

Minutes

COMMISSION ON STATE MANDATES

Location of Meeting: Room 447
State Capitol, Sacramento, California
September 23, 2016

Present: Member Eraina Ortega, Chairperson
Representative of the Director of the Department of Finance
Member Mark Hariri, Vice Chairperson
Representative of the State Treasurer
Member Scott Morgan
Deputy Director of Administration and State Clearinghouse Director,
Governor's Office of Planning and Research
Member Richard Chivaro
Representative of the State Controller
Member Sarah Olsen
Public Member
Member Don Saylor
County Supervisor

Absent: Member Carmen Ramirez
City Council Member

NOTE: The transcript for this hearing is attached. These minutes are designed to be read in conjunction with the transcript.

CALL TO ORDER AND ROLL CALL

Chairperson Ortega called the meeting to order at 10:00 a.m. Executive Director Heather Halsey called the roll and announced that Member Ramirez had notified Commission staff that she could not attend the September hearing. Member Chivaro was absent at roll call.

APPROVAL OF MINUTES

Member Olsen made a motion to adopt the minutes. With a second by Member Hariri, the July 22, 2016 hearing minutes were adopted by a vote of 5-0.

PUBLIC COMMENT FOR MATTERS NOT ON THE AGENDA

The Chairperson asked if there was any public comment. There was no response.

HEARINGS AND DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (GOV. CODE, § 17551, 17557, 17559, and 17570) (action)

Executive Director Heather Halsey swore in the parties and witnesses participating in the hearing.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181.1(c) (info/action)

Item 2 *Appeal of Executive Director Decision, 15-AEDD-01*
County of San Diego, Appellant

This matter is an appeal by the County of San Diego of the executive director’s decision to dismiss an Incorrect Reduction Claim filed by the County of San Diego because it was not filed within the period of limitation.

Chief Legal Counsel Camille Shelton presented the item and recommended that the Commission adopt the proposed decision to uphold the executive director’s decision to deem the filing incomplete for lack of jurisdiction.

Parties were represented as follows: Kyle Sand, representing the appellant; Jim Spano representing the State Controller’s Office.

Member Chivaro joined the meeting.

Following discussion among the Commission members, staff, and parties, Member Saylor made a motion to grant the appeal. With a second by Member Olsen, the motion to reject the staff recommendation and grant the appeal resulted in a vote of 3-2, with Member Hariri abstaining. However, under the Commission’s regulations, four affirmative votes are required for action. Member Chivaro made a motion to adopt the staff recommendation. With a second by Chair Ortega, the motion to adopt the staff recommendation and deny the appeal resulted in a tie vote of 3-3. Therefore, no action was taken and the matter was continued to the next regularly scheduled hearing.

INCORRECT REDUCTION CLAIMS

Item 3 *The Stull Act, 14-9825-I-01*
Education Code Sections 44660-44665
Statutes 1983, Chapter 498; Statutes 1999, Chapter 4
Fiscal Years 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002,
2002-2003, 2003-2004, and 2004-2005
Oceanside Unified School District, Claimant

This Incorrect Reduction Claim addresses audit reductions made by the State Controller’s Office to reimbursement claims filed under *The Stull Act* program.

Chief Legal Counsel Camille Shelton presented this item and recommended that the Commission partially approve this Incorrect Reduction Claim and requested that the Controller reinstate costs based on the Controller’s findings.

Parties were represented as follows: Arthur Palkowitz and Todd McAteer, representing the claimant; Jim Spano and Ken Howell, representing the State Controller’s Office.

Following discussion among the Commission members, staff, and parties, Member Chivaro made a motion to adopt the staff recommendation. With a second by Member Morgan, the motion to partially approve this Incorrect Reduction Claim was adopted by a vote of 6-0.

Item 4 *Seriously Emotionally Disturbed Pupils: Out-of-State Mental Health Services*, 11-9705-I-02

Government Code Section 7576 as amended by Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60100 and 60110

Fiscal Years 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, and 2005-2006

AND

Handicapped and Disabled Students; Handicapped and Disabled Students II; and Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services, 12-9705-I-03

Government Code Sections 7571, 7572, 7572.5, 7572.55, 7576, 7581, and 7586 as added by Statutes 1984, Chapter 1747 (AB 3632); and as amended by Statutes 1985, Chapter 1274 (AB 882); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60020, 60030, 60040, 60045, 60050, 60055, 60100, 60110, 60200, and 60550 (Emergency regulations effective January 1, 1986 [Register 86, No. 1], and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28]; and Emergency regulations effective July 1, 1998 [Register 98, No. 26]; final regulations effective August 9, 1999 [Register 99, No. 33])

Fiscal Years 2006-2007, 2007-2008, and 2008-2009

County of Orange, Claimant

These consolidated Incorrect Reduction Claims address the State Controller's reduction of vendor costs claimed for board and care and treatment services for out-of-state residential placement of seriously, emotionally disturbed, or SED, pupils in facilities organized and operated for-profit.

Senior Commission Counsel Julia Blair presented this item and recommended the Commission adopt the Proposed Decision to deny these consolidated Incorrect Reduction Claims.

Parties were represented as follows: James Harman, representing the claimant; Chris Ryan and Jim Spano, representing the State Controller's Office.

Following discussion among the Commission Chairperson and parties, Member Chivaro made a motion to adopt the staff recommendation. With a second by Member Morgan, the motion to deny this Incorrect Reduction Claim was adopted by a vote of 6-0.

REQUEST FOR RECONSIDERATION OF AN ADOPTED DECISION

Item 5 16-RAD-01

Handicapped and Disabled Students II, 12-0240-I-01

Government Code Sections 7572.55 and 7576; Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726);

California Code of Regulations, Title 2, Sections 60020, 60050, 60030, 60040, 60045, 60055, 60100, 60110, 60200 (Emergency regulations effective July 1, 1998 [Register 98, No. 26] final regulations effective August 9, 1999 [Register 99, No. 33])

Fiscal Years 2002-2003 and 2003-2004

County of Los Angeles, Requester

AND

16-RAD-02

Handicapped and Disabled Students, 13-4282-I-06

Government Code Sections 7572 and 7572.5; Statutes 1984, Chapter 1747 (AB 3632); Statutes 1985, Chapter 1274 (AB 882);

California Code of Regulations, Title 2, Division 9, Section 60040 (Emergency regulations filed December 31, 1985, designated effective January 1, 1986 [Register 86, No. 1] and re-filed June 30, 1986, designated effective July 12, 1986 [Register 86, No. 28])

Fiscal Years 2003-2004, 2004-2005, and 2005-2006

County of Los Angeles, Requester

These consolidated Requests for Reconsideration of an Adopted Decision address two of the Commission's July 22, 2016 Decisions to deny two Incorrect Reduction Claims under the *Handicapped and Disabled Students*, and *Handicapped and Disabled Students II* programs as untimely filed. The claimant in those two Incorrect Reduction Claims requests that the Commission schedule a reconsideration of those Incorrect Reduction Claims on the grounds that it was allegedly a legal error for the Commission to raise the limitations issue when the Controller had not raised the limitations issue.

Senior Commission Counsel Paul Karl Lukacs presented this item stating that staff recommends that the Commission deny these consolidated Requests for Reconsideration of an Adopted Decision because the claimant has not provided a satisfactory explanation of why the claimant failed to raise this legal argument earlier.

Parties were represented as follows: Peter Lee, representing the claimant; Jim Spano and Chris Ryan, representing the State Controller's Office.

Following discussion among the Commission members, staff, and parties, Member Olsen made a motion to adopt the staff recommendation. With a second by Member Chivaro, the motion to deny these consolidated Requests for Reconsideration of an Adopted Decision was adopted by a vote of 6-0.

HEARINGS ON COUNTY APPLICATIONS FOR FINDINGS OF SIGNIFICANT FINANCIAL DISTRESS PURSUANT TO WELFARE AND INSTITUTIONS CODE SECTION 17000.6 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, ARTICLE 6.5 (info/action)

- Item 6 Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commission, or to a Hearing Officer

No applications were filed.

