
23 think that's the end of the inquiry.

24 The February 25th submittal that the State Water  
25 Resources Control Board had provided under my signature,

1 is really designed to help the commissioners understand a  
2 Government Code section, so that you don't feel like  
3 you're blindly just hiding behind the Government Code  
4 section.

5 In other words, it lays out the rationale by which  
6 Government Code section 17516 was adopted by the  
7 Legislature and provides a reasoned analysis as to why  
8 that Government Code section is constitutional.

9 And I won't go into that analysis again. It's in  
10 the record. I think it's pretty clear. And I welcome  
11 and am available to answer any questions on it. But I do  
12 want to address a couple of the issues the County has  
13 raised.

14 First of all, as my testimony -- or as the written  
15 testimony had indicated, the particular permit at issue  
16 here, the Regional Water Quality Control Board is  
17 compelled to issue, pursuant to federal law. Now, the  
18 Regional Water Quality Control Boards regulate the  
19 discharge of waste, generally. This particular permit,  
20 a municipal stormwater permit, which is a creature of  
21 federal law, can only be issued to municipalities. So  
22 to the extent that the County claims that there's a  
23 Trojan horse, it's somewhat of a misnomer because  
24 it's really federal law that has created that  
25 characterization. Only municipal dischargers, municipal

1 stormwater permittees can have this kind of permit.

2 So the question then becomes: What are the  
3 requirements within that permit? And the regional boards  
4 required to develop those on a record that's before it,  
5 are supposed to look at sources of pollution, and  
6 basically are required to regulate the municipalities  
7 here, and Los Angeles County is jointly regulated with  
8 84 other cities under this permit.

9 And those requirements are designed to protect water  
10 quality. And we base those on what is developed over the  
11 course of prior permits. This is actually the third such  
12 permit that the County has had for its municipal  
13 stormwater.

14 Each permit under federal law is required to get  
15 more stringent, to the extent that there continue to be  
16 stormwater quality problems.

17 You may not all be familiar with the stormwater  
18 quality problems in the Los Angeles region, and it's not  
19 before you today. But suffice it to say, it is the  
20 number one problem with respect to water quality in the  
21 Los Angeles region. And that's why each successive  
22 permit has been required to get more and more stringent,  
23 to go after those sources of pollution. It's as a result  
24 of federal law, however, that the County and its sister  
25 cities are required to receive the permit.

1           The second issue that the County raises that I think  
2 merits particular response, is the issue of inspections.  
3 Under federal law, the cities and counties are required  
4 to have an inspection program for these facilities.  
5 There's some concern by the County that the State is  
6 somehow shifting its responsibility. And that couldn't  
7 be further from the truth. The State continues to carry  
8 out its inspection obligations. And, again, this is  
9 really not before the Commission today; but I think it's  
10 important that you appreciate it, because I know my board  
11 members are frustrated sometimes when we say, legally,  
12 they can't do something, but they want to know, "Well,  
13 what's the basis for why we would do it, in the first  
14 instance?"

15           And so, first, the cities and the counties have  
16 inspection requirements under federal law. The State  
17 will continue to carry out its own inspection  
18 obligations. But what we're looking for the cities and  
19 the counties to do is, they are required pursuant to  
20 federal law to develop ordinances to regulate municipal  
21 stormwater runoff. And that's pursuant to our permit as  
22 well.

23           And we wish to ensure that they actually enforce  
24 their ordinances, and their inspection requirements are  
25 designed to ensure that their ordinances are being

1 faithfully followed. Again, those are general  
2 descriptions.

3 I'm available for any questions.

4 The other test claims you hear concerning this  
5 permit today will raise many of the same issues. And I  
6 would just request my comments be incorporated on all  
7 test claims, though I will be available for questions.  
8 And I encourage the Commission to uphold the staff  
9 recommendation and the Executive Director's decision to  
10 deny the test claims pursuant to Government Code section  
11 17516.

12 CHAIR TILTON: Thank you.

13 Does anyone else wish to speak on this item?

14 (No audible response was heard.)

15 CHAIR TILTON: I think the issue, Members, before us  
16 is whether Government Code 17516 applies, which means  
17 that we would reject this as not part of our  
18 jurisdiction.

19 MEMBER LAZAR: Mr. Chairman, I think Mr. Kaye had  
20 something else to say.

21 MR. KAYE: Yes, I'd like to say that in every other  
22 case that I've been familiar with, with the Commission --  
23 which I've been at most of the hearings, as I say, over  
24 a number of years -- where you have identified or it's  
25 very clear from the beginning that a funding disclaimer

1 applies -- it's my understanding that the practice of the  
2 Commission has always been to not cut it off at that  
3 point, but to consider the merits of the matter.

4 We've had cases where it plainly stated a funding  
5 disclaimer in the legislation; and yet the courts have  
6 ruled that we were correct, ultimately, in our view of  
7 the situation.

8 And I think that regarding the issue of the federal  
9 mandate, we recognize it is a very broad federal mandate  
10 and the counties are affected. But I think the matter  
11 is quite clear that the State and regional boards have a  
12 tremendous amount of discretion. And under the Hayes  
13 case, if the State voluntarily assigns certain -- whether  
14 they be inspection or enforcement duties to the counties  
15 and cities, then it becomes a reimbursable state-mandated  
16 program. And you've held that consistently, and the  
17 courts have held that consistently.

18 But I think by denying even considering the various  
19 aspects of this claim, you foreclose any possible  
20 movement to greater understanding as to, you know, what  
21 is the Commission's position on this matter.

22 Thank you.

23 CHAIR TILTON: Thank you, Mr. Kaye.

24 Members, any questions?

25 MEMBER LAZAR: Could I just ask Camille to respond

1 to that, please?

2 MS. SHELTON: Sure. Typically, when there are  
3 disclaimers in legislation, the Commission will go  
4 through an analysis of the merits of the claim. But in  
5 the past, we've not ever received a document or a test  
6 claim filed on a permit issued by a water quality control  
7 board. And here -- so for the first time, we're applying  
8 17516. And the Commission is required to apply that  
9 Government Code section which, by the plain language,  
10 says that any rules or requirements issued by the State  
11 Water Resources Control Board or by any regional water  
12 control board are not executive orders.

13 So we have taken the position that the Commission  
14 does not have the jurisdiction over this claim and can't  
15 get into the merits of it.

16 MEMBER LAZAR: Thank you.

17 CHAIR TILTON: Any other questions?

18 VICE CHAIR SHERWOOD: Mr. Chair and Mr. Kaye, I just  
19 don't see how in good conscience I can get by with that  
20 section and really come to any other determination, other  
21 than the fact that, frankly, staff's recommendation is  
22 correct in this case. I appreciate, you know, what  
23 you've said today in your situation. But I think -- I  
24 just feel in my particular case, that my hands are tied  
25 by 17516.

1 CHAIR TILTON: Do we have a motion?

2 MEMBER BARNES: I move the staff recommendation.

3 VICE CHAIR SHERWOOD: Second.

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

5 Paula, will you call the roll, please?

6 MS. HIGASHI: I'd just like to clarify. This is a  
7 vote on Item 2?

8 CHAIR TILTON: Right.

9 MS. HIGASHI: Okay.

10 MEMBER BARNES: Is there any reason why it can't be  
11 on 3 as well, since, as I understand it, we've heard  
12 testimony on that.

13 MR. KAYE: Yes.

14 MEMBER BARNES: Did you have anything more to say  
15 about that?

16 MR. KAYE: No. My understanding is that the  
17 presentation would cover both Item 2 and Item 3. And  
18 I was told that you might want to consider voting  
19 separately, but it's at the discretion of the Commission.

20 CHAIR TILTON: What's your motion?

21 MEMBER BARNES: I'd like to make it on both Items 2  
22 and 3.

23 CHAIR TILTON: Okay, the motion is to vote on both,  
24 2 and 3.

25 MEMBER BOEL: I'd like a point of clarification. Is

1 the vote -- an "aye" vote supporting the staff  
2 recommendation?

3 MEMBER BARNES: Yes.

4 CHAIR TILTON: Call the roll, Paula.

5 MS. HIGASHI: Mr. Barnes?

6 MEMBER BARNES: Aye.

7 MS. HIGASHI: Ms. Boel?

8 MEMBER BOEL: Aye.

9 MS. HIGASHI: Mr. Lazar?

10 MEMBER LAZAR: Aye.

11 MS. HIGASHI: Mr. Sherwood?

12 VICE CHAIR SHERWOOD: Aye.

13 MS. HIGASHI: Mr. Tilton?

14 CHAIR TILTON: Aye.

15 MR. KAYE: Thank you.

16 CHAIR TILTON: Thank you for your testimony.

17 MS. HIGASHI: This brings us to Item 4, which  
18 Ms. Shelton will also present.

19 MS. SHELTON: Item 4 involves the appeal by several  
20 cities of the Executive Director's decision to return  
21 their test claim filing, alleging that the *Waste*  
22 *Discharge Requirements* program required by the California  
23 Regional Water Quality Control Board, Los Angeles Region,  
24 is a reimbursable state-mandated program.

25 Like the earlier items, the Executive Director

1 returned the filing to the cities because the plain  
2 language of Government Code section 17516 provides that  
3 the requirements or rules issued by the Water Quality  
4 Control Board are not executive orders subject to  
5 Article XIII B, section 6, of the California  
6 Constitution.

7 The cities are arguing that the Commission cannot  
8 rely on the plain language of 17516. They contend that  
9 17516 is unconstitutional as applied to this claim, and  
10 that the California Regional Water Quality Control Board  
11 implemented the new requirements through underground  
12 rulemaking in violation of the Administrative Procedures  
13 Act.

14 Staff concludes that the Executive Director  
15 correctly returned this filing.

16 First, the Commission does not have the authority  
17 to determine if the requirements issued by the  
18 California Regional Water Quality Control Board are  
19 underground regulations. Second, Article III, section  
20 3.5, of the California Constitution prohibits the  
21 Commission from declaring Government Code section 17516  
22 unconstitutional. Thus, the Commission is required by  
23 law to enforce the plain language of 17516, and find that  
24 the document issued by the California Regional Water  
25 Quality Control Board is not an executive order subject

1 to Article XIII B, section 6, of the California  
2 Constitution.

3 Staff recommends that the Commission deny the  
4 cities' appeal.

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

7 MR. MCGINLEY: Certainly. My name is Evan McGinley.  
8 I am here on behalf of the applicants under this test  
9 claim, the cities of Beverly Hills, Carson, Monrovia,  
10 Norwalk, Rancho Palos Verdes, West Lake Village. And I  
11 think that's all.

12 MR. LAUFFER: And once again, Michael Lauffer with  
13 the State Water Resources Control Board.

14 CHAIR TILTON: Mr. McGinley, would you like to  
15 begin?

16 MR. MCGINLEY: Yes, thank you.

17 Initially, I'd just like to say that we also  
18 incorporate the remarks that were made earlier by  
19 Mr. Kaye. I think a lot of what Mr. Kaye said,  
20 particularly about the constitutionality of the executive  
21 order and whether or not the permit is something which is  
22 entitled to be treated as an unfunded mandate, and to  
23 obtain a subvention of funds is applicable here as well.

24 As a result, I won't really go into -- I prepared  
25 more extensive remarks about the constitutionality. I

1 won't really go into that, other than to point out one  
2 area in which we would disagree with the State Water  
3 Resources Control Board.

4 If you've had a chance to review, as I'm sure you  
5 have, the State Water Resources Control Board's  
6 comments, you'll note that they make reference to the  
7 proposition, Proposition Number 4, in the ballot  
8 materials that were prepared at the time that was put  
9 before the voters of the state of California.

10 I think it's interesting and worthwhile to note that  
11 nowhere in those materials is there any mention that what  
12 is now enshrined as Article XIII B, section 6, was ever  
13 intended to specifically exempt orders issued by the  
14 Regional Water Control Board or the State Water Resources  
15 Control Board, pursuant to either of those agencies'  
16 administration of the federal NPDES permitting program in  
17 the State of California.

18 And I think, while I can appreciate I guess the  
19 conundrum that's before the Commission this morning about  
20 having to deal with the constitutionality of this  
21 measure, nevertheless, we think that the plain language  
22 of Article XIII B, section 6, really doesn't speak to nor  
23 contemplate any kind of exception being carved out. I  
24 mean, there are three exceptions that are specifically  
25 stated under Article XIII B, section 6. There's nothing

1 that references orders issued by the regional board.

2 So I'd ask you to keep that in mind. I'm not sure  
3 that it's necessarily going to comfort you in making a  
4 decision that's contrary to the one that you just  
5 rendered; but nevertheless, I think it's worth mentioning  
6 for your consideration.

7 The second point that I would like to touch on --  
8 and, again, there is tremendous parallels between both  
9 our application, as well as the County's applications.  
10 So almost necessarily, I have to cover some of the same  
11 ground; but I'll keep my remarks brief, nevertheless.

12 We believe that even if you accept that you are  
13 constrained by Government Code 17500 and the provisions  
14 that are part of that section of the Government Code, we  
15 think that it's still possible for you to find that there  
16 is the possibility that an unfunded mandate has been  
17 visited upon the cities that we represent. And in that  
18 regard, I would point you to two specific, possibly  
19 three, specific points for your consideration.

20 Number one is that, as Mr. Kaye pointed out earlier,  
21 although the State board contends that what is taking  
22 place here is simply the regional board's implementation  
23 of a federally-required permitting program, there is  
24 choice. There are various policy considerations and  
25 opportunities that the regional board has in implementing

1 the permitting requirements. They have chosen to  
2 implement inspection requirements.

3 Now, the regulations that Mr. Lauffer called to your  
4 attention earlier and has written about in his comments  
5 on behalf of the board, mention 40 CFR 122.6. Those  
6 regulations actually deal with the requirement for  
7 applying for a permit. Those are the application  
8 requirements that the cities had to follow when they were  
9 applying to be covered under the permit that's at issue  
10 here.

11 But those provisions do not require that the cities  
12 have to undertake an inspection of facilities which are  
13 regulated under a different permit. And that is the  
14 case. And I don't know that that's a point that Mr. Kaye  
15 covered before.

16 We are talking about commercial and industrial  
17 facilities as well as construction sites, which are  
18 already regulated under two separate permits which have  
19 been issued by the State Water Resources Control Board.  
20 Those permits, in turn, are within the specific  
21 jurisdiction of each regional board, are administered and  
22 enforced by those regional boards, and are actually  
23 inspected by those regional boards.

24 Now, Mr. Kaye did point out that the State board  
25 receives monies from the permit applicants. We think

1 that this is the kind of issue that really gets to the  
2 heart of why Article XIII B, section 6, was adopted. It  
3 was the voters' intent that the State not be allowed to  
4 shift the cost of maintaining State programs onto local  
5 governments. I mean, this is precisely at the heart of  
6 why this provision was adopted. And we think that this  
7 is -- I mean, despite the very articulate comments that  
8 have been put forth by Mr. Lauffer, nevertheless, the  
9 State board, the regional boards have choices as to how  
10 they will meet their obligations under the Clean Water  
11 Act. And they have chosen to meet their obligations in  
12 a way which shifts the burden of certain programmatic  
13 responsibilities onto local governments.

14 Additionally, we would point out -- and this is  
15 something that we had addressed in our comments as  
16 well -- that the nature of the program and the permit,  
17 which is at issue here, this isn't simply one permit.  
18 This is one iteration of the same sort of permit which  
19 has been issued and adopted by regional boards across the  
20 state. Thus, it resembles a rule of general application.

21 Now, under the State's Administrative Procedures  
22 Act, a rule of general applicability is supposed to be  
23 formally adopted through the State's rulemaking  
24 provisions. That hasn't been done in this case. And  
25 so as a result, we would argue that this -- although

1 17516 says "executive order includes rules, orders,  
2 plans, et cetera, which have been adopted by regional  
3 boards," in the case where action has been taken by a  
4 regional board, which is essentially something that  
5 should be put through the formal rulemaking provisions  
6 of the APA, what has not gone through those provisions,  
7 we don't think that that provision under 17516 is  
8 applicable. And through their own actions, the regional  
9 boards and the State board have essentially removed  
10 themselves from the cover of that exemption under 17516.

11 The last point that I would make is simply this:  
12 17516 -- I'm sorry, the definition of "executive order"  
13 talks about and contemplates an exemption for actions  
14 which have been taken by the Regional Water Quality  
15 Control Board. And I would offer this for your  
16 consideration: It's interesting to note that that  
17 provision actually talks also about exemptions for  
18 publicly-owned treatment works. And we think that  
19 it's at least an ambiguous provision, in that if you  
20 look at -- there would be no reason to actually have  
21 specific language that talks about publicly-owned  
22 treatment works, apart from orders and plants, which  
23 is generally where that provision is going.

24 So our argument would simply being this: That there  
25 would be no reason to specifically mention POTWs if, in

1 fact, that provision doesn't actually go towards POTWs as  
2 a whole. And, really, it's not a provision that that's  
3 applicable to something such as the situation that we  
4 have here: Permits which are issued to dischargers of  
5 municipal stormwater systems.

6 That concludes my remarks. But if the Commission  
7 has any questions, I'd be more than happy to answer them.

8 CHAIR TILTON: Any questions, Members?

9 (No audible response was heard.)

