

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 126

Sacramento, California

July 28, 2005

- Present: Chairperson Anne Sheehan
Representative of the Director of the Department of Finance
Member Nicholas Smith
Representative of the State Controller
Member Francisco Lujano
Representative of the State Treasurer
Member Jan Boel
Representative of the Director of the Office of Planning and Research
Member Paul Glaab
City Council Member
- Vacant: Local Elected Official
Public Member

CALL TO ORDER AND ROLL CALL

Chairperson Sheehan called the meeting to order at 9:33 a.m.

Chairperson Sheehan welcomed the Commission's newest member, Paul Glaab, a city council member for the City of Laguna Niguel.

APPROVAL OF MINUTES

- Item 1 A. May 26, 2005
 B. June 10, 2005

Upon motion by Member Smith and second by Member Boel, the minutes were adopted. Member Glaab abstained.

PROPOSED CONSENT CALENDAR

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

- Item 12 PROPOSED STATEMENT OF DECISION TO DISMISS TEST CLAIM
Tenure Grievance Arbitration, 98-TC-18
Sierra Joint Community College District
Education Code Sections 87610.1 and 87611
Statutes 1988, Chapter 973 (AB 1725)

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

PROPOSED AMENDMENT OF PARAMETERS AND GUIDELINES AS REQUESTED BY CLOVIS UNIFIED SCHOOL DISTRICT

- Item 13 *Consolidation of Employee Benefits Disclosure* 04-PGA-27 (CSM-4502)
Education Code Section 42142, Statutes 1994, Chapter 650 (AB 3141)

-and-

School District Fiscal Reporting, (97-TC-19)
Education Code Sections 42100, 42127, 42127.5, 42127.6, 42128, 42131,
and Government Code Section 3540.2; Statutes 1981, Chapter 100 (AB 777);
Statutes 1985, Chapter 185 (AB 367); Statutes 1986, Chapter 1150 (AB 2861);
Statutes 1987, Chapters 917 (AB 93) and 1452 (SB 998); Statutes 1988,
Chapters 1461 (AB 3403) and 1462 (SB 1677); Statutes 1990, Chapter 525
(SB 1909); Statutes 1991, Chapter 1213 (AB 1200); Statutes 1992, Chapter 323
(AB 2506); Statutes 1993, Chapters 923 (AB 2185) and 924 (AB 1708);
Statutes 1994, Chapters 650 (AB 3141) and 1002 (AB 3627); Statutes 1995,
Chapter 525 (AB 438)

PROPOSED AMENDMENT OF PARAMETERS AND GUIDELINES BASED ON
STATUTES 2004, CHAPTER 895 (AB 2855, SECTION 6)

- Item 14 *Employee Benefits Disclosure* 04-PGA-25 (CSM-4502)
Education Code Sections 42140 and 42142
Statutes 1994, Chapter 650 (AB 3141)
Statutes 1995, Chapter 525 (AB 438)
Statutes 1996, Chapter 1158 (AB 2964)

SET ASIDE PARAMETERS AND GUIDELINES BASED ON STATUTES 2004,
CHAPTER 316, (AB 2851, SECTIONS 2 AND 4) AND REQUEST OF THE STATE
CONTROLLER'S OFFICE

- Item 15 *Mineral Resource Policies*, 04-PGA-11 (4155)
Public Resources Code Section 2762
Statutes 1975, Chapter 1131 (SB 1128)
- Item 16 *Democratic Presidential Delegates*, 04-PGA-10 (4130 and 4131)
Elections Code Sections 6305, subdivision (d) and 6329.2
Statutes 1982, Chapter 1603 (AB 1935)
Statutes 1983, Chapter 1166 (AB 277)
- Item 17 *Annual Short Doyle Audits*, 04-PGA-13 (4238)
Welfare and Institutions Code Section 5712.1, 5712.01
Statutes, 1984, Chapter 1327 (AB 2381)
Statutes 1985, Chapter 1232 (AB 1856)
- Item 18 *Short-Doyle Case Management*, 04-PGA-14 (4246)
Welfare and Institutions Code Sections 5675, 5677, 5678
Statutes 1979, Chapter 875 (AB 1656)
Statutes 1984, Chapter 1327 (AB 2381)
Statutes 1985, Chapter 757 (AB 1214)
DMH Letters 85-23 and 86-06

AMEND PARAMETERS AND GUIDELINES BASED ON STATUTES 2004,
CHAPTER 206 (AB 2854, SECTIONS 1 & 2) AND REQUEST OF THE STATE
CONTROLLER'S OFFICE

- Item 19 *Local Elections: Consolidation*, 04-PGA-21 (CSM-4311)
Statutes 1981, Chapter 1013 (SB 230), Statutes 1982, Chapter 218 (AB 2367),
Statutes 1985, Chapter 896 (SB 572), Statutes 1986, Chapter 188 (AB 2737) and
Chapter 667 (AB 2605), Statutes 1987, Chapters 2 (AB 155), 84 (AB 428), and
1083 (SB 415)

SET ASIDE PARAMETERS AND GUIDELINES BASED ON STATUTES 2004,
CHAPTER 895 (AB 2855, SECTIONS 2) AND REQUEST OF THE STATE
CONTROLLER'S OFFICE

- Item 20 *American Government Course Document Requirements*, 04-PGA-29,
(97-TC-02 (a.k.a. 97-258-01))
Education Code Section 51230,
Statutes 1996, Chapter 778 (AB 3086)

ADOPTION OF PROPOSED STATEWIDE COST ESTIMATES (action)

- Item 21 *Postmortem Examinations: Unidentified Bodies, Human Remains*, 00-TC-18
County of Los Angeles, Claimant
Government Code Section 27521.1
Statutes 2000, Chapter 284 (SB 1736)

PROPOSED AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS,
TITLE 2, DIVISION 2, CHAPTER 2.5 (action)

- Item 22 Adoption of Proposed Regulatory Action: Implementation of AB 2856
Amendments to California Code of Regulations, Title 2, Division 2, Chapter
2.5, Article 1 – General, Article 3 – Test Claims, Article 4 – Mandates
Recognized by the Legislature, Article 7 – Hearings, Article 8.5 – Forms

Member Boel moved for adoption of the consent calendar, which consisted of items 12 through 22.
With a second by Member Glaab, the consent calendar was unanimously adopted.

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

- Item 3 Staff Report (if necessary)

No appeals were filed.

STAFF REPORT

- Item 24 Executive Director's Report (info)

- *Mandate Reform.* Nancy Patton, Assistant Executive Director, introduced Program Analyst, Cathy Cruz, who is primarily responsible for the analysis of parameters and guidelines, incorrect reduction claims, and statewide cost estimates. On behalf of the Commission staff, Ms. Patton congratulated Ms. Cruz for obtaining her Master's of Public Policy and Administration and for completing her thesis titled, *Reassessing the State Mandates Problem in California.*

Ms. Cruz provided an overview of her thesis, suggesting that there is a fundamental problem with the mandates system itself and with the relationship between state and local government. She noted that the current discourse in California focuses only on specifics of the process, and argued that effective reform would require policymakers to first address the fundamental flaws of the mandates system and the relationships and then modify the overall process as needed. She concluded that lawmakers can ensure an effective mandates system in California by practicing collaboration and delaying mandate effective dates, requiring mandate explanations, implementing pilot projects, and using sunset language. Ms. Cruz noted that the 2005-2006 Budget directs the Department of Finance to evaluate the current mandates reimbursement process and to provide alternatives to the Legislature by March 1, 2006. She stated her hope that the information and recommendations in her thesis would be considered and that it assists all parties in the reform process.

Chairperson Sheehan thanked Ms. Cruz for her work. Member Boel stated that the thesis should be sent to interested parties.

- *California's Sustained Superior Accomplishment Award.* Paula Higashi, Executive Director, announced that Senior Commission Counsel, Camille Shelton, was selected as the Commission's first recipient of the State of California's Sustained Superior Accomplishment Award. She explained that this award was for sustained superior job performance resulting in an exceptional contribution to the efficiency of state government in the area of mandate determination for the period between December 2002 and April 2005. Ms. Shelton received a commemorative plaque and \$250.

Ms. Higashi stated that Ms. Shelton has provided excellent legal advice and service to the Commission since 1997. She noted that Ms. Shelton's accomplishments included: representing the Commission in litigation at all levels in the courts; analyzing the *Handicapped and Disabled Students* program; participating as a trainer in the mandates portion of the Office of Administrative Law's rulemaking training; updating legislative staff on mandates case law; and participating in the audit processes for the *School Bus Safety*, *Peace Officer Bill of Rights*, and *Animal Adoption* programs. Paul Starkey, Chief Legal Counsel, also honored Ms. Shelton for her overall sustained achievement in litigation and for her work on the *Handicapped and Disabled Students* program.

Chairperson Sheehan presented Ms. Shelton with a commemorative plaque and letter from the Commission members.

RECONSIDERATION OF PRIOR STATEMENTS OF DECISION AS DIRECTED BY THE LEGISLATURE IN STATUTES 2004, CHAPTER 316 (AB 2851) AND CHAPTER 895 (AB 2855)

Ms. Higashi swore the parties and witnesses participating in the hearing of agenda items 4 through 11.

- Item 4 *Extended Commitment — Youth Authority*, 04-RL-9813-07 (98-TC-13)
Welfare and Institutions Code Sections 1801 and 1801.5
Statutes 1998, Chapter 267 (SB 2187)
Directed by Statutes 2004, Chapter 316, Section 3, Subdivision (b) (AB 2851)

Katherine Tokarski, Commission Counsel, presented this item. She stated that the test claim was filed by the County of Alameda alleging a reimbursable state mandate for Welfare and

Institutions Code sections 1800, 1801, and 1801.5, as amended by Statutes 1984, chapter 546 and Statutes 1998, chapter 267. She noted that these code sections provide procedures for delaying the discharge of a youthful offender when he or she is determined to be physically dangerous to the public because of the person's mental or physical deficiency, disorder, or abnormality.

Ms. Tokarski explained that the Legislature required the Commission to reconsider the original Statement of Decision adopted January 25, 2001, which found that reimbursable state-mandated activities were imposed by the 1984 amendment to Welfare and Institutions Code section 1800. However, because the 1984 statute was not included in the express language of the reconsideration statute that otherwise named with specificity the statute and chapter numbers the Commission was directed to reconsider, she stated that the Commission cannot reconsider its prior decision on Statutes 1984, chapter 546. Thus, staff found that the Commission's original findings as to Statutes 1984, chapter 546 stand and that the Commission is limited to reconsidering claims on the amendments by Statutes 1998, chapter 267. Staff found, however, that Statutes 1998, chapter 267 does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution and does not impose costs mandated by the state pursuant to Government Code section 17514.

Staff recommended that the Commission adopt the staff analysis.

Parties were represented as follows: Zlatko Theodorovic and Lance Christensen, with the Department of Finance.

Mr. Theodorovic concurred with the staff analysis.

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

Item 5 Proposed Statement of Decision
 Extended Commitment — Youth Authority, 04-RL-9813-07
 See Above

Katherine Tokarski, Commission Counsel, presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflects the decision on the reconsidered test claim.

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

Item 6 *Photographic Record of Evidence, 04-RL-9807-09 (98-TC-07)*
 Penal Code Section 1417.3
 Statutes 1985, Chapter 875 (AB 556); Statutes 1986, Chapter 734 (AB 2715);
 Statutes 1990, Chapter 382 (AB 3408)
 Directed by Statutes 2004, Chapter 316, Section 3, Subdivision (d) (AB 2851)

Eric Feller, Commission Counsel, presented this item. He stated that Penal Code section 1417.3, subdivision (a), requires, upon order of the court, introducing a photographic record of evidence for exhibits that pose a security storage or safety problem in lieu of the actual exhibits. Penal Code section 1417.3, subdivision (b), requires introducing a photographic record of evidence for exhibits that are toxic, that pose a health hazard to human, and that require submission of a certified chemical analysis of those exhibits.

Mr. Feller stated that article XIII B, section 9, subdivision (b), of the California Constitution applies to Penal Code section 1417.3, subdivision (a), because the activity is triggered by court order. Therefore, staff found that the activity is not reimbursable. As to Penal Code section 1417.3, subdivision (b), staff found that it constitutes a reimbursable state mandate for providing a photographic record and a certified chemical analysis. In addition, staff found that storing exhibits is a reimbursable activity for cities, but not counties because they already have the responsibility for storing exhibits since the days that trial courts were under the umbrella of counties.

Staff recommended that the Commission adopt the staff analysis, which partially approves the test claim.

Parties were represented as follows: Pete Cervinka, with the Department of Finance.

Mr. Cervinka concurred with the staff analysis with one exception. He requested that the Statement of Decision include language that specifically excludes the finding of a mandate for school districts and community colleges. He noted that such a finding was included in the staff's draft analysis. He added that the Education Code permits, but does not require, school districts and community college districts to establish police departments.

Mr. Feller responded that the issue of eligible claimants is addressed during the parameters and guidelines phase. He explained that the finding in the draft staff analysis was removed because staff decided it was premature to determine who the eligible claimants were at the Statement of Decision phase.

Mr. Cervinka noted that the proposed Statement of Decision excludes counties as eligible claimants for part of the mandate.

Mr. Feller explained that there was a direct statutory basis for the county exclusion. He stated that the test claim statute applies to law enforcement that put on evidence in criminal trials but does not mention school districts, community college districts, or special districts. Thus, staff determined that more analysis would be required at the parameters and guidelines phase to determine whether the statute applies to the districts.

Chairperson Sheehan encouraged the Department of Finance to provide any necessary information during the parameters and guidelines phase.

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

Item 7 Proposed Statement of Decision
 Photographic Record of Evidence, 04-RL-9807-09 (98-TC-07)
 See Above

Eric Feller, Commission Counsel, presented this item. He indicated that unless there were objections, staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the test claim decision. Staff also recommended that the Commission allow minor changes to be made to the final Statement of Decision, including the hearing testimony and vote count.

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

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

Item 8 *Standardized Testing and Reporting (STAR)*, 04-RL-9723-01
Education Code Sections 60607, subdivision (a), 60609, 60615, 60630, 60640,
60641, and 60643, as amended by Statutes 1997, Chapter 828 (SB 376);
Title 5, California Code of Regulations, Sections 850-874, 97-TC-23
Directed by Statutes 2004, Chapter 895, Section 19 (AB 2855)
(CONTINUED FROM MAY 26, 2005)

Eric Feller, Commission Counsel, presented this item. He stated that currently, the *Standardized Testing and Reporting* program, or STAR, consists of four sets of tests: 1) the Spanish Assessment of Basic Education, Second Edition (SABE/2); 2) the California Achievement Tests, Sixth Edition Survey (CAT/6); 3) the California Standards Tests; and 4) the California Alternate Performance Assessment for handicapped people. However, he explained that when the original test claim was filed in 1998, the STAR program only consisted of the SABE/2 and CAT/6. Therefore, staff found that the Commission's jurisdiction in this reconsideration was limited to SABE/2 and CAT/6.

Mr. Feller indicated that the findings from the May hearing were unchanged as to the activities required under the federal Individuals with Disabilities Education Act and the Equal Education Opportunity Act, which are as follows:

- Activities required under the Individuals with Disabilities Education Act.
 1. exempting testing for pupils, if the pupil's individualized education program has an exemption provision;
 2. determining the appropriate grade-level test for each pupil in a special education program; and
 3. providing appropriate testing adaptation or accommodations to pupils in special education programs.
- Activity required under the Equal Education Opportunity Act.
 1. administering an additional test – SABE/2 – to limited-English proficiency pupils enrolled in grades 2 through 11.

Because the SABE/2 is required under federal law, Mr. Feller explained that it is not a reimbursable state mandate; thus, only the CAT/6 was left for analysis. He noted that in the prior analysis, the issue was whether the STAR program was a federal mandate under the federal No Child Left Behind Act. However, he stated that this inquiry was no longer relevant because the CAT/6 is not required by any federal law. Therefore, staff found that the CAT/6 is a reimbursable state mandate. Staff also found that federal Title VI funds and state general funds must be used to offset the CAT/6 administration, even though it is referred to as the STAR program in the budget.

Mr. Feller stated that the Department of Finance requested postponement of this item because of proposed legislation that would clarify legislative intent regarding the effective date of the reconsideration and prior appropriations for the STAR program. The executive director denied the request because enactment of the legislation at this point is speculative, and therefore, does not meet the definition of good cause, which the Commission's regulations require for continuance of agenda items.

Staff recommended that the Commission adopt the staff analysis, which partially approves the prior adopted Statement of Decision.

Parties were represented as follows: Art Palkowitz, on behalf of the San Diego Unified School District; David Scribner, on behalf of the Grant Joint Union High School District; Paul Warren, with the Legislative Analyst's Office; Gerry Shelton, with the California Department of Education; and Pete Cervinka and Lenin Del Castillo, with the Department of Finance.

Mr. Palkowitz raised a concern regarding the reimbursement period in the event that the Department of Finance's proposed legislation is subsequently enacted. Ms. Higashi stated that staff would decide the issue depending on what the legislation says and what the Commission does.

Mr. Feller noted that staff proposed a reimbursement period beginning July 1, 2004. However, he stated that he would have to research how legislative intent works retroactively applied in the event of a subsequently-enacted bill.

Chairperson Sheehan asked the Department of Finance for information about the request and the status of the legislation. Mr. Del Castillo responded that the language is expected to be included in a technical education omnibus bill and should be passed before the end of the 2005 legislative year. Mr. Cervinka added that the language did not make it into a budget trailer bill, but it would be addressed through technical cleanup legislation. He argued that this forthcoming legislation would clarify the Legislature's intent for the Commission to reconsider its decision retroactively to the beginning of the claim period.

Mr. Warren stated that a staff member for Assemblyman Laird who assisted in the development of the bill confirmed the understanding that the reconsideration was to be a complete review of all claims going back to 1997.