STAFF REPORTS

- Item 7 Legislative Update (info)

Executive Director Heather Halsey noted that there is nothing new to report.

- Item 8 Chief Legal Counsel: New Filings, Recent Decisions, Litigation Calendar (info)

Chief Legal Counsel Camille Shelton presented this item.

- Item 9 Executive Director: Workload Update, 2017 Hearing Calendar, and Tentative Agenda Items for the October 2016 and January 2017 Meetings (info/action)

Executive Director Heather Halsey presented this item and reported on the Commission's pending caseload. Ms. Halsey noted that Senior Commission Counsel Eric Feller's last day with the Commission was on August 12, 2016; he worked with the Commission for 15 years and will be missed by staff. The Commission will be recruiting a new attorney in the coming months.

Executive Director Heather Halsey also presented the 2017 hearing calendar.

Following discussion among the Commission members and staff, Member Chivaro made a motion to adopt the proposed 2017 hearing calendar. With a second by Member Saylor, the motion to adopt the 2017 hearing calendar was adopted by a vote of 6-0.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (info/action)

A. PENDING LITIGATION

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(e)(1):

Trial Courts:

Nothing pending.

Courts of Appeal:

1. *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Board, San Diego Region v. Commission on State Mandates and County of San Diego, et al.* (petition and cross-petition)
Third District Court of Appeal, Case No. C070357
Sacramento County Superior Court Case No. 34-2010-80000604

- [*Discharge of Stormwater Runoff*, Order No. R9-2007-000 (07-TC-09), California Regional Water Control Board, San Diego Region Order No. R9-2007-001, NPDES No. CAS0108758, Parts D.1.d.(7)-(8), D.1.g., D.3.a.(3), D.3.a.(5), D.5, E.2.f, E.2.g,F.1, F.2, F.3, I.1, I.2, I.5, J.3.a.(3)(c) iv-vii & x-xv, and L]
2. *Counties of San Diego, Los Angeles, San Bernardino, Orange, and Sacramento v. Commission on State Mandates, et al.*
 Fourth District Court of Appeal, Division One, Case No. D068657
 San Diego County Superior Court, Case No. 37-2014-00005050-CU-WM-CTL
 [Mandate Redetermination, *Sexually Violent Predators*, (12-MR-01, CSM-4509);
 Welfare and Institutions Code Sections 6601, 6602, 6603, 6604, 6605, and 6608;
 Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763 (AB 888); Statutes
 1996, Chapter 4 (AB 1496) As modified by Proposition 83, General Election,
 November 7, 2006]

 3. *Coast Community College District, et al. v. Commission on State Mandates,*
 Third District Court of Appeal, Case No. C080349
 Sacramento County Superior Court, Case No. 34-2014-80001842
 [*Minimum Conditions for State Aid*, 02-TC-25/02-TC-31
 (Education Code Sections 66721, 66721.5, 66722, 66722.5, 66731, 66732, 66736,
 66737, 66738, 66740, 66741, 66742, 66743, 70901, 70901.5, 70902, 71027, 78015,
 78016, 78211.5, 78212, 78213, 78214, 78215, 78216, 87482.6, and 87482.7; Statutes
 1975, Chapter 802; Statutes 1976, Chapters 275, 783, 1010, and 1176; Statutes 1977,
 Chapters 36 and 967; Statutes 1979, Chapters 797 and 977; Statutes 1980, Chapter
 910; Statutes 1981, Chapters 470 and 891; Statutes 1982, Chapters 1117 and 1329;
 Statutes 1983, Chapters 143 and 537; Statutes 1984, Chapter 1371; Statutes 1986,
 Chapter 1467; Statutes 1988, Chapters 973 and 1514; Statutes 1990, Chapters 1372
 and 1667; Statutes 1991, Chapters 1038, 1188, and 1198; Statutes 1995, Chapters 493
 and 758; Statutes 1998, Chapter 365, 914, and 1023; Statutes 1999, Chapter 587;
 Statutes 2000, Chapter 187; and Statutes 2002, Chapter 1169; California Code of
 Regulations, Title 5, Sections 51000, 51002, 51004, 51006, 51008, 51012, 51014,
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 55825, 55827, 55828, 55829, 55830, 55831, 58102, 58104, 58106, 58107, 58108,
 59404, and 59410; Handbook of Accreditation and Policy Manual, Accrediting
 Commission for Community and Junior Colleges (Summer 2002); and “Program and
 Course Approval Handbook” Chancellor’s Office California Community Colleges
 (September 2001).]

4. *Paradise Irrigation District, et al. v. Commission on State Mandates, Department of Finance, and Department of Water Resources*
Third District Court of Appeal, Case No. C081929
Sacramento County Superior Court, Case No. 34-2015-80002016
[*Water Conservation* (10-TC-12/12-TC-01, adopted December 5, 2014), Water Code Division 6, Part 2.55 [sections 10608-10608.64] and Part 2.8 [sections 10800-10853] as added by Statutes 2009-2010, 7th Extraordinary Session, Chapter 4 California Code of Regulations, Title 23, Division 2, Chapter 5.1, Article 2, Sections 597-597.4; Register 2012, No. 28.]
5. *California School Board Association (CSBA) v. State of California et al.*
First District Court of Appeal, Case No. A148606
Alameda County Superior Court, Case No. RG11554698
[2010-2011 Budget Trailer Bills; Education Code sections 42238.24 and 56523]

California Supreme Court:

1. *State of California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region v. Commission on State Mandates and County of Los Angeles, et al*
(petition and cross-petition)
California Supreme Court, Case No. S214855
Second District Court of Appeal, Case No. B237153
Los Angeles County Superior Court, Case No. BS130730
[*Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, Los Angeles Regional Quality Control Board Order No. 01-182, Permit CAS004001, Parts 4C2a., 4C2b, 4E & 4Fc3]

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(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 or staff.

B. PERSONNEL

To confer on personnel matters pursuant to Government Code section 11126(a).

The Commission adjourned into closed executive session at 11:16 a.m., pursuant to Government Code section 11126(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 to confer with and receive advice from legal counsel regarding potential litigation; and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

**RECOVENE IN PUBLIC SESSION
REPORT FROM CLOSED EXECUTIVE SESSION**

At 11:22 a.m., Chairperson Ortega reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126(e)(2) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and to confer

with and receive advice from legal counsel regarding potential litigation, and, pursuant to Government Code section 11126(a)(1) to confer on personnel matters.

ADJOURNMENT

Hearing no further business, Chairperson Ortega adjourned the meeting at 11:23 a.m.


Heather Halsey
Executive Director

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PUBLIC MEETING

**COMMISSION ON
STATE MANDATES**

COMMISSION ON STATE MANDATES

TIME: 10:00 a.m.

DATE: Friday, September 23, 2016

**PLACE: State Capitol, Room 447
Sacramento, California**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Reported by:

Daniel P. Feldhaus

California Certified Shorthand Reporter #6949

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A P P E A R A N C E S

COMMISSIONERS PRESENT

ERAINA ORTEGA
Representative for MICHAEL COHEN, Director
Department of Finance
(*Chair of the Commission*)

MARK HARIRI
Representative for JOHN CHIANG
State Treasurer
(*Vice Chair of the Commission*)

RICHARD CHIVARO
Representative for BETTY T. YEE
State Controller

SCOTT MORGAN
Representative for KEN ALEX
Director
Office of Planning & Research

SARAH OLSEN
Public Member

DON SAYLOR
Yolo County Supervisor
Local Agency Member



PARTICIPATING COMMISSION STAFF PRESENT

HEATHER A. HALSEY
Executive Director
(*Item 9*)

CAMILLE N. SHELTON
Chief Legal Counsel
(*Items 2, 3, and 8*)

JULIA BLAIR
Senior Commission Counsel
(*Item 4*)

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF

continued

PAUL KARL LUKACS
Senior Commission Counsel
(Item 5)



PUBLIC TESTIMONY

Appearing Re Item 2:

For Appellant County of San Diego:

KYLE E. SAND
Senior Deputy County Counsel
County of San Diego
1600 Pacific Highway Room 355
San Diego, California 92101