10 CHAIR TILTON: Mr. Lauffer, do you want to add more  
11 comments from your first testimony?

12 MR. LAUFFER: I will be mercifully brief again,  
13 Mr. Tilton.

14 First of all, I request that any comments I've  
15 previously made be incorporated on this item.

16 Mr. McGinley has identified three items where he  
17 believes that it provides an avenue for this Commission  
18 to essentially bypass Government Code section 17516 and  
19 to actually proceed to the merits on the test claim.

20 The first of his suggestions is the true choice  
21 analysis, under Hayes. Frankly, I have no doubt that  
22 Mr. McGinley and I will end up in a debate ultimately on  
23 the merits, either in the permitting proceeding or in the  
24 subsequent court proceeding based on what the Commission  
25 does. Obviously, we take different approaches on the

1 true-choice question. But simply put, that doesn't  
2 matter in the context of the exemption under Government  
3 Code section 17516. So I think the Commission can stop  
4 its analysis there and not even look at that issue.

5 The second two points, the general application  
6 point -- in fact, conceivably, there's a rule of general  
7 application that somehow the regional board is following  
8 that hasn't been adopted pursuant to the APA. I wouldn't  
9 even want to speculate whether or not that might open the  
10 door for you all. However, clearly, in order to do that,  
11 you would have to be passing on the legality of other  
12 state agencies, which is simply not within the purview  
13 of this Commission. And I don't think that alters the  
14 analysis under Government Code section 17516.

15 One interesting thing is the fact that the exemption  
16 for executive orders doesn't apply just to permitting  
17 actions; it applies to all actions under Division 7 of  
18 the Water Code. So even if the regional board did this  
19 as a regulation and the State board did it as a  
20 regulation, it would still fall within the Government  
21 Code purview.

22 The final analysis or issue put forward is the fact  
23 that Government Code section 17516 is potentially  
24 ambiguous because of its reference to POTWs. I really do  
25 believe that this also does not provide an avenue for the

1 Commission to blow past Government Code section 17516.  
2 On its language, on its face, it's clear with respect  
3 to actions taken pursuant to Division 7 of the Water  
4 Code.

5 The provision of Government Code section 17516 that  
6 Mr. McGinley references talks about two things, and  
7 they're conjunctive.

8 It, first of all, is precatory language. And the  
9 Commission's legal counsel may be able to provide you  
10 additional guidance on this; but it does not say that  
11 enforcement orders issued to POTWs are outside of the  
12 exemption. It says it's the Legislature's desire --  
13 I don't have the exact language in front of me -- but  
14 California courts have consistently held that that kind  
15 of language is not directory to the agency. Instead,  
16 it's precatory. It's essentially the legislative  
17 preference, if you will. But it's not binding on the  
18 Commission.

19 The other thing is, it doesn't talk about just  
20 POTWs, it talks about, quote, "enforcement orders,"  
21 unquote, directed towards POTWs. And that's certainly  
22 not the issue before the Commission today, and certainly  
23 doesn't do anything, at least in my legal analysis, to  
24 take the particular test claims and the particular  
25 actions of the regional board out of the purview of

1 Government Code section 17516.

2 And with that, I'll conclude my comments.

3 I once again urge the Commission to adopt the staff  
4 recommendation.

5 CHAIR TILTON: Thank you.

6 Camille, do you want to make any follow-up comments?

7 MS. SHELTON: No, I agree with all of those  
8 comments.

9 Just one thing to mention on the second issue of  
10 whether or not their permit went through the regulatory  
11 process. You know, the definition of an executive order  
12 goes way beyond a regulation. It can include any rule or  
13 plan or order. So it really doesn't have bearing on  
14 whether or not something is an executive order, if it  
15 went through the regulatory process.

16 But the plain language of 17516 does clearly apply  
17 to permits issued by the Regional Water Quality Control  
18 Board. And that's why we are applying the plain language  
19 here.

20 CHAIR TILTON: No more discussion. Do I have a  
21 motion?

22 VICE CHAIR SHERWOOD: I'd like to move for approval  
23 of staff's recommendation.

24 MEMBER BARNES: I'll second.

25 CHAIR TILTON: A motion and second. And so that's

1 on Item Number 4.

2 MS. HIGASHI: Ms. Boel?

3 MEMBER BOEL: Aye.

4 MS. HIGASHI: Mr. Lazar?

5 MEMBER LAZAR: Aye.

6 MS. HIGASHI: Mr. Sherwood?

7 VICE CHAIR SHERWOOD: Aye.

8 MS. HIGASHI: Mr. Barnes?

9 MEMBER BARNES: Aye.

10 MS. HIGASHI: Mr. Tilton?

11 CHAIR TILTON: Aye.

12 Thank you for your testimony.

13 MR. MCGINLEY: Thank you.

14 MEMBER LAZAR: I just have to say these issues are

15 really painful for cities. Our city is going through

16 something similar, and I'm very sympathetic, but

17 unfortunately I have to follow the recommendations that

18 I think are appropriate.

19 Thank you.

20 CHAIR TILTON: Thank you, Mr. Lazar.

21 MS. HIGASHI: Ms. Shelton will now introduce Items 5

22 and 6.

23 MS. SHELTON: Items 5 and 6 involve the appeal by

24 several cities of the Executive Director's decision to

25 return two test claim filings alleging that the

1        *Stormwater Pollution Control Requirements* issued by the  
2        California Regional Water Quality Control Board,  
3        Los Angeles Region, are reimbursable state-mandated  
4        programs.

5                In October 2003, the Executive Director returned  
6        these two filings because the plain language of  
7        Government Code 17516 provides that the requirements or  
8        rules issued by the California Regional Water Quality  
9        Control Board are not executive orders subject to  
10       Article XIII B, section 6, of the California  
11       Constitution. The cities again argued that the  
12       Commission ~~not~~<sup>cannot</sup> rely on the plain language of Government  
13       Code 17516. Staff concludes that the Executive Director  
14       did correctly return these filings based on the plain  
15       language of that section; and furthermore, Article III,  
16       Section 3.5, of the California Constitution prohibits  
17       the Commission from declaring 17516 unconstitutional.

18                Staff recommends that the Commission deny the  
19        cities' appeal.

20                Will the parties please state your names, for the  
21        record?

22                MR. FARFSING: Yes, my name is Ken Farfsing. I'm  
23        the city manager for the City of Signal Hill. Today I'm  
24        here representing the cities of Baldwin Park, Bellflower,  
25        Cerritos, Covina, Downey, Monterey Park, Pico Rivera,

1 Signal Hill, South Pasadena, West Covina, in Test claims  
2 21 and 22.

3 CHAIR TILTON: Mr. Farfsing, do you want to go ahead  
4 and start?

5 MR. LAUFFER: And once again for the record, Michael  
6 Lauffer with the State Water Resources Control Board.

7 MR. FARFSING: First, let me apologize to the  
8 Commission if this is like a scene out of the movie  
9 "Groundhog Day." I'm not a lawyer, and I'm not here  
10 to address legal issues, but I would like to join the  
11 comments that have been made today by the County of  
12 Los Angeles and the Artesia cities. And I'm going to  
13 incorporate their arguments into my testimony.

14 I wanted to limit my testimony to giving the  
15 Commission a better understanding of the particular  
16 mandates, so that you'll be in a position to consider  
17 how and whether these mandates were appropriate to be  
18 issued as part of the NPDES permit, the stormwater  
19 permit, ordered by our regional board.

20 There are three mandates which we believe are  
21 appropriately classified as unfunded, which we believe  
22 are subject to reimbursement under the State law and the  
23 California Constitution. These three unfunded mandates  
24 are the mandate to place trash receptacles at all transit  
25 stops in our cities; the mandate to inspect

1 state-permitted industrial facilities in construction  
2 sites, even though the State is compelled to conduct  
3 these inspections; and the mandate to do whatever it  
4 takes to prevent an accedence of water quality standards  
5 are an objective.

6 I first want to point out that, prior to the  
7 adoption of this stormwater permit in December of 2001,  
8 none of these three mandates were in existence in the  
9 prior stormwater permits. There was no obligation under  
10 any executive order or statute for the cities to carry  
11 out this work. Each of these mandates was created with  
12 the adoption of our new stormwater permit in 2001.

13 The trash receptacle requirement is on page 49 of  
14 the permit. And essentially, what it required is that  
15 all the cities place trash receptacles at transit stops  
16 that had shelters, by August 1st, 2002. And then you  
17 had to place receptacles at all other transit stops in  
18 your community no later than February 3rd, 2003. That  
19 was regardless of whether one person entered the bus or  
20 a hundred persons got on the bus at the transit stop.  
21 It also required that the receptacles be maintained as  
22 necessary.

23 So this is really the first time that a state agency  
24 has ordered local agencies throughout the County of  
25 Los Angeles to install trash receptacles at all transit

1 stops and to maintain trash receptacles.

2 We feel this is plainly a new mandate that was  
3 imposed upon the cities and did not exist prior to the  
4 adoption of this permit. And frankly, it's not a mandate  
5 that should be associated with a stormwater permit, let  
6 alone a mandate that's appropriately issued by a Regional  
7 Water Quality Control Board.

8 As a case example to comply with the mandates,  
9 Signal Hill installed 61 trash receptacles at a cost of  
10 10,000 dollars, with the annual maintenance cost  
11 estimated at 18,000 dollars. No funding has come from  
12 the State to Signal Hill -- to any of the cities, to  
13 either install or maintain the trash receptacles.  
14 We do not understand how this mandate could be imposed  
15 upon us under state law without there being some type of  
16 funding source.

17 The second mandate was created for the first time  
18 also by this new stormwater permit, and it's a  
19 requirement that the cities inspect all industrial and  
20 construction state-permitted facilities within their  
21 jurisdiction, if they're not inspected by the State.  
22 I'll use the industrial program as an example for  
23 discussion purposes. For industrial facilities covered  
24 by the State under the NPDES program, the State already  
25 collects an annual inspection fee to inspect

1 state-permitted industrial facilities. This fee was  
2 recently increased by the State Water Board to  
3 830 dollars per facility, and it's required to be paid  
4 directly to the State by the facility's operator,  
5 regardless of whether or not the State actually conducts  
6 their inspection. There are literally hundreds of these  
7 state-permitted facilities in Los Angeles County.  
8 There's about 50 of these facilities in the City of  
9 Signal Hill.

10 The State in our NPDES permit under section 4.3  
11 starting on page 27, has required that individual cities  
12 conduct the inspections of these state facilities. The  
13 problem with conducting the inspections is that the  
14 facilities are already paying an inspection fee to the  
15 State to conduct their inspection, yet the cities are  
16 being asked to conduct the inspection of the  
17 State-permitted facilities, and are basically forced to  
18 collect a second inspection fee, if that's even legal,  
19 from these facilities, even though the facilities are  
20 only being inspected once. In effect, the State is  
21 asking us to conduct their inspections but refuses to  
22 remit the inspection fee to the cities. The cities are  
23 doing the State's work, as agents of the State's NPDES  
24 permit program, but the State is refusing to pay the  
25 cities for this work, even though the State is collecting

1 the fees for the inspections.

2 Clearly, this is an existing requirement that's to  
3 be carried out by the State of California to inspect the  
4 industrial and construction facilities that have State  
5 NPDES permits, and yet equally clear with the permit, is  
6 the mandate that the cities conduct the inspections. It  
7 cannot be the responsibility of the cities to inspect  
8 state-permitted facilities. That's bad enough. But it's  
9 a particular problem in an unfunded mandate when the  
10 State collects the inspection fee, and then creates a  
11 major impediment to the cities to actually collect a  
12 second fee. The cities believe it's illegal for the  
13 State to force the cities to conduct these inspections of  
14 state-permitted facilities unless the State transfers the  
15 inspection fee that is collected from these facilities to  
16 the cities to perform the inspections.

17 The final unfunded mandate that we have identified  
18 at this point is the permit contains a mandate to  
19 actually prohibit all accedence from our storm drain  
20 systems of any water quality objectives or standards.  
21 This is a complicated legal issue, but the gist is  
22 actually explained fairly well in a report we've included  
23 in our documentation prepared by the University of  
24 Southern California in November of 2002, entitled,  
25 "An Economic Impact Evaluation of Proposed Stormwater

1 Treatment for Los Angeles County." A review of the  
2 report shows that the municipalities are likely to  
3 expend billions of dollars to design, construct,  
4 implement and maintain treatment facilities throughout  
5 the County, as necessary, to remove pollutants from  
6 stormwater, in order to comply with this requirement  
7 under the permit. This is clearly a mandate that did  
8 not exist before the permit, and it's a mandate that we  
9 believe is inappropriately included within our permit,  
10 as it goes beyond the reasonableness standards and the  
11 MEP standards as set forth under State law and the Clean  
12 Water Act.

13 It's not appropriately a part of a stormwater  
14 permit, and is a mandate that would literally require  
15 cities to collectively expend billions of dollars as  
16 reflected in the USC study to comply with its terms. The  
17 mandate is not required by federal law, it's not  
18 permitted by State law, and it's the most expensive of  
19 all the mandates of which the cities must comply.

20 In conclusion, there's a series of mandates that are  
21 identified in our legal papers. And those papers are the  
22 county and cities of Artesia, et al. And we ask that you  
23 realistically consider whether these mandates are  
24 appropriately included as part of a stormwater permit.  
25 We believe they are not, and that you should consider the

1 financial impacts of these mandates on the cities and the  
2 counties, particularly during these difficult economic  
3 times for all the cities and the counties throughout the  
4 state. The cities and counties can ill afford these  
5 programs, and we firmly believe that these programs are  
6 not appropriately a part of the stormwater permit. Thus  
7 if they are to be imposed upon the cities and the  
8 counties, the State must fund these new mandates.

9 Thank you for your time this morning.

10 CHAIR TILTON: Thank you.

11 Mr. Lauffer?

12 MR. LAUFFER: Thank you, Mr. Tilton.

13 Once again, I'll incorporate my comments previously.  
14 However, I think what you heard from Mr. Farfsing is much  
15 frustration on the part of the cities. But you've also  
16 heard frequently, references to authority, and "we don't  
17 believe it's appropriate in a stormwater permit."

18 And I think, frankly, what you're hearing is a lot  
19 of concern about what the permit actually requires. And  
20 as I discussed earlier, that's something that really is  
21 being ferreted out in another forum before the courts.  
22 And while I certainly respect everything Mr. Farfsing has  
23 said today, needless to say, I disagree with many of the  
24 characterizations of the permit and perhaps some of the  
25 fiscal analysis that has gone into certain aspects of

1 the permit. But all of that, even if you were to accept  
2 it as true, I don't think has any -- well, it does not  
3 alter the analysis that your staff has conducted under  
4 Government Code section 17516. This statute is as it  
5 reads right now. And for purposes of this Commission,  
6 I would believe that it's most appropriate to just follow  
7 the staff recommendation, consistent with the other  
8 actions earlier today. And I'll conclude my comments on  
9 that.

10 Of course, I'm available for any comments or  
11 questions.

12 CHAIR TILTON: Any questions or comments from  
13 Members?

14 (No audible response was heard.)

15 CHAIR TILTON: Camille, do you have more comments?

16 MS. SHELTON: I have nothing further.

17 CHAIR TILTON: Okay.

18 Do I have a motion?

19 MEMBER BARNES: I move the staff recommendation.

20 MEMBER BOEL: Second.

21 CHAIR TILTON: I have a motion and second for staff  
22 recommendations.

23 So, no more comments?

24 Call the roll.

25 MS. HIGASHI: Just to clarify, this is for Items 5

1 and 6?

2 CHAIR TILTON: 5 and 6, that is correct.

3 MEMBER BARNES: Yes. Thank you.

4 MS. HIGASHI: Mr. Lazar?

5 MEMBER LAZAR: Yes.

6 MS. HIGASHI: Mr. Sherwood?

7 VICE CHAIR SHERWOOD: Yes.

8 MS. HIGASHI: Mr. Barnes?

9 MEMBER BARNES: Aye.

10 MS. HIGASHI: Ms. Boel?

11 MEMBER BOEL: Aye.

12 MS. HIGASHI: Mr. Tilton?

13 CHAIR TILTON: Aye.

14 MS. HIGASHI: The motion is carried.

15 CHAIR TILTON: Thank you for your testimony.

16 MS. HIGASHI: Does everyone have their second  
17 binder?

18 We're now on Item 7. And our first test claim will  
19 be presented by Commission counsel, Eric Feller.

20 MR. FELLER: Good morning. This is the *Integrated*  
21 *Waste Management* test claim in which claimants seek  
22 reimbursement for the costs of community colleges in  
23 diverting at least 25 percent of all solid waste  
24 generated on campus from landfill or transformation  
25 facility disposal by January 2002, and diverting at least

1 50 percent by January 2004, and other related activities  
2 as listed on pages 7 and 8 of the analysis -- the staff  
3 analysis.

4 Staff finds that the claim is a  
5 partially-reimbursable state mandate for the following  
6 activities listed in the analysis:

7 Complying with the board's model integrated waste  
8 management plan.

9 Designating a solid waste reduction and recycling  
10 coordinator.

11 Diverting 25 percent of waste from landfills by  
12 January 2002, and 50 percent by January 2004.

13 Requesting a time extension or alternative  
14 requirement if necessary, with all the accompanying  
15 things that that requires.