Mr. Scribner argued that the legislation has a substantial impact on the decision and he felt that all parties should be entitled to a transparent process. He asked that the Commission staff be informed so that they can in turn inform individuals on the STAR program mailing list.

Mr. Starkey responded that the Commission and staff, as an administrative agency, could not be brought into the legislative process. He maintained that the Commission's concern is to preserve its own process and to act in a way that makes the most sense in light of the matters being presented.

Mr. Scribner clarified that he was not asking the Commission to be involved, but just for notification. He argued that the issue was huge and quick determinations should not occur without there being some discourse.

Chairperson Sheehan stated that the Commission would decide, after all testimony, to take action today or delay action. She felt it was an important issue and because it was already postponed once, she wanted to make sure everyone had the opportunity to testify. She also stated that she agreed with Mr. Starkey, noting that individually each Commissioner could weigh in on legislation, but that was not their role here today. Instead, she encouraged Mr. Scribner to communicate his interest by talking to the individuals involved in the legislation.

Mr. Cervinka added that the Department of Finance noticed its intent regarding the reimbursement period language in its comments to the Commission.

Mr. Starkey noted that the executive director denied a request to have the matter continued. Thus, he stated that depending on what the Commission decides, the issue of why the

Commission is overruling the executive director's decision may need to be addressed.

Mr. Palkowitz argued that the information provided by the California Department of Education after the May hearing failed to show that the state faces severe and certain penalties, and thus, failed to show that STAR was a federal mandate. He noted that the documentation indicated somewhat of a commendation that the California program is doing well and that only two other states have been penalized. Regarding staff's position that the SABE/2 test is not a state mandate, Mr. Palkowitz disagreed. He asserted that the Equal Education Opportunities Act is a broad statute to discourage discrimination. He stated that school districts have to test English learners otherwise it would be discrimination. Moreover, Mr. Palkowitz disagreed with staff's analysis regarding the offsetting of Title VI funds.

Mr. Scribner raised a concern about the Commission's jurisdiction to analyze the STAR program as it currently exists. Although he technically agreed with the staff analysis, he argued that the tests involved were irrelevant because the issue was whether the STAR program was federally mandated under the No Child Left Behind Act.

Mr. Warren supported the continuance of the matter because he felt that the reason why the Legislature requested the Commission to reconsider the decision was to look at the issues related to federal law. He stated that because the proposed Statement of Decision eliminates those issues, further clarification from the Legislature would be helpful. Further, Mr. Warren submitted that by separating the different parts of the STAR program, school districts may be precluded from filing claims for the other tests.

Mr. Warren also said that federal law requires certain and severe consequences for a program to constitute a mandate, but he felt that the test Mr. Palkowitz referred to was unreasonable and argued that it must be looked at from a broader standpoint.

Mr. Shelton asserted that it was overly simplistic to conclude that no threats of penalties exist because the federal government has not assessed penalties on California with respect to the implementation of the No Child Left Behind Act. He noted that any positive comments in the documentation indicated that the California Department of Education is able to implement programs even in an environment of compulsion and coercion. He argued that \$3 billion of federal money is at risk and the California Department of Education feels required to put the programs under the No Child Left Behind Act in place.

Mr. Feller stated that the discussion about the No Child Left Behind Act and whether it is a federal mandate is no longer relevant because the program at issue, the CAT/6, is not required by any federal program. Therefore, the federal penalties in the No Child Left Behind Act are not relevant. He indicated that the staff analysis makes no finding as to whether or not the No Child Left Behind Act is a federal mandate.

Regarding Mr. Palkowitz's comments about the Equal Education Opportunities Act, Mr. Feller noted that the courts have interpreted it to mean that foreign language testing is required. As far as the issue of offsetting Title VI funds, Mr. Feller stated that the Commission was bound by the language in the state budget, which requires the Title VI funds be used to offset the mandated program, or the CAT/6 administration.

With regard to Mr. Scribner's comments, Mr. Feller maintained that the Commission had limited jurisdiction. He explained that no test claim had been filed on the other two STAR tests, and therefore, the issue was whether the program, as it was enacted in 1997, was a federal mandate. In response to Mr. Scribner's contention that it did not matter what tests were involved,

Mr. Feller noted that the *Hayes* case states that it does matter because if the state freely chooses to impose a requirement on local agencies, then it becomes a state mandate. He repeated that the CAT/6 is not required under federal law.

Mr. Feller indicated that any opinion by the Commission on the No Child Left Behind Act would be an advisory opinion at this point.

Chairperson Sheehan asked whether the proposed legislation only addresses the issue of retroactivity. Mr. Cervinka responded that the intent was to address the retroactivity issue for reconsideration. However, he added that he would not preclude the language from also clarifying legislative intent. He maintained that although there is no language in print, the Department of Finance fully intends to see the retroactivity issue addressed in legislation, as well as the Legislature's intent as to the scope of the reconsideration.

Ms. Higashi asked Mr. Warren to clarify his earlier concern about school districts being precluded from filing claims for the other tests pursuant to subsequent amendments to the STAR program's statutes. Mr. Warren explained his concern and noted that the size of the claims in the last few years indicated that districts were claiming on the program as a whole, rather than for those portions under the original law.

Ms. Higashi noted that the subject of the test claim is a 1997 statute and implementing regulations. She clarified that the statute referenced by Mr. Warren was not included in the test claim, and therefore, the issue he raised about higher costs being claimed would be an audit issue for the State Controller's Office.

Chairperson Sheehan stated that the Commission could take action today or delay action to the next hearing; however, she commented that it was very speculative in terms of whether there is legislation. Ms. Higashi added that the Commission could also partially decide an issue, but indicated that if the Commission did take action today, any language from the Legislature could be worded differently based on whatever the Commission decides. For instance, she stated that the direction could be to amend, modify, set-aside, or start over.

Mr. Cervinka asked a clarifying question, to which Ms. Higashi explained her assumption that if the Commission took action, the Legislature would be aware of the action and would draft language accordingly to reflect the current situation. Chairperson Sheehan agreed that such direction was within the Legislature's prerogative.

Mr. Feller maintained that a legislative requirement for the Commission to determine whether the No Child Left Behind Act is a federal mandate would not change the staff recommendation because the Commission's jurisdiction is limited to the prior reconsideration. Mr. Cervinka asked a technical question about the auditing of claims, to which Mr. Feller responded that the State Controller has the authority to do so.

Mr. Starkey noted that if the Commission were to make a decision, the next phase would be adoption of the Statement of Decision, in which the sole issue is whether or not it accurately reflects the Commission's decision. He stated that the Commission could also separate the issues or hold the whole matter open. If the matter is held over, he believed that the parties have the opportunity to comment on what has been presented thus far. As to the issue of good cause, he felt that there was additional information provided at this hearing that gives the Commission a wide discretion to decide whether or not to continue the matter.

Mr. Cervinka stated that the proposed legislation was, in fact, speculative and could be adjusted to reflect any action the Commission takes. Therefore, he withdrew the Department of Finance's request to postpone the matter.

With the understanding that the Legislature can react to the Commission's decision, Member Boel made a motion to adopt the staff analysis. With a second by Member Glaab, the motion carried unanimously.

- Item 9 Proposed Statement of Decision
Standardized Testing and Reporting (STAR), 04-RL-9723-01
See Above
(CONTINUED FROM MAY 26, 2005)

Eric Feller, Commission Counsel, presented this item. He indicated that unless there were objections, staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the test claim decision. Staff also recommended that the Commission allow minor changes to be made to the final Statement of Decision, including the hearing testimony and vote count.

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

- Item 10 *School Accountability Report Cards I*, 04-RL-9721-11
Education Code Sections 33126, 35356, 35256.1, 35258, 41409 and 41409.3,
Statutes 1989, Chapter 1463 (SB 280); Statutes 1992, Chapter 759 (AB 1248);
Statutes 1993, Chapter 1031 (AB 198), Statutes 1994, Chapter 824 (SB 1665);
Statutes 1997, Chapter 918 (AB 568), 97-TC-21
Directed by Statutes 2004, Chapter 895, Section 18 (AB 2855)
(CONTINUED FROM MAY 26, 2005)

Katherine Tokarski, Commission Counsel, presented this item. She noted that the Commission adopted its original Statement of Decision on April 23, 1998, but AB 2855 directs the Commission to reconsider this prior final decision. She also noted that this matter was originally heard for reconsideration at the May 26, 2005 hearing, resulting in a tie vote.

Ms. Tokarski stated that in enacting Proposition 98, the Classroom Instructional Improvement and Accountability Act, the voters provided public schools with state funding guarantees. As part of the constitutional funding guarantee, the voters required schools to undergo an annual audit and to issue an annual school accountability report card. She stated that the test claim was filed on statutory amendments to the Proposition 98 requirements for a school accountability report card. However, staff found that the Commission does not have authority to reconsider its decision on Statutes 1997, chapter 912 because it was not specifically named in AB 2855.

Ms. Tokarski indicated that Government Code section 17556, subdivision (f), was amended by Statutes 2005, chapter 72, effective July 19, 2005. The amendment provides that the Commission shall not find costs mandated by the state if the test claim legislation was expressly included in a ballot measure or imposes duties that are necessary to implement or that are reasonably within the scope of a ballot measure approved by voters in a statewide or local election. Thus, she stated that pursuant to applicable case law, article XIII B, section 6, and Government Code section 17556, subdivision (f), the Commission must find that the state is imposing newly required activities on school districts beyond the scope of those already imposed by voters through ballot measures in order for the test claim statutes under reconsideration to

require reimbursement.

Ms. Tokarski noted that School Innovations and Advocacy contends that the Commission cannot consider Government Code section 17556, subdivision (f), in its reconsideration because AB 2855 explicitly requests reconsideration in light of only federal statutes enacted and state court decisions rendered since the statutes in the original test claim were enacted. Staff finds that while the Commission's jurisdiction on the *School Accountability Report Cards* program is limited, the Commission must rely on the entire body of applicable existing law including current federal constitutional, case, and regulatory law; as well as state constitutional, statutory, and regulatory law when conducting its reconsideration. She added that Government Code section 17556, subdivision (f), was passed as urgency legislation and the Commission is required to apply the law.

However, Ms. Tokarski explained that staff's recommendation was not based solely on the amendment to Government Code section 17556, subdivision (f). Staff also found that by requiring some new data elements and a new method for publicizing and distributing the existing school accountability report card, the state has not shifted from itself to school districts the burdens of state government when the directive can be complied with by a minimal reallocation of resources, as described by the court in a 2003 decision, *County of Los Angeles v. Commission on State Mandates*. Based on this controlling case law, staff found no higher level of service or costs mandated by the state.

As another ground for finding no costs mandated by the state, Ms. Tokarski stated that in *Department of Finance v. Commission on State Mandates*, the California Supreme Court found that the availability of state program funds precludes a finding of a reimbursable state mandate. Staff finds that there is a unique relationship between the voter-enacted school accountability report card requirement and the Proposition 98 school funding guarantee. Therefore, the billions of dollars in state funds received under Proposition 98 are equivalent to program funds that can be used for the purpose of completing the annual school accountability report card.

Ms. Tokarski noted that school districts have not demonstrated that the state funds received were unavailable for the claimed additional costs of providing the school report card.

Therefore, staff found that the statutes subject to reconsideration do not impose a new program or higher level of service on school districts and do not impose costs mandated by the state. Staff recommended that the Commission adopt the staff analysis to deny the reconsidered portions of the original test claim decision.

Parties were represented as follows: Abe Hajela, with School Innovations and Advocacy; Richard Hamilton, with the California School Boards Association and the Education and Legal Alliance; Robert Miyashiro, with the Education Mandated Cost Network; Estelle Lemieux, with the California Teachers Association and on behalf of the Education Coalition; and Pete Cervinka and Lenin Del Castillo, with the Department of Finance.

Mr. Hajela acknowledged that Government Code section 17556, subdivision (f), changed but argued that when the Commission was asked to reconsider this matter, it was asked to do so on the basis of recently enacted federal statutes or state court decisions. As to staff's position regarding the minimal cost issue, he believed that it was the Commission's job to figure out the cost and to assess whether or not it is minimal. Finally, he disagreed with staff's view of the relationship between Proposition 98 and the *School Accountability Report Card* program because it was not based on any case law. He asserted that there was no case saying that Proposition 98 program funds are just for school accountability report cards.

Mr. Hamilton concurred with Mr. Hajela's comments. He disagreed with staff's reliance on Government Code section 17556, subdivision (f), because there was no opportunity for public comment to point out the impact of such a change.

Regarding the issue about the minor reallocation of resources, Mr. Miyashiro pointed out that the staff analysis includes a discussion about claims that exceed \$5 million, an amount that is not minor for schools to bear. He contended that Proposition 98 makes no appropriation whatsoever. Rather it establishes a constitutional minimum funding level for K-14 education, and it also provides for the Legislature to suspend the amount or provide an amount less than the minimum guarantee. Thus, he felt it was a stretch to argue that a minimum constitutional guarantee for funding constituted program funds.

Moreover, regarding staff's position that school districts have not demonstrated that the state funds received were unavailable for the claimed additional costs of providing the school report card, Mr. Miyashiro asserted that school districts would be unable to make such a demonstration in any case for any program. He contended that staff was using a circular argument.

Ms. Lemieux concurred with the previous testimony.

Mr. Del Castillo commented that the *School Accountability Report Card* program was established by a statewide ballot measure and had the recognition that elements of the program would be subject to change. Thus, he stated that it was not a reimbursable state-mandated program.

Mr. Cervinka added that the amendments to Government Code section 17556, subdivision (f), were included in AB 138, a general trailer bill necessary to implement the budget. He asserted that the legislation was not necessary to provide grounds for the Commission to decide that this program did not constitute a reimbursable state mandate. Mr. Hajela disagreed.

Chairperson Sheehan noted that at the May hearing, before the law was changed, she voted in support of the staff analysis and felt it was justified.

Ms. Tokarski stated that it would be impossible to do an analysis that was limited to federal statutes and state court decisions because it would leave out the state constitution and the Government Code. She noted that it would be a violation of the Commission's duty if the Commission were to ignore current enacted law when making a determination. Regarding the program funds issue, she stated that the analysis of Proposition 98 funding was specific to an analysis of the *School Accountability Report Card* program because it was established as part of Proposition 98. She indicated that based on current law, it was not staff's intention for the recommendation to apply to all future education claims.

Member Smith commented that the amendment to Government Code section 17556, subdivision (f), was not an issue for the State Controller. However, he noted that the Commission cannot enlarge the plain text of what is actually in statute, which clearly says federal law and state case law. He recommended that the Legislature be appropriately notified of the issue so that clarification can be made by including some reference to mandates law in general.

Member Boel made a motion, which was seconded by Member Glaab, to adopt the staff analysis. The motion carried 3-2, with Member Smith and Member Lujano voting "No."

- Item 11 Proposed Statement of Decision
School Accountability Report Cards I, 04-RL-9721-11
See Above
(CONTINUED FROM MAY 26, 2005)

Katherine Tokarski, Commission Counsel, presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflects the reconsidered test claim decision. Minor changes to reflect the hearing testimony and vote count will be included in the final Statement of Decision.

Member Boel made a motion, which was seconded by Member Glaab, to adopt the proposed Statement of Decision. The motion carried 3-2, with Member Smith and Member Lujano voting "No."

STAFF REPORTS

- Item 23 Chief Legal Counsel's Report (info)
Recent Decisions, Litigation Calendar

Paul Starkey, Chief Legal Counsel, reported that there were no updates.

- Item 24 Executive Director's Report (info/action)
New Budget, Workload, Legislation
Hearing Calendar – 2006 (action)

Ms. Higashi reported the following:

- *Budget and Legislation.* Staff received the appropriation for additional staff positions and is now in the process of developing plans and duty statements. Staff will begin recruitment to fill the positions.

The State Controller's Office budget received 10 new positions, nine of which are audit positions for mandate reimbursement claims. She stated that this could result in an increased incorrect reduction claim workload for the Commission.

AB 138 directs the Commission to reconsider the *Mandate Reimbursement Process* program. The mandate is deferred for school districts and suspended for local agencies.

The Statements of Decision adopted at this hearing will be reported to the Legislature.

Regarding the Department of Finance study referenced by Ms. Cruz in an earlier presentation, Ms. Higashi indicated that Commission staff was available to help and to participate in the process. Chairperson Sheehan suggested that in working with the Department of Finance, the Commission should have a special meeting to get feedback from people about the mandates process.

- *Next Hearing.* The September hearing date was changed to Tuesday, September 27.
- *2006 Hearing Calendar.* Ms. Higashi presented a proposed hearing calendar for 2006 to allow the members time to discuss and work out any scheduling conflicts.

PUBLIC COMMENT

There was no public comment.

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. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01069, CSM Case No. 03-L-01, consolidated with *County of Los Angeles v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS087959, transferred to Sacramento Superior Court, Case No. 05CS00865, CSM Case No. 03-L-11 [*Animal Adoption*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
3. *San Diego Unified School District v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01401, CSM Case No. 03-L-03 [*Graduation Requirements IRC*]
4. *Castro Valley Unified School District v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01568, CSM Case No. 03-L-04 [*Graduation Requirements IRC*]
5. *San Jose Unified School District v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01569, CSM Case No. 03-L-05 [*Graduation Requirements IRC*]
6. *Sweetwater Union High School District v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01570, CSM Case No. 03-L-06 [*Graduation Requirements IRC*]
7. *Clovis Unified School District v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01702, CSM Case No. 03-L-09 [*Graduation Requirements IRC*]
8. *Grossmont Union High School District v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 04CS00028, CSM Case No. 03-L-10 [*Graduation Requirements IRC*]
9. *CSAC Excess Insurance Authority v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS092146, CSM Case No. 04-L-01 [*Cancer Presumption for Law Enforcement and Firefighters and Lower Back Injury Presumption for Law Enforcement*], consolidated with *City of Newport Beach v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS095456, CSM Case No. 04-L-02 [*Skin Cancer Presumption for Lifeguards*]
10. *County of Los Angeles, et al. v. Commission on State Mandates, et al.*, Second District Court of Appeal [Los Angeles] Case Number B183981, CSM Case No. 04-L-03, (Los Angeles Superior Court Nos. BS089769, BS089785) [*Transit Trash Receptacles, et al./Waste Discharge Requirements*]

11. *Southern California Association of Governments, et al. v. Commission on State Mandates*, Sacramento Superior Court Case No. 05CS00956, CSM Case No. 04-L-04 [*Regional Housing Needs Determination-Councils of Government*]

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 Sheehan 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 Sheehan 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, and upon motion by Member Glaab and second by Member Smith, Chairperson Sheehan adjourned the meeting at 12:01 p.m.