For State Controller's Office:

JIM L. SPANO
Interim Chief, Financial Audits Bureau
Chief, Mandated Cost Audits Bureau
Division of Audits
State Controller's Office
3301 C Street, Suite 725
Sacramento, California 95816

Appearing Re Item 3:

For Claimant Oceanside Unified School District:

TODD McATEER
Director of Human Resources, Certificated Employee,
Oceanside Unified School District
2111 Mission Avenue
Oceanside, California 92058

ARTHUR M. PALKOWITZ
Artiano Shinoff
2488 Historic Decatur Road, Suite 200
San Diego, California 92106

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 3: *continued*

For State Controller's Office:

JIM L. SPANO
Interim Chief, Financial Audits Bureau
Chief, Mandated Cost Audits Bureau
Division of Audits
State Controller's Office

KEN HOWELL
Audit Manager
Division of Audits
State Controller's Office
3301 C Street, Suite 725
Sacramento, California 95816

Appearing Re Item 4:

For Claimant County of Orange:

JAMES HARMAN
Supervising Deputy County Counsel
County of Orange
333 West Santa Ana Boulevard
Santa Ana, California 92701

For State Controller's Office:

JIM L. SPANO
Interim Chief, Financial Audits Bureau
Chief, Mandated Cost Audits Bureau
Division of Audits
State Controller's Office

CHRISTOPHER B. RYAN
Audit Manager, Division of Audits
State Controller's Office
3301 C Street, Suite 725
Sacramento, California 95816

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 5:

For Claimant County of Los Angeles:

PETER LEE
Deputy County Counsel
Office of the County Counsel
County of Los Angeles
500 West Temple Street
Los Angeles, California 90012

For State Controller's Office:

JIM L. SPANO
Interim Chief, Financial Audits Bureau
Chief, Mandated Cost Audits Bureau
Division of Audits
State Controller's Office

CHRISTOPHER B. RYAN
Audit Manager, Division of Audits
State Controller's Office



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1 CHAIR ORTEGA: Okay, thank you. We have a quorum.
2 We have the minutes from the July 22nd meeting.
3 Are there any corrections or comments on the
4 minutes?

5 MEMBER OLSEN: Move adoption.

6 CHAIR ORTEGA: Okay, moved by Ms. Olsen.

7 Is there a second?

8 VICE CHAIR HARIRI: Second.

9 CHAIR ORTEGA: Second by Mr. Hariri.

10 Is there any comment on the minutes?

11 *(No response)*

12 CHAIR ORTEGA: Seeing none, all in favor, say "aye."

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

14 CHAIR ORTEGA: Minutes are adopted.

15 EXECUTIVE DIRECTOR HALSEY: Chief Legal Counsel
16 Camille Shelton will present Item 3, an incorrect
17 reduction claim on the *Stull Act*.

18 MEMBER OLSEN: Are we doing Item 2?

19 EXECUTIVE DIRECTOR HALSEY: I'm sorry, Item 2, an
20 appeal of the Executive Director decision.

21 Okay, let's start that over again.

22 And now we will take up public comment for matters
23 not on the agenda.

24 Please note that the Commission cannot take action
25 on matters not on the agenda. However, it can schedule

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1 issues raised by the public for consideration at future
2 meetings.

3 CHAIR ORTEGA: Okay, is there any public comment on
4 items not on the agenda?

5 *(No response)*

6 CHAIR ORTEGA: Seeing none, we'll move on.

7 There is no Consent Calendar.

8 EXECUTIVE DIRECTOR HALSEY: Okay, and let's move on
9 to Article 7.

10 Will the parties and witnesses for Items 2, 3, 4,
11 and 5 please rise?

12 *(Parties/witnesses stood to be sworn or*
13 *affirmed.)*

14 EXECUTIVE DIRECTOR HALSEY: Do you solemnly swear or
15 affirm that the testimony which you are about to give is
16 true and correct, based on your personal knowledge,
17 information, or belief?

18 *(A chorus of affirmative responses was heard.)*

19 EXECUTIVE DIRECTOR HALSEY: Thank you.

20 Chief Legal Counsel Camille Shelton will present
21 Item 2, the appeal of an Executive Director decision for
22 the dismissal of an incorrect reduction claim filed by
23 the County of San Diego because it was not filed within
24 the period of limitation.

25 MS. SHELTON: Good morning. This item was heard by

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1 the Commission at the March and May hearings, but has not
2 received a sufficient number of votes for action.

3 No changes have been made to the proposed decision.

4 The Commission's regulations require that an
5 incorrect reduction claim shall be filed no later than
6 three years following the Controller's written notice of
7 adjustment, reducing a claim for reimbursement.

8 If the filing is not timely, the regulations require
9 Commission staff to deem the filing incomplete and the
10 filing will be returned by the Executive Director for
11 lack of jurisdiction.

12 In this case, the County of San Diego appeals the
13 decision of the Executive Director to deem an incorrect
14 reduction claim that was filed more than three years
15 after the Controller's first final audit report as
16 untimely and incomplete. The Claimant argues that the
17 Controller's revised final audit report supersedes the
18 original report, and triggered the timely filing of the
19 incorrect reduction claim.

20 Staff recommends that the Commission adopt the
21 proposed decision to uphold the Executive Director's
22 decision to deem the filing incomplete for lack of
23 jurisdiction.

24 Will the parties and witnesses please state your
25 names for the record?

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1 MR. SAND: Kyle Sand, Senior Deputy County Counsel
2 with the County of San Diego.

3 MR. SPANO: Jim Spano, State Controller's Office,
4 Division of Audits.

5 CHAIR ORTEGA: Okay, thank you.

6 Mr. Sand, before we get started, I just wanted to
7 mention to the members who were here when we had the
8 conversation last time, I thought that since it had been
9 so long since we first heard this issue in March, that
10 it would make sense to kind of start over.

11 And we have folks here who were not here at the
12 March meeting; and so we'll just begin with the item and
13 see where it takes us.

14 Mr. Sand?

15 MR. SAND: Great. Well, thank you for having me.
16 It's good to be here again.

17 Several years ago, on December 18th, 2012, the State
18 Controller's Office issued this revised final audit
19 report. And in the revised audit report, it indicated
20 explicitly, it stated that it superseded an earlier
21 report that was issued earlier in that year.

22 Now, under your regulations -- not the new
23 regulations adopted -- and I believe it went into effect
24 recently -- but the regulations in effect at the time and
25 in effect at the time of the filing, we had three years

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1 from the date of the final audit report.

2 Now, the County filed its claim on December 10th,
3 2015, which is within three years from the date of this
4 report; and the Executive Director rejected our filing.
5 Now, there had been, as many commissioners may remember,
6 several issues within the past five to ten years
7 regarding what is the appropriate filing date for these
8 claims.

9 Now, I believe that the Commission has pretty much
10 fixed that issue with the new regulations that went into
11 effect. I was reading them again this morning; and I
12 believe the language was added, "*no later from the date*
13 *a claimant first receives the State Controller's report,*"
14 which would infer that it was the first time we got one,
15 not this revised one. I think that somewhat clarifies
16 the issue. But based on the plain reading of the
17 regulation in effect at the time and based on this report
18 and the date on it and also the letter on the cover page,
19 indicating that it superseded the prior report, this is
20 the report. This is the final audit report, you know, in
21 addition to the fact that every page in here indicates
22 that it is a revised report.

23 So that is what the County of San Diego relied upon
24 when we filed our claim in -- well, nine or ten months
25 or so ago; but I submit, on the information provided and

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1 our briefing on the issue -- and I believe we also have
2 a transcript of the last time around. But I say a lot
3 of -- I think I sound like Woody Allen when I read these
4 things afterwards. So that was unpleasant to read. But
5 it sounded a lot better the first time.

6 So with that, I'll take questions from the
7 Commission.

8 CHAIR ORTEGA: Mr. Spano. Let's have Mr. Spano
9 respond.

10 MR. SAND: Yes.

11 MR. SPANO: I have no general comments to make.
12 I'm here basically if there are any questions regarding
13 the factual accuracy or factual information, I can
14 respond to.