16 Submitting annual reports to the board on the  
17 progress in reducing solid waste and submitting recycled  
18 material reports to the board.

19 Staff also finds that some of the claimants'  
20 activities do not constitute reimbursable activities as  
21 specified in the analysis.

22 One of the issues in the test claim is whether  
23 community colleges have fee authority to fund the waste  
24 reduction program. Staff finds that they do not.

25 Staff recommends the Commission partially approve

1 the test claim for the activities listed.

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

4 MR. PETERSEN: Keith Petersen, representing the test  
5 claimants.

6 MS. BORZELLERI: Deborah Borzelleri, attorney for  
7 the Integrated Waste Management Board.

8 CHAIR TILTON: Mr. Petersen, do you want to start?

9 MR. PETERSEN: Thank you very much.

10 I'm going to stand with the written submissions, but  
11 request two clarifications, if I can. I'd like to look  
12 at one sentence on page 39 of the staff recommendation.  
13 It's the first staff conclusion. After the bold text, it  
14 says, "A community college must comply with the board's  
15 model integrated waste management plan, which includes,"  
16 et cetera.

17 With that, we need to look at page 19. The second  
18 paragraph begins -- and it's two long sentences, but I  
19 need to highlight this -- the second paragraph begins,

20 *"Subdivision (b) (1) of section 42920*  
21 *states 'On or before July 1st, 2000, each state*  
22 *agency shall develop and adopt, in consultation*  
23 *with the board, an integrated waste management*  
24 *plan, in accordance with requirements of this*  
25 *chapter.'*

1                   *"Subdivision (b) (2) states, 'Each state*  
2                   *agency shall submit an adopted integrated waste*  
3                   *plan to the board for review and approval on or*  
4                   *before July 15th, 2000.'*

5                   *"Read in isolation, the statutes appear to*  
6                   *be mandates by using the word 'shall.'"*

7                   The staff recommendation has concluded that -- I  
8                   believe concluded that regardless of whether a college  
9                   adopts its own plan or not, it has to follow the State  
10                  plan.

11                  Now, we've heard a great deal this morning about the  
12                  Commission's hands being tied by the plain meaning of the  
13                  statute. Looking at that sentence, the plain meaning of  
14                  that sentence is that "Colleges shall adopt an integrated  
15                  waste management plan." And why isn't the Commission's  
16                  hands bound by the plain meaning of that code section?  
17                  That's my question. That plainly states that colleges  
18                  have to adopt their own plan; and why aren't you bound by  
19                  that language?

20                  MEMBER LAZAR: He asked for an answer.

21                  MR. PETERSEN: I'm sorry, I can't ask him directly.  
22                  I have to ask the Commission.

23                  MR. FELLER: It's because it's of the language  
24                  directly after that in (b) (3) which says that, if that  
25                  has not happened, that the model plan governs the

1 community college. Therefore, the staff's position is  
2 that it's not actually a requirement for the community  
3 college to develop its own plan, if the model plan  
4 governs, if they have not done so.

5 In fact, in looking at the minutes of the Integrated  
6 Waste Management Board, that nearly happened. A plan was  
7 nearly adopted for a community college that failed to  
8 adopt its own plan. And I believe -- well, it's in the  
9 footnotes. But anyway, it's on the board's Web site.

10 CHAIR TILTON: Thank you.

11 MR. PETERSEN: I'd like to respond to that.

12 CHAIR TILTON: Sure, go ahead.

13 MR. PETERSEN: The automatic adoption of the State  
14 plan is only if the college doesn't adopt its own plan.  
15 It's a separate part of the code section. The code says,  
16 "A college shall adopt its plan." The next section says,  
17 "If they don't adopt the plan, the board will force the  
18 plan on the college."

19 The staff conclusion is pertinent to those colleges  
20 that don't adopt their own plan. They have the State  
21 plan.

22 The law says, "The college shall adopt the plan; and  
23 if it adopts a plan, it should follow its own plan." The  
24 staff conclusion does not apply to those colleges which  
25 adopt their own plan. It's obviously a local issue

1       versus a state issue.

2               The fact that there is no penalty for not adopting  
3 your own plan is not significant.  Until recently, there  
4 was no penalty for not adopting a state budget on time.  
5 I mean, it happens in the law every day.  So the way this  
6 code section is constructed is, they're telling colleges  
7 to "Adopt your own plan; and if you don't, the State will  
8 give you its plan."

9               The staff recommendation says, "Even though you  
10 adopted your own plan, regardless of whether you adopted  
11 your own plan, you have to follow the State plan."  And  
12 that's not a plain reading of the statute.  That's not  
13 what that code section says.  That's a leap they made.  
14 And I don't know why that's -- I don't know where that  
15 comes from, as far as laws of statutory construction.

16              So simply stated again, the law says if you adopt  
17 your own plan, you follow it; if you don't adopt your  
18 plan, you follow the State plan.  The Commission says,  
19 "No matter if you adopt your plan, you're going to follow  
20 the State plan," or, "You will be reimbursed for the  
21 State plan."  And I don't think there's any authorization  
22 anywhere for that conclusion.

23              CHAIR TILTON:  Let me ask the question because, in  
24 listening to your argument, it seems to me that you're  
25 arguing that if we choose to have our own plan, that's

1 what's enforceable; but staff, in its analysis, is saying  
2 there is the option to choose, using the State plan,  
3 which is presumably a cheaper option or less-expensive  
4 option. So is that the issue? Am I understanding you  
5 correctly?

6 MR. FELLER: I believe so.

7 MR. PETERSEN: Actually, the effect of this  
8 Commission staff's position is, if you adopt your own  
9 plan, so what? You're following -- you'll be reimbursed  
10 for the State plan.

11 CHAIR TILTON: Right. But, I think, that the issue  
12 that I'm trying to put out in front of us -- and Paula,  
13 maybe you can help me -- is the issue about whether there  
14 is discretion on the community colleges' part to which  
15 plan you would use.

16 MR. PETERSEN: The law says, "You shall adopt the  
17 plan." There's just no penalty for not doing it.

18 MR. STARKEY: I'm not sure if my <sup>microphone</sup> ~~mike~~ is working, so  
19 I'll talk loud. I am confused at this point because  
20 Mr. Petersen brought up the conclusion on page 39. And  
21 what I'm hearing you say is that you believe that staff  
22 is saying that if an agency were to adopt its own plan,  
23 it must also adopt the State plan.

24 MR. PETERSEN: No.

25 MR. STARKEY: You're not saying that?

1 MR. PETERSEN: No. I'm saying --

2 MR. STARKEY: The response would be, staff has  
3 concluded, in looking at the law, not looking at each  
4 separate provision, but reading those provisions  
5 together, to say what has the State required. And the  
6 State has only required that, at a minimum, the model  
7 plan of the State be adopted.

8 MR. PETERSEN: That's a misstatement of law.

9 MR. STARKEY: Well, we --

10 MR. PETERSEN: The law says --

11 MR. STARKEY: We read those two sections together.

12 MR. PETERSEN: No, you read each sentence  
13 separately. The law says you will adopt the plan. If  
14 you do not adopt the plan, the State will force its plan  
15 on you.

16 It doesn't say, "You've got the discretion of not  
17 adopting a plan." It says, "You will adopt a plan."  
18 There's no penalty for not adopting a plan, except the  
19 State plan will be forced on you. The fact that there's  
20 no penalty has no implication for reimbursement.

21 The staff's conclusion is, you've got a choice of  
22 not following the law.

23 Now, as a general statement by attorneys that you  
24 don't have to follow law, I don't think that's supposed  
25 to be where the staff is going. Colleges were told

1 three or four years ago, and they didn't attend  
2 reimbursement seminars and nobody from the Commission  
3 called them up and said, you know, "Ignore that first  
4 sentence because you're going to be reimbursed for the  
5 State plan, no matter what you do." The law came out  
6 several years ago, and the director of maintenance and  
7 operations said, "I have to adopt a model plan." I  
8 don't know how many districts -- excuse me, "I have to  
9 adopt a plan for the district."

10 I do not know how many districts have adopted a  
11 plan, just adopted the State model plan. It might be one  
12 and the same. The point I'm making is, there's no legal  
13 requirement -- excuse me, there's no reason for the staff  
14 to conclude that reimbursement will be circumscribed by  
15 the State plan, because the law says each college adopts  
16 its own plan. And the fact that they don't, there's a  
17 state plan, makes no difference at all. That doesn't  
18 make it discretionary.

19 The law says you shall develop a plan. It's not  
20 ~~discretionary~~ <sup>diccretionary</sup>; there's just no penalty. There's a  
21 difference from what they're trying to say, that if you  
22 don't have to -- if the law has a substitute, it's  
23 discretionary. That's not the case.

24 This is something new for the Commission staff.

25 MEMBER BOEL: I'd like to hear what Paula has to say

1 about this.

2 MS. HIGASHI: As I read this, just my quick  
3 understanding of the situation is that there's a  
4 difference between what law mandates and what is  
5 reimbursable. And what the staff recommendation here  
6 concludes is that, if the model plan is adopted for the  
7 community college district, that then it would be  
8 reimbursable. It's a state-imposed reimbursable state  
9 mandate program. And so there are two distinctions.

10 What Mr. Petersen is arguing is that all of it  
11 should be reimbursable. And what staff has done is  
12 limited it to what the State has adopted for the local  
13 agency -- for the community-college district.

14 CHAIR TILTON: Mr. Petersen, you have a comment?

15 MR. PETERSEN: I understand what the staff has done.  
16 They just don't have a legal basis for doing it.

17 The law says you will adopt your own plan; and if  
18 you don't, the State plan will be implemented.  
19 Reimbursement for the plan should be either your plan or  
20 the State plan.

21 If the issue is cost containment and the State model  
22 plan is the scope of reimbursement, that's, you know, one  
23 issue, the parameters and guidelines, practices, perhaps.  
24 But as a matter of law, they can't do what they did.  
25 They decided reimbursement would be the model plan; and

1 the law says you have to adopt your own plan.

2 It's true that what the law mandates and what the  
3 Commission reimburses are two different things, but there  
4 has to be a reason. They don't have a reason.

5 MR. STARKEY: I respectfully disagree. The  
6 reasoning is contained on page 19 of the staff  
7 recommendation. And as I said, the staff has read the  
8 statutory scheme and has interpreted it to mean that  
9 there is no mandate with respect to the agency opting  
10 voluntarily to choose its plan, as opposed to just going  
11 with the State's model plan.

12 Clearly in this statute, the State was creating a  
13 statute scheme that would encourage the locals to develop  
14 a plan and, in fact, was insistent that they do it, to  
15 the point that <sup>IF</sup> a plan was not adopted, they would have  
16 the State's plan.

17 But I don't think you read statutes in isolation to  
18 understand what they mean. So that's our legal basis.

19 CHAIR TILTON: Walter?

20 MEMBER BARNES: Yes. Could I ask -- is it Deborah  
21 Borzelli?

22 MS. BORZELLERI: Borzelleri, yes.

23 MEMBER BARNES: Borzelleri, I apologize. What's  
24 your thoughts about this?

25 MS. BORZELLERI: I agree with Mr. Starkey. I do not

1 believe the statute should be read in isolation; they  
2 should be read together. And the practical effect is  
3 that, if they do not adopt it, the State plan will take  
4 over. We agree with the staff's analysis.

5 MEMBER BARNES: And I guess the question I'm  
6 wondering about is that the words they used was that, if  
7 they don't adopt a plan that they've developed or if the  
8 board rejects a plan, then the model plan is imposed upon  
9 them.

10 MS. BORZELLERI: Correct.

11 MEMBER BARNES: And so I guess my question is, I  
12 agree, you can't take this stuff in isolation; but it  
13 seems like we -- or that the staff recommendation is  
14 suggesting that we take it in isolation, that sets the  
15 consequence of a plan not being submitted or a plan being  
16 rejected is the imposition of the model plan. I guess it  
17 does seem to me that it's more a consequence than it is,  
18 you know, a requirement.

19 MS. BORZELLERI: Actually, you know, it is a fine  
20 point. But our staff has always viewed it as a choice.  
21 And I think that the fact that it is discretionary in the  
22 end result, is how we looked at it.

23 MEMBER BARNES: Just to add, I noticed that the  
24 wording says, "An integrated waste management plan in  
25 accordance with the requirements of this chapter."

1           Have you published anything with regard to the  
2 requirements? Or have you just issued the model plan as  
3 to meet these requirements? How did the requirements get  
4 into this?

5           MS. BORZELLERI: I'm going to need to talk to staff.

6           MR. FELLER: I think the requirements of this  
7 chapter are the 25 and 50 percent reductions, if I'm not  
8 mistaken.

9           MS. BORZELLERI: That's correct. But I think there  
10 are some more specifics. And we actually -- we published  
11 the model plan, but I believe there were some additional  
12 documents that went with that.

13          MR. O'SHAUGHNESSY: Trevor O'Shaughnessy, staff of  
14 the Integrated Waste Management Board.

15          If I may restate your question so I can have a clear  
16 understanding, and then attempt to answer your question.  
17 Are you asking whether or not staff provided additional  
18 information describing what the programs were, what  
19 recycling was? Or were you just asking what the overall  
20 program was and what we presented when the legislation  
21 was passed and what the board did to inform people of the  
22 implementation?

23          MEMBER BARNES: Well, it just says "requirements,"  
24 "in accordance with the board requirements." So without  
25 getting into a listing of those board requirements, did

1 you publish requirements or did you just publish a model  
2 plan and say, "If you meet this, then you've taken care  
3 of it"?

4 MR. O'SHAUGHNESSY: The model plan was essentially  
5 outlining what was needed to be submitted. So I guess  
6 you could state that those were a type of requirement  
7 that was needed to be met or a minimum standard of  
8 developing or putting a plan together for submission to  
9 the board, outlining what it was you were planning to do  
10 for your specific location in recycling and diversion of  
11 materials from California landfills.

12 MEMBER BARNES: So that if they complied with that  
13 model plan, that would be the minimum level of compliance  
14 with this particular provision?

15 MR. O'SHAUGHNESSY: Either complying with the model  
16 plan or submitting information that covered those issues,  
17 yes, that is correct.

18 MEMBER BARNES: So potentially, anything more than  
19 that that came from a separate plan, that would be  
20 discretionary, on their part?

21 MR. O'SHAUGHNESSY: That is absolutely correct.  
22 Anything above and beyond that was completely  
23 discretionary, which a lot of entities that submitted  
24 plans did do, they went above and beyond what the minimum  
25 requirements or requested information was.

1 MEMBER BARNES: Okay, thank you.

2 CHAIR TILTON: Mr. Petersen?

3 MR. PETERSEN: I have to object again for the  
4 record. There's nothing in the law that says this is  
5 discretionary. This is where fine points are decided.

6 Whether their staff thinks it's discretionary or not  
7 is not determinative of anything. The law says the  
8 college will do its best to adopt a plan by that date;  
9 and if it doesn't, it gets the State plan. The State  
10 model plan doesn't say it's discretionary; the State  
11 model plan doesn't say that the original requirement to  
12 file your own plan was discretionary. That's something  
13 Commission staff has made up today. And it's not  
14 automatic. If you don't file, you end up with the State  
15 plan. It's not automatic that you end up with the State  
16 plan; it's a failure to file. It means you get a State  
17 plan. You don't go straight to the State plan if you  
18 file your own plan.

19 And, again, this stuff came out four years ago.  
20 And maintenance and operations directors don't know  
21 these little ins and outs of mandate reimbursement law.  
22 They didn't know they could wait and do nothing until the  
23 State plan was dropped on their doorstep. This is some  
24 sort of convenient way of getting to the State plan that  
25 doesn't exist in law.

1 MEMBER BOEL: I have a question.

2 CHAIR TILTON: Sure.

3 MEMBER BOEL: Could you, as a jurisdiction, just  
4 file the State plan originally, as your plan?

5 MR. PETERSEN: I believe if you had the State plan  
6 in hand, there's nothing legally to prevent you from  
7 slapping a letter on top of it and having your own board  
8 adopt it. But there's no requirement to do that.

9 MEMBER BOEL: No, but that would satisfy the law,  
10 according to your interpretation?

11 MR. PETERSEN: Yes, it would be your plan because  
12 you slapped the letter on top of it, yes. And you don't  
13 have much reportable costs if all you do is slap a letter  
14 on top of it.

15 CHAIR TILTON: Any more questions or comments?

16 MEMBER BARNES: About that issue, no; but I did have  
17 a couple of others things.

18 CHAIR TILTON: Okay, go ahead.

19 MR. PETERSEN: And I also had a second issue also.

20 CHAIR TILTON: Why don't you go ahead and finish  
21 your testimony?

22 MEMBER BARNES: Then let's get yours out of the way.

23 MR. PETERSEN: Okay, thanks.

24 To the conclusions again -- this should be fairly  
25 easy to clear up. Page 39, the third conclusion,

1                   *"Divert solid waste. A community college*  
2                   *must divert at least 25 percent of all of*  
3                   *its solid waste from landfill disposal or*  
4                   *transformation facilities by 2002."*

5                   And it indicates that goes up to 50 percent.

6                   I wish to clarify for the record, if the staff  
7                   recommendation and statement of decision anticipates  
8                   potential reimbursement of actually doing the mandate,  
9                   of actually doing diversion things, or just are they  
10                  limiting it to planning to do these things? Or is the  
11                  scope of the staff recommendation also including  
12                  reimbursement for actually doing these things?