PAULA HIGASHI
Executive Director

PUBLIC HEARING
COMMISSION ON STATE MANDATES

--o0o--



TIME: 9:33 a.m.
DATE: July 28, 2005
PLACE: State Capitol, Room 126
Sacramento, California

--o0o--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ORIGINAL

--o0o--

Reported By: YVONNE K. FENNER, CSR License #10909, RPR

Yvonne K. Fenner & Associates
CERTIFIED SHORTHAND REPORTERS

(916) 531-3422
Fax (916) 457-8369 yfennercsr@aol.com
2256 Murieta Way, Sacramento, California 95822

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A P P E A R A N C E S

COMMISSION MEMBERS

ANNE SHEEHAN, Chairperson
Representative of Tom Campbell, Director
State Department of Finance

NICHOLAS SMITH
Representative of Steve Westly
State Controller

JAN BOEL
Deputy Director, Office of Planning and Research

PAUL GLAAB
City Council Member
Laguna Niguel City Council

FRANCISCO LUJANO
Representative of Philip Angelides
State Treasurer

COMMISSION STAFF

PAULA HIGASHI, Executive Director
CATHERINE M. CRUZ, Program Analyst
ERIC FELLER, Commission Counsel
NANCY PATTON, Assistant Executive Director
CAMILLE SHELTON, Senior Commission Counsel
KATHERINE TOKARSKI, Commission Counsel

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2 PETE CERVINKA, Principal Program Budget Analyst
State of California, Department of Finance
3
4 LANCE CHRISTENSEN
State of California, Department of Fiance
5
6 LENIN DEL CASTILLO, Finance Budget Analyst
State of California, Department of Finance
7
8 ABE HAJELA
School Innovations and Advocacy
9
10 RICHARD HAMILTON
California School Boards Association
11
12 ESTELE LEMIEUX, Lobbyist
California Teachers Association
13
14 ROBERT MIYASHIRO
Education Mandated Cost Network
15
16 ARTHUR M. PALKOWITZ, Manager
Office of Resource Development
San Diego City Schools
17
18 DAVID E. SCRIBNER, Esq., President/CEO
Scribner Consulting Group, Inc.
19
20 GERALD SHELTON,
State of California, Department of Education
21
22 ZLATKO R. THEODOROVIC, Principal Program Budget Analyst
State of California, Department of Finance
23
24 PAUL WARREN,
State of California, Legislative Analyst's Office
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ERRATA SHEET

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Page	Line	Correction
<u>2</u>	<u>17</u>	Put in the name Paul M. Starkey, chief legal counsel.
<u>12</u>	<u>4</u>	Added the word <u>director</u> after assistant executive.
<u>13</u>	<u>3</u>	- Added the word <u>the</u> after <u>of</u> and before mandates. - Took out the <u>s</u> in issues and made it issue.
<u>13</u>	<u>5</u>	Crossed off the word <u>the</u> & changed it to <u>our</u> ,
<u>16</u>	<u>15</u>	Added the word <u>to</u> between and & individual.
<u>20</u>	<u>1</u>	Took out Hobart (phonetic) & replaced it with POBAR.
<u>20</u>	<u>18</u>	Put in <u>and</u> before Disabled.
<u>26</u>	<u>12</u>	Took out the <u>i</u> in christiensen & made it christensen.
<u>31</u>	<u>8</u>	Took out boiler & put boiler plate
<u>36</u>	<u>24</u>	Put the word <u>analysis</u> after prior,
<u>48</u>	<u>6</u>	Added <u>E</u> to CD & made it CDE
<u>48</u>	<u>11</u>	Added <u>E</u> to CD & Made it CDE
<u>54</u>	<u>4</u>	Added <u>E</u> to CD & Made it CDE

1 BE IT REMEMBERED that on Thursday, the 28th
2 day of July 2005, commencing at the hour of
3 9:33 a.m., thereof, at the State Capitol, Room 126,
4 Sacramento, California, before me, Yvonne K. Fenner,
5 a Certified Shorthand Reporter in the State of
6 California, the following proceedings were had:

7 --o0o--

8 CHAIRPERSON SHEEHAN: I would like to call the
9 Commission on State Mandates July 28th hearing to order.
10 Before we call the roll, I would like to welcome our
11 newest member. Is this on? How's that? Can you hear me
12 now? Is that better? How about that?

13 All right. So we'll call the meeting of State
14 Mandates July 28th hearing to order. I'd like to welcome
15 Paul Glaab, our newest member of the Commission. Paul is
16 a city council member for the City of Laguna Niguel.
17 Welcome.

18 MR. GLAAB: Thank you very much.

19 CHAIRPERSON SHEEHAN: We're glad to have you. I
20 don't know if you'd like to say anything or let the
21 audience know what your background is.

22 MR. GLAAB: Well, thank you, Madame Chairman and
23 Members. It's my first meeting, and certainly it's a
24 pleasure and an honor to be here, to be selected by the
25 Governor to serve on this Commission. I used to work in

1 Sacramento and worked actually here in the Capitol, so
2 it's interesting to come back and be sitting in this
3 chair.

4 But I hale from the city of Laguna Niguel down in
5 south Orange County. I've received many, many comments,
6 letters, and e-mails that they're glad that they have a
7 city representative, so I'm very, very honored to be
8 here, and I want to thank everybody for their support,
9 and I look forward to working with you. Thank you.

10 CHAIRPERSON SHEEHAN: Thanks. Welcome.

11 Paula, would you call the roll?

12 MS. HIGASHI: Certainly.

13 Ms. Boel.

14 MS. BOEL: Here.

15 MS. HIGASHI: Mr. Glaab.

16 MR. GLAAB: Here.

17 MS. HIGASHI: Mr. Lujano.

18 MR. LUJANO: Here.

19 MS. HIGASHI: Mr. Smith.

20 MR. SMITH: Here.

21 MS. HIGASHI: Ms. Sheehan.

22 CHAIRPERSON SHEEHAN: Here.

23 We have a quorum.

24 The first item.

25 MS. HIGASHI: The first item, we have the

1 minutes, item 1A, the minutes of May 26th, and 1B, the
2 minutes for June 10th, before you for approval.

3 CHAIRPERSON SHEEHAN: Okay.

4 MR. SMITH: I move approval.

5 CHAIRPERSON SHEEHAN: All right.

6 MS. BOEL: I second.

7 CHAIRPERSON SHEEHAN: We have a motion and a
8 second. Does anyone have any corrections to the minutes
9 before we vote?

10 (No audible response.)

11 CHAIRPERSON SHEEHAN: All right, a motion and a
12 second. All those in favor, signify by saying "aye."

13 MULTIPLE SPEAKERS: Aye.

14 CHAIRPERSON SHEEHAN: Any opposed?

15 (No audible response.)

16 CHAIRPERSON SHEEHAN: The minutes are approved.

17 MS. HIGASHI: And Mr. Glaab, should I note you as
18 an abstention?

19 CHAIRPERSON SHEEHAN: Yeah.

20 MR. GLAAB: Oh, that's right. Thank you very
21 much.

22 CHAIRPERSON SHEEHAN: Okay.

23 MS. HIGASHI: The next item of business is the
24 proposed consent calendar, and we have a list before you.
25 It's on blue paper, and it's items 12, 13, 14, 15, 16,

1 17, 18, 19, 20, 21, and 22.

2 CHAIRPERSON SHEEHAN: Okay. So are there any
3 objections to the proposed consent calendar? If not,
4 we'll entertain a motion.

5 MS. BOEL: I move that we adopt the consent
6 calendar as passed -- as proposed.

7 CHAIRPERSON SHEEHAN: As proposed. Is there a
8 second?

9 MR. GLAAB: Second.

10 CHAIRPERSON SHEEHAN: We have a motion and a
11 second. All those in favor say "aye."

12 MULTIPLE SPEAKERS: Aye.

13 CHAIRPERSON SHEEHAN: Any opposed? Abstentions?
14 (No audible response.)

15 CHAIRPERSON SHEEHAN: So the consent calendar is
16 taken care of.

17 MS. HIGASHI: All right. We have -- at this time
18 there are two items that are on the agenda that normally
19 would come up during my report at the very end of the
20 meeting, but because of the ordering of the agenda items
21 today, I wanted to be sure that we had these items early
22 in the meeting so everybody could hear what is being
23 discussed.

24 CHAIRPERSON SHEEHAN: Sure.

25 MS. HIGASHI: And the first item is in your

1 binders. You may note that we gave you a copy of Cathy
2 Cruz, of our staff's, thesis. And we had invited her
3 here today to give a brief overview of it. And Nancy
4 Patton, assistant executive, who is her supervisor, will
5 introduce this.

6 CHAIRPERSON SHEEHAN: Great. Thanks.

7 MS. PATTON: Morning.

8 CHAIRPERSON SHEEHAN: Morning.

9 MS. PATTON: I think most people here today know
10 Cathy Cruz. She's an extremely talented program analyst
11 with the Commission, and she's primarily responsible for
12 the analysis of parameters and guidelines and incorrect
13 reduction claims and statewide cost estimates. In May
14 2005 she obtained her Master's degree in public policy
15 and administration and, believe it or not, she did her
16 thesis on the State Mandates process. So we're here
17 today to introduce Cathy.

18 And Cathy, we just wanted to tell from you Paula
19 and I and all your coworkers how proud we are of you and
20 how we congratulate you. And we know how hard it is to
21 work full time and go to school full time and to study
22 mandates day and night.

23 MS. CRUZ: Thank you. Thank you, Paula and
24 Nancy. I'm still here, so I guess it was okay, it wasn't
25 that bad.

1 Good morning, Members. Good morning, ladies and
2 gentlemen. My thesis provides a comprehensive briefing
3 of mandates issues so that policymakers currently
4 involved in the discourse can make better-informed
5 decisions about mandates reform in the state. My study
6 describes our mandates process based on statutes, case
7 law, and regulations. It examines various reports issued
8 by the Bureau of State Audits, the Legislative Analyst's
9 Office, and the California Performance Review. And it
10 highlights the major problems surrounding mandates reform
11 in California. To better understand the problem, my
12 thesis also examines mandate provisions in other states
13 with particular emphasis on a mandate study conducted in
14 Minnesota.

15 Our mandate reimbursement system here in
16 California is not the effective system that was intended
17 by our legislature back in 1985. The discourse in
18 California was focused only on specifics of the process
19 framing two issues: First, that mandates are costing the
20 state much more than expected, and second, that the
21 process is never completed within the 12-month statutory
22 time line.

23 Now, California's current process has resulted in
24 an approximate \$2-billion state debt to local
25 governments, and the legislature is not informed of such

1 costs until an average of about five years after a
2 program's implementation. My study concludes, however,
3 that the issues of high cost and process delays can be
4 reconceptualized as subproblems that stem from a much
5 larger problem lying outside the mandates process. There
6 is a fundamental problem with the system itself and with
7 the relationship between state and local government.

8 My study uses four criteria to evaluate options
9 for addressing the mandates problem in California:
10 First, does it create incentives to perform or
11 consequences for inaction? Two, does it reduce overall
12 uncertainty? Three, does it make mandates costs more
13 predictable? And finally, does it make the legislature
14 aware of mandate costs earlier?

15 I suggest a two-part approach for addressing the
16 mandates problem in our state. Lawmakers must first
17 improve the system and the relationships and then modify
18 the specifics of the mandates process as needed.

19 The first step in effective reform is to address
20 the fundamental flaws of the system and of the
21 relationships. To improve the system and relationships
22 we must transform the disincentives into incentives to
23 perform. And also, trust between state and local
24 government must be developed to restore confidence in the
25 mandates system. Practicing collaboration, coupled with

1 delaying the effective date of mandates to provide time
2 for collaboration, can meet these challenges. However,
3 successful collaboration requires the State's top leaders
4 to make a commitment to improving working relationships
5 with local government. Furthermore, the State should
6 encourage stakeholder participation in the process by
7 creating additional incentives to perform or consequences
8 for inaction.

9 Once the fundamentals of the system and
10 relationships are sound, then the mandates process can be
11 modified and improved. At least three options would be
12 worthwhile for California to consider because they would
13 make mandate costs more predictable and inform the
14 legislature of these mandate costs sooner. They are
15 adopting mandate explanations, pilot projects, and sunset
16 language. These recommendations also address the process
17 issues identified by current discourse.

18 It is essential that policymakers address the
19 fundamental flaws of the mandates system and the
20 relationships before modifying the overall process.
21 Tinkering with a process before addressing the underlying
22 problem only results in temporary, Band-Aid solutions.
23 Eventually the problem will resurface. Additionally,
24 government officials must be reminded that they are
25 ultimately accountable to the people of California. The

1 public is not concerned about the power struggles between
2 state and local government. They are only concerned with
3 how well government carries out its duties.

4 So by practicing collaboration and delaying
5 mandate effective dates, by requiring mandate
6 explanations, implementing pilot projects, and using
7 sunset language, lawmakers can ensure an effective
8 mandate system in California because the problems and
9 concerns would be addressed before the mandates are
10 implemented and before the Commission on State Mandates
11 process for determining reimbursement even begins.

12 As you know, since the establishment of the
13 Assembly Special Committee on State Mandates in 2002, the
14 governor and the legislature have been reviewing and
15 making changes to the existing process and individual
16 mandates. The 2005/2006 budget directs the Department of
17 Finance to evaluate the current mandates reimbursement
18 process and to provide alternatives and suggest process
19 improvements to the chairperson of the fiscal committees
20 of each house of the legislature and to the chairperson
21 of Joint Legislative Budget Committee by March 1 of 2006.
22 It is my hope that the information and recommendations
23 contained in my thesis will be considered and that it
24 will assist all parties in the reform process.

25 Thank you very much for the opportunity to share

1 my thesis with you all.

2 MR. SMITH: Move approval.

3 CHAIRPERSON SHEEHAN: Yes. Thank you. And thank
4 you for your work on this because I think the suggestions
5 you made are things that we can take into account as we
6 put the group together. I know from having worked with
7 the legislature on the review process for the Mandates
8 Commission, it is a very important step that we're taking
9 to make suggestions so any and all input from interested
10 parties will be welcome in this. So thank you for your
11 work.

12 MS. BOEL: I hope you're sending that to
13 interested parties. Are you going to be sending your
14 thesis --

15 MS. CRUZ: There is a plan to, yes.

16 MS. BOEL: Great.

17 CHAIRPERSON SHEEHAN: Great. So thank you.

18 And --

19 MS. HIGASHI: And I have a second special item.
20 And this is one of those items that we don't do often
21 enough, but I'm very pleased about. And because of the
22 work we do and the role of our staff, I wanted to do this
23 in public because I believe that it's important to all of
24 us and recognition should be done publicly.

25 The Commission today is honoring Camille Shelton,

1 Senior Commission Counsel, as the first recipient of the
2 State of California's Sustained Superior Accomplishment
3 Award. This award is for sustained superior job
4 performance resulting in an exceptional contribution to
5 the efficiency of state government in the area of mandate
6 determination. In addition to a commemorative plaque,
7 Camille will receive a cash award of \$250.

8 As you all know and many of you in the audience
9 who have been here as long as Camille has been on our
10 staff, she has been here since 1997. And during that
11 entire period of time, she has provided excellent legal
12 advice and service to the Commission. However, as
13 established in state law for this award, this award is
14 actually presented for the limited period from December
15 2002 through April 2005.

16 Camille has always provided excellent
17 representation for the Commission in litigation, and
18 she's certainly represented the Commission in all levels
19 in the courts. She's -- if you've ever been to court and
20 you've seen her in action, she's an excellent advocate.
21 And even though she claims she's nervous, I've never seen
22 her nervous in the Supreme Court when trying to respond
23 to questions of Chief Justice or the other justices. And
24 she has gotten extra time for us on many occasions
25 because they're so engaged in the dialogue.

1 She's also analyzed the most difficult test
2 claims, including most recently the Handicapped and
3 Disabled Students Reconsideration as well as the second
4 test claim that was filed on that program. She's known
5 throughout the state and certainly in Sacramento as an
6 expert in mandates law. And she's developed excellent
7 relationships with all of the parties that she works with
8 through this process, and this expertise and her
9 relationships has resulted in Camille being a speaker and
10 a major participant in the mandates -- I should say the
11 mandates portion of the Office of Administrative Law's
12 training on rulemaking.

13 She's also participated in every meeting that we
14 have had to update legislative staff on mandates case
15 law. And she's frequently -- in fact, one time when we
16 cautioned Leg. staff that they needed to consult Leg.
17 Counsel for advice, one of the staffers suggested, "Well,
18 we could change the law to make her available to us."
19 And these are just a few examples.

20 And one other, sometimes our attorneys are called
21 on to do things that, you know, they're saying, well,
22 this really isn't legal or it shouldn't be in my duty
23 statement, whatever, and often it involves when they have
24 to work with auditors. And there were a couple of audits
25 that the Commission staff was involved in and that was

1 regarding the School Bus Safety, Hobart (phonetic), and
2 Animal Adoption Programs that the State Auditor was
3 involved in, and Camille was the staff attorney who
4 assisted us throughout that process and advising us and
5 counseling us on our responses with that program.