15 CHAIR ORTEGA: Okay. So, Mr. Sand, I don't think
16 it's pleasant for any of us to go back and look at the
17 transcripts and see what we said.

18 So I'll open it up for any questions or comments at
19 this point.

20 I think, as you all know from looking at the
21 transcript, I'm sure we were left with a tie when we had
22 taken up this issue twice before.

23 So is there any comment at this point?

24 MEMBER SAYLOR: I have some questions.

25 CHAIR ORTEGA: Okay. Yes, Mr. Saylor, please.

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1 MEMBER SAYLOR: So I forgot -- let's see, the
2 gentleman from San Diego, your name is Mr. Sand?

3 MR. SAND: Correct.

4 MEMBER SAYLOR: Okay, so you mentioned that there
5 was a regulation that left some uncertainty for
6 interpretation.

7 Is that an accurate statement?

8 MS. SHELTON: If you go to page 10 of the proposed
9 decision, it outlines what the regulations said at the
10 time. And at the time, it said your incorrect reduction
11 claim shall be filed no later than three years following
12 the date of the Office of the State Controller's final
13 state audit report, letter, remittance advice, or other
14 written notice of adjustment. So it lists maybe various
15 types of written documents that the Controller was
16 issuing at that time, and didn't maybe clarify that it
17 had to be your first notice, which would trigger the
18 timing of filing your incorrect reduction claim within
19 the statute of limitations.

20 This last year, clarifying regulations do go into
21 effect beginning October 1st; and they say it's when the
22 claimant first receives a written notice. So as we've
23 seen through several incorrect-reduction-claim hearings,
24 the Controller has issued what they call a final audit
25 report; and then there are subsequent writings in various

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1 forms. And we've had a lot of different factual
2 situations in these incorrect reduction claims.

3 And here, we have a situation where they issued a
4 final audit report in March 2012, and then issued a
5 revised final audit report in December 2012.

6 And what is my understanding of the reading of the
7 record is that the revision occurred to a finding dealing
8 with offsetting revenues and did not deal with the
9 reduction that was being challenged in this incorrect
10 reduction claim. So there, nothing changed with respect
11 to that reduction of costs.

12 MEMBER SAYLOR: Right. The regulation changed
13 regarding the timing, when does that -- when was that
14 effective?

15 MS. SHELTON: It becomes effective October of 1st.

16 MEMBER SAYLOR: So it's not effective yet?

17 MS. SHELTON: It's been deemed finalized and will be
18 published by the Secretary of State's office and go into
19 effect, correct.

20 MEMBER SAYLOR: So when San Diego County was
21 reviewing this topic, they could reasonably have expected
22 that the time-line would have started at the time the
23 final revised report was given to them by the State
24 Controller?

25 MS. SHELTON: That's argument that the County of

1 San Diego was making. But the intent of the regulation
2 was not that, when you read that in light of all the case
3 law on the purpose of statute of limitations. The
4 statute of limitations is there to give some limitation
5 as to when you are required to file something. It should
6 not change every time a state agency issues new writings.

7 The whole idea of that is, when you first become
8 aware of a wrong, that is the triggering of the clock.
9 And all the law says, you can file even complaints in
10 court without knowing all the facts. You know, they
11 first became, you know, aware of the wrong in March --
12 and, actually, even before that, when the draft came out.
13 The final audit report said that it's still the same, we
14 are still reducing these costs. So at that point, that
15 was when the time began to start.

16 MEMBER SAYLOR: Have we taken action on other
17 incorrect reduction claims where the time -- have we
18 taken action on other matters of this sort based on this
19 interpretation you're describing?

20 MS. SHELTON: Yes, there have been several this
21 year.

22 MEMBER SAYLOR: Okay, so the timeliness question has
23 been applied uniformly in other circumstances that are
24 analogous?

25 MS. SHELTON: Correct. Except I believe in this

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1 particular claim, several years ago we issued one where,
2 looking at it now, it was a wrong decision. It was one
3 where the Commission took jurisdiction on a -- I think a
4 subsequent written notice. And that is a wrong decision.
5 But these decisions are not precedential.

6 This is a full analysis of the law dealing with
7 statute of limitations; and we believe this is the
8 legally correct conclusion.

9 MEMBER SAYLOR: Okay.

10 CHAIR ORTEGA: Go ahead, Ms. Olsen.

11 MEMBER OLSEN: Okay, so as I recall our discussion,
12 way back -- was it March that we had the initial
13 discussion? -- the discussion came down to -- after we
14 had all talked a lot and asked a lot of questions and
15 spoken at length, it came down to one word, and the word
16 was that in the Controller's subsequent writings, they
17 had used the word "*superseded*," and they had used that
18 word in relation to the entire report. They had not said
19 it supersedes items blah-blah-blah and blah-blah-blah.
20 They said, "This report supersedes the prior report."
21 And that's where the concern came down. And that hasn't
22 changed, because that's part of the historical record.
23 The Controller used the language that the subsequent
24 report superseded the prior report.

25 And I think that's compelling to me, because we're

1 in a really language-dependent job here. Our words have
2 to matter; and they have to be -- you know, if they can
3 be defined concretely, then they need to be defined that
4 way. And "superseded" means superseded. So that's my
5 concern about trying to interpret it any other way.
6 Because it seems to me that "superseded" is a word that
7 isn't really open to interpretation. It has a very
8 discrete meaning.

9 CHAIR ORTEGA: I don't disagree that we've come down
10 to this word on this one; but now having sat through
11 numerous discussions about the timing questions and what
12 seems to me the clear pattern of the Controller's office
13 having a back-and-forth with the claimants during and
14 after the final audit report is issued, that the use of
15 "supersedes" means nothing more than any of the words or
16 reports that have been issued by the Controller's Office,
17 and then used in these discussions to explain why the
18 timing is appropriate.

19 So I think I agree that that's what it comes down to
20 here; but I see it differently, in that we've just seen
21 example after example where it's treated differently, and
22 so no one word means anything different than another.
23 And it feels to me, that the final audit is as it's been
24 described by Ms. Shelton.

25 MS. SHELTON: I was just going to say that. When

1 you look at the case law that we've described, just
2 generally talking about statute of limitations, the key
3 fact is when they had constructive notice of a wrong
4 being done. And they had notice of that with the
5 March report. And so whatever language the Controller
6 uses, it didn't change the finding. So they had notice
7 back in March 2012.

8 MEMBER SAYLOR: Why are we changing this regulation
9 to change the way that this is treated? What's the
10 reason for the regulation --

11 MS. SHELTON: It is a clarifying change. When the
12 old regulation was written, it was written because we --
13 at the time, I don't believe the Controller's office was
14 really consistently even issuing audit reports. They
15 were issuing all kinds of written notices to the claimant
16 community, to let them know that they had a reduction.
17 So it was written to say, well, whatever type of written
18 notice you have, you have to file it within three years.

19 We weren't aware of necessarily the interpretation
20 by all the other claimant community until we started
21 really doing these incorrect reduction claims. You know,
22 we focused on those over the last two years. That they
23 were -- some agencies were interpreting it to mean any
24 subsequent reduction. But the clock can't keep changing,
25 giving you more and more time because then at some point,

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1 you're going to five, six, seven years. In this case,
2 it's just a few months, yes.

3 MEMBER SAYLOR: It seems to me that we -- that the
4 State acknowledges that there was an uncertainty and
5 potential -- multiple potential interpretations of the
6 regulation that was in place when San Diego County was
7 considering this issue.

8 And so I think that, by itself, suggests that there
9 is a reason to give a little bit of benefit of the doubt
10 in interpretation. And if you receive this final report
11 that supersedes the other ones, or all the other matters
12 that came before, it seems like a reasonable
13 interpretation that the County could have come forward
14 earlier, sure, but they didn't. And probably a reason
15 that they didn't, is that they thought they had until
16 December. I mean, that seems like a reasonable
17 interpretation of the facts.

18 Did you discover -- did San Diego County
19 deliberately wait? Why didn't you file earlier, just to
20 make sure you covered --

21 MR. SAND: Well, there were a lot of reasons we
22 didn't file it earlier; but the main reason is that it
23 wasn't due.