13                  CHAIR TILTON: Clarification?

14                  MR. FELLER: The intent was to actually reimburse  
15                  doing these things.

16                  MR. PETERSEN: Thank you.

17                  Those are my two clarification issues. Thank you.

18                  VICE CHAIR SHERWOOD: Does that help, by the way,  
19                  meet your specification?

20                  MR. PETERSEN: That's my understanding of the word  
21                  of the verb "divert." I just wanted to make sure -- I  
22                  had some problem on a previous test claim where the word  
23                  "implementation" did not mean "implementation." So I  
24                  wanted to make sure that "divert" meant "divert."

25                  CHAIR TILTON: Is anyone here from the Department of

1 Finance? I just noticed their comments in terms of their  
2 question on the jurisdiction of community college.

3 (No audible response was heard.)

4 CHAIR TILTON: Walter, do you have some other  
5 questions?

6 MEMBER BARNES: Yes. I have two comments -- or  
7 questions, actually. And the first one has to do with  
8 the solid waste coordinator. I notice that the staff  
9 recommendation is to approve for the designation and  
10 activities associated with the solid waste reduction and  
11 recycling coordinator.

12 In looking at the bill -- and keep in mind, that  
13 most of the implementation was imposed upon State  
14 agencies and community colleges got in by definition --  
15 there was, as I recall, a reference in the bill to using  
16 existing resources to cover the duties assigned to the  
17 designated solid waste reduction and recycling  
18 coordinator. My experience and understanding is that for  
19 all the State agencies, this language was used to  
20 indicate that there would be no additional staffing  
21 associated with this activity, that basically State  
22 agencies had to designate an already-existing staff  
23 person associated with this. So I guess my feeling is  
24 that the community colleges -- their contention that  
25 this is a new requirement on them, and that basically --

1 I agree with that. But it does seem to me that the clear  
2 intent of the legislation was to indicate that anyone who  
3 had to -- it was required to appoint a solid waste  
4 reduction and recycling coordinator, was to also abide by  
5 the intent of the legislation that, that existing  
6 resources be used to take care of this.

7 And so since I see that that was applied across the  
8 board with all of the State agencies, I don't see any  
9 reason why it shouldn't be applied across the board with  
10 regard to the community colleges. So it would seem to me  
11 that this should not be a reimbursable activity.

12 CHAIR TILTON: Mr. Feller, since this is your  
13 analysis, any comment?

14 MR. FELLER: That's addressed on pages 31 and 32.  
15 And the reason that community colleges are treated  
16 differently under this -- as far as mandates and  
17 reimbursement goes -- is because they're subject to  
18 Article XIII B, section 6. And the courts have held  
19 in other situations -- and I've outlined some of those  
20 on page 32, in footnote 63 -- that --

21 MEMBER BARNES: Excuse me, which page was that?

22 MR. FELLER: It's on page 32, in footnote 63.

23 The courts have said things like, "Legislative  
24 disclaimers or findings and budget control language are  
25 no defense to reimbursement."

1           The Carmel Valley court called such language  
2 self-serving and transparent attempts to do indirectly  
3 that which cannot lawfully be done directly.

4           So the courts have, in a couple of past cases,  
5 rejected that kind of language that says that the local  
6 agency has to absorb the cost within its existing  
7 resources.

8           MEMBER BARNES: I guess my question is that in these  
9 cases, wasn't it basically a mandate that was imposed  
10 only on local governments, as opposed to this mandate,  
11 which basically affects both state government agencies,  
12 as well as local government?

13           MR. FELLER: This legislation is different in that  
14 way. And the Legislature may not have foreseen  
15 Article XIII B, Section 6, because the primary focus was  
16 State agencies; but we believe that that language applies  
17 in this case because of the community-college nexus and  
18 because of their constitutional right to reimbursement.

19           MEMBER BARNES: I notice you were --

20           MR. PETERSEN: Yes. I believe we all know, there  
21 is a great deal of the legislation that combines state  
22 and local duties in the same statute. So I don't see  
23 how that would be too significant to the issue of  
24 reimbursement.

25           And I have to agree with staff here, that the

1 Commission's hands are tied by the plain meaning of the  
2 court's decision, that legislative disclaimers are  
3 ineffectual.

4 MEMBER BARNES: Any thoughts from you?

5 MR. STARKEY: Staff looked at that, and we believe  
6 that the approach that we're taking that that language is  
7 not going to be determinative as the way we have to go  
8 with that.

9 I think that if the situation were being audited in  
10 terms of reasonable activities and things like that,  
11 there might be some issues as to how -- to what extent  
12 a community college might be complying, if they're within  
13 sort of the spirit of the law, in terms of doing it with  
14 existing resources, that they really went far aside, I  
15 think there might be some audit issues. But in terms of  
16 mandate determination, I don't think we can rely upon  
17 that as a limiting language.

18 MEMBER BARNES: Okay, the other question that I  
19 have -- and this is probably less about the decision,  
20 than it is -- and perhaps it's a Parameters and  
21 Guidelines issue -- but it seems to me that one aspect  
22 of the annual report should contain information on  
23 savings that can be used to cover the costs of this  
24 mandate. There is a reference to savings being used to  
25 offset the costs; but it seems to me that the only place

1 in which we're going to see those savings or see a  
2 documentation associated with those savings, is going to  
3 be in the annual report.

4 As I say, this is probably more of a Parameters and  
5 Guidelines issue; and I'm more than willing to have it  
6 dealt with in the Parameters and Guidelines. But I'd  
7 seek sort of agreement, you know, from the Members, that,  
8 in fact, that kind of thing should be put into there --  
9 or should be included in the Parameters and Guidelines.

10 VICE CHAIR SHERWOOD: I would agree with you,  
11 Walter. And I think it's an important issue, especially  
12 in this case, when we're talking about a lot of different  
13 offsetting revenues, fee authorities, it's a complicated  
14 issue in this particular matter, especially. And I think  
15 it's something that has to be worked out in the P's and  
16 G's, and we have to be very thorough on it.

17 In fact, in the past, I think we have been  
18 criticized -- we're always criticized, now that I think  
19 about it -- but we have been criticized on this specific  
20 issue relative to our certainty of issues of this nature  
21 in P's and G's. And I think it's a wonderful comment,  
22 and I'm fully supportive of it.

23 MEMBER BARNES: Okay, I appreciate it.

24 CHAIR TILTON: I don't need to play my Finance role.  
25 I appreciate it.

1 MR. PETERSEN: I'd like to add to Mr. Barnes'  
2 comments. In addition, the type of income you're talking  
3 about, I met with several maintenance directors who have  
4 the plan in force, is the -- it was a penny and a half  
5 per can in the glass recycling and that sort of thing.  
6 But the Parameters and Guidelines can also specify -- and  
7 they usually do -- that if the college is getting a grant  
8 to do the recycling plan, of course, you can't claim the  
9 costs that the grant covers. Now, that's fairly standard  
10 in the reimbursement business, we all know that. But  
11 that mechanism exists. If the college is getting  
12 revenues for doing something the State mandates, those  
13 revenues offset the State mandate. And the recycling  
14 income, as far as the reimbursement business goes, is  
15 just another revenue source that must be offset.

~~MEMBER BARNES~~

16 ~~CHAIR TILTON~~: The one comment I'd have is just to  
17 make sure that -- the overall sense, it seems to me, is  
18 reduce landfill. So there's a tipping fee savings that  
19 needs to be calculated also, it seems to me, it's an  
20 important point.

21 But I think very clearly, the legislation was there,  
22 I think, to reduce landfills, to reduce costs. And so as  
23 long as we get the P's and G's, we include all those --  
24 all factors, that there's net costs, and I think we ought  
25 to reimburse those, but let's make sure it's a net cost

1 issue, not just --

2 CHAIR TILTON: Okay, thank you for the comments.

3 MEMBER BARNES: Sure.

4 CHAIR TILTON: Do we have a motion then?

5 Oh, excuse me. I apologize.

6 MS. BORZELLERI: That's okay.

7 I just wanted to make some brief comments.

8 Thank you, Trevor.

9 Again, my name is Deborah Borzelleri representing  
10 the Integrated Waste Management Board. I appreciate the  
11 Commission's comments so far. They do dovetail with some  
12 of mine. I have three points to make.

13 First, it's already been stated that this is  
14 somewhat a convoluted claim in that we're dealing with  
15 community colleges and State agencies within one statute.  
16 And I wanted to give you a little brief overview to make  
17 my point that I -- well, I'll just make a brief overview  
18 of the major statute that established the diversion  
19 guidelines in California. It's AB 939, Statutes of 1989.  
20 And that established the Integrated Waste Management  
21 Board's, as we know it today, task of overseeing the  
22 diversion of waste from California's landfills:  
23 25 percent by the year 1995 and 50 percent by the year  
24 2000. And the structure of that program sets forth the  
25 local jurisdictions, cities, counties and regional

1 agencies as the direct implementers of that statute.  
2 Local jurisdictions are tasked with working at their  
3 level in cooperation with the State, other entities,  
4 waste haulers, within their jurisdictions, to establish  
5 integrated waste management plans. And those plans set  
6 forth the myriad of programs needed to ensure the  
7 25 percent and 50 percent goals.

8 AB 75 was enacted in 1999, as a result of  
9 complaints by some local jurisdictions -- many local  
10 jurisdictions -- that the State was not pulling its  
11 weight in the diversion efforts. Efforts that local  
12 jurisdictions could not, within the hierarchy of  
13 government, force on state agencies.

14 One study estimated state agencies annually generate  
15 between 500,000 and 850,000 tons of waste, representing  
16 1 to 2 percent of the waste stream. But that State  
17 agency diversion, including community colleges, hovered  
18 between 5 and 12 percent. That's well below the current  
19 statewide local government average at that time of  
20 33 percent.

21 So AB 75, this test claim statute, was intended to  
22 extend the responsibility to large State facilities that  
23 could be impacting a jurisdiction's ability to reach its  
24 diversion goals. Then "large state facilities" defined  
25 in AB 75 to include community colleges, and presumably,

1 by specifically including community colleges in the  
2 statute, community colleges had not done their part to  
3 assist the local jurisdictions, contributing to the low  
4 diversion problems; and to some extent, perhaps relying  
5 on their quasi, sometimes State status. So there was  
6 some sort of difficulties with making this whole thing  
7 happen.

8 So paradoxically, the Government Code for purposes  
9 of allowing -- for reimbursable mandate defines "school  
10 districts" to include community college districts. Your  
11 staff analysis says certain of those mandates are  
12 reimbursable. We just wanted to point out for the  
13 record, as you're well aware, the contradictory results  
14 with community colleges being subject to this law, State  
15 facilities, large State facilities due to their impact  
16 on local jurisdictions, because they are not covered by  
17 the originating statute, AB 939, but perhaps being  
18 allowed to claim reimbursement as a local entity under  
19 the local mandates law.

20 So we find that as a problem. We have not been  
21 before this Commission before. Understand that this  
22 issue is with you. There are particular legal parameters  
23 there, but we just had to make this statement for the  
24 record.

25 The second point, board staff respectfully disagrees

1 with the staff analysis regarding the applicability of  
2 Government Code section 17556(d), and the community  
3 colleges' fee authority. We went back and forth a few  
4 times on this issue.

5 It's true that AB 75 does not specifically authorize  
6 in the test claim statute fee authority; however, we  
7 believe community colleges do have optional fee authority  
8 to recover costs of implementing the program. And my  
9 basis for this is that the governing boards of community  
10 college districts have broad authority to act in any  
11 manner that is not in conflict with or inconsistent with  
12 or preempted by any law, and that is not in conflict with  
13 purposes for which community college districts are  
14 established.

15 I'm citing Education Code section 70902. And this  
16 is in your staff analysis.

17 Based on this statutory provision, the Chancellor's  
18 office provided a legal opinion that addresses fees that  
19 are optional in nature. And I quote them in reading  
20 this, "Under the authority of the permissive code" -- and  
21 they're section 70902(a) -- "a district may charge a fee,  
22 which is optional in nature, provided the fee is not in  
23 conflict or inconsistent with existing law and is not  
24 inconsistent with the purposes for which community  
25 college districts are established."

1           Our arguments pointed out, there is nothing  
2 inconsistent, we believe, with them -- with some sort of  
3 fee covering recycling costs or waste costs.

4           Then Education Code section 70209(b)(9) requires the  
5 governing board of a district to establish student fees,  
6 as it is required to establish by law, and in its  
7 discretion, fees, as it is authorized to establish by  
8 law.

9           So it appears from the Chancellor's legal office  
10 opinion, that optional fees are authorized under their  
11 interpretation.

12           The staff analysis disregards that opinion and  
13 maintains that permissive code does not provide authority  
14 to charge an optional fee to cover the AB 75 program.  
15 The board wishes to point out for the record, that  
16 according to the staff analysis, it appears that the  
17 governing board would not be able to charge any  
18 optional-type fees for any purpose; and we do not believe  
19 this is the case. It is likely the Chancellor's office  
20 or any governing boards would also agree with that  
21 assessment.

22           My third point is -- and this does perhaps go more  
23 to the Parameters and Guidelines -- the two community  
24 colleges that are making this test claim, had  
25 diversion -- we believe had some diversion programs in

1 place sometime before the test claim statute was  
2 enacted. Should the Commission find there are, in fact,  
3 reimbursable mandates, we'll be interested to review the  
4 Proposed Parameters and Guidelines and provide comments  
5 because, as we've noted before in our written comments,  
6 not only is it likely that community colleges are saving  
7 money through these programs, but we believe that many,  
8 if not all, were already in place prior to the enactment  
9 of AB 75. And we're all aware that pursuant to  
10 Government Code section 17565, reimbursement is allowed  
11 only for costs incurred after the operative date of the  
12 mandate.

13 In addition, going back to my previous point  
14 regarding fee authority, since many of the colleges had  
15 recycling programs in place, they must have had some  
16 ability to fund the programs. So we'll be curious to  
17 know where the money came from or what -- whether there  
18 were fees charged for that.

19 Thank you.

20 CHAIR TILTON: Well, I've got a question. I  
21 apologize for skipping over you now. I appreciate that  
22 we went back to you on these issues.

23 One of the issues I read in the staff -- that's why  
24 I asked if Finance staff was here -- it seems to me it's  
25 not clear to me how these kind of efficient operations

1 of facilities aren't included as part of maintaining the  
2 basic program of providing education. And given the  
3 significant amount of general funding that goes to  
4 community colleges, it seems to me, it would be easy for  
5 me to conclude this is the normal cost of doing business.  
6 And forgetting the fee issue here, I'm just wondering,  
7 do we need to address that issue here, or is it a  
8 P and G issue? How do I struggle with that issue in  
9 terms of whether this is not an activity that should  
10 already be covered under the existing budget; or if not,  
11 by the fee structure?

12 MR. PETERSEN: I certainly have something to say,  
13 if you don't.

14 MS. HIGASHI: What I was going to do is defer to  
15 Mr. Feller, to tell us what is in the record currently  
16 that addresses that issue specifically, and if we need to  
17 augment the record.

18 CHAIR TILTON: Okay.

19 MR. FELLER: Well, let me see if I understand your  
20 question correctly.

21 CHAIR TILTON: Two points -- and they may or may not  
22 have been direct -- my question is, just in terms of  
23 trying to conclude whether these are new activities or  
24 activities that normally should be done, anyway, based on  
25 the comment here and some already had, and questioning --

1       there's two issues for me: One is, "Are they the kind of  
2       things that are already covered in terms of funding for  
3       community colleges as part of their state and local  
4       funding, as a normal cost of doing business to provide  
5       the educational activities?"; and then the other point is  
6       that, even if they're not, some discussion on their  
7       abilities to raise fees to cover these things, because I  
8       consider basic running a facility efficiently and  
9       maintaining proper, you know, facility maintenance and  
10      those kinds of issues, which this is part of, is  
11      subordinate to providing the educational activity.

12           MR. FELLER: Okay, there wasn't anything in the  
13      record regarding that first point about the amount of  
14      funding that they're already getting.

15           As a new program or higher level of service, we  
16      looked at it as a new requirement.

17           In terms of the fee authority, as Ms. Borzelleri  
18      referred to 70902(b)(9), Student Fees, "The community  
19      college shall establish student fees as required to  
20      establish by law and, in its discretion, fees, as it is  
21      authorized to establish by law."

22           And their argument is that based on a  
23      community-college Chancellor's opinion, that there's this  
24      thing called "permissive fee authority," where students  
25      can opt into a fee and pay for recycling activities.

1           Even if that exists, if you look on page 435, the  
2           copy of the Chancellor's opinion that they're relying on  
3           is in your binder; and on page 435, it says -- it looks  
4           like paragraph I:

5                     *"Fees required for funded services.*

6                     *It is the opinion of the Chancellor's office*  
7                     *that community college districts may not charge*  
8                     *students a fee for use of a service which the*  
9                     *district is required to provide by state law*  
10                    *or which the district is already funded to*  
11                    *provide."*

12           This is one of those "required to provide by state  
13           law" programs. And so even according to the community  
14           college Chancellor's office, they would -- I don't think  
15           that they would say that fees are allowed for this type  
16           of program because State law requires it.