6 With that, I'd like to turn this over to Paul
7 Starkey who will give you a little bit more detail about
8 all of her cases and her accomplishments in litigation.

9 Congratulations, Camille.

10 MS. SHELTON: Thank you.

11 MR. STARKEY: Thank you, Paula, Members of the
12 Commission. As chief counsel, I have to say that I have
13 a great legal team and you have great representation. A
14 large part of that is because of Camille Shelton and the
15 work that she's done. This award is focused on a period
16 of time and for two specific things: Overall sustained
17 achievement in litigation and for her work on the
18 Handicapped Disabled cases.

19 As senior Commission counsel, Camille has
20 provided continuous, highly competent legal analysis and
21 counsel and staff recommendations to you, the Commission,
22 and in litigation. Her efforts, through careful research
23 and analysis, combined with her excellent writing have
24 helped the Commission articulate an increasingly clear
25 methodology for mandate determination, a methodology

1 which has been upheld by the courts.

2 During the period of this award, a record number
3 of Commission decisions were being contested in the
4 courts including two cases that went to the California
5 Supreme Court. Most of the cases involved judicial
6 review of the test claim decisions, but there were six
7 cases arising out of incorrect reduction claims for the
8 Graduation Requirements Program. Almost all of this
9 litigation involved untried complex legal issues relating
10 to mandate determination.

11 Because of Camille's ongoing excellent legal work
12 as demonstrated in the published decisions for Department
13 of Finance versus Commission on State Mandates, Kern High
14 School District 2003 and County of Los Angeles versus
15 Commission on State Mandates 2003, and in all of her
16 work, the Commission has received continuous effective
17 legal guidance. Camille's litigation efforts have
18 directly resulted in satisfying the Commission's policy
19 directive in Government Code section 17500 to render
20 sound quasijudicial decisions.

21 This award is also presented for Camille's
22 superior work on the Handicapped and Disabled Students
23 tests claims. In 2004, 2005 Camille analyzed and drafted
24 two separate legal recommendations concerning these test
25 claims. One recommendation involved a reconsideration of

1 the original test claim decision, Handicapped and
2 Disabled Students CSM 4282, that's an old number, which
3 was ordered by the legislature in SB 1895, which was an
4 urgency statute. The other recommendation, Handicapped
5 and Disabled Students II, involved amendments to the
6 original test claim legislation. These test claims
7 presented extraordinarily difficult legal work due to the
8 procedural histories of these claims combined with their
9 complexity and volume. Camille worked diligently and
10 tirelessly, often in my office talking with me, through
11 these very detailed complex statutes and regulations in
12 this program to provide the Commission with a well
13 reasoned and supported legal recommendation.

14 As a result of her efforts, the matters were
15 expedited and set for hearing before the end of the
16 fiscal year, this last fiscal year, 2004/2005, resulting
17 in compliance with the urgency statute and the pressing
18 need for the resolution of these matters by the
19 Commission.

20 For her sustained superior job performance, we're
21 pleased to recognize Camille with this award.

22 And Chairperson Sheehan, if you will make the
23 presentation.

24 CHAIRPERSON SHEEHAN: Sure.

25 Camille, we've got a plaque for you commemorating

1 this occasion. And before I give it to you, I'll read
2 it. Can people hear me? Hopefully.

3 The State of California Sustained Superior
4 Accomplishment Award is presented to Camille Shelton,
5 Senior Commission Counsel, for sustained superior job
6 performance and exceptional contribution to the
7 efficiency of state government.

8 So congratulations and thank you.

9 (Applause.)

10 I also have a letter for you from all of the
11 Commission members commemorating this and thanking you
12 for your hard work. We know from having sat through your
13 presentations in the hearings what a great job you do.
14 So thank you on behalf of the Commission as well as the
15 State.

16 MS. SHELTON: Thank you very much.

17 CHAIRPERSON SHEEHAN: Thank you, Camille.

18 (Applause.)

19 CHAIRPERSON SHEEHAN: Next item is No. 4.

20 MS. HIGASHI: Yes. We're now at the hearing
21 portion of our agenda. And as is customary, will all of
22 the parties and witnesses who will be coming up for
23 testimony on or representation on these items please
24 stand, and what we'll do is administer the oath. Would
25 you please raise your right hands. Do you solemnly swear

1 or affirm that the testimony which you're about to give
2 is true and correct based upon your personal knowledge,
3 information, or belief?

4 MULTIPLE SPEAKERS: Yes.

5 MS. HIGASHI: Thank you.

6 Our first item is item 4, and this item is the
7 reconsideration of the Extended Commitment - Youth
8 Authority test claim. Commission counsel, Katherine
9 Tokarski will present this item.

10 MS. TOKARSKI: Good morning.

11 Extended Commitment - Youth Authority was a test
12 claim filed by the County of Alameda alleging a
13 reimbursable state mandate for Welfare and Institutions
14 Code sections 1800, 1801, and 1801.5 as amended by
15 Statutes of 1984, chapter 546, and Statutes of 1998,
16 chapter 267.

17 These code sections provide procedures for
18 delaying the discharge of a youthful offender when he or
19 she is determined to be physically dangerous to the
20 public because of the person's mental or physical
21 deficiency, disorder, or abnormality.

22 The legislature required the Commission to
23 reconsider the statement of decision originally adopted
24 January 25th, 2001, which found reimbursable
25 state-mandated activities were imposed by the 1984

1 amendment to Welfare and Institutions Code section 1800,
2 but no reimbursable activities were attributed to
3 sections 1801 or 1801.5.

4 Although Statutes of 1984 was part of the
5 original mandate determination, it was not included in
6 the express language of the reconsideration statute which
7 otherwise named with specificity the statute and chapter
8 numbers the Commission was directed to reconsider.
9 Therefore, the Commission cannot reconsider its prior
10 decision on Statutes of 1984, chapter 546, and is limited
11 to reconsidering claims on the amendments by Statutes of
12 1998. However, staff found no new activities
13 specifically attributed to these amendments in the test
14 claim allegations and found no evidence that the
15 amendments imposed a new program or higher level of
16 service.

17 Staff concludes that Statutes of 1998, chapter
18 267, does not impose a new program or higher level of
19 service within the meaning of article XIII B section 6,
20 of the California Constitution and does not impose costs
21 mandated by the State pursuant to Government Code section
22 17514.

23 In the case of reimbursable state-mandated
24 activities from Statutes of 1984, chapter 546, staff
25 finds the Commission does not have statutory authority to

1 rehear that portion of the original decision and
2 therefore those findings continue to stand and no
3 parameters and guidelines amendments are required.

4 Staff recommends the Commission adopt this staff
5 analysis.

6 CHAIRPERSON SHEEHAN: Great. Thank you.

7 MR. THEODOROVIC: Zlatko Theodorovic from the
8 Department of Finance. We concur with the staff
9 analysis.

10 CHAIRPERSON SHEEHAN: Okay.

11 MR. THEODOROVIC: We have no issues.

12 MR. CHRISTENSEN: Lance Christensen, also from
13 the Department of Finance.

14 CHAIRPERSON SHEEHAN: Okay. Any formal
15 testimony?

16 (No audible response.)

17 CHAIRPERSON SHEEHAN: Any questions from any of
18 the members or any discussion on the recommendation?

19 (No audible response.)

20 CHAIRPERSON SHEEHAN: Then is there a motion?

21 MS. BOEL: I move that we adopt the staff
22 analysis.

23 CHAIRPERSON SHEEHAN: All right. Is there a
24 second?

25 MR. LUJANO: Second.

1 CHAIRPERSON SHEEHAN: All right. So we have a
2 motion and a second to adopt the staff recommendation.
3 All those in favor signify by saying "aye."

4 MULTIPLE SPEAKERS: Aye.

5 CHAIRPERSON SHEEHAN: Any opposed?

6 (No audible response.)

7 CHAIRPERSON SHEEHAN: Okay.

8 MS. HIGASHI: Item 5.

9 MS. TOKARSKI: Item 5 is the statement of --
10 proposed statement of decision for the item you just
11 heard. The sole issue before the Commission is whether
12 the proposed statement of decision accurately reflects
13 the decision you just made. Staff recommends the
14 Commission adopts the proposed statement of decision
15 beginning on page 3 which accurately reflects the staff
16 recommendation on the reconsidered test claim.

17 CHAIRPERSON SHEEHAN: Okay. Any questions or
18 comments on the staff recommendation? All right.

19 MS. BOEL: I move that we adapt the staff
20 statement of decision.

21 CHAIRPERSON SHEEHAN: We have a motion.

22 MR. GLAAB: Second.

23 CHAIRPERSON SHEEHAN: And a second. All those in
24 favor say "aye."

25 MULTIPLE SPEAKERS: Aye.

1 CHAIRPERSON SHEEHAN: Any opposed?

2 (No audible response.)

3 CHAIRPERSON SHEEHAN: Okay.

4 MS. HIGASHI: This brings us to item --

5 CHAIRPERSON SHEEHAN: Good job, guys. We like it
6 short and sweet.

7 MS. HIGASHI: This brings us to item 6,
8 reconsideration of prior statement of decision on
9 Photographic Record of Evidence. And this item will be
10 presented by Commission counsel Eric Feller.

11 MR. FELLER: Good morning. The Photographic
12 Record of Evidence test claim consists of two statutes.
13 Subdivision (a) requires, upon order of the court,
14 introducing a photographic record of evidence for
15 exhibits that pose a security storage or safety problem
16 in lieu of the actual exhibits. Subdivision (b) of the
17 test claim statute requires introducing a photographic
18 record of evidence for exhibits that are toxic, that pose
19 a health hazard to humans, and requires submitting a
20 certified chemical analysis of those exhibits.

21 As to subdivision (a) regarding the exhibits that
22 pose a security, storage, or safety problem, because this
23 activity is triggered by court order, article XIII B,
24 section 9(b) applies. And this constitutional provision
25 puts court-imposed mandates outside the local spending

1 limited of article XIII B. So staff found that
2 subdivision (a) is not reimbursable.

3 As to subdivision (b) regarding the toxic
4 exhibits, staff finds that it constitutes a reimbursable
5 mandate for photographing and providing a certified
6 chemical analysis. As to the activity of storing
7 exhibits, staff finds that this is not reimbursable for
8 counties because they always had responsibility for
9 storing exhibits dating back to the days when counties
10 were -- the trial courts were under the umbrella of the
11 counties. So it's not an activity that's new to them.
12 However, staff found that the storage activity is
13 reimbursable for cities.

14 Therefore, staff recommends the Commission adopt
15 the analysis that partially approves the test claim.

16 Would the parties and witnesses please state your
17 name for the record.

18 MR. CERVINKA: Pete Cervinka, Department of
19 Finance.

20 In general we concur with the staff analysis with
21 what we think is one minor exception. We would like to
22 see the statement of decision augmented slightly to
23 include language that specifically excludes a finding of
24 mandate for school districts and community colleges. I
25 was informed by our staff that regularly handles this

1 claim that such an exclusion was explicitly included in
2 the draft staff analysis, but we were unable to find this
3 language in the final staff analysis or proposed
4 statement of decision before the Commission today.

5 Now, the draft staff analysis on pages 10 and 11
6 stated that the original statement of decision applied to
7 law enforcement agencies generally. In the parameters
8 and guidelines, this was interpreted to include school
9 district law enforcement agencies. The issue, therefore,
10 is whether the Commission erred in including school
11 districts and community colleges as eligible claimants.
12 Staff finds that it did.

13 And then no longer quoting, Ed Code sections
14 38000 and 72300 permit K12 and community college
15 districts to establish police departments but do not
16 require it; therefore, forming these agencies is a
17 discretion -- forming these entities is a discretionary
18 activity on the part of the districts. And pursuant to
19 case law and consistent with other Commission decisions
20 regarding school districts and community college law
21 enforcement activities, it's clear that the consequences
22 of participation in a discretionary program cannot be
23 found to be reimbursable.

24 We believe it's important for this issue to be
25 addressed in the statement of decision itself rather than

1 waiting until the parameters and guidelines phase of the
2 process. The statement I just quoted from the draft
3 staff analysis would appear to support my request, and
4 therefore we thank you for consideration.

5 CHAIRPERSON SHEEHAN: Okay. Did you want to
6 address that, Mr. Feller?

7 MR. FELLER: The issue of eligible claimants is a
8 boiler issue in every set of parameters and guidelines
9 that the Commission issues. It is not typically dealt
10 with in the statement of decision, and that's why it was
11 pulled out of the draft. The decision was made that it
12 was premature to determine who the eligible claimants
13 were at the statement of decision phase of the process.

14 MR. CERVINKA: If --

15 CHAIRPERSON SHEEHAN: Go ahead.

16 MR. CERVINKA: If I could just ask for further
17 clarification, it was my understanding that the proposed
18 statement of decision does, at least for part of the
19 claim, exclude counties as eligible claimants, and I'm
20 just wondering if you would explain the difference.

21 MR. FELLER: There's a -- because there's a
22 direct statutory basis for that in the new program or
23 higher level of service portion of the analysis. This
24 test claim statute doesn't mention school districts at
25 all or community college districts or special districts,

1 so it was determined that more analysis would be required
2 for that at the parameters and guidelines phase.

3 CHAIRPERSON SHEEHAN: So if I understand, the
4 issue will be looked at in the P&Gs stage of this and
5 that the concern that you have is right now the statute
6 only specifically addresses the county issue, without
7 pointing to school districts or community colleges.

8 MR. FELLER: This statute applies to law
9 enforcement that put on evidence in criminal trials. We
10 haven't determined whether that applies to school
11 districts or special districts.

12 CHAIRPERSON SHEEHAN: Okay.

13 MR. CERVINKA: I would assume then that there's
14 adequate information now in the record that would --

15 CHAIRPERSON SHEEHAN: Right.

16 MR. CERVINKA: -- illustrate that for the next
17 phase, so I think that our concerns have been addressed
18 and I appreciate your consideration and explanation.
19 Thank you.

20 CHAIRPERSON SHEEHAN: Yeah, and I would encourage
21 you in that next phase to provide the information and any
22 materials that you would want as they go through the
23 P&Gs.

24 MR. CERVINKA: Appreciate it. Thank you.

25 CHAIRPERSON SHEEHAN: All right. Any other

1 questions or comments on this?

2 (No audible response.)

3 CHAIRPERSON SHEEHAN: If not, we'll entertain a
4 motion.

5 MS. BOEL: I'd like to move that we adopt the
6 staff analysis.

7 MR. SMITH: Second.

8 CHAIRPERSON SHEEHAN: We have Ms. Boel made the
9 motion and Mr. Smith seconded it. All right. Any
10 further discussion?

11 (No audible response.)

12 CHAIRPERSON SHEEHAN: If not, all those in favor
13 signify by saying "aye."

14 MULTIPLE SPEAKERS: Aye.

15 CHAIRPERSON SHEEHAN: Any opposed?

16 (No audible response.)

17 CHAIRPERSON SHEEHAN: That passes unanimously.

18 MS. HIGASHI: Item 7.

19 MR. FELLER: Unless there's opposition, staff
20 recommends that the Commission adopt the proposed
21 statement of decision which accurately reflects the
22 decision on the test claim. Staff also recommends the
23 Commission allow minor changes to the statement of
24 decision including reflecting the hearing testimony and
25 vote count that will be included in the final SOD.

1 CHAIRPERSON SHEEHAN: Okay. All right. Any
2 questions on that?
3 (No audible response.)
4 CHAIRPERSON SHEEHAN: If not, we'll entertain a
5 motion.
6 MR. SMITH: Move approval.
7 MS. BOEL: Second.
8 CHAIRPERSON SHEEHAN: Mr. Smith and Ms. Boel.
9 It's been moved and seconded to adopt the statement of
10 decision, the proposed statement of decision. All those
11 in favor signify by saying "aye."
12 MULTIPLE SPEAKERS: Aye.
13 CHAIRPERSON SHEEHAN: Any opposed?
14 (No audible response.)
15 CHAIRPERSON SHEEHAN: That passes unanimously.
16 Now, before we move on to item 8, we're going to
17 take a quick five-minute break, because it's going to
18 be -- we can get some water or whatever because my guess
19 is that it's going to be probably a lengthy discussion.
20 MS. HIGASHI: Okay.
21 CHAIRPERSON SHEEHAN: All right, so about five
22 minutes.
23 (Recess taken.)
24 CHAIRPERSON SHEEHAN: I'd like to reconvene the
25 Commission on State Mandates meeting.

1 The next item, Paula.

2 MS. HIGASHI: We're now on item 8,
3 reconsideration of the prior statement of decision on
4 Standardized Testing and Reporting. This is a
5 continuation from our last hearing. Commission counsel
6 Eric Feller will present this item.

7 MR. FELLER: Thank you. Good morning again.

8 As Paula mentioned, this is the reconsideration
9 of the Standardized Testing and Reporting test claim or
10 STAR, as we call it. This analysis differs somewhat from
11 the one heard at the May hearing as I'll explain.

12 The STAR program consists of four sets of tests,
13 the STAR program as it currently exists. There's a
14 foreign language test or the SABE/2 test; the CAT/6 test,
15 a national norm reference test; the California Standards
16 Tests; and the CAPA for handicapped people. Of these,
17 this analysis only considers the first tests, the Spanish
18 language test and the CAT/6 because those were all the
19 STAR program consisted of in 1998 when the original test
20 claim was filed, and they were the tests upon which the
21 original claimants filed the claim. So the Commission's
22 jurisdiction in this reconsideration is limited to only
23 those first two tests, the SABE/2 and the CAT/6,
24 basically half of the current STAR program.