24 MEMBER SAYLOR: Okay, so you felt that -- you
25 actually, honestly interpreted, is that what you're

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1 telling me --

2 MR. SAND: Correct. We were quite surprised to get
3 the decision.

4 MEMBER SAYLOR: Yes, I think that's a reasonable
5 interpretation.

6 CHAIR ORTEGA: Go ahead.

7 MR. SAND: I believe the word "superseded" does have
8 a specific meaning in this context. It's defined and has
9 a legal definition of to nullify, to make void, to take
10 the place of.

11 So this is the State Controller's report. When the
12 regulation says three years from the date of the report,
13 this is the report that we have three years from the date
14 of. Not one that, for all intents and purposes, doesn't
15 exist anymore. It doesn't appear on the State
16 Controller's Web site. This report does, as the final
17 audit report. And I do understand the appeal to case law
18 that is being made. And I suppose if we were talking
19 about a personal injury, where it said "three years from
20 the date of injury," and I knew the date of that injury,
21 then I would apply that same case law.

22 However, here, we're looking at a specific legal
23 timeframe that's been written into your regulations; and
24 it said "three years from the date of the report." Not
25 "the first report" or "the date that the claimant first

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1 receives." And I believe it's now "the final state audit
2 report."

3 So that's our position.

4 MEMBER SAYLOR: Yes.

5 CHAIR ORTEGA: Ms. Shelton?

6 MEMBER SAYLOR: I'm not sure where we go. But I
7 think, fairness ought to have a weight in what we do
8 here. And I think it's fair to consider the lack of
9 clarity in the regulation and what seems to be reasonable
10 interpretation by the local government bringing this
11 claim.

12 MS. SHELTON: Well, excuse me, it's certainly a gray
13 issue. There is, you know, definitely both legal
14 arguments on both sides.

15 And just to maybe reiterate, the writing of the old
16 regulation can be definitely interpreted as meaning,
17 three years from whatever written notice that you get
18 on the reduction. And they certainly received a written
19 notice of the reduction dated March 2012. They had
20 notice of the reduction, which their particular
21 reduction, the findings never changed.

22 You know, "supersede" means to replace. And if
23 you look at a statute, when something is repealed and
24 replaced, it stays in law until it's replaced. So
25 nothing has changed. I mean, when you were looking --

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1 it hadn't changed back to March 2012. So that's just the
2 other interpretation.

3 MEMBER SAYLOR: Right.

4 CHAIR ORTEGA: And I think it is worth mentioning
5 again that the superseding report doesn't actually change
6 the incorrect reduction. It addresses other issues.

7 MS. SHELTON: Mr. Spano can clarify; but I believe
8 it made no changes at all to the bottom line number as
9 well.

10 MR. SPANO: Basically, what happened is when we did
11 the audit initially, the Department of Health is very
12 late in doing their *Early Periodic Screening Diagnostic*
13 *and Treatment, EPSDT*, settlement. And so what happens is
14 we agree to the time that once they do the settlement,
15 we'll go back and we'll take a look at it. And when we
16 looked at it, we found out that the offsetting revenue
17 was overstated by \$184,000. But the fact of the matter
18 is, the offsetting revenues in all the other categories
19 far exceeded the expenditure incurred. So prior to the
20 initial audit report -- this is for the 2008-2009 fiscal
21 year -- allowable cost was zero.

22 When we reissued the audit, the allowable cost was
23 zero. So we reissued it just to disclose the facts right
24 now; but it had no dollar impact at all to the 2008-2009,
25 or the entire three-year audit report that we audited.

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1 It didn't affect the other two years, it only affected
2 the one year. And our report, it was clear that it had
3 no fiscal impact to the dollar findings at all.

4 MEMBER SAYLOR: But the issue is timeliness of the
5 submittal. It doesn't matter what was in the report.
6 So I think that if this was submitted -- if they had
7 submitted their claim without regard to any date -- just
8 an arbitrary delay or asleep at the switch or inadvertent
9 action or even malicious action, to submit it late, that
10 would be one thing. But they submitted it, timed with
11 what they perceived to be a reasonable interpretation of
12 the regulation in place.

13 So they just did it on time, based on a reasonable
14 interpretation. It wasn't just, they're late or they're
15 four years late or five years late, and want to catch up,
16 or didn't have any regard to timing. I think they did
17 it in a reasonable way. And I think we should be fair
18 in our interpretations of the law. And I think they
19 made -- I think we should consider the merits of the
20 matter, taken into our jurisdiction, and weigh it in that
21 manner. That's my view.

22 CHAIR ORTEGA: Okay, any other comments from
23 commissioners?

24 *(No response)*

25 CHAIR ORTEGA: Any other public comment on this

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1 item?

2 (No response)

3 CHAIR ORTEGA: All right, seeing none, if there is
4 to be a motion, it's in order.

5 MEMBER SAYLOR: I move that we accept -- that we
6 approve the appeal.

7 MEMBER OLSEN: Second.

8 MS. SHELTON: Can I clarify the grounds?

9 MEMBER SAYLOR: Okay.

10 MS. SHELTON: Because if the motion is granted, I'm
11 going to have to rewrite the decision.

12 Is this being made on the ground that the regulation
13 that existed at the time was understood differently by
14 different parties, and it was later clarified; and the
15 fact that the Controller's revised audit report
16 superseded the earlier audit report?

17 MEMBER SAYLOR: Right.

18 CHAIR ORTEGA: Such is the motion by Mr. Saylor and
19 seconded by Ms. Olsen.

20 Please call the roll.

21 EXECUTIVE DIRECTOR HALSEY: Mr. Morgan?

22 MEMBER MORGAN: Yes.

23 EXECUTIVE DIRECTOR HALSEY: Mr. Chivaro?

24 MEMBER CHIVARO: No.

25 EXECUTIVE DIRECTOR HALSEY: Mr. Hariri?

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1 VICE CHAIR HARIRI: Abstain.

2 EXECUTIVE DIRECTOR HALSEY: Ms. Olsen?

3 MEMBER OLSEN: Yes.

4 EXECUTIVE DIRECTOR HALSEY: Ms. Ortega?

5 CHAIR ORTEGA: No.

6 EXECUTIVE DIRECTOR HALSEY: Mr. Saylor?

7 MEMBER SAYLOR: Yes.

8 CHAIR ORTEGA: It passes, 3 to 2.

9 MS. SHELTON: So it's 3 to 2 on Mr. Saylor's motion,
10 which means that the appeal is granted.

11 And so I will have to take this --

12 EXECUTIVE DIRECTOR HALSEY: Don't you need 4?

13 MS. SHELTON: Oh, I'm sorry, I need 4.

14 I'm back to the same -- you're right, I'm very
15 sorry, yes. Under the Commission's regulations, it does
16 require four affirmative votes for an action. We have
17 only three and two.

18 CHAIR ORTEGA: Okay.

19 MS. SHELTON: You can do another motion or you
20 can --

21 CHAIR ORTEGA: I don't know what another motion
22 might be.

23 MEMBER CHIVARO: Move the staff recommendation.

24 CHAIR ORTEGA: Okay, we can move the --

25 MEMBER CHIVARO: I will move the staff

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1 recommendation.