17           As Ms. Borzelleri pointed out, if a community  
18           college was already implementing these programs before  
19           the test claim legislation came into effect, Government  
20           Code 17565 says that that doesn't preclude the existence  
21           of a state-mandated program. That still would be  
22           reimbursable, even if they were doing it voluntarily,  
23           before the fact.

24           CHAIR TILTON: I guess my point here is, this  
25           jurisdiction does get state resources. So the second

1 point here, it said "can raise fees unless it's already  
2 been funded." So how do I get the issue of whether this  
3 is reasonably expected to be covered out of the operating  
4 budgets of community college?

5 MR. FELLER: I'll defer to Mr. Petersen.

6 MR. PETERSEN: I've had this come up seven or eight  
7 times in the 16 years I've been doing this. It's a  
8 Department of Finance argument that you shouldn't be  
9 reimbursed for the normal cost of doing business, or  
10 what you should be doing, anyway.

11 First of all, unless the Department of Finance is  
12 God, who knows what we're supposed to be doing, anyway?  
13 That's a personal opinion.

14 Second -- and this is going to come up next year on  
15 something you probably all heard about, clean bathrooms  
16 at K-12. That's going to be a big thing next year, where  
17 you're supposed to have clean bathrooms. Well -- but  
18 every time the Department of Finance has used the "normal  
19 cost of doing business" argument in a test claim I've  
20 been involved with, the Commission staff has ignored it  
21 because it's not statutory. It's merely a policy or  
22 personal opinion. Reimbursements governed by 17514,  
23 17556 -- 17514 says any new duty program adopted after  
24 1975, irrespective of what you were doing or what people  
25 think you should be doing, it's a statute adopted after

1 1975.

2 If the fee issue becomes important, I think we  
3 should spend some time briefing it because if the  
4 presumption is that a college can charge students for any  
5 new law, we're in a real problem here, constitutionally  
6 and mandate-wise.

7 The entire body of fee law in public education  
8 pertains to providing services directly to students.  
9 Community colleges, the example is student health  
10 services. You can charge a fee for student health  
11 services because it's not educational and it's a service  
12 you're providing directly to the student.

13 And the ASB, which is voluntary fees. The law is  
14 quite clear, Mr. Feller quoted it appropriately, that  
15 you cannot -- a community college cannot charge on their  
16 own authority a fee for something the State requires them  
17 to do. If the State wants to give the community colleges  
18 the power to charge for recycling, they can do that.  
19 They did not do that.

20 As it stands now, though, recycling doesn't look  
21 like education or services directly to a student, so that  
22 wouldn't work.

23 And to clarify, 17565, Mr. Feller is correct; that  
24 is, it states clearly that if you were doing something as  
25 an option before it became a law, you're not penalized

1 when it becomes a requirement. I believe the board read  
2 that backwards.

3 I also understand there's some trailer bill language  
4 being proposed that would change that the other  
5 direction; but that's not the law yet, so that's not an  
6 issue.

7 CHAIR TILTON: Let me ask you a question because I  
8 think I'm not -- let's put the fee aside.

9 MR. PETERSEN: Uh-huh.

10 CHAIR TILTON: My issue is, the part of the mandates  
11 issue -- and this is where you get carrying two hats,  
12 whether community colleges are a local or a State  
13 entity -- what I'm kind of asking is, it seems to me on  
14 this point, that a community college district is already  
15 doing something here and, therefore, it's a legitimate  
16 question as to how are you paying for that. And if the  
17 answer is, I'm paying for that out of State  
18 appropriations for that, then my point is, why should we  
19 pay twice?

20 MR. PETERSEN: I understand.

21 CHAIR TILTON: I understand the Finance logic  
22 sometimes, but that's the question.

23 MR. PETERSEN: The standard reasoning is, if you're  
24 doing something locally, voluntarily, you can stop doing  
25 it when the Governor cuts your budget 5 percent and spend

1 money on instructors.

2 If the law says you have to keep doing it, you can't  
3 stop doing it. So it's no longer a local choice. If  
4 it's purely a local choice, you can't do anything  
5 about -- you know, that's your choice to do it.

6 But if you're -- and everybody's budget is  
7 declining. If you can't stop doing it, it must be a  
8 mandate.

9 CHAIR TILTON: Okay, I appreciate your comment.  
10 Department of Finance?

11 MR. WILKENING: Michael Wilkening with the  
12 Department of Finance.

13 Unfortunately, I don't have expertise in the  
14 community colleges budget, so I can't really shed light  
15 on it. But it might be useful, given this discussion,  
16 for me to try to get somebody over here that could.  
17 Perhaps if you could continue this, move to the next two  
18 items maybe, and then bring this up at the end, I might  
19 be able to get somebody from Finance that can address  
20 your questions.

21 CHAIR TILTON: I'd appreciate that, because I think  
22 I'd like to -- I understand the comments back here; but  
23 if there's an argument that this is funded, then I'd like  
24 to hear it; if there's not, then we won't put it on the  
25 record and move on to the next item. So could you bear

1 with us and could we put this on hold for a little while?

2 MR. PETERSEN: I'm sorry, we're going to hold this  
3 for what purpose?

4 CHAIR TILTON: The only issue I'm trying to address  
5 is, as part of my responsibility here, is to ask a  
6 question: Do we give guidance to staff in terms of  
7 addressing whether this is funded or not? I understand  
8 your comments and they may be very valid, and it may be  
9 the appropriate comments to the question.

10 MR. PETERSEN: Right.

11 CHAIR TILTON: But I would appreciate at least  
12 trying to get the perspective of whether there's a  
13 position that this is, in fact, funded.

14 MR. PETERSEN: So it's your expectation that someone  
15 from Finance could come over and tell you whether  
16 recycling is funded by State General Funds?

17 CHAIR TILTON: I'm just trying to getting the  
18 perspective on the issue, right. And then we can put  
19 that in the record and then the Commission can respond to  
20 it or not. It seems to me, it's a question I'd like to  
21 get answered. If you would bear with us for a few  
22 minutes, they're going to go get someone to answer the  
23 question.

24 I do appreciate your answer, though. I think  
25 there's merit in your answer, and I was trying to put the

1 issue before the Commission for discussion.

2 Paula?

3 MS. HIGASHI: Could I suggest at this point that we  
4 take a five-minute break and a few minutes longer, if our  
5 court reporter needs a few minutes longer, and then we  
6 can come back, and then we can find out when someone will  
7 be coming over?

8 CHAIR TILTON: That would be very good. And if  
9 they're not coming right over, then I think we can move  
10 on. At least I can have the question answered for the  
11 Commission.

12 MR. PETERSEN: Well, it's a pervasive -- I believe  
13 your position is very pervasive in State government. So  
14 it's a good point to discuss.

15 CHAIR TILTON: I understand. I would just like to  
16 get it on the record; and then if the Commission can be  
17 responding based on that information is all.

18 Thank you very much.

19 Let's take a break for five minutes.

20 (A recess was taken from 11:12 a.m.  
21 to 11:23 a.m.)

22 CHAIR TILTON: Thank you for the break. I've got  
23 something to report back from the Department of Finance.

24 Mr. Petersen, first of all, I want to comment on  
25 your response. I think it had merit when you talked

1 about discretionary and non-discretionary issues. But  
2 what I was trying to find out is whether we could cite in  
3 the Finance budget whether this was specifically covered  
4 or not. Since my intuition says it probably was, but  
5 they said they couldn't identify that it was specifically  
6 covered in budget. So I was hopeful --

7 MR. PETERSEN: So it's a non-issue now, huh?

8 CHAIR TILTON: Well, not that it's a non-issue; but  
9 in terms of this body, I couldn't come back and  
10 demonstrate for the record that it specifically is.  
11 We can all talk about intuition, what we think is the  
12 case; but I have a responsibility to put things on the  
13 record that we can then cache, and I couldn't cache that  
14 one.

15 But I appreciate your comment about discretionary  
16 funds. I understand in these tight budget times, those  
17 are issues that are valid. But I think the key issue for  
18 me is Walter's point about making sure, as we did the  
19 P's and G's, we identify both revenues as well as cost  
20 avoidance in terms of tipping fees and if they are, in  
21 fact, mandates and that's what we'll address. I  
22 appreciate those comments.

23 Any more comments? Does anyone else have anything  
24 else to say?

25 (No audible response was heard.)

1 CHAIR TILTON: Or does the Board have questions or  
2 comments?  
3 MEMBER BOEL: I'd like to make a motion.  
4 CHAIR TILTON: Motion to accept staff's  
5 recommendation entirely.  
6 VICE CHAIR SHERWOOD: I'll second that motion.  
7 CHAIR TILTON: Okay. We have a motion and a second  
8 to accept staff's recommendation.  
9 Paula, call the roll.  
10 MS. HIGASHI: Mr. Sherwood?  
11 VICE CHAIR SHERWOOD: Aye.  
12 MS. HIGASHI: Mr. Barnes?  
13 MEMBER BARNES: Aye.  
14 MS. HIGASHI: Ms. Boel?  
15 MEMBER BOEL: Aye.  
16 MS. HIGASHI: Mr. Lazar?  
17 MEMBER LAZAR: Aye.  
18 MS. HIGASHI: Mr. Tilton?  
19 CHAIR TILTON: Aye.  
20 MS. HIGASHI: The motion is carried.  
21 CHAIR TILTON: Thank you for your testimony.  
22 MR. PETERSEN: Thank you.  
23 MS. HIGASHI: This brings us to Item 8. It's the  
24 proposed Statement of Decision.  
25 Mr. Feller?

1 MR. FELLER: The staff recommends the Commission  
2 adopt the proposed statement of decision beginning on  
3 page 2, which accurately reflects the decision of the  
4 test claim. Staff also requests the Commission allow  
5 minor changes be made to the SOD, including those two  
6 that reflect the hearing testimony <sup>and vote</sup> ~~invoke~~ count.

7 CHAIR TILTON: Mr. Feller, does that mean you  
8 include a stronger reference to identifying the savings  
9 in them?

10 MR. FELLER: That would be in the Parameters and  
11 Guidelines. We would identify those offsets.

12 VICE CHAIR SHERWOOD: Could I just clarify the last  
13 statement you made, to clarify two issues?

14 MR. FELLER: I'm sorry?

15 VICE CHAIR SHERWOOD: In the Statement of Decision,  
16 you were going to note testimony and --

17 MR. FELLER: Yes, and --

18 MEMBER BOEL: The vote count.

19 MR. FELLER: -- the vote count. That would be on  
20 page 2, where you see the brackets.

21 VICE CHAIR SHERWOOD: I'm sorry.

22 MR. FELLER: Yes.

23 CHAIR TILTON: Mr. Petersen, do you have a comment?

24 MR. PETERSEN: Yes, in order to get closure on my  
25 first issue, is it fair to say that whether or not a

1 college adopts its own plan, it will be reimbursed  
2 according to the State plan? Is that a fair statement of  
3 what the Statement of Decision means?

4 CHAIR TILTON: Yes. But let me restate what I think  
5 you're saying, in my view, is we have accepted staff  
6 recommendation that you have the State plan, but to  
7 accept anything above that is discretionary.

8 MR. PETERSEN: Okay. I wanted to make sure.

9 So whether or not they adopt the plan, the State  
10 plan will govern?

11 CHAIR TILTON: No.

12 MR. PETERSEN: Whether or not they adopt their own  
13 plan, the State plan describes reimbursement, not their  
14 plan?

15 CHAIR TILTON: That's correct.

16 MR. PETERSEN: Thank you.

17 CHAIR TILTON: That's the recommendation of staff,  
18 as I understand it.

19 VICE CHAIR SHERWOOD: Yes.

20 CHAIR TILTON: No discussion?

21 *(No audible response was heard.)*

22 CHAIR TILTON: Can I have a motion?

23 MEMBER LAZAR: So moved.

24 CHAIR TILTON: I've got a motion to approve the  
25 staff recommendation. Do I have a second?

1 MEMBER BOEL: Second.

2 CHAIR TILTON: And a second.

3 Call the roll.

4 MS. HIGASHI: Mr. Barnes?

5 MEMBER BARNES: Aye.

6 MS. HIGASHI: Ms. Boel?

7 MEMBER BOEL: Aye.

8 MS. HIGASHI: Mr. Lazar?

9 MEMBER LAZAR: Aye.

10 MS. HIGASHI: Mr. Sherwood?

11 MEMBER SHERWOOD: Aye.

12 MS. HIGASHI: Mr. Tilton?

13 CHAIR TILTON: Aye.

14 MS. HIGASHI: The motion carries.

15 MR. PETERSEN: Thank you.

16 MS. BORZELLERI: Thank you.

17 MR. PETERSEN: It was a tough one.

18 MS. HIGASHI: This brings us to Item 9. This item

19 will be introduced by Commission counsel, Katherine

20 Tokarski.

21 MS. TOKARSKI: Good morning. In 1988, the

22 California voters approved Proposition 98, which amended

23 the California Constitution, including adding the

24 following language:

25 *"Any school district maintaining the*

1 elementary or secondary school shall develop  
2 and cause to be prepared an annual audit  
3 accounting for such funds and shall adopt a  
4 school accountability report card for each  
5 school."

6 The proposition also added Education Code sections on the  
7 school accountability report cards. 97-TC-21 was a  
8 previous test claim heard and approved by the Commission  
9 covering legislative amendments to the school  
10 accountability report card Education Code sections.  
11 Before you today our consolidated test claims, *School*  
12 *Accountability Report Cards II and III*. The claims  
13 allege new reimbursable activities are required for  
14 including new components in the school accountability  
15 report card, as well as for training school personnel to  
16 either use the optional State template or regarding  
17 standard definitions to be used when preparing the school  
18 accountability report card.

19 Claimant Empire Union also alleges new activities  
20 from the amendment of Education Code Section 33126 by  
21 statutes 1997, Chapter 912. However, that statutory  
22 amendment was part of the original *School Accountability*  
23 *Report Card* Statement of Decision, and staff asserts that  
24 no further issues on the merits may be raised before the  
25 Commission at this time.

1           As to the remainder of the test claim legislation,  
2           staff finds that to the extent that the claimed  
3           amendments to the Education Code are a restatement of  
4           what was required by the voters in enacting  
5           Proposition 98, no program or new program or higher level  
6           of service can be found.

7           The Department of Finance filed late comments  
8           yesterday concurring with the staff analysis.

9           Staff recommends that the Commission adopt the final  
10          staff analysis, which denies this consolidated test  
11          claim, as described in the conclusion on page 21.

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

14          MR. SCRIBNER: Good morning. David Scribner,  
15          representing the claimant, Empire Union.

16          MR. WILKENING: Michael Wilkening with the  
17          Department of Finance.

18          MR. CASTILLO: Lenin Del Castillo with the  
19          Department of Finance.

20          CHAIR TILTON: Mr. Scribner, go ahead.

21          MR. SCRIBNER: Thank you.

22          We have several areas of disagreement with the staff  
23          analysis, as you can probably surmise, and it's not a big  
24          surprise this morning.

25          By way of background, essentially what we're dealing

1 with here in this test claim is an opinion, the opinion  
2 of how one would apply verbiage that included -- that was  
3 added by the electorate in Education Code 33126, that  
4 language which is "but is not limited to."

5 Now, recall under Proposition 98, section 33126 came  
6 into play, requiring school accountability report cards,  
7 or SARCs, to include 13 specific activities. We, as a  
8 people, voted to say: We want to see this information on  
9 our schools: 13 activities. But it's not limited to  
10 that.

11 In staff's opinion, the "but is not limited to"  
12 language gives the Legislature a credit card, that says,  
13 "We can add whatever we want, we can change the original  
14 13 activities, we can add to it, we can amend it forever  
15 more. We can make the SARC from an original one- or  
16 two-page document, to a ten-page document. And they're  
17 not being mandated costs or new activities imposed upon  
18 districts because the 'but is not limited to' language  
19 was intended to do that."

20 Fine. Where's the legal support?

21 As long as I've been doing mandates, and especially  
22 over the last few years of mandates law on this  
23 Commission, being under the microscope it has been, one  
24 of the ultimate mantras that we hear is that a decision  
25 must be based on some legal basis in the record.

1           What you have before you in the record by staff is  
2 nothing more than its opinion, its read of what it  
3 believes the "but is not limited to" language was meant  
4 to do. There's no statement from the electorate that  
5 says that "We intended the Legislature to be able to add  
6 to the SARC at will, ad infinitum, to make it the very  
7 large and complicated document that it is today." That's  
8 not there.

9           Instead, what you have in the record from the  
10 claimant, is an analysis no different than what you had  
11 in the SARC I test claim. You have a review of what we  
12 did before the Legislature added this information to the  
13 SARC, and a declaration signed under penalty of perjury  
14 that says, "We never did that before. This is new. We  
15 are incurring additional costs on an annual basis to  
16 include additional information on programs, first and  
17 foremost, many of them that did not even exist at the  
18 time Proposition 98 was adopted; but we're doing this  
19 because the Legislature said we had to. Not the  
20 electorate, the Legislature."