25 The findings of the May hearing have not changed

1 as to activities required under the federal Individuals
2 with Disabilities Education Act or IDEA and the language
3 test. Staff still finds that some of those activities
4 are required under federal law. For example, three
5 activities which are required under IDEA are exempting
6 testing for pupils if the pupils' individualized
7 education program has an exemption provision, determining
8 the appropriate grade level for each pupil in a
9 specialized education program, and providing appropriate
10 testing adaptation or accommodations to pupils in special
11 ed programs.

12 As to the language test, staff finds that the
13 activity of administering an additional test to limited
14 English proficiency pupils enrolled in grades 2 through
15 11, the SABE/2 test, is required under the federal Equal
16 Education Opportunity Act as interpreted by federal case
17 law.

18 Staff also finds that some activities in the
19 prior decision no longer are legally required and
20 therefore are no longer reimbursable. I made those clear
21 in your analysis.

22 Since the Spanish test is not reimbursable, that
23 leaves the CAT/6 for analysis.

24 The prior centered around whether STAR was a
25 federal mandate under No Child Left Behind. Staff finds

1 this inquiry is no longer relevant because the CAT/6 is
2 not required by the federal No Child Left Behind Act or
3 any other federal law. As mentioned, the CAT/6 is a
4 national norm reference test. No Child Left Behind
5 requires tests that are aligned to state standards.
6 California has those California standards tests, but they
7 were enacted in 2000/2001, a couple years after this test
8 claim was decided -- or the test claim statute was filed,
9 I should say. Therefore, staff finds that the CAT/6 is a
10 reimbursable state mandate.

11 Another difference from the May hearing as it was
12 presented, the item was presented, is that staff finds
13 that the federal title VI and the state general funds
14 must be used to offset the CAT/6 administration, even
15 though it, in the budget, is referred to as the STAR
16 program. They have to do that in any years that the
17 legislature requires it because federal title I funds --
18 any year the legislature requires it, but federal title I
19 funds are not required to offset the mandate.

20 The Department of Finance has requested the
21 Commission postpone this item until a later hearing in
22 the event that legislation is enacted to clarify
23 legislative intent regarding the effective date of this
24 reconsideration and prior appropriations for STAR.
25 Commission staff denied this request because the

1 Commission's regulations call for continuing agenda items
2 only for good cause, and the proposed legislation does
3 not fit within the definition of good cause in our
4 regulations and because it is speculative at this point
5 as to whether a bill would be enacted.

6 So staff recommends the Commission adopt this
7 analysis that partially approves the prior adopted
8 Commission decision.

9 Would the parties and witnesses please state your
10 name for the record.

11 MR. PALKOWITZ: Good morning. My name is Art
12 Palkowitz on behalf of San Diego Unified School District.

13 MR. SCRIBNER: Good morning. David Scribner on
14 behalf of Grant Joint Union High School District.

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

17 MR. SHELTON: Gerry Shelton, California
18 Department of Education.

19 MR. CERVINKA: Pete Cervinka, Department of
20 Finance.

21 MR. DEL CASTILLO: Lenin Del Castillo, Department
22 of Finance.

23 CHAIRPERSON SHEEHAN: Would you like to begin?

24 MR. PALKOWITZ: Thank you. Before I start, I
25 guess I would like to know from staff if somewhere down

1 the road there is this legislation the DOF says is
2 forthcoming, how will that proceed based on a Commission
3 decision today?

4 MS. HIGASHI: Obviously we don't know what that
5 legislation is going to say yet, so depending on what
6 that legislation says and what is enacted and what the
7 Commission does today, we will figure it out once it was
8 enacted.

9 MR. PALKOWITZ: I mean, basically the staff has
10 recommended that the reconsideration not go back to the
11 time of when the legislation was first enacted, and the
12 proposed legislation that the Department of Finance says
13 is forthcoming would say that there is going to be
14 legislation that will allow the Commission -- or to go
15 back and be effective on that date. Is that --

16 MS. HIGASHI: Let me defer to Mr. Feller on the
17 question of the reimbursement period.

18 MR. FELLER: I think I made it pretty clear in
19 the analysis as to why we picked July 1, 2004, for the
20 reimbursement period. As to whether a
21 subsequently-enacted bill can affect a prior
22 reconsideration statute, I haven't researched that yet,
23 so I'd have to look at how legislative intent works
24 retroactively applied, in that light. So I couldn't tell
25 you what the Commission might be recommending or what the

1 Commission staff might be recommending.

2 MR. PALKOWITZ: Thank you.

3 CHAIRPERSON SHEEHAN: Can I ask Finance at this
4 point in time in terms of the person who requested this,
5 the status of the legislation, you know, what is -- what
6 do you at least think. Obviously they're on recess now,
7 but a little bit of information backing up the request
8 and what is in the legislation and the likelihood that it
9 may be -- land on the Governor's desk. So whoever,
10 whichever of you would like to address that issue.

11 MR. DEL CASTILLO: Yeah, hi. Lenin Del Castillo
12 with the Department of Finance. It's language that we
13 expect to be placed in a technical education omnibus
14 bill, and we expect that to be passed before the end of
15 the 2005 legislative year.

16 CHAIRPERSON SHEEHAN: Is it in one of the budget
17 trailer bills that still is being acted on upstairs? Is
18 there opposition, consensus?

19 MR. CERVINKA: As indicated in our May submission
20 to the Commission, we were going to pursue this
21 legislation. Due to the way that mandates issues were
22 handled in the budget process, this language did not make
23 it into a budget trailer bill, per se; however, there is
24 a substantial -- there are a few pieces of legislation
25 that will, as we do every year, have technical cleanup.

1 And this issue -- it's our understanding with leg staff
2 that this issue will be addressed in one of those pieces
3 of technical cleanup legislation.

4 We think that -- as we've indicated and the LAO
5 indicated in our prior testimony at the last hearing that
6 the legislature did, in fact, intend the Commission on
7 State Mandates to reconsider its decision retroactively
8 to the beginning of the claim period and that because
9 that is the common understanding of intent, language will
10 be forthcoming to clarify that issue.

11 CHAIRPERSON SHEEHAN: Okay. Mr. Warren and
12 then --

13 MR. WARREN: I discussed this issue with the
14 staff member who assisted Mr. Laird (phonetic) in the
15 development of the bill that contained this original
16 reconsideration, and he confirmed that it was their
17 understanding that this was going to be a complete review
18 of all STAR claims going back to '97 and that he
19 expressed interest in helping us get this change to be
20 made.

21 CHAIRPERSON SHEEHAN: Go ahead.

22 MR. SCRIBNER: I guess my only issue is so that
23 we can make this process as transparent as possible, can
24 we as claimants and interested parties be brought into
25 the loop as to where this magic piecework of legislation

1 is, where it's coming from? You know, you have an item
2 that's coming after this that had a piece of legislation
3 that magically appeared that had a substantial impact on
4 the outcome of the test claim. This type of legislation
5 has a substantial impact on this decision and what this
6 body will do. And I think that all parties should be
7 entitled to have some sort of discourse as to what's
8 going to occur here and not have something occur last
9 minute, behind closed doors, without information, without
10 notes, without opportunity to comment.

11 I think I'm a little frustrated with the
12 discussion only because we're trying to make this as even
13 as possible so that the right decision is made. Now, I
14 may disagree with where this Commission goes and Lord
15 knows I have in the past, but I have always agreed that
16 the process has worked properly. And that is my concern
17 here, that you may be faced with directives where the
18 process has not occurred the way it should occur.

19 And we would just like to ask that somehow
20 Commission staff be brought into the loop so that they
21 can inform individuals that are on the mailing list for
22 this item to know what's going on, where we're -- what's
23 happening, what kind of legislation is coming up.
24 Because as it is now, I have not heard from the
25 Department of Finance representatives that they have any

1 idea where this language is coming from, what's going to
2 be said in that language, who's bringing it forward, when
3 it's going to happen. And I think with a program that is
4 the No. 2 program as far as cost to schools, we need a
5 little more transparency than just simply allowing this
6 to happen behind -- with all due respect, behind closed
7 doors without there to be some public comment and
8 scrutiny as to what's going on.

9 CHAIRPERSON SHEEHAN: Go ahead, Paul.

10 MR. STARKEY: I appreciate all the concerns
11 raised. This is one of those cases where I might be
12 ruffling my hair, I think, as I think about what's
13 happening. The Commission and staff cannot be brought
14 into this process in any way, shape, or form. It's a
15 legislative process that is being talked about. The
16 issues of transparency and the need for information, that
17 is a subject, a legitimate subject, for discussion on the
18 legislative side of it, but we are an administrative
19 agency and cannot be involved in that process.

20 Our only concern today is actually to preserve
21 and protect our process and to do what we should do today
22 that makes the most sense in light of the matters that
23 are being presented. So I just want to interject that,
24 that we cannot be involved in that legislative process.
25 What's happened here is separate.

1 CHAIRPERSON SHEEHAN: All right. What I would
2 like -- go ahead, Dave.

3 MR. SCRIBNER: I wanted to clarify. I respect
4 the comments. I'm not asking for the Commission to
5 actually be involved in legislation. The Commission
6 obviously has a vital interest into any legislation that
7 may come down that impacts its current process.

8 My request is since claimants are having a hard
9 time getting involved in the process, the Commission
10 might have an easier time to interject itself to say we
11 just want to be notified, and we will then in turn
12 notify. I'm not asking for the Commission to take a
13 stand, position, or analysis. But the members that are
14 sitting here today are in the system, and you have the
15 access that seems to be thwarting our ability. We don't
16 have the access to see those type of things, and they
17 seem to be happening so quickly we don't have time to
18 respond.

19 And you will hear comments, I'm sure, on the next
20 item that do address that, that things happened so fast
21 no one had a chance to take a look at that. And this
22 issue is huge, and we shouldn't allow the quick
23 determinations to occur without there being some
24 discourse, and that's all I was actually requesting the
25 Commission to do.

1 CHAIRPERSON SHEEHAN: All right. I guess before
2 we proceed, because what I would like to do today is go
3 ahead and have all the testimony and then the Commission
4 can decide whether they want to take action today,
5 whether they feel they want to wait until our next
6 meeting in September to see if the legislation comes --
7 if nothing comes, then we can go ahead and take action
8 then -- but to hear everyone who has come here today. It
9 is an important issue. We postponed this once. We need
10 to get to all the people who have flown up here to
11 testify and spent the time coming before.

12 So that's what I would like to do, and then after
13 we hear all the testimony, the Commission can decide
14 whether they want to move, take action today, or whether
15 they feel they want to delay action until we see what
16 happens in September. But the record can be closed, we
17 will have heard all the input -- unless the legislature
18 decides to do something completely in left field, and
19 then we'll have to go back and figure out what it is that
20 they did, but that -- we can have that discussion after
21 all the testimony has been taken.

22 Now -- but what I would encourage you to do is,
23 you know, as you found your way to this building, you may
24 want to find your way upstairs and talk to the members
25 and the staff, some of the people here who were involved

1 in this. I think Mr. Starkey is correct. As an
2 administrative body, you know, each of one can weigh in
3 individually on legislation, but that's not our role here
4 today. I would encourage you to talk to the individuals
5 who have talked about what's going on, who's looking at
6 the legislation, what is done, and communicate to
7 interested parties upstairs your interest in that.

8 MR. SCRIBNER: Sure. Like everyone, we just
9 heard about this yesterday with the late filing, so that
10 is our surprise, so --

11 CHAIRPERSON SHEEHAN: Right.

12 MR. SCRIBNER: -- we had no chance to contact --

13 MR. CERVINKA: Just as a point of clarification,
14 we did notice our intent with specifically what the
15 language would be doing in terms of adjusting the
16 reimbursement period in our May 6th submission to the
17 Commission, so this has actually been out there for at
18 least two and a half, three months.

19 MR. SCRIBNER: Okay. Well, I'll agree to
20 disagree, and we can move on to comments. That would be
21 great.

22 CHAIRPERSON SHEEHAN: All right. All right,
23 so --

24 MR. STARKEY: Madame Chairperson?

25 CHAIRPERSON SHEEHAN: Yes.

1 MR. STARKEY: I just want to make a process
2 comment too. Procedurally where this is, I think, is
3 that there was a request made to the executive director
4 to have this matter continued. That was denied. And so
5 at some point in the discussion, we may get to --
6 depending on how the Commission decides what it's going
7 to do, there may be an issue about why the Commission is
8 overruling the executive director's decision and then the
9 basis for that. Because I think I'm going to need that
10 for process, to put that into any kind of recommendation.

11 CHAIRPERSON SHEEHAN: Well, if, in fact, that's
12 what the Commission decides, but I want to hear -- I want
13 to take the testimony, and then we can have a discussion
14 on that.

15 MR. STARKEY: Thank you.

16 CHAIRPERSON SHEEHAN: Go ahead.

17 MR. PALKOWITZ: Thank you. Just to recap, this
18 matter was heard on the May calendar, and we've got one
19 member at least who wasn't present. And what's happened
20 here is that STAR was passed by the legislature in 1998,
21 and several years later the Commission approved it as a
22 test claim. On direction of the legislature, it was
23 asked that the Commission review this under
24 reconsideration and see if it is still a mandate.

25 Thorough analysis was done by staff and the

1 parties, and prior to the last hearing in May, staff had
2 an analysis that it is still a mandate and that NCLB is
3 not a mandate that would supersede this mandate nor will
4 title I money be used as an offset for the state's
5 mandate reimbursement claims.

6 At the last hearing, it was stated by the CD
7 representative that given the opportunity, they would be
8 able to show that the state faces severe and certain
9 penalties, and as a result of that finding, this would
10 not be no longer a mandate, and therefore NCLB would
11 supersede this. During the past 60 days, CD has
12 submitted documents that the staff has analyzed,
13 everybody has had an opportunity to review, and
14 notwithstanding that, it seems that that has not been
15 shown.

16 The documents do reveal that two other states
17 have received some penalties. Out of the 50 states,
18 that's less than 5 percent. There really wasn't any real
19 showing of California being threatening that they will
20 lose funding and as a result be considered reaching to
21 the level that NCLB is a mandate.

22 As a matter of fact, some of the material that I
23 reviewed stated that, and I quote: The enclosed report
24 contains a listing of critical monetary elements in each
25 of the areas. A description of the scope of the monitor,

1 review and findings and recommendations and commendations
2 that the team, that being the NCLB team that came out
3 here to review California's procedures, cited as a result
4 of the review. The EDT, that being the federal team, was
5 impressed with the efforts of your staff, CDE, to
6 implement statewide the many requirements of title I and
7 title X programs.

8 So this letter is indicating not only is it not a
9 threat of severe and certain penalties, it's somewhat of
10 a commendation that the program is doing well. So based
11 on this, I believe staff concluded that there is not a
12 federal mandate, and accordingly the analysis is a
13 similar analysis as was at the prior staff analysis.

14 Now, as Mr. Feller pointed out, there are four
15 programs: A foreign language program referred to as
16 SABE, the CAT/6, the California Standard, and CAPA. Now,
17 the staff has taken the position similar to the position
18 taken previously that SABE, the foreign language, is not
19 to be reimbursed. And basically their position is based
20 on a statute referred to as the Equal Education
21 Opportunities Act that was passed in 1974.

22 Usually when there's an allegation that a federal
23 statute supersedes a state statute and therefore this
24 should not be a state mandate, you are really able to
25 pinpoint a certain statute. Rather, this Equal Education

1 Opportunities Act is obviously a very broad statute that
2 goes well beyond testing of English learners. And as a
3 result of a test that was heard in Texas, staff believes
4 that that statute directly affects SABE in California,
5 and therefore we should not be reimbursed for testing
6 that relates to English language learners.

7 It's been our position that we don't feel that's
8 correct, that that Equal Opportunity statute is really a
9 broad statute to discourage discrimination and that the
10 fact that we are testing English learners, we have to do
11 that or otherwise we would be discriminating against
12 English learners, seems to be a very stretch of what
13 federal and state mandate is about in this situation. So
14 we disagree on that analysis.

15 On the CAT/6 analysis for grades 3 and 7, we are
16 in agreement with the state, the staff analysis, that
17 title I is not to be used as an offset, and we
18 respectfully disagree on the analysis of title VI, that
19 it should be used as an offset.

20 If there are no specific questions at this time,
21 I reserve my right to respond to other comments.

22 CHAIRPERSON SHEEHAN: Okay.

23 MR. PALKOWITZ: Thank you.

24 CHAIRPERSON SHEEHAN: Any questions at this
25 point?

1 (No audible response.)

2 CHAIRPERSON SHEEHAN: Go ahead.

3 MR. SCRIBNER: Good morning. I'm going to kind
4 of throw us in reverse a little bit, unfortunately.
5 Obviously the comments that Grant submitted to the
6 Commission are not being considered here, so I'm not
7 going to detail the discussion that we had originally
8 submitted.

9 The issue to me that's before you this morning is
10 a very basic issue, and that does go to Commission
11 jurisdiction as to what portion of STAR should it be
12 considering. You have a staff analysis in front of you
13 this morning that says the only thing that it can
14 review -- that you can review is essentially the
15 Stanford/9 portion of the exam, therefore the CST and
16 CAPA portions that came later are outside your purview.

17 I had intended to come this morning to request
18 that this item be put off until September in light of the
19 request to have legislation imposed. I am not going to
20 do that. The reason, though, why I wanted there to be
21 time for interested parties to comment is because what
22 you have before you has never been before you before. I
23 think we need to understand that by no fault of staff --
24 I'm not faulting staff. I technically agree with the
25 analysis. I think what they've done is correct. I

1 think, unfortunately, we were all chasing our tails from
2 the beginning. It's unfortunate because of the time and
3 expense that everybody has incurred going, unfortunately,
4 down the wrong road.