2 CHAIR ORTEGA: I will second the staff
3 recommendation.

4 So moved by Mr. Chivaro; seconded by myself.

5 Please call the roll for the staff recommendation.

6 EXECUTIVE DIRECTOR HALSEY: Mr. Morgan?

7 MEMBER MORGAN: No.

8 EXECUTIVE DIRECTOR HALSEY: Mr. Chivaro?

9 MEMBER CHIVARO: Aye.

10 EXECUTIVE DIRECTOR HALSEY: Mr. Hariri?

11 VICE CHAIR HARIRI: Aye.

12 EXECUTIVE DIRECTOR HALSEY: Ms. Olsen?

13 MEMBER OLSEN: No.

14 EXECUTIVE DIRECTOR HALSEY: Ms. Ortega?

15 CHAIR ORTEGA: Aye.

16 EXECUTIVE DIRECTOR HALSEY: Mr. Saylor?

17 MEMBER SAYLOR: No.

18 MS. SHELTON: That's a tie.

19 EXECUTIVE DIRECTOR HALSEY: So we still have no
20 resolution of this matter at this time.

21 CHAIR ORTEGA: Despite our best efforts.

22 MR. SAND: It's a pleasant morning flight.

23 And I have a fine collection of Southwest peanuts.

24 CHAIR ORTEGA: Okay, so procedurally, can I ask for
25 a little guidance?

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1 EXECUTIVE DIRECTOR HALSEY: We can put this on the
2 next hearing, is what we --

3 MS. SHELTON: The Commission's regulations say that
4 in a tie vote, basically, your first option would be just
5 to put it over to the hearing when you have a full slate
6 of the seven members, so that you don't have a tie with
7 the seven members, assuming nobody abstains from the
8 issue.

9 EXECUTIVE DIRECTOR HALSEY: Yes, this morning, I
10 kept this on even though I knew Carmen wasn't coming,
11 because there were different people, and I didn't know
12 if they might vote differently than last time there was a
13 vote taken.

14 CHAIR ORTEGA: Right.

15 EXECUTIVE DIRECTOR HALSEY: So sorry. But maybe we
16 should just wait until I'm sure we have seven. If we
17 don't have seven, I'll postpone the matter, so you don't
18 need to fly up.

19 MR. SAND: Thank you.

20 EXECUTIVE DIRECTOR HALSEY: So that would be
21 October 28th right now it would be tentatively set for.

22 Let us know if you have a conflict.

23 CHAIR ORTEGA: Thanks.

24 MR. SAND: Thank you.

25 CHAIR ORTEGA: Thank you, Mr. Sand and Mr. Spano.

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1 Okay, we'll move on to Item 3.

2 EXECUTIVE DIRECTOR HALSEY: Chief Legal Counsel
3 Camille Shelton will present Item 3, an incorrect
4 reduction claim on the *Stull Act*.

5 MS. SHELTON: Good morning. This incorrect
6 reduction claim addresses audit reductions made by the
7 State Controller's Office to reimbursement claims filed
8 under the *Stull Act Program*.

9 The *Stull Act Program* was approved as a higher level
10 of service and allows partial reimbursement to K-12
11 school districts for some activities relating to the
12 evaluation of certificated employees.

13 The Controller's audit report reduced all costs
14 claimed, finding that the claimant did not have
15 sufficient documentation, as required by the parameters
16 and guidelines, to support the reimbursement of salary
17 and benefit costs associated with the evaluation of
18 nearly 1,700 employees for five to ten hours each.

19 After the audit, the Controller offered to reimburse
20 the claimant salary and benefit costs based on the
21 evaluation of 1,149 employees, for 30 minutes each. And
22 this finding was based on documentation later provided by
23 the claimant, showing the number of employees evaluated
24 during the audit period, and a time claimed to perform
25 the mandate in later fiscal years.

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1 The claimant has declined that offer and continues
2 to dispute the time taken to conduct the evaluations,
3 asserting now that each evaluation took two and a half
4 hours.

5 For the reasons outlined in the proposed decision,
6 staff recommends that the Commission partially approve
7 this incorrect reduction claim and requests that the
8 Controller reinstate \$35,967 in total costs based on the
9 Controller's findings that 1,149 employees were evaluated
10 during the audit report and that each evaluation took
11 30 minutes.

12 As clarified by the Controller after the issuance of
13 the proposed decision, the \$35,967 includes both direct
14 and indirect costs, and not just the direct costs as
15 noted in the proposed decision. Therefore, if the
16 Commission adopts the proposed decision, the language
17 will be corrected to note that the reinstatement of that
18 dollar amount includes both direct and indirect costs.

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

21 MR. PALKOWITZ: Good morning. Art Palkowitz on
22 behalf of the claimant, Oceanside Unified School
23 District.

24 MR. McATEER: Todd McAteer, Director of Human
25 Resources, Oceanside School District.

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1 MR. SPANO: Jim Spano, State Controller's Office,
2 Division of Audits.

3 MR. HOWELL: Ken Howell, State Controller's Office,
4 Division of Audits.

5 CHAIR ORTEGA: Mr. Palkowitz?

6 MR. PALKOWITZ: Thank you.

7 Just a brief summary.

8 So the Commission decided this test claim back in
9 May 2004. As noted by Camille Shelton, it involves
10 evaluations of teachers that were required by the State.
11 The Controller commenced an audit in 2010 and finalized
12 it in 2011. There is no issue about timeliness of filing
13 this incorrect reduction claim as in the previous agenda
14 item.

15 Initially, the Controller denied the entire claim.
16 After submitting the incorrect reduction claim, the
17 Controller contacted us and stated, there may be
18 adjustments to the claim and that we should provide them
19 with the list of employees that were evaluated, which we
20 did.

21 After they reviewed that information, we had an
22 agreement to two out of the three of the outstanding
23 issues:

24 First of all, the District agreed to the reduction
25 of the number of evaluations. The District submitted

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1 1,698 evaluations. They agreed with the Controller that
2 that amount should be reduced to 1,149.

3 The parties also agreed what was a reasonable
4 reimbursable rate, which was \$60 per hour.

5 What the parties still are in dispute is, how long
6 does the evaluation take. The Controller is saying
7 it's 30 minutes, relying on a statement from a District
8 employee that is unknown. It is our position that, at
9 a minimum, it's two and a half hours, or 150 minutes.
10 And this is based on audits performed by the Controller
11 to several other districts, where they did time studies
12 and came to that conclusion.

13 Mr. McAteer is here today to help explain to all
14 of us the procedure that's involved in performing
15 evaluations.

16 MR. McATEER: Good morning. So my position at the
17 District includes five years of being a teacher, which is
18 the person that gets evaluated; and then I have 13 years
19 working as a principal, the person that primarily does
20 the evaluation. And in the past four years, I worked as
21 director of human resources. So I have a span of
22 perspective of doing evaluations.

23 Ed. Code section 4464 stipulates that the evaluation
24 and assessment of the performance of each certificated
25 employee shall be made on a continuing basis as follows:

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1 At least once each school year for probationary
2 personnel, at least every other year for personnel with
3 permanent status, and at least every five years for
4 personnel with permanent status who have been employed
5 at least ten years with the school district.

6 In Oceanside Unified School District, we take the
7 evaluation and assessment of our employees seriously.

8 Other than maintaining a safe learning environment,
9 the evaluation between the teacher and evaluator is a
10 top priority of school administration. A quality
11 evaluation between these two include a collaboration with
12 an ultimate goal of being improved student performance.

13 Our evaluation system is defined by our master
14 contract between the school district and the teachers
15 union. It is a comprehensive and inclusive process that
16 is designed to provide the employee with a voice in the
17 process, constructive feedback, and includes reflective
18 practice, uses objective data, and is based on the
19 California standards for the teaching profession.

20 I would like to take you through the evaluation
21 cycle process and briefly explain the steps to you to
22 help build your understanding of the time that's needed
23 to complete the task to evaluate employees.

24 As you know, at the time of this audit, we used
25 STAR testing data. The STAR test was administered in

1 the spring; and that data was usually returned to school
2 districts and parents in the fall. That data is used to
3 drive evaluations.

4 One of the first things that the evaluator will do,
5 is take time to meet with the employee, the teacher, or
6 the person being evaluated, to review the previous year's
7 STAR data. That data helps define what the goals will
8 be for future evaluations and professional growth areas.
9 This takes time for the administrator and employee to sit
10 down together to review the data and examine the results
11 of the previous year's work.

12 The district provides the list of names to the
13 school district administrators; so there's time taken to
14 review the list to make sure that those are employees
15 that should be on your evaluation cycle, to let them know
16 they're going to be evaluated, and work with them at
17 developing their goals for the year to be evaluated. So
18 the time that it takes to sit down and explain to a new
19 employee the process can be minutes to hours, depending
20 on their level of need and experience.