21           Now, I have an opinion as to what the "but is not  
22 limited to" language is meant to do. I think that we  
23 included the "but is not limited to" language in  
24 section 33126 so that we would not hog-tie districts and  
25 the information that they wished to provide within a

1 SARC. Think about it. The electorate said, "We want  
2 13 specific activities." They said, "But it's not  
3 limited to those 13 specific activities." We did so  
4 because we recognize there's over a thousand school  
5 districts and thousands of school sites in this state.  
6 They all have different programs, they all have different  
7 ways to meet accountability, they all have different  
8 aspects to the program that they may want to involve  
9 their parents and guardians about. So what we did  
10 instead was say instead of, "Just give them these 13, but  
11 that's all you can do. Prepare a separate document, if  
12 you want to supply any other information," we said, "It's  
13 not limited to that. If you want to add more things to  
14 your accountability document, go ahead. Feel free,  
15 because we know that you will make the best judgment to  
16 inform your parents and guardians on an annual basis of  
17 how you're meeting the State's goals. That's the  
18 claimant's position of what that "but is not limited to"  
19 language is meant to mean.

20 Do I have any legal support for that? None. It's  
21 opinion, not unlike what staff put forward today. Do  
22 they have any legal support for that read? None.

23 And you would have to admit that my opinion as to  
24 what the "but is not limited to" language meant is just  
25 as plausible as staff's. It's not far-fetched to mean

1 that we wanted to give more information. We didn't want  
2 to limit districts and their ability to provide  
3 information to parents or guardians. Staff has no legal  
4 support for its opinion as to what it means.

5 Staff does respond to a comment that the claimant  
6 made on page 15 of the staff analysis -- and I'm not sure  
7 if that's the Bates page number -- but it's the middle of  
8 page 15, the third paragraph that starts, "In comments  
9 dated October 27th, 2003." We asked, "Why would the  
10 Legislature go to such lengths to specifically delineate  
11 over a dozen new pieces of information that must be in a  
12 SARC, if this information was somehow already required to  
13 be reported?"

14 Staff goes on to say: Well, a change in law doesn't  
15 necessarily mean it's an addition, that it's a new  
16 activity. Claimants agree, there is a maximum statutory  
17 construction that states that there are times when the  
18 Legislature makes an amendment, and it's doing so to  
19 clarify existing law. That's great. But remember where  
20 Education Code section 33126 came from. It came from the  
21 electorate, not the Legislature.

22 So what staff is doing is saying that the  
23 Legislature has the ability to clarify what the  
24 electorate initially intended with Proposition 98. We  
25 don't know. There is no statement here from the

1       electorate. Only a statement of what the Legislature  
2       wants to see in the SARC. Not what we voted on to  
3       include in the SARC.

4               Now, here's another problem and it's minor because  
5       we had a standard rule here with the Commission, and that  
6       is Commission decisions have no precedential value. We  
7       understand that. But if you vote up the staff  
8       recommendation here today, you have a huge inconsistency  
9       that can't be ignored. You have a *SARC II* test claim  
10      that has been adopted under the exact same fact pattern,  
11      under the exact same set of laws, but now you're reaching  
12      a different result.

13              Now, I have an idea of how we can get to what I was  
14      talking about opinion, of my opinion versus staff's  
15      opinion, and why really our opinions don't matter. It's  
16      really what the law says and what the legal basis of a  
17      decision is, and that is, to determine what we were doing  
18      before and after the test claim legislation. That's  
19      Lucia Mar case law.

20              Let's look at *SARC I* and *SARC II* and compare them.  
21      The facts are the same. The electorate added  
22      section 33126 to the Education Code. *SARC I*, the  
23      Legislature comes around, does a little tweaking, adds  
24      some things. Test claim filed. Mandate.

25              *SARC II*, the same thing, the electorate, we're

1 dealing with the original 13 activities, the Legislature  
2 comes along, tweaks, adds some things, here we are today,  
3 with a staff rec that says no mandate.

4 Obviously, something has to have changed; right? I  
5 mean, I can't put it any clearer. There has to be a  
6 difference between the first test claim and this test  
7 claim.

8 So has there been a change in the Education Code?  
9 None cited by staff. None cited by Finance. None cited  
10 by the claimant. It's the same.

11 Has there been a change in the Government Code?  
12 Maybe the way that we go about determining these mandates  
13 have changed since *SARC I*. No, that hasn't changed,  
14 either.

15 Staff points to new case law later on, as far as  
16 trying to knock out costs mandated by the State. We'll  
17 address that, but as far as determining whether there's  
18 a new program or higher level of services, is there case  
19 law that has changed since *SARC I*? No. What's changed?  
20 Staff. Staff's opinion. That's what's changed.  
21 Everything else is the same. Everything else is the  
22 same.

23 So when you make your determination whether or not  
24 there is a higher level of service here, it must be done  
25 on something more substantial than an opinion as to what

1 language was intended to mean. Because in the end,  
2 that's all it is.

3 What the claimant has provided you when you're  
4 making your determination whether this is a higher level  
5 of service or a new program is what's required under the  
6 law. We reviewed what we did before the Legislature  
7 added these activities and we reviewed what we did after.  
8 We came to the conclusion, supported by declaration,  
9 signed under penalty of perjury, that this information  
10 was never added to a SARC, never even contemplated to be  
11 added to a SARC until the Legislature told us to do so.  
12 Not the electorate, the Legislature.

13 Now, the second issue that I need to address today  
14 goes to the cost mandated by the State argument. That  
15 was the "new program, higher level of service" issue.  
16 I'm a little confused on this one. I admit, I'm easily  
17 confused, so that doesn't say much. But I think the best  
18 way to go about this is to start at the end. So if we  
19 could go to page 19 of the staff analysis, that would be  
20 great.

21 At the top of page 19, staff concludes:

22 *"Claimants have not demonstrated that the*  
23 *State funds received through Article XVI,*  
24 *sections 8 and 8.5, or any other sources beyond*  
25 *property tax revenue, are unavailable for the*

1           *claimed additional costs of issuing SARCs.*

2           *In the absence of that showing, staff finds the*  
3           *test claim legislation did not impose costs*  
4           *mandated by the State."*

5           This is where I'm confused. Staff is tying the SARC  
6           program to Proposition 98, which is a funding guarantee,  
7           not an appropriation. It's not something that appears in  
8           a budget. And then they're using the Department of  
9           Finance case -- the new case -- to support that position.  
10          And on page 18, they have some italicized language -- no,  
11          it's not the italicized language I would use; but, you  
12          know, we disagree.

13          At the bottom, beginning with,

14                 *"The costs necessarily occurred in*  
15                 *complying the notices and agenda requirements*  
16                 *under that funded program --"*

17          Now, that's what I would italicize.

18                 *"-- under that funded program do not entitle*  
19                 *claimants to obtain reimbursement under*  
20                 *Article XIII B, section 6, because the State,*  
21                 *in providing program funds to claimants,*  
22                 *already has provided funds that may be used*  
23                 *to cover the necessary activities."*

24          There is a fundamental difference between the facts  
25          in the Department of Finance case and what you have

1 before you today. The difference is that the Department  
2 of Finance case dealt with a program that had a specific  
3 line item in the budget. It receives funding for it.  
4 It's identified and funded specifically by the State.  
5 And the court said, "When you're looking for such a small  
6 bubble of activities to be reimbursed, this notice and  
7 agenda portion, you can't show us that the money that's  
8 in the budget for that activity doesn't cover that."  
9 That's what that case stands for.

10 There's no line item in the budget for SARC.  
11 There's no appropriation already made and identified for  
12 SARC, in which we're saying, we can't fund SARC.

13 Staff is bootstrapping. Staff is saying, "Well,  
14 since SARC was part of the funding guarantee" -- even  
15 though it's not an appropriation -- "the funding  
16 guarantee, the State intended that Prop. 98 money shall  
17 go to pay for SARC, first and foremost, and then you fund  
18 everything else." That's the only read you can have  
19 here. That's essentially what staff is saying: You must  
20 use Prop. 98 money first and foremost for SARC. And if  
21 that doesn't cover the bill, then come back to us.

22 But that's not what Prop. 98 says. That's not what  
23 was intended. There's no clear link between the SARC  
24 requirements and activities and the Prop. 98 guarantee.

25 In fact, staff admits as much by saying, on page 15,

1 in footnote 27, it says,

2 "Empire Union's comments dispute that the  
3 Proposition 98 funding guarantee is an  
4 available state funding source for providing  
5 SARC. On the contrary, there must be a  
6 presumed close link between the two due to the  
7 Constitutional single-subject rule."

8 Prop. 98, again, is not a funding source, period.  
9 Period. It's a guarantee. The budget is a funding  
10 source.

11 And, again, when we're talking about opinion and  
12 what we believe and we'd like to see what's happening and  
13 intuition that's been used today, staff uses the term "a  
14 presumed close link." But yet there's no legal basis to  
15 make the leap between combining them for purposes of  
16 funding and it actually being true. There's no legal  
17 basis for that decision here in this analysis.

18 Staff attempts to do so with the Department of  
19 Finance case; but as I already pointed out, the fact  
20 patterns are completely different. The Department of  
21 Finance case here is completely inapplicable. The  
22 Department of Finance, again, dealt with a program that  
23 was specifically identified in the budget, specifically  
24 received funding for it, and people were seeking  
25 reimbursement for a subset of activities that were

1 already funded due to a budget appropriation.

2 We don't have that here. When you're talking about  
3 costs mandated by the State, what do you have? You have  
4 an unfunded requirement by the Legislature that says,  
5 "We want these additional activities listed in the SARC."  
6 What you have is the Legislature adding activities that  
7 weren't there immediately before the test claim came into  
8 play. The Legislature did that, not the electorate.  
9 There's no case law that's going to pull us back out and  
10 say, "You have funding." General funding for education  
11 is not what's applied here. That's not the test. It  
12 wasn't the test in the Department of Finance case, and it  
13 shouldn't be the test here.

14 I respectfully request that this morning you deny  
15 the staff analysis and approve the test claim for the  
16 activities listed in the original test claim filing.

17 Thank you.

18 CHAIR TILTON: First, I'd like to hear from staff,  
19 and then I'd like to hear from the Department of Finance.

20 MS. TOKARSKI: Okay, the claimant representative  
21 focused on the "but is not limited to" language that was  
22 part of the original initiative language of Education  
23 Code section 33126. Although this language is emphasized  
24 on page 15 as a part of the analysis, this is not what  
25 staff's analysis hinges on. It hinges on for dealing

1 with the new-program or higher-level-of-service issues.

2 What the language of 33126 was, as far as the  
3 program components of the SARC, the very first item is,  
4 "The model school accountability report card shall  
5 include, but is not limited to, assessment of the  
6 following school conditions," and the first one is,  
7 "Student achievement in and progress towards meeting  
8 reading, writing, arithmetic and other academic goals."

9 Many of the so-called new items that the Legislature  
10 added, deal specifically with testing results of  
11 particular tests that are required now. And it's  
12 staff's assertion that those go specifically to providing  
13 information on student achievement and progress towards  
14 meeting reading, writing, arithmetic and other academic  
15 goals. This is just an example of the analysis that you  
16 have before you.

17 In addition, regarding the follow-up issue of costs  
18 mandated by the State, which if you did not get to -- if  
19 you went beyond new program or higher level of service  
20 and said, "Okay, these are new. We agree with the  
21 claimant, these are new," then you would get to costs  
22 mandated by the state, and staff is relying on current  
23 case law, both old and new case law.

24 On page 18, there are citations to the County of  
25 Sonoma and Redevelopment Agency which go into the issue

1 of -- for example, "No state duty subvention is triggered  
2 where the local agency is not required to expend its  
3 proceeds and taxes." And that's where the focus on  
4 Prop. 98 funding is, versus a budget line item. Staff's  
5 assertion is because this particular requirement  
6 providing a school accountability report card was part of  
7 Proposition 98, and Proposition 98 was a funding  
8 guarantee, staff agrees, it's not a particular budget  
9 line item which is normally what we've looked at in the  
10 past for deciding whether a program was fully funded or  
11 not.

12 But in this case, it's part of Proposition 98  
13 funding guarantee, it's state funds. And staff's  
14 position is that claimant has not shown that those state  
15 funds are not available to cover any incremental  
16 increased costs expended in order to comply with the new  
17 language that the Legislature has now added.

18 So those are the two main issues. I'd be happy to  
19 answer any questions that come up, either that you have  
20 right now or after Finance has had their chance to  
21 respond.

22 CHAIR TILTON: Questions from Members?

23 (No audible response was heard.)

24 CHAIR TILTON: Can we hear from the Department of  
25 Finance?

1 MR. CASTILLO: I just --

2 CHAIR TILTON: Oh, excuse me.

3 MR. SCRIBNER: Could I respond, and we could kind of  
4 keep this discussion in flow, so there's not a  
5 disconnect? Or would you prefer to hear from Finance?

6 CHAIR TILTON: Let's hear from Finance and then come  
7 back and wrap it up.

8 MR. SCRIBNER: Okay, okay.

9 MR. CASTILLO: I'd just like to note, as staff  
10 mentioned earlier in a letter that we recently submitted,  
11 we concur with their staff analysis.

12 MR. SCRIBNER: Thank you for being brief. We'll  
13 keep this together now.

14 When staff talks about the focus on the program  
15 components, this goes back to actually what you discussed  
16 a little bit earlier on the previous test claim.  
17 Mr. Petersen talked about this when we were talking about  
18 mandates, and that's loss of discretion. The 13 original  
19 program activities have a very broad statement. We all  
20 agree. But that means that schools could then do or put  
21 in what they chose to, to meet that broad statement;  
22 because the model SARC in Education Code section 35256  
23 provides that variances among SARCs are permitted to meet  
24 local needs, so that the broad nature of the language was  
25 meant to meet the fact that we have a thousand-plus

1 school districts and thousands of school sites.

2 What the Legislature has done, in *SARC I* and in  
3 *SARC II*, has taken away that discretion. When we're  
4 talking about assessment, when we're talking about pupil  
5 achievement, rather than allowing districts to decide  
6 how they want to transmit that information to parents,  
7 the Legislature has made the decision for them. The  
8 Legislature has said, "When we're talking about these  
9 specific 13 activities, this is what you must include,  
10 period. You have no choice but to include that  
11 information."

12 Had the Legislature not acted, schools could have  
13 chose to put in API scores, high school exit exam passage  
14 rates, governor's performance award rates, dropout  
15 prevention rates. They could have chose to do that.

16 Does that mean they would have? Who knows?

17 The Legislature, by its actions, has taken away the  
18 discretion to determine whether or not we want to put  
19 that information into the SARC. We've expanded an  
20 original item from 13 activities to well over two dozen.  
21 And staff says, "That's not a higher level of service."  
22 We disagree.

23 CHAIR TILTON: Any questions from board members?

24 (No audible response was heard.)

25 CHAIR TILTON: Do we have a motion?

1 VICE CHAIR SHERWOOD: I'd like to move --  
2 MEMBER BARNES: I move the staff analysis.  
3 VICE CHAIR SHERWOOD: I'll second that.  
4 CHAIR TILTON: Any more discussion?  
5 I have a motion and a second. Call the roll.  
6 MS. HIGASHI: Ms. Boel?  
7 MEMBER BOEL: No.  
8 MS. HIGASHI: Mr. Lazar?  
9 MEMBER LAZAR: Yes.  
10 MS. HIGASHI: Mr. Sherwood?  
11 VICE CHAIR SHERWOOD: Yes.  
12 MS. HIGASHI: Mr. Barnes?  
13 MEMBER BARNES: Yes.  
14 MS. HIGASHI: And Mr. Tilton?  
15 CHAIR TILTON: Aye.  
16 MS. HIGASHI: The motion carries.  
17 Item 10.  
18 MS. TOKARSKI: The next item for you is the  
19 Statement of Decision on the *School Accountability Report*  
20 *Cards II and III*. The sole issue before the Commission  
21 is whether the proposed Statement of Decision accurately  
22 reflects the decision you just made. Staff recommends  
23 that the Commission adopt the proposed Statement of  
24 Decision beginning on page 2, which accurately reflects  
25 the staff recommendation on the test claim, minor changes

1 to reflect the hearing testimony and the vote count will  
2 be included when issuing the final Statement of Decision.

3 CHAIR TILTON: Do we have any further testimony?

4 (No audible response was heard.)

5 CHAIR TILTON: Do we have a motion?

6 VICE CHAIR SHERWOOD: Move for approval of staff's  
7 recommendation.

8 MEMBER LAZAR: Second.

9 CHAIR TILTON: We have a move and second to approve  
10 staff's recommendation.

11 Call the roll.

12 MS. HIGASHI: Mr. Lazar?

13 MEMBER LAZAR: Yes.

14 MS. HIGASHI: Mr. Sherwood?

15 VICE CHAIR SHERWOOD: Aye.

16 MS. HIGASHI: Mr. Barnes?

17 MEMBER BARNES: Aye.

18 MS. HIGASHI: Ms. Boel?

19 MEMBER BOEL: Aye.

20 MS. HIGASHI: Mr. Tilton?

21 CHAIR TILTON: Aye.

22 MS. HIGASHI: This brings us --

23 Did you want to say anything --

24 MR. FELLER: Oh, no. I'm ready to go.

25 MS. HIGASHI: Okay. This brings us next to Item 11.

1 This item will be presented by Commission counsel Eric  
2 Feller.

3 MR. FELLER: Good morning, again. This is the  
4 *High School Exit Examination* test claim in which  
5 claimants seek reimbursement for costs of school  
6 districts performing various activities in administering  
7 the high school exit examination.