5 I think that we are partially on the right road,
6 and I'll get back to the jurisdiction issue in a minute,
7 but I wanted to provide substantive comments to you and
8 to staff and have staff address those comments in writing
9 so you could have that before you. However, in light of
10 the fact that we may have legislation out there that
11 could impact us, and like Mr. Feller, I have not
12 researched legislative intent to determine how that will
13 impact the reconsideration of this body, and now I wish I
14 had, I don't want to put this over because I want to take
15 the chance that maybe it won't have as much of an impact
16 as we -- the Department of Finance may think it does. I
17 don't know. I don't know how it's going to play out.

18 But I think it's important that this body
19 understand that what you have before you has not been
20 addressed by anyone other than staff. I've not had the
21 opportunity to provide you comments. Mr. Palkowitz has
22 not. The same with all state agencies.

23 But again, I think the issue is jurisdiction.
24 What we're looking at for jurisdiction is to determine
25 the ultimate issue. The ultimate issue is is NCLB a

1 federal mandate as it relates to the STAR program? Our
2 position is it doesn't matter what test is plugged in
3 there. It's irrelevant. Because the ultimate goal here,
4 I think, is to determine whether the NCLB is a federal
5 mandate vis-à-vis the STAR program, whether the STAR
6 program in whatever shape or form is going to be
7 continued to be reimbursable.

8 And we are going down that road. We have a lot
9 of comments and documentation that was provided by state
10 agencies and interested parties to try and get that
11 determination made. Now we have a revised staff analysis
12 that kind of backs us away from that. And like I said
13 earlier, I think technically they are partially correct.

14 I think to get to the ultimate issue of what we
15 truly are here to determine, there is jurisdiction here.
16 The original test claim included Education Code section
17 60640, and in that section it essentially says this is
18 the STAR program, you must do it. And it makes reference
19 to other code sections that impose the specifics of the
20 test, whether it be CST, whether it be something
21 different.

22 I understand staff's position that those code
23 sections have never been plugged. Fine. But I don't
24 think that what we're looking at here is the specifics of
25 the tests. We never have. If you go back to the revised

1 analysis that you were issued -- the draft -- I'm sorry,
2 it's kind of confusing -- the draft revised staff
3 analysis that came after the May hearing, the
4 documentation that was provided by CD, there really
5 wasn't a discussion of the CST or CAPA because what we
6 were doing was looking at a global discussion, NCLB
7 versus STAR in whatever form. And I think that that is
8 the issue that this body needs to address once and for
9 all, NCLB versus STAR, not what program is here, not what
10 program falls under STAR because that is not -- that is
11 not -- in my opinion, not relevant here for your
12 determination. And I think that jurisdiction can be
13 pulled from the Education Code and just said, look, let's
14 get to the ultimate issue.

15 And although I would love to be able to provide
16 written comments, I am not requesting this item be put
17 over so that we have the opportunity to do so. However,
18 if the Commission determines on its own merit today to
19 overturn the executive director's decisions and provides
20 sufficient reason why this item should be put over to
21 September, we reserve our right to then file comments as
22 well. And if you would like, we will adhere to a comment
23 schedule, if that's necessary. Thank you.

24 CHAIRPERSON SHEEHAN: Mr. Warren.

25 MR. WARREN: Paul Warren with the Legislative

1 Analyst's Office.

2 I just wanted to very briefly express our support
3 for putting this item over. As we've talked about in the
4 past, the reason why the legislature requested the
5 Commission to revisit this item was to look at the issues
6 related to federal law. The most recent statement of
7 decision basically eliminates those issues in the way
8 that it's interpreted the Commission's charge. We think
9 some clarification from the legislature would be helpful.

10 A second issue, though, that I think that this
11 last statement of decision raises that I'm not sure was
12 intended, and again as I said last time, I'm not a lawyer
13 so you want to listen to your own staff, by focusing on
14 only the CAPA portion -- I'm sorry, the CAT/6 portion of
15 the test, the norm referenced portions, basically what
16 the staff analysis does is says that there is no current
17 mandated claim for the other portion of the test that has
18 been added since the beginning of the program, that is,
19 what we call the standards test. And that's the main
20 portion of STAR today.

21 Well, that was put in place, I believe, in 2002.
22 And there has been no claim made by local government, by
23 school districts, for that portion of the test. There's
24 also a law that says you have one year to make a claim on
25 a new mandate. By separating out the different pieces of

1 STAR, it seems to me that this decision would preclude
2 school districts from filing a claim for this other
3 portion of the test. I don't believe that that was
4 intended, but my lay reading of the decision suggests
5 that would be the case. And personally, I think school
6 districts should have every opportunity to make their
7 case for those costs. So I think there's another reason
8 that a delay would be useful, to clarify that issue for
9 you.

10 I also just want to express some concerns about
11 the whole discussion of the issue of the federal mandate
12 as it's been going on here. Mr. Palkowitz talked about,
13 you know, this threshold of, you know, are there certain
14 and severe consequences from us not having a testing
15 system as is required under federal law. And, you know,
16 that kind of places the State in a funny moral place.

17 I don't know if this is a part of a Supreme Court
18 decision, but think about we get a billion and a half
19 dollars in federal funds in exchange for certain
20 requirements that are part of federal law. Can the State
21 really be in a position of saying, you know, we're not
22 going to implement that until they come and they take our
23 arm and they make it a little painful. I don't think
24 that's really something that the State, from a good
25 government moral sense, really can do in every case where

1 federal law requires us to do something in exchange for
2 funds. And recall that these are funds that
3 overwhelmingly, 95 percent of these funds, are going to
4 school districts.

5 So I know that federal law says there has to be
6 certain and severe consequences for these kind of
7 programs to constitute a mandate, but I think the test
8 that is being discussed here and that Mr. Palkowitz
9 referred to I think is an unreasonable one, and I
10 think -- I think you need to look at it from a broader
11 standpoint of what commitment we make when we accept the
12 funds. So I'll leave it at that.

13 CHAIRPERSON SHEEHAN: Okay. Mr. Shelton.

14 MR. SHELTON: Gerry Shelton, Department of
15 Education. I came today with the intent of simply saying
16 that we had no direct comments on your staff's analysis.
17 But I kind of find myself pulled into the discussion here
18 a little bit.

19 I would ask the Commission first of all to rely
20 on your staff's summary and on my declarations regarding
21 the testimony that I provided in May rather than
22 Mr. Palkowitz's reporting of that testimony. In fact,
23 the issue of certain and severe penalty was an issue
24 brought up by Mr. Starkey. And in response to that, I
25 replied that if -- if the test that, in fact, was going

1 to be applied here was a test that said the Department is
2 only being forced into implementing NCLB if, in fact,
3 there are certain penalties that have occurred. And my
4 response to that was, in fact, if that's the test, then
5 there is no way that I can provide evidence to meet that
6 test.

7 I think it's overly simplistic to conclude that
8 the fact that no penalties have been assessed on
9 California by the federal government with respect to the
10 implementation of NCLB means that no threat of penalties
11 exist. In fact, Mr. Palkowitz referred to the evaluation
12 that the feds have given to the Department of Education
13 and State Board of Education's implementation of NCLB and
14 referenced a number of positive comments about that
15 implementation.

16 I think that I would take that -- those positive
17 comments and our effectiveness in implementing the
18 programs not so much as proof that no penalties or threat
19 of penalties exist, but, in fact, an indication that the
20 Department is able to implement programs even in an
21 environment of compulsion and coercion. And the exact
22 words that I used in my testimony were not certain and
23 severe penalties. It was that, in fact, the Department
24 operates in an environment of compulsion and coercion
25 that's placed on us by the federal government, that is,

1 that we feel forced to implement these programs. And to
2 us, that indicates that the federal government is
3 mandating, in fact, those programs on us.

4 There's also been comment in some of the
5 rebuttals to my testimony and to the declarations that I
6 provided that, in fact, these penalties or potential
7 penalties were not of a significant nature. And there
8 were a number of numbers thrown around. I guess I would
9 first of all correct Mr. Warren that we're talking about
10 \$3 billion approximately in federal funding here, not 1.5
11 billion that's at risk. But I also want to kind of
12 extend Mr. Warren's argument.

13 The focus here has been in terms of the -- some
14 of the questions that came from staff and in the last
15 hearing and some of the rebuttals, the focus has been on
16 statutory language in the No Child Left Behind Act that
17 talks about penalties assessed to title I administrative
18 funds. But I think I would indicate that that's only the
19 tip of the iceberg. You know, that provides the
20 Department of Education, the U.S. Department of Education
21 the authority to come in and assess administrative
22 penalties against us. But then you have to play out
23 where that goes.

24 By assessing administrative penalties against us,
25 for example, Grant Unified in their rebuttal used the

1 number 10 -- I think it was 10.9 million, something like
2 that. 10.9 million is approximately a hundred positions
3 in the Department -- in the California Department of
4 Education. That's a significant chunk of our ability to
5 implement these programs. And if you take away our
6 ability to implement these programs and meet federal
7 requirements, then the ultimate impact is that we're out
8 of compliance in the eyes of the federal government.

9 Being out of compliance in the eyes of the
10 federal government means that the next time that the
11 budget cycle at the federal level occurs, the next time
12 that Congress appropriates funds, the next time that the
13 U.S. Department of Education allocates funds out to the
14 state, those allocations may short California.

15 So our position and our reaction to this
16 environment of compulsion and coercion that we're placed
17 in by the feds is that, in fact, it's \$3 billion at risk
18 here. It's not 10.9 million. It's not a hundred
19 million. But ultimately through the budget process,
20 which requires no statutory authority in the No Child
21 Left Behind Act, but through the federal budget process
22 we have \$3 billion at the table here that are at risk.
23 And we take that very seriously, and we operate programs
24 accordingly and feel that we're required to put these
25 programs under NCLB in place. Thank you.

1 CHAIRPERSON SHEEHAN: Finance, do you want to
2 address any issues on the staff analysis?

3 MR. CERVINKA: No, I think our prior testimony
4 probably covers what we would say at this point.

5 CHAIRPERSON SHEEHAN: All right. Not on the
6 request, but on the --

7 MR. CERVINKA: Right. Yes.

8 CHAIRPERSON SHEEHAN: -- underlying staff
9 analysis. That's what we're addressing right now.
10 Okay. Anyone else who wants to testify?

11 If not, Mr. Feller, do you want to respond to
12 address some of the issues?

13 MR. FELLER: Sure. It appears there's some
14 confusion as to what this analysis actually finds. The
15 whole discussion about No Child Left Behind and whether
16 or not it's a federal mandate is no longer relevant.
17 That would only apply if the state program was required
18 by the federal program. The state program, being CAT/6,
19 isn't required by the federal program, so the federal
20 penalties in No Child Left Behind is no longer a relevant
21 issue. We don't -- this analysis makes no finding as to
22 whether or not No Child Left Behind is a federal mandate.

23 To clarify, the May analysis that you heard also
24 made that finding. That analysis said that there was
25 lack of evidence as to whether it was. So the finding on

1 No Child Left Behind as to lack of evidence before now
2 the finding is that No Child Left Behind is no longer
3 relevant. The -- California could remove the requirement
4 for the CAT/6 and still be in compliance with No Child
5 Left Behind. So that -- that no longer is an issue.

6 Mr. Palkowitz again brought up the Equal
7 Education Opportunities Act. I agree with him that the
8 language in that statute is somewhat vague, but the
9 courts have interpreted it to mean that the testing --
10 foreign language testing is required. They fault it not
11 just in the Casteneda case in Texas, they faulted a
12 school district in Colorado in the Keys (phonetic) case,
13 which is also in your analysis. So two federal courts
14 have said that if you don't have this language testing,
15 you're in violation of the federal Equal Education
16 Opportunities Act.

17 As far as the offset for title VI funds that
18 Mr. Palkowitz mentions he disagrees with, we're bound by
19 the language in the state budget that requires title VI
20 funds to be used to offset the STAR program. As it would
21 apply today, it would be the CAT/6 program
22 administration. So that -- excuse me, I believe that the
23 language in the state budget says that the appropriate
24 title VI funds have to be used for the mandated programs
25 first. And so the priority would be for the CAT/6

1 administration, if you find that this is, in fact, a
2 state mandate.

3 As far as Mr. Scribner's comments about the
4 Commission jurisdiction and not worrying about what test
5 is required, the Commission does have limited
6 jurisdiction. There's -- and I marked the place in the
7 record where the parameters and guidelines are limited to
8 only two tests. It's on page 751. And it says only the
9 designated achievement and primary language tests enacted
10 by Statutes of 1997, Chapter 820, are reimbursable
11 pursuant to these parameters and guidelines. Staff never
12 made a finding because no test claim was filed on these
13 other tests, and so the issue isn't whether the whole
14 STAR program is a state mandate, but whether the STAR
15 program as it existed and enacted in 1997 is a federal
16 mandate. And again, that only is the CAT/6 and the SABE
17 or Spanish language test.

18 As far as which tests, it doesn't really matter,
19 I think that the Hayes case in your blue binder indicates
20 that it does. Because if the State freely chooses to
21 implement a requirement, impose a requirement, on local
22 agencies, then it becomes a state mandate and not a
23 federally triggered mandate. And as I mentioned, the
24 CAT/6 is not required by under federal law.

25 I think that covers it. The -- I -- I think that

1 any opinion by the Commission on No Child Left Behind
2 would be somewhat of an advisory opinion at this point.
3 Until you have a state mandate that's brought in by a
4 claimant that is something that is triggered by No Child
5 Left Behind, until we have that situation, it wouldn't be
6 prudent to make a finding on No Child left Behind because
7 it's not relevant to the test at issue. It would be
8 primarily an advisory opinion.

9 So that's it.

10 CHAIRPERSON SHEEHAN: Okay. I've got a question
11 either for Mr. Warren or Mr. Cervinka. On the request in
12 terms of the postponement or taking this off today, the
13 legislation that you're discussing upstairs simply
14 addresses the retroactivity; is that correct, or the
15 dates going back?

16 MR. CERVINKA: Our intent is to address the
17 retroactivity issue for the reconsideration. I wouldn't
18 necessarily preclude that language from also perhaps
19 clarifying legislative intent. As Mr. Warren indicated,
20 I think the legislature originally envisioned that the
21 Commission reconsider its decision in light of federal
22 statutes. I think perhaps it may be the case that the
23 legislature intended the question of whether NCLB is a
24 federal mandate or not to be addressed by the Commission
25 in its reconsideration.

1 So I wouldn't preclude that second piece, some
2 clarification of the intent with the reconsideration to
3 also be part of that legislation.

4 CHAIRPERSON SHEEHAN: Is the -- I guess my
5 question is does the language that you have discussed in
6 terms of pending legislation address that issue, or are
7 you simply speculating that that may?

8 MR. CERVINKA: Well, I think as may be implicit
9 from what I've said already, there is no language in
10 print at the present moment. You know, as noticed in our
11 May request, we fully intend to see the retroactivity
12 issue addressed in that legislation, and I think it would
13 be our hope, given the conversations that have happened
14 today, that that language might also address the
15 legislature's intent with respect to what the scope of
16 the reconsideration would be.

17 CHAIRPERSON SHEEHAN: All right. Did you have a
18 question, Ms. Higashi?

19 MS. HIGASHI: I had a question for Mr. Warren.
20 During his testimony he made a reference to some statutes
21 that were further amendments to STAR statutes and that
22 his concern was that the text of -- in the staff
23 recommendation and analysis before you today would
24 preclude a claimant from ever filing a test claim on a
25 subsequent statute. And he noted that the later statutes

1 were not before the Commission in a pending test claim
2 filing.

3 So what I wanted to find out is if the claimants
4 have already incurred costs under those statutes that you
5 were referring to and just -- I was confused because of
6 the fact we have a current statute of limitations. So
7 that on its face when you were talking about a 2002
8 statute, it sounded as if they were already beyond the
9 statute of limitations, so claimants could not even file
10 on those statutes. So I was just -- you know, I didn't
11 understand your statement.

12 MR. WARREN: Okay. The way that the statute's
13 constructed is that the norm reference test, which is now
14 the CAT/6, is 60642 in the Education Code. 60642.5
15 authorizes the California standards test, which comprises
16 the bulk of the STAR program today. Okay. So the
17 statement of decision narrowly defines this STAR mandate
18 as only those that were in place at the beginning of the
19 program.

20 And from a legal standpoint, I don't doubt that
21 he's correct. I think I personally have considered this
22 mandate, and I think the discussion up until this last
23 statement of decision, proposed statement of decision,
24 has looked at the STAR program as a whole, okay, and that
25 the size of the claims that have come in in the last few

1 years it seems to be clear that districts are claiming on
2 the program as a whole, okay. Not just for those
3 portions of the original law that are still in place, so.

4 MS. HIGASHI: And so I just wanted to note for
5 the record that the statute that is the subject of the
6 test claim is a 1997 statute and then there are also
7 implementing regulations. The Ed Code section that
8 Mr. Warren just cited to was adopted in 2000, so it is
9 not included in this test claim, and the issue that he's
10 raising about cost claims perhaps being higher than
11 originally anticipated, that would end up becoming an
12 audit issue with the State Controller's Office. But I
13 was just trying to clarify that. I didn't understand how
14 those claims -- how by postponing the action that that
15 makes it easier for claimants to in the future file a
16 test claim.

17 CHAIRPERSON SHEEHAN: That clarifies the question
18 you have?

19 MS. HIGASHI: Yes, thank you.

20 CHAIRPERSON SHEEHAN: Okay. All right. Either
21 Mr. Starkey or Ms. Higashi, in terms of the options for
22 the Commission today, we may have -- I mean, we've heard
23 the testimony. We can either move to adopt the staff
24 analysis, if that's what the Commission would like to do,
25 potentially hold off on the final action on the staff

1 analysis until the next meeting and see if there is
2 legislation. It's very speculative in terms of whether
3 there's legislation or not, so I don't know if either of
4 you want to address in terms of the other alternatives.