21 For evaluations to occur in our district, it's
22 required by contract language to sit down with an
23 employee and do at least one 30-minute observation
24 evaluation. The reason for that is to get enough time
25 that you can see a lesson from start to finish. And

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1 sometimes it takes longer, 40 or 50 minutes, depending
2 on the type of lesson and the grade level that's being
3 observed.

4 For temporary and probationary employees, it is
5 recommended at least two formal observations be
6 conducted. So for those employees, you're looking at
7 a minimum of 60 minutes of an evaluator sitting in the
8 classroom, looking at the teacher or evaluatee.

9 After the evaluation is completed, there is time
10 to debrief and share the observation findings. The
11 administrator will sit down with the person being
12 evaluated and reflect upon the data that was observed,
13 make recommendations, review findings, and take next
14 steps.

15 The law requires that we do a summative written
16 evaluation. That also takes time; and that requires the
17 evaluator to cover the six California teaching standards
18 for the profession. That means another meeting, where
19 the administrator and the teacher sit down together to
20 review a written document that summarized the evaluation
21 for that year.

22 At the conclusion of that, the administrator is
23 required to submit all documentation and paperwork to the
24 district in order for that individual to have met the
25 evaluation cycle.

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1 This is the process that we use in Oceanside. It's
2 very similar to most districts. It's something that's
3 nearly uniform as we all comply with Ed. Code to evaluate
4 employees. And you'll see that in our comparison to
5 nearby districts, the minimum requirement that they had
6 listed, that was granted by the Commission, was two and
7 a half hours. I would say that's conservative. You've
8 seen in our report that we've estimated it's between
9 five and ten hours, which is a more realistic amount of
10 time that it takes to complete what I just described.

11 So I think in our recommendation, you can see that
12 the minimum that I think that is acceptable and that has
13 been allowed by the Commission, is two and a half hours
14 to complete what we've done, based on the evaluations
15 that we've presented.

16 CHAIR ORTEGA: Okay, thank you.

17 Before we move on, can I ask, Ms. Shelton, can
18 you address the issue that's raised in the staff
19 recommendation about the extent to which some of the
20 claimant issues are beyond the scope of what the test
21 claim -- the parameters and guidelines allow?

22 MS. SHELTON: Sure. If you look at pages 12 and 13,
23 which identifies the parameters and guidelines, this
24 reimbursement was allowed only on a very limited scope.
25 It's a higher-level-of-service case.

1 So the full spectrum of evaluation activities that
2 the witness has just talked about are not eligible for
3 reimbursement. They're only eligible for reimbursement
4 under B of the P's & G's, which is when an employee
5 receives an unsatisfactory evaluation. Every other year,
6 you're going to have to go back and reevaluate them; and
7 the full spectrum of activities are required only under
8 that situation. For all other employees that receive
9 satisfactory evaluations, the only thing that's eligible
10 for reimbursement is the review of the instructional
11 techniques and strategies and review of the STAR results;
12 and then including the written portion in the existing
13 report. There is no meeting allowed as reimbursable.
14 There is no conference. None of that is provided for in
15 the parameters and guidelines.

16 CHAIR ORTEGA: Thank you.

17 MS. SHELTON: So that's basically the reason.

18 The other reason as well, is that these parameters
19 and guidelines required -- they did require
20 contemporaneous source documentation, which the
21 Controller has not asserted and has not required. But
22 they haven't received any documentation from the claimant
23 regarding the time taken for each evaluation. The only
24 documentation they had, as I understand it -- and
25 Mr. Spano can testify a little bit more on this -- was

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1 from later fiscal years that are not in this audit
2 period, which showed 30 minutes per evaluation.

3 CHAIR ORTEGA: Mr. Spano?

4 MR. SPANO: Go ahead.

5 MR. HOWELL: Yes, that's correct. The documentation
6 that we actually did have, we had time records for 2006,
7 where the vast majority of the people that were actually
8 listed there, as far as the principal is listing the time
9 that they spent doing the specific evaluation processes,
10 was 30 minutes. Approximately 30 minutes.

11 So what we did was, when we received the IRC, we
12 felt that it would be appropriate to go back and
13 reassess, just to make sure that we maybe didn't make a
14 mistake. We just, obviously, hear everything that the
15 District was addressing in the IRC. And we essentially
16 assessed that, yes, there were most likely costs in those
17 early years that weren't picked up, so to speak; meaning,
18 that we didn't look at maybe getting a list of everyone
19 that maybe was evaluated in those first seven or eight
20 years.

21 So we were able to get lists, again, from the
22 District, which the District agreed with. That's where
23 we got the 1,149 evaluations. And then at that point,
24 we thought, "Okay, well, what do we do about the time
25 issue?" And that's where we said, "Okay, well, we're

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1 going to take the contemporaneous records that we do
2 have, that were created in '06-07, create an average
3 from that and then apply it back to each of those line
4 items in those earlier years." Because, again, from
5 '97-'98 through '04-05, we had no contemporaneous time
6 documentation with which to use to apply to those
7 1,149 evaluations that the District provided.

8 CHAIR ORTEGA: Thank you, Mr. Howell.

9 Any -- go ahead.

10 MS. SHELTON: Let me just clarify, too, the standard
11 of the review of the Controller's audit decision.

12 So this is an audit decision that they're making.
13 And under the standard of review, the Commission may not
14 reweigh the evidence and must defer to the expertise of
15 the Controller, absent any evidence to the contrary. And
16 we don't have any documentation showing the time taken
17 in those earlier years to contradict the 30-minute time.

18 MR. PALKOWITZ: May I have the opportunity to
19 respond?

20 CHAIR ORTEGA: Sure, Mr. Palkowitz.

21 MR. PALKOWITZ: Thank you.

22 First of all, in our IRC, we submitted
23 certifications for the period of time of this IRC. Those
24 certifications were signed by individuals who did the
25 evaluations. Those evaluations show -- and let me just

1 say, those are in Tab M and in Tab 3. And those
2 evaluations show time spent somewhere between four to
3 six hours per evaluation.

4 Now, what has happened is, the Controller in other
5 audits of Norwalk, Poway, Elk Grove, auditing the exact
6 activities of the Stull Act, determined those hours were
7 not appropriate; those were for activities that were not
8 covered by that. And they reduced those hours as
9 follows -- excuse me, I'm sorry.

10 So for Poway, they allowed 1.52 hours for permanent;
11 and for prob. or temporary, 3.57. The reason for that
12 is prob. or temporary -- probationary/temporary employees
13 you have to do every year; permanent, you don't. So that
14 averaged out to 2.54 of hours spent.

15 On Norwalk, permanent was 1.89, and probationary/
16 temporary was 3.07. That was determined to be reasonable
17 at 2.48. Almost two and a half.

18 Elk Grove, they rounded off to two and a half.

19 These are results of the Controller's audits of
20 those three districts, conducting the same type of
21 activities as Oceanside.

22 Now, there was also an audit of Castro, which I
23 would define as an outlier, because it had 3.57 for
24 permanent, and 3.89 for outlier -- I mean, for
25 probationary.

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1 So as a result, the other three audits are 2.5.

2 This is similar to Mr. McAteer's testimony, that at
3 a conservative level, the District spent 2.5 on the
4 reimbursable activities that were allowable.

5 What has happened is, in the audit of Oceanside,
6 there is a statement that the District accepted
7 30 minutes as a reasonable amount. This is inadmissible.
8 This would not be admissible in a court, under the
9 regulation CCR 1187.5(a). It's not reliable. We don't
10 know who said it. We don't know in what context.

11 And, more importantly, common sense would say, it's
12 not what happened based on Mr. McAteer's testimony, based
13 on the documents we submitted, and based on the other
14 audits.

15 To rely on the 30 minutes of that statement, would
16 be similar to relying, if someone at the District said
17 it took ten hours. It's an outlier. It doesn't fairly
18 represent. We don't really know what was said between
19 that person and the District, so that should not be
20 really considered.

21 What's reasonable and reliable evidence, is
22 Mr. McAteer's testimony, the certifications we submitted,
23 and the audits. And based on that, the two and a half
24 time spent to conduct these reviews and evaluations, is
25 a reasonable amount.