8 Staff finds that the claim is a partially-  
9 reimbursable state mandate for the following activities  
10 listed in the analysis. Those are providing and  
11 documenting notice of the exam; determining whether  
12 English-learning pupils have sufficient skills to be  
13 assessed with the exam; administering the exam, including  
14 the activities required by the regulations in doing so;  
15 maintaining test security, again, including activities  
16 required by the regulations; and reporting data to either  
17 the Superintendent of Public Instruction or whoever is  
18 designated by the superintendent.

19 Staff also finds that some of the claimant's  
20 activities do not constitute reimbursable activities as  
21 specified in the analysis. And one of the issues in this  
22 test claim is whether the three-dollar administration  
23 apportioned to districts is sufficient to meet the costs  
24 of the program.

25 The State was afforded a presumption that this

1 amount is sufficient to cover the district's costs; but  
2 the claimant has successfully rebutted the presumption by  
3 submitting sworn declarations. Therefore, staff found  
4 that three-dollars-per-exam administration is not  
5 sufficient to cover the costs of the program. Staff  
6 recommends the Commission partially approve the test  
7 claim for the activities listed.

8 Will the parties and witnesses their names for the  
9 record.

10 MR. SCRIBNER: David Scribner representing the  
11 claimant.

12 MR. WILKENING: Mike Wilkening, Department of  
13 Finance.

14 MR. CASTILLO: Lenin del Castillo, Department of  
15 Finance.

16 CHAIR TILTON: Mr. Scribner, go ahead.

17 MR. SCRIBNER: We have an easier time this time.  
18 At least as far as I'm concerned, we end on a positive  
19 note this morning.

20 We concur with staff's recommendation and appreciate  
21 the change in tactic after we had submitted the  
22 declarations showing that the three-dollar preparation  
23 was not sufficient to cover the costs.

24 However, there is one issue outstanding that we are  
25 currently still trying to support; and at this point in

1 time, I cannot provide legal support, so I'm not going to  
2 raise the issue. The issue does surround who is required  
3 to actually submit the results to the parents or  
4 guardian.

5 The law just simply says "that shall be provided."  
6 It doesn't specifically say who it is. We have been  
7 desperately seeking some sort of management advisory  
8 directing the schools to do it because the schools are,  
9 in fact, submitting that information. But at this time,  
10 I cannot provide any legal support for that position.  
11 It would just be opinion. So we are not going to -- we  
12 won't fight over that issue this morning.

13 So having said that, we concur.

14 And if I do receive something within the time for  
15 reconsideration of this issue, we will put that forward  
16 and request reconsideration on that matter.

17 Thank you.

18 CHAIR TILTON: I appreciate that.

19 Department of Finance?

20 MR. WILKENING: Mike Wilkening of Finance.

21 We have three points regarding the staff's analysis.

22 The first is there's an assertion in the staff  
23 analysis that the No Child Left Behind is not a federal  
24 mandate. And we disagree with this. We would note that  
25 there's in excess of two billion dollars in funds that

1 are provided pursuant to that statute, and that in  
2 reality, there is no real choice there. The State has  
3 to take that money and then comply with the mandates that  
4 the feds have imposed through that statute.

5 The second piece which kind of derives from the  
6 first, is that there's an assertion that the *High School*  
7 *Exit Exam* is not a federal mandate, because No Child Left  
8 Behind is not a federal mandate. And we disagree with  
9 this as well. We think that the *High School Exit Exam* is  
10 a federal mandate for tenth graders. It's required by  
11 No Child Left Behind that the State have a cumulative  
12 assessment in the tenth grade and the high school exit  
13 exam is the State's test that we use to comply with that  
14 federal requirement.

15 And then the last point being that I believe that  
16 the standard for determining whether or not a mandate  
17 claim reaches a thousand-dollar threshold should be more  
18 stringent than just an assertion. We think that there  
19 should be data that's submitted at the time that the  
20 assertion is made, so that there can be an analysis of  
21 whether or not that does, indeed, meet the  
22 thousand-dollar threshold. So we would disagree with  
23 the contention that the three dollars is not adequate  
24 because there's no data to support that contention.

25 CHAIR TILTON: Mr. Scribner?

1 MR. SCRIBNER: Sure, I'd like to respond to those  
2 three comments, and we'll do it backwards.

3 As far as the thousand-dollar minimum claim amount  
4 and the declarations that are submitted, they are  
5 submitted under penalty of perjury. They are developed  
6 based on data the districts have.

7 What the Department of Finance is recommending is  
8 actually a mandate. So if you want to go that route, we  
9 can; but it's a new mandated program for us to submit  
10 data with the claim, to support the thousand-dollar  
11 minimum claim amount. We don't have to do that now. The  
12 penalty of perjury document has often been sufficient,  
13 and it has been for a long time.

14 And then the NCLB issues -- and I'll combine them as  
15 a funding source and the *High School Exit Exam* being a  
16 federal mandate -- this is very complicated, and actually  
17 NCLB in my opinion is going to end up just like the  
18 *Special Education* test claim in the Hayes. Staff is  
19 correct, NCLB is not a requirement. It is an incentive  
20 program that if districts wants to continue to receive  
21 Title 1 funding, they were required to submit a state  
22 plan. The State did so, along with -- all 50 states, I  
23 believe, submitted a state plan, to continue to receive  
24 funding at their choice.

25 To make a determination whether NCLB actually

1 requires the same level of service as we have here with  
2 the *High School Exit Exam*, NCLB would actually have to  
3 delineate the *High School Exit Exam*. If it just says, as  
4 it does, that there must be an assessment made, when the  
5 State comes in and says "That assessment is going to be  
6 made in this way," that's a mandate. It's the same thing  
7 we have with *Special Education*.

8 If the feds and the State allow there to be just any  
9 kind of assessment and districts had discretion as to how  
10 that assessment was going to be made, there would be no  
11 mandate there.

12 So what we have in the State plan is a series of  
13 assessments, accountability measures and things that the  
14 State has in place and has chosen to impose upon  
15 districts that aren't required by NCLB. And NCLB is very  
16 broad. It says, "States, you do it as you choose to do  
17 it. States, go ahead, do the assessments."

18 And our state has said, "*High School Exit Exam*,  
19 that's how it's going to be."

20 That's why staff didn't raise NCLB because, really,  
21 in this test claim, it's a non-issue. It may be an issue  
22 in others; but this one, it's not.

23 MR. WILKENING: And to follow up with that, we think  
24 that NCLB is coercive. There is no discretion on the  
25 part of the State, really, whether to participate in

1 that. To not participate would be to forgo a large  
2 amount of funding for schools. It's a false choice.

3 As to the discretion that the districts could have  
4 to do their own assessments, No Child Left Behind does  
5 not allow that. There has to be a single statewide  
6 standard that's applied to all the schools for  
7 comparability across those schools. So it's correct that  
8 the State has chosen an assessment, but it is required  
9 under NCLB to choose an assessment.

10 MR. SCRIBNER: Sorry, I didn't want this to be back  
11 and forth. I was waiting.

12 CHAIR TILTON: Why don't you go ahead then?

13 MR. SCRIBNER: Okay. Just very briefly.

14 This all goes back to the Hayes case, the analysis  
15 of the carrot and the stick and the City of Sacramento  
16 cases and all the special ed morass that we went through  
17 years ago. The bottom line is, NCLB is a choice. It's  
18 not a good choice; it's not a fair choice. There is a  
19 carrot and stick there, obviously; but it's still a  
20 choice. And for this test claim, it is a non-issue,  
21 because there is no clear delineation in NCLB as far as  
22 a *High School Exit Exam* is concerned. None. There are  
23 very broad statements as far as assessments, very broad  
24 statements about accountability. And when the State  
25 chooses to impose a certain assessment under a program

1 that it chooses to continue to be a member of, it's a  
2 mandate. This Commission held that for many programs  
3 under the *Special Education* test claim. The Hayes court  
4 says that. I didn't bring the Hayes case, or I could  
5 cite to you the specific paragraph that says,  
6 essentially, we need to look at how the mandate became  
7 imposed upon the locals. Did it come from the feds or  
8 did it come from the State? And that's a gross, loose  
9 interpretation of what that says, but that's essentially  
10 what the Hayes court wanted to know.

11 And in many of the special education programs, this  
12 Commission found that it came from the State, not the  
13 feds. And that same decision applies here. *High School*  
14 *Exit Exam* came from the State. It came before NCLB. If  
15 you wanted to even talk about the point in time argument,  
16 it was before NCLB was brought into play, and the State  
17 chose to continue to add that to its State plan when it  
18 sought additional funding from the feds.

19 CHAIR TILTON: Eric, can you respond for me, from  
20 the Finance point of view, that in order to get the  
21 federal funds, we have to have a statewide decision about  
22 what criteria is used?

23 MR. FELLER: It's staff's position that No Child  
24 Left Behind and the predecessor statute, Improving  
25 America's Schools Act of 1994, are funding statutes, that

1 the State is not required to participate in.

2 The statute itself actually says that, and I quote  
3 that part of it on page 43 of the final staff analysis,  
4 in 23 USC 6311(f), it says that,

5 *"The provisions do not direct or control*  
6 *a state...or school's specific instructional*  
7 *content, academic achievement standards and*  
8 *assessments, curriculum or program of*  
9 *instruction."*

10 The statute itself says it, and it's staff's  
11 position that NCLB and its predecessor statute were  
12 funding statutes and not federal mandates.

13 CHAIR TILTON: Any questions from Members?

14 MEMBER BARNES: I had a question about the  
15 three-dollar-per-student funding source. Am I correct  
16 in assuming that this will be considered an offset to  
17 the costs?

18 MR. FELLER: Correct.

19 MEMBER BARNES: And so I assume that will also be  
20 included within the Parameters and Guidelines.

21 I'm a little unclear about the funding for NCLB, and  
22 maybe you could help me with that. The State applies for  
23 it, but does it pass through and go down to the school  
24 districts?

25 MR. WILKENING: The vast majority of it does.

1       There's several titles that are set up under NCLB, and  
2       they're for varied purposes, from general funding for  
3       education, to teacher training, to funding for  
4       assessments, to funding for English language learners.  
5       So there's -- the federal set up that structure where  
6       there's several different titles that will flow through  
7       to the locals, so that they can pay for these programs.

8               MEMBER BARNES:   And I guess with regard to this  
9       particular mandate, is there federal funding to -- is  
10      that in addition to what they previously had to operate  
11      these things?

12             MR. WILKENING:   No Child Left Behind did increase  
13      the amount of money that the federal government was  
14      giving to the schools for education.

15             MEMBER BARNES:   And how does that increase relate  
16      to this specific mandate?   Or is there a direct  
17      relationship?

18             MR. SANCHEZ:    Juan Sanchez with the California  
19      Department of Education.

20             MEMBER BARNES:   Sure.

21             MR. SANCHEZ:    Just to clarify a little bit on how  
22      NCLB works is that, as it was correctly stated, there's a  
23      number of titles in NCLB having to do with Migrant Ed.  
24      and things like that.   What happens is, when the law was  
25      passed, the States submit a plan to the federal

1 government, and that plan includes various provisions  
2 that the State must agree to in order to get the funding,  
3 get the federal funding. So the mechanics are such that  
4 the State will submit a plan for the various titles --  
5 those that they want to participate, if you will. And  
6 then what will happen is, the funding is provided to the  
7 States and then, you know, funding must be approved to be  
8 spent for the various programs.

9 MEMBER BARNES: And I guess the question I'm trying  
10 to get to is: Is there a tie between the funding that  
11 passes through to the school districts and this  
12 particular mandate?

13 MR. SANCHEZ: In the *High School Exit Exam*? There's  
14 not necessarily a specific tie. What happens is that  
15 when the State submitted its plan for NCLB, you know, it  
16 had some assessment and some performance characteristics  
17 for students. So what the State did in this particular  
18 case is incorporated a high school exit to meet that  
19 requirement. So that's where the tie is in the plan, if  
20 that makes any sense. It's kind of a convoluted issue.

21 MEMBER BARNES: I guess I'm going around it, so I'll  
22 try and be as direct as I can. Is there a rationale for  
23 saying that that money is, in fact, intended to pay for  
24 these activities?

25 MR. SANCHEZ: There wouldn't -- where that exists or

1 where that language exists -- and, again, I hate to kind  
2 of do the same thing and go around in circles -- but  
3 where that exists or where that link is, is in the State  
4 plan that's submitted to the federal government.

5 So, for example, if the federal government, as part  
6 of receipt of these funds, of "X" funds, says "There will  
7 be an assessment component in your plan, tell us how  
8 you're going to meet this assessment component." Then  
9 what the State would do is say, "To meet that  
10 requirement, what we're going to do is -- and in this  
11 particular case, high school exit meets that  
12 requirement." So that's in the State plan.

13 MR. WILKENING: So that's in order to receive an  
14 increased funding --

15 MR. SANCHEZ: Correct.

16 MR. WILKENING: -- you need to have cumulative  
17 assessment in the tenth grade.

18 And so the State has said, "Okay, we have a High  
19 school exit exam, that's a cumulative assessment, so we  
20 will use that to fulfill this requirement that we have  
21 a cumulative assessment in order for the schools then to  
22 receive additional funding."

23 CHAIR TILTON: Mike, was that specific then in that  
24 plan, would the feds say if you did not do what's  
25 described by the State, you would not be in compliance

1 with the requirements of getting the money?

2 MR. WILKENING: It is specifically in the State  
3 plan. And so, yes, if we didn't comply with that, then  
4 we would be in violation of our state plan and jeopardize  
5 the federal funding.

6 MR. SANCHEZ: Correct.

7 CHAIR TILTON: So then the next argument, that if we  
8 don't do exactly as described in the plan by the State,  
9 then the federal money would not be coming, so there is a  
10 linkage to that funding?

11 MR. WILKENING: Yes.

12 MR. SANCHEZ: I mean, unless there's an exception  
13 that's made. If there's certain parts of -- if you've  
14 been reading, like, in popular media right now, they're  
15 talking about NCLB and some of the requirements that they  
16 had; and that some states are saying, you know, "We can't  
17 meet some of the requirements."

18 So, now, there's an exception, you know; but that  
19 has to occur at the federal level.

20 CHAIR TILTON: Okay. So you don't know then,  
21 necessarily, if not following exactly every component of  
22 the specific plan we submitted would require the feds to  
23 pull back money? First, I thought we were saying we had  
24 a specific plan, comply with that specific plan is  
25 required for the funding, now you're saying it may not

1 be that --

2 MR. SANCHEZ: You know, I'm talking in general  
3 terms. If there was a situation where a state, for  
4 example, were to submit a plan to the federal government  
5 and part of that plan were "X" number of activities, and  
6 the State was fearing that it couldn't complete that  
7 activities, they know it could petition, you know, the  
8 federal government to say, "We haven't been able to.  
9 Now, what's the remedy here?"

10 MEMBER BARNES: What's the relationship between this  
11 federal funding and this three dollars? Is the three  
12 dollars just state money, or is that --

13 MR. WARREN: If I could?

14 MEMBER BARNES: Yes.

15 MR. WARREN: Paul Warren with the Legislative  
16 Analyst's Office.

17 MEMBER BARNES: Sure.

18 MR. WARREN: I do believe that when NCLB was  
19 passing, there was a large increase for the funding to  
20 schools, to help schools address the different  
21 requirements that were in state law. And some of them  
22 were procedural, like, assessments; and some of them are  
23 more global, like we expect student performance to  
24 increase significantly, and if you were to keep up with  
25 the papers, that's what the discussion is about, a lot.

1           When the law passed, it was prior to No Child Left  
2 Behind, and so there was a state appropriation of funds  
3 for the local administrative costs of three dollars a  
4 kid. So that money is still, for the most part, there,  
5 out of state funds; and then, of course, districts also  
6 receive the No Child Left Behind funds.

7           And, you know, the increase that California  
8 experienced from No Child Left Behind was significant,  
9 it was in the hundreds of millions of dollars increase.  
10 So certainly in the aggregate, there was certainly  
11 enough money to pay for the assessment mandates that are  
12 contained in the act.

13           MEMBER BARNES: Sure. Mr. Scribner?

14           MR. SCRIBNER: I've been dying over here to speak.

15           MEMBER BARNES: I'm sure you are. I'm dying to hear  
16 you. I really am.

17           MR. SCRIBNER: I think, Member Barnes, what you're  
18 talking about is: Is there a clear line between NCLB  
19 funding --

20           MEMBER BARNES: Sure.

21           MR. SCRIBNER: -- state plan activity?

22           No, there's not. As far as if you can trace dollars  
23 that you're going to get a certain amount of money for  
24 assessment and a certain amount of money for  
25 accountability, a certain amount of money for this, it's

1 a pool. It's a pot of money. The federal government  
2 does not say that, "Okay, we're going to provide you with  
3 accountability and funds, but you've got to spend XYZ  
4 amount of money on your high school exit exam." That  
5 does not exist.

6 A pot of money flows based on what the State  
7 determines to be the requirements that it chooses to  
8 impose upon its locals, not what the feds require. This  
9 is getting kind of twisted here with the feds are  
10 throwing all this money out. They are. But the State  
11 chose to say, "This is what we're going to do to meet  
12 it." So the federal government then says, "Here's your  
13 pot for that portion of your state plan," like was  
14 mentioned by the representative from CDE. That portion  
15 of the State plan receives a certain amount of money.  
16 It is not delineated how that money should be spent or  
17 how it's to be allocated.