5 MS. HIGASHI: Basically, your assessment is
6 correct that those are the things the Commission could
7 do. The Commission could also partially decide an issue.
8 But certainly based on Mr. Cervinka's comments, it's not
9 exactly clear if the proposed legislation would end up
10 being brought up on just retroactivity, so it could mean
11 that other parts of the analysis as written would then
12 potentially be out of date.

13 The other comment is just that if the Commission
14 did take any action today, then any language coming from
15 the legislature could -- would be worded differently
16 based on whatever the Commission's action would be today,
17 and it might be to amend or modify or set-aside or start
18 over.

19 CHAIRPERSON SHEEHAN: Right.

20 Go ahead, Mr. Cervinka.

21 MR. CERVINKA: Do I understand that to say that
22 if the Commission -- what you just said is that if the
23 Commission did take action today, that wouldn't preclude
24 the legislature from ordering a future reconsideration
25 yet again? Is that one possibility under what you just

1 said?

2 MS. HIGASHI: What I was saying is that I'm
3 making an assumption that if the Commission did take an
4 action, that we certainly know that the legislature is
5 aware of what is happening and that they would draft
6 language accordingly to reflect whatever the situation is
7 at that point in time when the bill was being adopted.

8 CHAIRPERSON SHEEHAN: I mean certainly I think
9 the legislature, in tracking what we do, at any time can
10 decide subsequently to, you know, direct us to reconsider
11 or do something else. That's always within their
12 prerogative, and we know they've taken that prerogative
13 to heart on numerous occasions.

14 Mr. Feller, did you want to address an issue?

15 MR. FELLER: I just -- I don't understand how the
16 legislature asking us to make a determination as to NCLB
17 would change the outcome here because our jurisdiction is
18 limited to the prior reconsideration -- I mean to the
19 prior decision, which only included two tests. So
20 whether -- again, whether No Child Left Behind is or is
21 not a federal mandate wouldn't change the conclusion that
22 we're recommending that the Commission adopt here.

23 MR. CERVINKA: With one further question then.
24 It's my understanding that the current Ps and Gs here are
25 broadly stated such that they allow STAR program costs.

1 Are you suggesting that retroactively the Controller
2 should then be examining test claims filed pursuant to
3 this issue and tossing costs unrelated to CAT/6? Is
4 that --

5 MR. FELLER: I wouldn't presume to suggest the
6 State Controller's Office do anything. But the State
7 Controller can audit these claims as stated in the
8 parameters and guidelines. And I believe the parameters
9 and guidelines are fairly clear in that they are limited
10 to the two tests that we're talking about today.

11 MR. STARKEY: If I can just address the options
12 issue again.

13 CHAIRPERSON SHEEHAN: Um-hmm.

14 MR. STARKEY: Again, I think that this is a very
15 complicated procedural issue and also a substantive
16 issue. But in some of the comments, I'm hearing again
17 that the legislative function and the administrative
18 function are being blended. So just to kind of suggest
19 where I think we are with this, this is the time and
20 place for the hearing. All the parties are here. There
21 was a motion made to the executive director to continue
22 the hearing for the pending litigation. That was denied.

23 CHAIRPERSON SHEEHAN: Correct.

24 MR. STARKEY: There's been some additional
25 information provided to the Commission today. So where

1 we stand today in terms of what the Commission does is
2 that the Commission, if it makes any decision, the next
3 phase would be to go to adopting a statement of decision,
4 and under our regulations the Commission then would only
5 have the jurisdiction at that point to say that -- for
6 the statement of decision that either it does or does not
7 reflect what the Commission has already decided. So by
8 making any decision today, you are starting to close down
9 that jurisdiction, so that's one point.

10 The other option is that you can separate out any
11 of these issues, decide some issues and hold others open.
12 You can also hold open the whole matter.

13 I do want to address that Mr. Scribner made a
14 point and I think it's one that the Commission has to
15 consider that if, in fact, the matter does -- is held
16 over, I do believe that the parties, all the parties,
17 would have opportunity to comment on what has been
18 presented thus far, including what was presented at
19 today's hearing. I personally heard some things today
20 that I don't think I've seen in any of the documents I've
21 read. So there could be additional briefing on all of
22 that.

23 Having said that, I want to address just the
24 issue of good cause. The letter that was presented to
25 the executive director provided certain information that

1 the executive director based her decision upon. Again,
2 there's additional information today. In the
3 regulations, the definition of good cause is expansive.
4 It's defined by the Commission in its regulations, but
5 one of the first factors is, No. 1, the number and
6 complexity of the issues raised. And then the last
7 factor is any other factor which the Commission deems in
8 the contents of a particular claim constitutes good
9 cause.

10 So you have wide discretion to decide whether or
11 not this should be continued. The Commission's policy
12 and regulation and law is that continuances are
13 disfavored, but the Commission by statute, regulation has
14 the power to oppose suggestions on the agenda, and so
15 that could be done in this particular case. And I think
16 that there are factors that have been presented that meet
17 the definition of good cause, if the Commission decides
18 to do that.

19 CHAIRPERSON SHEEHAN: Okay. All right. Did you
20 want to say something else?

21 MR. CERVINKA: Want to say? You know, our
22 request, as noted, was -- to postpone the issue was
23 denied, as the chair and the executive director indicated
24 a few minutes ago. The pending legislation is, in fact,
25 speculative and could therefore be adjusted to reflect

1 any action the Commission chose today -- chose to take
2 today, if they choose to take any. In light of that,
3 perhaps we would withdraw our request to postpone.

4 CHAIRPERSON SHEEHAN: Okay. Okay. So Finance,
5 it is all speculative, so --

6 MR. CERVINKA: I would say at this point we're no
7 longer suggesting that the Commission postpone.

8 CHAIRPERSON SHEEHAN: Okay. All right. So we
9 have -- any other testimony? Would anyone like to say
10 anything else on the issue?

11 We have the staff recommendation. Do we have a
12 motion?

13 MS. BOEL: Yeah, I'd like to move. At first I
14 was inclined to go the other way, but hearing -- I would
15 prefer from what you're saying is that the legislature
16 can react to us rather than us sitting here and waiting
17 to see what the legislature does, so in light of that, I
18 would like to move that we adopt the staff analysis.

19 MR. GLAAB: Second.

20 CHAIRPERSON SHEEHAN: We have a motion and a
21 second to adopt the staff analysis. Discussion on it?

22 (No audible response.)

23 CHAIRPERSON SHEEHAN: All right. All those in
24 favor --

25 MULTIPLE SPEAKERS: Aye.

1 CHAIRPERSON SHEEHAN: -- signify by saying "aye."
2 Any opposed?
3 (No audible response.)
4 CHAIRPERSON SHEEHAN: Any abstentions?
5 (No audible response.)
6 CHAIRPERSON SHEEHAN: That is unanimous.
7 MS. HIGASHI: Item 9.
8 CHAIRPERSON SHEEHAN: We'll see what happens.
9 MS. HIGASHI: Item 9.
10 CHAIRPERSON SHEEHAN: Go ahead, Eric.
11 MR. FELLER: Unless there's objection, staff
12 recommends the Commission adopt the proposed statement of
13 decision which accurately reflects the decision on this
14 test claim. Staff also recommends the Commission allow
15 minor changes to be made to the statement of decision
16 including reflecting the hearing testimony, and the vote
17 count will be included in the final SOD.
18 CHAIRPERSON SHEEHAN: All right.
19 MS. BOEL: I move we adopt the proposed
20 reconsideration -- the proposed statement of decision.
21 CHAIRPERSON SHEEHAN: All right. So we have a
22 motion. Do we have a second?
23 MR. SMITH: Second.
24 CHAIRPERSON SHEEHAN: There's a motion, a second
25 by Mr. Smith. Any other further discussion?

1 (No audible response.)

2 CHAIRPERSON SHEEHAN: All those in favor signify
3 by saying "aye."

4 MULTIPLE SPEAKERS: Aye.

5 CHAIRPERSON SHEEHAN: Opposed?

6 (No audible response.)

7 CHAIRPERSON SHEEHAN: That was adopted
8 unanimately. My guess we'll see everyone at some future
9 point on this. Okay.

10 MS. HIGASHI: This brings us -- this brings us to
11 item 10, reconsideration of the prior statement of
12 decision on the School Accountability Report Card claim,
13 and this is also a matter that was continued from the
14 last hearing.

15 CHAIRPERSON SHEEHAN: All right. Katherine, this
16 is yours?

17 All right. So all those would like to testify on
18 this issue -- all right.

19 Go ahead, Katherine.

20 MS. TOKARSKI: School Accountability Report Cards
21 was a test claim approved by the Commission at the
22 April 23rd, 1998 hearing. AB 2855 directs the Commission
23 to reconsideration this prior final decision. This item
24 was initially heard at the May 26th, 2005 Commission
25 hearing resulting in a tie vote. A notice was issued

1 granting the opportunity for any party to file comments
2 on the issues under reconsideration, and the item was
3 continued to today's hearing.

4 In enacting Proposition 98, The Classroom
5 Instructional Improvement and Accountability Act, the
6 voters provided public schools with state funding
7 guarantees. As part of this constitutional guarantee of
8 funding, the voters also required schools to undergo an
9 annual audit and to issue an annual school accountability
10 report card. The test claim was filed on statutory
11 amendments to the Prop 98 requirements for a school
12 accountability report card. Although it was part of the
13 original test claim, Statutes of 1997, chapter 912, was
14 not named in AB 2855; therefore, staff finds the
15 Commission does not have authority to rehear that portion
16 of the original decision.

17 Government Code section 17556, subdivision (f)
18 was amended by Statutes of 2005, chapter 72, effective
19 July 19th, 2005. The amendment provides the Commission
20 shall not find costs mandated by the State if the test
21 claim legislation was expressly included in a ballot
22 measure or imposes duties that are necessary to implement
23 or reasonably within the scope of a ballot measure
24 approved by the voters in a statewide or local election.

25 Plus pursuant to applicable case law, article

1 XIII B, section 6, and Government Code section 17556,
2 subdivision (f), in order for the test claim statutes
3 under reconsideration to require reimbursement, the
4 Commission must find that the State is imposing newly
5 required acts or activities on school districts beyond
6 the scope of those already imposed by the voters through
7 ballot measures, ultimately resulting in costs mandated
8 by the State.

9 In comments dated July 25th, 2005, which I
10 believe you've all received, School Innovations and
11 Advocacy argues the Commission cannot consider this law
12 when making its decision on reconsideration, because AB
13 2855 only explicitly requests reconsideration in light of
14 federal statutes enacted and state court decisions
15 rendered since these statutes were enacted, these
16 statutes referring to the original test claims.

17 Staff finds that while the Commission's
18 jurisdiction on the School Accountability Report Cards
19 claim is limited, when conducting the reconsideration,
20 the Commission must rely on the entire body of applicable
21 existing law including current federal constitutional,
22 case, and regulatory law, as well as state
23 constitutional, statutory, and regulatory law, none of
24 which were described in the reconsideration statute. The
25 amendment to Government Code section 17556 was passed as

1 urgency legislation that became effective and operative
2 as law on July 19th, 2005, and the Commission is required
3 to apply the law.

4 However, staff's recommendation is not based
5 solely on the amendment to section 17556(f). Staff also
6 finds that by requiring some new data elements and a new
7 method for publicizing and distributing the existing
8 school accountability report card, the State has not
9 shifted from itself to districts the burdens of state
10 government when the directive can be complied with by a
11 minimal reallocation of resources, as described by the
12 court in a 2003 decision, County of Los Angeles versus
13 Commission on State Mandates. Based on this controlling
14 case law, staff finds no higher level of service or costs
15 mandated by the State were imposed.

16 As another ground for finding that there are no
17 costs mandated by the State, in Department of Finance
18 versus Commission on State Mandates, the California
19 Supreme Court found that the availability of state
20 program funds precludes a finding of a reimbursable state
21 mandate. Staff finds that there is a unique relationship
22 between the voter-enacted school accountability report
23 card requirement and the Proposition 98 school funding
24 guarantee. Therefore, the billions of dollars in state
25 funds received under Prop 98 are equivalent to program

1 funds that can be used for the purpose of completing the
2 annual school accountability report card. School
3 districts have not demonstrated that the state funds
4 received are unavailable for the claimed additional costs
5 of providing these report cards.

6 Therefore, staff finds that the statutes subject
7 to reconsideration do not impose a new program or higher
8 level of service on school districts and do not impose
9 costs mandated by the State. Staff recommends the
10 Commission adopt the staff analysis to deny the
11 reconsidered portions of the original test claim decision
12 as stated in the conclusion beginning at page 28.

13 Will the parties and witnesses please state your
14 names for the record.

15 MR. HAJELA: Abe Hajela, School Innovations and
16 Advocacy.

17 MR. HAMILTON: Richard Hamilton, California
18 School Boards Association and the Education and Legal
19 Alliance.

20 MR. MIYASHIRO: Robert Miyashiro, Education
21 Mandated Cost Network.

22 MR. CERVINKA: Pete Cervinka, Department of
23 Finance.

24 MS. LEMIEUX: Estelle Lemieux with the California
25 Teachers Association also here on behalf of the Education

1 Coalition.

2 MR. DEL CASTILLO: Lenin Del Castillo, Department
3 of Finance.

4 CHAIRPERSON SHEEHAN: Okay. Who would like to
5 start?

6 MR. HAJELA: I'll start.

7 CHAIRPERSON SHEEHAN: Mr. Hajela.

8 MR. HAJELA: Thank you. Abe Hajela, School
9 Innovations and Advocacy. Several points I'd like to
10 make, most of which were made in my July 25th letter.
11 I'd just like to reiterate them.

12 First of all, staff did a good job of explaining
13 the law and limited jurisdiction that applies here. The
14 intent of the legislature was clear in AB 2055. They
15 said take a look at these statutes in light of federal
16 statutes and recent court decisions. It's pretty clear
17 the federal statutes they had in mind were No Child Left
18 Behind, which we won't talk about here, and then recent
19 court decisions. You can't expand beyond what the
20 legislature asked you to do. There's no case that I can
21 think of that says you can go beyond the clear and
22 unambiguous language in AB 2855. So, yes, it's true the
23 law has changed since then, but when they ask this
24 Commission to reconsider it, they asked you do so on the
25 basis of recently enacted federal statutes or state court

1 decisions. So that's the first point.

2 Secondly, on the minimal cost argument, we
3 continue to believe that it's the Commission's job to
4 figure out how much things cost and assess whether it's
5 minimal or not. So if you have additions to the SARC
6 requirements that were initially in Prop 98, you ought to
7 look at how much those costs compare to what was there
8 originally and decide whether the costs are minimal or
9 not. Just saying they're minimal doesn't quite get you
10 there. And it's the testimony I gave last time. Are
11 they minimal individually? Are they minimal together?
12 What is the basis for saying they're minimal? Staff
13 cites a case where the California Supreme Court decided
14 not to make that analysis. Well, of course the Supreme
15 Court is not going to make that sort of cost evidence
16 analysis, but that doesn't mean this Commission
17 shouldn't.

18 And finally, on this idea, which is sort of
19 continuous throughout the staff analysis, their view of
20 Proposition 98 and the relationship between the SARC is
21 not based on any case law. It's just based on their
22 reading of the statute. And that's at issue here, Number
23 One, because that was before you last time when you
24 originally considered this claim. But secondly, there's
25 no case law that possibly can get you to an analysis that

1 a funding formula in a state constitution is the same
2 thing as an appropriation. An appropriation is something
3 that's in the budget that says we're going to give you X
4 amount of dollars for this purpose. Those are programs
5 funds. The only case staff cites talks about program
6 funds. You can't take a formula and call it program
7 funds, and there's no case law that says you can.

8 There's a danger going down this route because
9 you can call the Prop 98 formula program funds now for
10 all purposes. There's no case law related to Prop 98 and
11 SARC. It's just something that they've created out of
12 the language of Prop 98 as they read it. So my question
13 would be well, why not count them as program funds for
14 everything? There's no state -- there's no case that
15 says they're program funds just for SARC.

16 So anyway. I made those points in my letter.
17 Nothing has changed. I don't know where to go from
18 there.

19 CHAIRPERSON SHEEHAN: All right. Go ahead.

20 MR. HAMILTON: I would like to join the comments
21 made by Mr. Hajela this morning for School Innovations
22 and Advocacy. The California School Boards Association
23 representing nearly a thousand school districts in the
24 state, and over 800 of those are members of our Education
25 and Legal Alliance, endorse the comments made.

1 I would like to just further focus on I find it
2 astounding that we are here looking at what I would call
3 stealth legislation enacted in the last minute without
4 any comment being included in the staff analysis and in
5 the decision when a whole section of this analysis and
6 decision says we are here for a very limited purpose, and
7 that is to look at new federal legislation and cases
8 enacted after. And here we are, we're looking now at
9 state legislation enacted when none of us had an
10 opportunity to make comment on it and to point out to the
11 legislature the impact of this change and how it would be
12 incorporated in a decision here before the Commission.

13 Thank you.

14 CHAIRPERSON SHEEHAN: Mr. Miyashiro.

15 MR. MIYASHIRO: Robert Miyashiro, for the record.

16 A couple points I'd like to make and I did make
17 them at the May hearing. Again, the point about the
18 minor reallocation of resources, your staff analysis on
19 page SA21 shows the accumulation of the claims that are
20 made for SARC, and it does point out that, in fact, these
21 are unaudited claims and they are claims for requirements
22 that also come from chapter 912, and therefore, they are
23 unable to parse out the portion of the issue before us
24 today for reconsideration.

25 But I also want to note for the record that the

1 Department of Finance views the omission of chapter 912
2 as inadvertent. And so at least in their view, the
3 entire amount would be up for reconsideration, and they
4 intend, as they state in a letter to the Commission, to
5 pursue legislation to include chapter 912 requirements as
6 well as the requirements that are before you today.
7 Those claims in your analysis exceed \$5 million. Again,
8 that would not seem to be a minor cost for schools to
9 bear.