18 So if that was your question, if you can, you know,  
19 follow the dead bodies all the way down, you can't.

20 MEMBER BARNES: Well, here's my question, is that,  
21 you know, I -- oh, I'm sorry, somebody else wants to  
22 speak. Go ahead.

23 MR. SANCHEZ: I'm sorry. I don't know if this might  
24 help, but as an example, each state plan is an individual  
25 document. So what you're going to find is that when you

1 go from state to state, what one state does to meet that  
2 accountability requirement, for example, or whichever it  
3 may be, will be different -- and may be the same -- and  
4 some may be more complete than others. Some may be more  
5 involved than others. So in that sense, it's not -- the  
6 plans necessarily, when the federal government requests a  
7 plan, they don't tie you to specific language. They say,  
8 you know, "Here's the general language," as Paul was  
9 saying. They tie you -- "Now, tell us how you're going  
10 to meet these requirements to get the funding."

11 MR. WILKENING: But they'll say, generally, that you  
12 have to do a cumulative assessment. That's not an option  
13 for a state to say, "We don't want to have a cumulative  
14 assessment of in the tenth grade."

15 MR. SANCHEZ: That's correct.

16 MR. WILKENING: That's a federal requirement.

17 MR. SCRIBNER: Of the State. Let's clarify, "of the  
18 State." Not of the locals, of the State. This is the  
19 *Special Education* test claim all over again. Of the  
20 State. When they say that, whether it be cumulative  
21 assessment or accountability or anything like that, NCLB  
22 talks about, for the most part, "of the State."

23 MEMBER BARNES: Let me kind of -- first off, I buy  
24 into the staff recommendations with regard to what's  
25 eligible as a mandate under here. So that's not an issue

1 for me; and whether -- I mean, I'll buy into the argument  
2 about how those mandates are imposed and why, you know,  
3 reimbursement should take place.

4 My only issue is with the issue of, is there funding  
5 to cover this mandate? And I think it's a fairly clear  
6 indication that the three dollars per student is a  
7 specific amount of money that is intended to deal with  
8 these particular mandates. So that definitely gets  
9 offset.

10 MR. SANCHEZ: That's correct.

11 MEMBER BARNES: The issue that I think is unclear in  
12 all of this is this pot of NCLB money is there to take  
13 care of a variety of things, which potentially could  
14 include those activities that are covered by this state  
15 mandate. And that money is being provided to the school  
16 district.

17 So I'm really more interested in how, you know,  
18 schools and/or the State is supposed to determine how  
19 much of that, in fact, does accrue to this particular  
20 mandate. And maybe this is not -- maybe this is not an  
21 issue that we can decide with regard to the activity; it  
22 may be an issue that we have to decide in connection with  
23 the P's and G's. But I guess I didn't want to leave on  
24 the table -- unless, of course, you're prepared to say  
25 that that pot of money, that no piece of it should be

1 available, you know, as an offset for this particular  
2 mandate. And I guess that's maybe the question I have.

3 MR. SCRIBNER: Right.

4 MEMBER BARNES: Is there such a disconnect between  
5 those funds, you know, and this particular activity, that  
6 no part of that extra funds -- and I mean, I think we  
7 would all agree, it's extra money that we didn't have  
8 before -- should apply here.

9 MR. WILKENING: First, we think that the three  
10 dollars per pupil is adequate. That's our initial  
11 opinion.

12 MEMBER BARNES: That's where the claim and that kind  
13 of stuff would take place.

14 MR. WILKENING: But we think to the extent that  
15 there are costs beyond three dollars that stand up to an  
16 audit by the Controller's office, that the funding that's  
17 provided under No Child Left Behind would be available to  
18 pay those costs.

19 MEMBER BARNES: But how much?

20 MR. SCRIBNER: Well, and again, there's nothing in  
21 the record, like you're suffering with -- there's nothing  
22 in the record from State agencies that would prove that  
23 up. So the Department of Finance has failed to provide  
24 any information -- CDE -- to provide any information,  
25 that would support that decision.

1 I agree with Member Barnes, I think that it is an  
2 issue that needs to be addressed; but I think it's one  
3 for P's and G's, when we're talking about the offset  
4 area, not whether or not these are actually mandated  
5 activities at this point in time.

6 And it may be worthwhile to request additional  
7 information from the claimants and State agencies to  
8 determine at what level does NCLB provide funding to us  
9 that could be applied to the *High School Exit Exam*.

10 MR. SANCHEZ: You know, that's one thing I also --  
11 we're getting really kind of into the mechanics of NCLB.  
12 But, you know, each individual title has specific  
13 requirements. So, you know, just to clarify; when you  
14 receive the NCLB funds, there is some flexibility, but  
15 there's also clear lines of demarcation between what's  
16 Title 1 money, what's Title 2 money, what's Title 3, 4,  
17 you know, and so on.

18 So what winds up happening is how it feeds --  
19 correct me if I'm wrong -- but how it feeds into the  
20 budget is that when one goes to the budget, the approved  
21 budget, and one looks at the budget act item number, then  
22 that money will be tied, in fact, to the NCLB funds. So  
23 that's where the connection happens. So you can, in  
24 fact, trace the NCLB funds to what's approved in the  
25 budget.

1           Now, if it's a situation where one is suggesting  
2           that money can be taken -- first of all, it has to be  
3           within the title, to allow movement between programs.  
4           And then there's the other issue that is, if one is  
5           suggesting that money can be taken from one program  
6           within that title to another program, that would  
7           basically happen, you know, via the budget process.

8           MEMBER BARNES: Well, let me just kind of -- I  
9           think -- and I'm sort of prepared to approve the staff  
10          recommendation, unless everybody else has other  
11          comments -- but I think this is another area that I'd  
12          like to ask the staff and everybody else who is going to  
13          be involved in developing the Parameters and Guidelines,  
14          to specifically, in your analysis back to us, address  
15          this particular issue of the federal funding; and whether  
16          any or all or none of it should be directly linked as an  
17          offset; okay. And I'll be interested to see what the  
18          results are.

19          VICE CHAIR SHERWOOD: Chair?

20          CHAIR TILTON: Go ahead.

21          VICE CHAIR SHERWOOD: My only question would be  
22          based on the current staff recommendation, if we were to  
23          pass it as such, would it be proper to address these  
24          issues in the P's and G's?

25          MS. HIGASHI: Yes, it would be. We have a specific

1 section in which we can make -- we can add specific  
2 language, as to what amounts, if any, need to be  
3 identified as offsets.

4 CHAIR TILTON: My only comment is that it seems to  
5 me, the issue for me is when you do that, if you'd give  
6 us some specifics and the details of what is submitted to  
7 the feds in order to get the fund, it seems to be an  
8 issue for me. So that's a very specific list if you have  
9 to do the following things, then I think it bears on the  
10 decision.

11 MEMBER BARNES: And I would specifically ask the  
12 Department of Education to really actively participate in  
13 this role here, because I think this is really a critical  
14 issue for you.

15 MR. SANCHEZ: Oh, yes, we'd be happy to.

16 MEMBER BARNES: So I really appreciate that.

17 MR. WARREN: I did have one other issue that maybe  
18 would be appropriate to look into as part of the P's and  
19 G's, and that is offsetting savings. There was a  
20 previous mandate, a pre-1975 mandate that required  
21 districts to do proficiency testing of students before  
22 they graduated. That means, they had to write or  
23 purchase a test, they had to administer it, they had to  
24 score it.

25 If I understand the mandates process correctly,

1 those should be considered to be offsetting savings that  
2 would reduce claims, and potentially, you know, with the  
3 three dollars and potentially the federal funds, all  
4 these pieces could be put together, from our perspective,  
5 to reduce the State's exposure on this mandate.

6 CHAIR TILTON: Good point. Thank you.

7 MEMBER BARNES: And by that, I hope you would  
8 participate in the development of those, as well; okay?

9 MR. WARREN: I'd be very happy to.

10 CHAIR TILTON: Eric, you had a comment?

11 MR. FELLER: I just want to say, I did try to  
12 outline some of the offsetting savings -- or the money  
13 already appropriated in the budget on page 44 of the  
14 analysis, when I talked about the amount appropriated  
15 for the last three years, 18.2 million in 2003-04, and  
16 the same amount in 2002-03 and 14.47 million in 2001-02.  
17 So I did try to outline some of those offsets for you.

18 VICE CHAIR SHERWOOD: Can I just make one more  
19 comment, kind of in general here?

20 It's really good to see the Legislative Analyst  
21 involved and get their input and Education and Finance.  
22 And I noticed -- and I'm not quite sure why this  
23 happened -- there was a comment in the write-up  
24 concerning a lack of documentary evidence. And I don't  
25 think that's common, is it, when Finance usually comes

1 before us? I think most of the evidence they present has  
2 either been attested to in some form.

3 Am I wrong about that?

4 MS. HIGASHI: Let me defer to Eric on it. There's  
5 a specific declaration in the record that he can point  
6 to.

7 VICE CHAIR SHERWOOD: Okay. My point is, if we can  
8 get evidence that has met the needs of the process, it  
9 would be better in the future. And I think Finance has  
10 done that in the past. And I think Finance, over the  
11 years, has participated in these proceedings to a great  
12 extent. They've always put their best foot forward and  
13 tried to do a good job. So I don't take this as a  
14 criticism of your overall effort.

15 But I think it's really important based on what  
16 we've heard from outside entities as to the importance  
17 of hearing from the various players that are involved in  
18 these issues, like Education. And we've had many  
19 education issues that come before us over the last ten  
20 years, that I've seen. And, quite frankly, in many  
21 cases, we didn't have participation from prior  
22 administrations, possibly.

23 So this was good to see today, and it's something  
24 that I think is so important to the process, so that we  
25 can get to the bottom line, and try to, you know, resolve

1 these issues and come up with a fair and equitable  
2 finding for everybody, because everybody puts a lot of  
3 work and effort into this. And I appreciate that fact  
4 and I appreciate what staff does also.

5 CHAIR TILTON: Walter, a motion?

6 MEMBER BARNES: I'm ready to move on it, if you are.

7 CHAIR TILTON: I'm ready.

8 MEMBER BARNES: Then I'll move the staff  
9 recommendation.

10 VICE CHAIR SHERWOOD: Second.

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

13 Roll call?

14 MS. HIGASHI: Mr. Lazar?

15 MEMBER LAZAR: Yes.

16 MS. HIGASHI: Mr. Sherwood?

17 VICE CHAIR SHERWOOD: Yes.

18 MS. HIGASHI: Mr. Barnes?

19 MEMBER BARNES: Yes.

20 MS. HIGASHI: Ms. Boel?

21 MEMBER BOEL: Yes.

22 MS. HIGASHI: Mr. Tilton?

23 CHAIR TILTON: Aye.

24 MS. HIGASHI: The motion is carried.

25 Item 12.

1 MR. FELLER: Staff recommends that the Commission  
2 adopt the proposed Statement of Decision beginning on  
3 page 2, which accurately reflects the staff  
4 recommendation on the test claim, with allowance for  
5 minor changes, including those to reflect the hearing  
6 testimony and the vote count that will be included in the  
7 final Statement of Decision.

8 CHAIR TILTON: Any testimony or comments?

9 Do I have a motion?

10 MEMBER LAZAR: I'll move.

11 CHAIR TILTON: Is that a motion?

12 MEMBER LAZAR: Yes.

13 MEMBER BARNES: Second.

14 CHAIR TILTON: And a second?

15 Roll call.

16 MS. HIGASHI: Mr. Sherwood?

17 VICE CHAIR SHERWOOD: Aye.

18 MS. HIGASHI: Mr. Barnes?

19 MEMBER BARNES: Aye.

20 MS. HIGASHI: Ms. Boel?

21 MEMBER BOEL: Aye.

22 MS. HIGASHI: Mr. Lazar?

23 MEMBER LAZAR: Yes.

24 MS. HIGASHI: And Mr. Tilton?

25 CHAIR TILTON: Aye.

1 MS. HIGASHI: Thank you.

2 MS. HIGASHI: This concludes the test claim portion  
3 of our hearing.

4 We're now at Item 17, which is Mr. Starkey's report.

5 MR. STARKEY: This is an update for the public. The  
6 only addition is that there is a new filing. The County  
7 of Los Angeles filed an appeal, filed a writ to the  
8 Commission's decision on *Animal Adoption*. There's  
9 currently a pending -- and a writ was filed by the  
10 Department of Finance which is pending in Sacramento  
11 Superior Court. This case is currently pending in  
12 Los Angeles Superior Court. It's the same case, *Animal*  
13 *Adoption*. And it was filed on January 23rd. However, we  
14 were only served on March 19th.

15 MS. HIGASHI: Item 18, this is my report.

16 We've had some hearings scheduled on our budget.  
17 And the first one will be the Senate Budget Committee  
18 hearing; and then the second will be the Assembly Budget  
19 Subcommittee hearing.

20 We've also had a number of updates on the  
21 legislative report. And Nancy Patton is our legislative  
22 coordinator for the Commission. And she has prepared an  
23 update on the legislation, and distributed it to you.

24 So if you have any specific questions you'd like to  
25 ask her at this time about the legislation, please feel

1 free to do so. But it's a white sheet.

2 CHAIR TILTON: Any questions from board Members?

3 (No audible response was heard.)

4 MS. HIGASHI: There's an unprecedented number of  
5 bills addressing mandate issues. We expect there to be  
6 more; much more dialogue, every time you turn on your  
7 television set, to watch what's happening in the Capitol,  
8 you will find a discussion on mandates. I think some of  
9 you may have noticed also, almost every Monday, the  
10 Assembly Special Committee on State Mandates has been  
11 meeting, and is in the midst of getting through review of  
12 many of the education mandates.

13 Commission staff continues to attend all of the  
14 hearings and provide staff assistance to committee staff,  
15 as well as to members during hearings.

16 We expect the discussions at that committee to start  
17 focusing on the mandates process itself. And that will  
18 be happening sometime in April. We're not quite sure.  
19 We expect it to be after the Easter break.

20 CHAIR TILTON: Paula, has anybody shared with you my  
21 director's comments about mandates at her confirmation?

22 MS. HIGASHI: No, I have not seen that.

23 CHAIR TILTON: Okay, let me a copy of those and I'll  
24 send it to you.

25 MS. HIGASHI: We've also -- there's also interest

1 from the Governor's office, the Education Secretary's  
2 office on the mandate issues. And generally, all of the  
3 Education committee staff and consultants are starting to  
4 coalesce within the structure of the Assembly Special  
5 Committee. So we expect that there will be meaningful  
6 discussion on the mandate process and the definitions for  
7 costs mandated by the State there. And so unless we  
8 receive further direction from the Commission, we will  
9 continue to assist there, as needed.

10 CHAIR TILTON: Maybe what I'll do then is just share  
11 with all the Members then, there was some discussion in  
12 my front office as part of the confirmation issue for the  
13 director, about mandates. And for information, I'll just  
14 share with you, as food for thought.

15 MS. HIGASHI: Okay, that will be great.

16 We've also included in your handouts, excerpts from  
17 the Leg. Analyst's Office report and various  
18 recommendations that are made regarding the mandates  
19 issues. And they're included in your exhibits. And if  
20 you have any questions about that, we can forward them  
21 over to the Leg. Analyst's Office. We expect that all of  
22 those issues will be brought up in the context of the  
23 Laird committee hearings.

24 CHAIR TILTON: Okay?

25 Any questions?

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(No audible response was heard.)

CHAIR TILTON: Any more comments from the public?

(No audible response was heard.)

CHAIR TILTON: Okay, we'll now move into closed session today; do we?

MS. HIGASHI: Just briefly on the next agenda. There will be four test claim items set for hearing. The ones listed: 2, 3, 4 and 5.

CHAIR TILTON: The Commission will now meet in closed executive session pursuant to Government Code section 11126 subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon pending litigation listed on the public notice and agenda to confer with and receive advice from legal counsel regarding potential litigation and pursuant to Government Code section 11261(a) and 17526. The Commission will also confer on personnel matters listed on the published notice of agenda.

We will reconvene in approximately ten minutes, fifteen minutes.

MR. STARKEY: Ten minutes.

(The Commission met in Closed Executive Session from 12:30 to 12:50 p.m.)

CHAIR TILTON: Okay, we're back in session.

1           The Commission met in closed executive session  
2 pursuant to Government Code section 11126, subdivision  
3 (e), to confer with and receive advice from legal counsel  
4 for consideration and action, as necessary and  
5 appropriate, upon the pending litigation listed on the  
6 public notice and agenda, and potential litigation, and  
7 Government Code section 11126(a) and 17526 to confer on  
8 personal matters listed on the published notice and  
9 agenda. All required reports from the closed session  
10 having been made, and with no further business to  
11 business, I'll make a motion to adjourn.

12           All in favor say "aye".

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

14           CHAIR TILTON: The meeting is adjourned.

15           MS. HIGASHI: Thank you very much.

16                   *(The proceedings concluded at 12:51 p.m.)*

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were reported by me at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer.

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

In witness whereof, I have hereunto set my hand this 15th day of April 2004.



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DANIEL P. FELDHAUS  
CSR #6949, RDR, CRR