10 The other point with regard to Proposition 98
11 providing program funds, again, Proposition 98 makes no
12 appropriation whatsoever. Proposition 98 establishes a
13 constitutional minimum funding level for K14 education,
14 and it also provided for the legislature to suspend that
15 amount and provide an amount less than the minimum
16 guarantee. So you can certainly see the State providing
17 billions of dollars to support public education both
18 before and after enactment of Proposition 98, and you
19 would also be unable to find any appropriation
20 specifically for school accountability report card either
21 before or after Proposition 98. And so I think it is a
22 stretch to argue that a minimum constitutional guarantee
23 for funding constitutes program funds.

24 And finally, the staff indicates that the
25 claimants have failed to demonstrate that they have been

1 unable to exhaust their -- or they have failed to
2 demonstrate the inability to fund this from state
3 program, state funds. That seems to be arguing that they
4 have to prove a negative. If there are state funds
5 available, the staff is saying that you have to show that
6 you can't use those state funds in order to fund this
7 requirement. What we would argue is that the school
8 districts would be unable to make that demonstration in
9 any case for any program. You cannot show that you don't
10 have state funds specifically to fund this program. What
11 you could show is that you did not fund a particular
12 activity, but you could not show that you don't have
13 funds to do it.

14 In order to show you have no funds to do it, you
15 would even run a deficit. The counter to that is, well,
16 part of that spending could have been applied to this.
17 So I think the argument that the claimants have failed to
18 demonstrate an inability to use state funds to fund this
19 mandate I think is kind of a circular argument. I don't
20 know how it could ever be shown that that would be the
21 case. Thank you.

22 CHAIRPERSON SHEEHAN: Thanks.

23 MS. LEMIEUX: Again, Estelle Lemieux, California
24 Teachers Association. We would concur with the testimony
25 you've just heard. Frankly, we just see this as just

1 another way of taking dollars from schools that are badly
2 needed.

3 CHAIRPERSON SHEEHAN: Department of Finance?

4 MR. DEL CASTILLO: Our argument is pretty brief.
5 As we mentioned at the last time we discussed this, the
6 SARC was established by a statewide ballot measure, and
7 it had the recognition that elements of the SARC would be
8 subject to change. And as these amendments are related
9 to the original test claim, you know, the program and
10 these amendments, they're not -- it's not a reimbursable
11 program because it was established by a statewide ballot
12 measure. And so, you know, we would support the
13 committee -- the Commission's staff analysis based on
14 that notion.

15 CHAIRPERSON SHEEHAN: All right. Go ahead.

16 MR. CERVINKA: I would just add to my colleague's
17 comment that it was mentioned in the earlier testimony
18 there was a reference to stealth legislation at the end
19 of the process, and we don't believe that, one, that was
20 stealth legislation. It was AB 138. It was a general
21 government trailer bill necessary to implement the
22 budget, but two, that legislation is completely
23 unnecessary to provide grounds for the Commission here to
24 make a decision that this is indeed not a reimbursable
25 mandate.

1 It's quite clear, as my colleague noted, the
2 original ballot said including but not limited to the
3 following things and required an annual comparison to the
4 template for the SARC provided by the superintendent. We
5 think the issue is very clear and doesn't rely on a
6 discussion of NCLB, an argument of di minimus or any
7 attempt to try to tie Prop 98 funding to the SARC. It's
8 just not necessary to make the argument.

9 CHAIRPERSON SHEEHAN: Did you want to briefly --

10 MR. HAJELA: Very briefly respond --

11 CHAIRPERSON SHEEHAN: Although I don't want to
12 get into a --

13 MR. HAJELA: -- to that. You absolutely needed
14 the change that you put through in AB 138 because the
15 statute specifically said the exception applies only if
16 they're expressly included in the ballot measure. So
17 these statutes, additional legislative mandates were not
18 expressly included in the ballot measure. So you needed
19 to change the law, and that's why you changed the law.
20 So let's just be clear about it.

21 CHAIRPERSON SHEEHAN: Although, as I recall from
22 the discussion in May, in the two-to-two poll and I
23 supported the staff analysis, and I think the
24 representatives from the Controller and the Treasurer
25 opposed it, that was before the law was changed, and we

1 still felt that they had justified it. So I'm not -- I
2 mean, I think there may be disagreements as to why -- if
3 they actually needed that in order to make this
4 recommendation. They had made the same staff analysis
5 prior to 138 being done upstairs and before, so.

6 MR. HAJELA: Correct. There's multiple
7 arguments. So they can still make their "all of Prop 98
8 counts as program funds" argument and you don't mean AB
9 138.

10 CHAIRPERSON SHEEHAN: Right. Right. So -- and I
11 guess the other way that -- and then I'll have staff
12 address it -- but I see it is sort of the substance of
13 the claim versus the process that this Commission uses to
14 look at any of the issues before us. So anyway, that's
15 how I see some of this.

16 But do you want to address some of the comments
17 that have been made?

18 MS. TOKARSKI: Sure.

19 CHAIRPERSON SHEEHAN: And then we'll open it up
20 for questions.

21 MS. TOKARSKI: Regarding the analysis, the
22 Commission is limited in its reconsideration to federal
23 statutes and state court decisions. It would simply be
24 impossible to do an analysis with those limitations.
25 You'd be unable to use any of the state constitution,

1 article XIII B, any of the Government Code sections as
2 they existed at any point in time. And it would simply
3 be a violation of the Commission's duty to ignore current
4 enacted law when making a determination.

5 But as you pointed out, even prior to this
6 amendment, the analysis went forward with the same
7 recommendation based on other considerations.

8 CHAIRPERSON SHEEHAN: Do you want to address the
9 program fund issue?

10 MS. TOKARSKI: Absolutely. Again, the analysis
11 of Prop 98 funding, not the formula, but the funding that
12 is actually received by the schools under Prop 98, this
13 is specific to -- I don't know how many more times I can
14 say this or how many different ways I can say this -- is
15 specific to an analysis of the School Accountability
16 Report Card program because that was established as part
17 of Proposition 98. And it is not staff's intention to --
18 based on current law to recommend that for all future
19 education claims.

20 You just had a claim before you that was an
21 education claim that was not the recommendation of staff
22 that they need to use their Proposition 98 funding first.
23 It's because the programs are inextricably linked through
24 the original initiative, Proposition 98, that we
25 recommend that the Commission acknowledge that the funds

1 received should be able to be used for this particular
2 program.

3 Do you have any further questions?

4 CHAIRPERSON SHEEHAN: I don't.

5 Any comments or questions from the Commission
6 members? Go ahead.

7 MR. SMITH: The Controller voted no on this item
8 last time. We will vote no again this time. And the
9 amended section 17556(f) doesn't matter to us.

10 However, I've got to say it is a little confusing
11 when you look at the staff analysis on this and on the
12 other reconsiderations that we have pages and pages of
13 what we can and can't do. We can't enlarge the plain
14 text of what's actually there. So I would recommend that
15 whatever way appropriate we notify the legislature just
16 of that fact, that, you know -- just some line in there
17 saying mandate law would clarify, because I thought it
18 was pretty funny that it wasn't in there. It says pretty
19 plainly to me federal law and state case law, nothing
20 about everything else.

21 MS. TOKARSKI: Mandates law in general?

22 MR. SMITH: Yeah. It doesn't say it, and you
23 can't say that we can't enlarge or add text to what's
24 plainly written down and it's just not there. So I would
25 make that recommendation, but consistent with our vote

1 last time, we're going to continue to vote no on this
2 item.

3 CHAIRPERSON SHEEHAN: Any other comments or
4 questions?

5 MS. BOEL: I'd like to move that we adopt the
6 staff analysis.

7 CHAIRPERSON SHEEHAN: We have motion. Do I have
8 a second?

9 MR. GLAAB: Second.

10 CHAIRPERSON SHEEHAN: All right. In light of the
11 tie vote before, I would suggest that we do a roll call.

12 MS. HIGASHI: Ms. Boel.

13 MS. BOEL: Aye.

14 MS. HIGASHI: Mr. Glaab.

15 MR. GLAAB: Aye.

16 MS. HIGASHI: Mr. Lujano.

17 MR. LUJANO: No.

18 MS. HIGASHI: Mr. Smith.

19 MR. SMITH: No.

20 MS. HIGASHI: And Ms. Sheehan.

21 CHAIRPERSON SHEEHAN: Aye.

22 MS. HIGASHI: The motion carries.

23 Item 10 -- I mean item 11.

24 MS. TOKARSKI: Item 11 is the proposed statement
25 of decision for the item that you just heard. The sole

1 issue before the Commission is whether the proposed
2 statement of decision accurately reflects any decision
3 made by the Commission at the July 28, 2005 hearing on
4 the School Accountability Report Card test claim
5 reconsideration.

6 Staff recommends that the Commission adopt the
7 proposed statement of decision beginning on page 3 which
8 accurately reflects the staff recommendation on the
9 reconsidered test claim. Minor changes to reflect the
10 hearing testimony and the vote count will be included
11 when issuing the final statement of decision.

12 CHAIRPERSON SHEEHAN: The only -- today is the
13 28th. You said the 20th, but I think today is the 28th.

14 MS. TOKARSKI: I thought I said the 28th.

15 CHAIRPERSON SHEEHAN: Okay. All right. I just
16 wanted to make sure the record reflects what today is.
17 Maybe I misheard.

18 All right. Any further discussion?

19 (No audible response.)

20 CHAIRPERSON SHEEHAN: If not, we'll entertain a
21 motion.

22 MS. BOEL: I move that we adopt the --

23 CHAIRPERSON SHEEHAN: Statement of decision.

24 MS. BOEL: -- statement of decision.

25 MR. GLAAB: Second.

1 CHAIRPERSON SHEEHAN: We have a motion by Ms.
2 Boel and a second from Mr. Glaab. Why don't we go ahead
3 and do a roll call again.
4 MS. HIGASHI: Okay. Mr. Glaab.
5 MR. GLAAB: Aye.
6 MS. HIGASHI: Mr. Lujano.
7 MR. LUJANO: No.
8 MS. HIGASHI: Mr. Smith.
9 MR. SMITH: No.
10 MS. HIGASHI: Ms. Boel.
11 MS. BOEL: Aye.
12 MS. HIGASHI: Ms. Sheehan.
13 CHAIRPERSON SHEEHAN: Aye.
14 MS. HIGASHI: The motion adopted.
15 This concludes the hearing portion of our
16 meeting. We have staff reports.
17 CHAIRPERSON SHEEHAN: Okay.
18 MS. HIGASHI: Mr. Starkey is first with item 23.
19 CHAIRPERSON SHEEHAN: Go ahead, Mr. Starkey.
20 MR. STARKEY: My public report stands as written.
21 No changes as of 11:35.
22 CHAIRPERSON SHEEHAN: I don't know. We haven't
23 been outside to hear if you've had any phone calls.
24 All right.
25 MS. HIGASHI: Item 24, my report. It covers

1 where we are in terms of our pending workload. Also it
2 mentions that we did receive the appropriation for the
3 additional staff positions which we're now developing
4 plans, duty statements, all of the details to go out to
5 begin advertising it to recruit and fill those positions.

6 Also I've given you an overview of what's in the
7 budget generally on mandate reimbursements and also
8 covered what we were aware of at that time which was
9 pending legislation AB 138.

10 CHAIRPERSON SHEEHAN: Which we heard about.

11 MS. HIGASHI: There are a couple other
12 curiosities in the budget, but they're in different
13 places in the budget, so I just wanted to note the
14 Controller's Office budget received ten new positions,
15 nine of which are audit positions that are specifically
16 for auditing mandate reimbursement claims, and there is a
17 requirement in the Budget Act for the Controller's Office
18 to report to the legislature next spring on what their
19 audit findings are, so that will be interesting. It
20 could result in an increased workload for incorrect
21 reduction claims for the Commission.

22 Another issue is that there is a mandated program
23 known as the Mandate Reimbursement Process, which is the
24 test claim that allowed local agencies and school
25 districts to be reimbursed for their costs in presenting

1 claims before the Commission. And in the school
2 districts' budget in the Department of Education side,
3 that mandate is deferred. In the local agency side of
4 the budget, that mandate is suspended. In AB 138 we're
5 directed to reconsider that matter. So we have it in
6 three different places.

7 There's also language in the State Controller's
8 Budget that directs us to provide in the Ps and Gs for
9 the program certain language which is regarding the
10 amount the consultants may charge. So it's -- we'll
11 figure it out and bring the matters before the
12 Commission.

13 CHAIRPERSON SHEEHAN: Okay.

14 MS. HIGASHI: After this hearing, the statements
15 of decision adopted will be issued next week. And at
16 that time also we are required to report the decisions to
17 the legislature, so they will receive notification of the
18 Commission's actions today in time for their return.

19 Other than that, I just wanted to recap what
20 Ms. Cruz pointed out in her presentation this morning,
21 that the Department of Finance has in its budget language
22 directing it to do a study, and Commission staff is
23 available to help in any way and to participate in that
24 process. And we look forward to having an opportunity to
25 look at it from another perspective instead of just

1 strictly within the legislative arena.

2 CHAIRPERSON SHEEHAN: Yeah, one thing I would add
3 to that is that with regard to that language directing
4 Finance to do a review of the mandate process and make
5 recommendations, I think at some point, maybe at the
6 September meeting, we can discuss maybe having, you know,
7 a special order at one of our hearings or some meetings
8 possibly out of Sacramento to get input from people on
9 the process as we work with Finance on putting this
10 together so that it comes out of our regular hearing
11 process. And we can notice it as a public hearing, an
12 informational hearing to take testimony. I think it
13 would be helpful to Finance as they're working on this.

14 MS. HIGASHI: That would be great.

15 Also, in my report I note what the next hearing
16 agenda is expected to look like.

17 CHAIRPERSON SHEEHAN: Yes, I saw that.

18 MS. HIGASHI: And I wanted to just clarify that
19 it will not be September 29th. We have changed the date
20 of the hearing to September 27th because of the need to
21 make a scheduling change.

22 CHAIRPERSON SHEEHAN: That was my request.

23 MS. BOEL: I did have a question. Do we have an
24 October hearing scheduled this year?

25 MS. HIGASHI: No, we do not.

1 MS. BOEL: Because I notice we have one next
2 year.

3 MS. HIGASHI: Right.

4 I've also presented to you a proposed meeting
5 hearing calendar for 2006. Because we have new staff
6 coming onboard at some time in the fall, we're not
7 exactly certain at what point in the spring agendas that
8 we'll start to have more agenda items so that it would be
9 beneficial to all to schedule maybe to have more
10 hearings. So we have proposed some tentative dates for
11 the off months that in the past couple of years we have
12 not met, just so that you can put them on your calendars.

13 Also, for December, I put two dates out there
14 because sometimes there are association meetings that are
15 scheduled for December, and I wasn't sure which date
16 would be better. And so I present these dates to you.
17 And if there's any discussion on these, this would be a
18 good time for us to try to work it out, and then we can
19 publish these dates and notify all the parties.

20 CHAIRPERSON SHEEHAN: Correct. Great. So I
21 think what we should do is get back to staff in terms of
22 those dates.

23 MS. HIGASHI: Okay.

24 CHAIRPERSON SHEEHAN: And if there are any
25 problems or issues that we foresee, make some

1 adjustments. But I think it is good to publish the
2 schedule well in advance so that people know when we will
3 hold the meeting.

4 MS. HIGASHI: Thank you. That's all I have,
5 unless there are any questions.

6 CHAIRPERSON SHEEHAN: All right. Any questions
7 from staff?

8 (No audible response.)

9 CHAIRPERSON SHEEHAN: Do we have closed session?

10 MR. STARKEY: Five minutes.

11 CHAIRPERSON SHEEHAN: Okay. Before we go into
12 closed session, any comments from the public on any other
13 items that need to be?

14 (No audible response.)

15 CHAIRPERSON SHEEHAN: If not, I think we will
16 adjourn to closed session and then come back in open and
17 conclude the meeting.

18 The Commission will now meet in closed executive
19 session pursuant to Government Code section 11126,
20 subdivision (E) to confer with and receive advice from
21 legal counsel, for consideration and action, as necessary
22 and appropriate upon the pending litigation listed on the
23 published notice and agenda; and to confer with and
24 receive advice from legal counsel regarding potential
25 litigation; and pursuant to Government Code sections

1 11126 subdivision (A) and 17526, the Commission will also
2 confer on personnel matters listed on the published
3 notice and agenda.

4 (Whereupon the Commission met in closed executive
5 session.)

6 CHAIRPERSON SHEEHAN: Okay. The Commission on
7 State Mandates is back in open session. The Commission
8 met in closed executive session pursuant to Government
9 Code section 11126, subdivision (E), to confer with and
10 receive advice from legal counsel for consideration and
11 action, as necessary and appropriate upon the pending
12 litigation listed on the published notice and agenda and
13 potential litigation; and Government Code section 11126,
14 subdivision (A) and 17526 to confer on personnel matters
15 listed on the published notice and agenda.

16 All required reports from the closed session
17 having been made and with no further business to discuss,
18 I'll entertain a motion to adjourn.

19 MR. GLAAB: So moved.

20 MR. SMITH: Second.

21 CHAIRPERSON SHEEHAN: We have a motion and a
22 second. All those in favor?

23 MULTIPLE SPEAKERS: Aye.

24 CHAIRPERSON SHEEHAN: Any opposed?

25 (No audible response.)

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CHAIRPERSON SHEEHAN: We are adjourned. Thank
you.

(Whereupon the hearing concluded at 12:01 p.m.)

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REPORTER'S CERTIFICATE

I hereby certify the foregoing hearing was held 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.

In witness whereof, I have hereunto set my hand this 16th day of August, 2005.



Yvonne K. Fenner
Certified Shorthand Reporter
License No. 10909