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1 CHAIR ORTEGA: Ms. Shelton?

2 MS. SHELTON: The only problem I have with that is
3 that the declarations or certifications in the record and
4 the testimony today have, again, talked about the full
5 spectrum of evaluation activities which are not eligible
6 for reimbursement.

7 On the 30-minute finding, I understood from the
8 record that the 30 minutes came from time logs and not
9 from a single employee. And if the Controller is relying
10 on documentation of time logs, that is a valid reliance.
11 And again, under the standard of review we cannot
12 second-guess the Controller's findings in that regard;
13 and so no evidence has been brought forth to contradict
14 that finding.

15 MR. PALKOWITZ: Okay, so the time logs are from
16 periods '06 and '07. Okay, '06 --

17 CHAIR ORTEGA: But that's because nothing has been
18 submitted that was contemporaneous documentation on this
19 claim; right?

20 MR. PALKOWITZ: If I may say, the IRC is for '97
21 to 2005. The '06-07 time logs are not part of this IRC,
22 okay. Those were done at a subsequent time. The
23 District went through different vendors. There was some
24 issues on the ability to get the information. But even
25 if we would rely on time logs from a different period,

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1 why aren't we relying on the time studies from the other
2 audits?

3 MS. SHELTON: That's a valid question, except that
4 the program hasn't changed; and it's not relevant to rely
5 on other districts. Their audits are not at issue here;
6 and we -- the Commission --

7 MR. PALKOWITZ: But why do we rely on a period
8 that's not part of the IRC?

9 MS. SHELTON: It's the same district, performing the
10 same program, which has not changed.

11 MR. PALKOWITZ: We don't know that. You don't know,
12 until you have people testify what went on in that
13 period, to say that statement. I understand what you're
14 saying, but --

15 MS. SHELTON: And the Claimant has not put any
16 evidence forward to substantiate what you're saying at
17 this point. It --

18 MR. PALKOWITZ: But we have. We have put on --
19 Mr. McAteer testified that it wasn't 30 minutes that it
20 takes to do these activities.

21 CHAIR ORTEGA: But, respectfully, it seems that
22 Mr. McAteer testified on a broader scope than what the
23 mandate allows, too. So I'm not sure how we can parse
24 that.

25 MR. McATEER: I was a principal at the time, and

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1 I'm included in that report. So I do know how much time
2 that I submitted. So I have direct knowledge of what
3 occurred at that time because I was working as a site
4 administrator that did do those evaluations.

5 MS. SHELTON: And so the activities listed on those
6 certifications go beyond the scope of the mandate.

7 MR. PALKOWITZ: Correct.

8 MS. SHELTON: That's the problem.

9 So the certifications --

10 MR. PALKOWITZ: And that's why the audit was
11 adjusted from the other audits. We understand that. We
12 understand that those evaluations and summaries we
13 provided with ours are not all reimbursable. That was
14 the form that was being used. And we appreciate that.
15 And that's why we're not asking for 4 to 6 hours.

16 We took what the Controller did, and reduced
17 everybody -- not only Oceanside, but all districts -- to
18 an amount that they said are allowable under the mandate.

19 And that amount is conclusively
20 2.5 hours. 150 minutes, not 30 minutes.

21 It seems to me that we have almost the best evidence
22 to use to determine what is a reasonable amount, and we
23 are discarding that. And the best evidence is what the
24 auditors did in conducting audits of four school
25 districts.

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1 MS. SHELTON: I think that testimony would be
2 relevant if this was a request to amend the parameters
3 and guidelines to include a reasonable reimbursement
4 methodology. We don't have an RRM in this set of
5 parameters and guidelines. This set of parameters and
6 guidelines is regulatory in nature; it requires each
7 claimant to provide contemporaneous source documentation.
8 The Controller is not forcing this claimant to provide
9 contemporaneous documentation. And it's using its audit
10 discretion to use documentation that the claimant did
11 have, in later years, performing the same program, at
12 30 minutes per evaluation.

13 Under the standard for review of this incorrect
14 reduction claim, we can't second-guess the Controller's
15 discretion in this regard. The claimant has put no
16 evidence in, other than asserting the audits of other
17 districts, which are not relevant for this incorrect
18 reduction claim, to contradict that finding.

19 CHAIR ORTEGA: Okay, so let's take a pause and see
20 if there are any questions from any of the commissioners.

21 Yes. Go ahead.

22 MEMBER SAYLOR: So why -- I guess I'm understanding
23 the evidentiary requirements; but why wouldn't the
24 Controller have looked at the same tasks done by other
25 districts as a part of their discretionary review of the

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1 audits at the end? If they can look at time periods not
2 covered by the requirement, why couldn't they also look
3 at audits of other districts that did the same task? So
4 why not? What's the reason?

5 MR. HOWELL: The main reason is because different
6 districts have different documentation with which they
7 provide to us to be able to show the exact amount of time
8 that they spent on certain activities.

9 MEMBER SAYLOR: Right.

10 MR. HOWELL: Some districts will be able to provide,
11 say, a time log or, you know, a time study, so to speak.
12 But it will have all the activities that were actually
13 laid out today, in terms of, you know, you have a goals
14 conference, you would have a pre-observation meeting,
15 you'd have the observation, you would have a
16 post-observation meeting. You have all those things,
17 and all of those things would be split out in terms of
18 the time increments. So it would be very easy for us to
19 be able to go in and remove the ones aren't allowable for
20 the P's & G's and then allow the ones that are.

21 So to be able to compare this particular agency to
22 all of the other agencies wouldn't be fair because they
23 all do things a little differently. So I don't feel that
24 it would be appropriate for us to be able to go and --

25 MS. SHELTON: Well, and the parameters and

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1 guidelines are the guiding document, and don't allow you
2 to look at other people's records.

3 The only way they can do that is if they request
4 the Commission to adopt a reasonable reimbursement
5 methodology, maybe recommending a unit time to conduct
6 these evaluations. And when that type of a request is
7 filed, then, yes, the Commission looks at the time of
8 a lot of different school districts; looks into their
9 documentation, looks at how they are performing the
10 mandate, and then usually does some sort of mathematical
11 averaging to determine a unit time. That has never been
12 adopted by the Commission. So we're bound by this set of
13 parameters and guidelines.

14 MEMBER SAYLOR: Is it still possible for a district
15 to request the reasonable reimbursement method?

16 MS. SHELTON: Yes, but it goes back to based on
17 their filing period; it would not go back all the way to
18 these earlier reimbursement claims.

19 MEMBER SAYLOR: Okay.

20 CHAIR ORTEGA: Okay, any other questions from
21 commissioners?

22 *(No response)*

23 CHAIR ORTEGA: Any closing comments here from
24 Mr. Palkowitz?

25 MR. PALKOWITZ: Yes, thank you.

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1 CHAIR ORTEGA: Please.

2 MR. PALKOWITZ: I believe that -- and I appreciate
3 everyone's attention in seeking what should be fair and
4 reasonable. To me, what's fair and reasonable is common
5 sense. And common sense says that the evidence shows,
6 based on what we submitted, that four to six hours was
7 spent, yet some of that is not attributable to the
8 reimbursement that Mr. McAteer said and explained.

9 And he covered what's reimbursable and what isn't
10 reimbursable. He covered both. And that's why he had
11 come up with a 2.5, versus the 4 to 6 hours that are on
12 the evaluation summaries that we submitted.

13 I feel that you have the ability to look at other
14 evidence. The other evidence is the audits. There's
15 been no argument that those audits are unreasonable or
16 unreliable. And to dismiss that is not looking, to me,
17 at all the evidence that's available.

18 Based on that, we feel our position is very
19 reasonable, and would request reimbursement based on
20 150 minutes, not 30 minutes, which is an amount that is
21 just not realistic on the time spent to conduct the
22 evaluations that are done by all the districts in the
23 same and similar manner in order to be pursuant to the
24 Education Code.

25 Thank you.

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1 CHAIR ORTEGA: Thank you.

2 Mr. Spano, Mr. Howell, anything else?

3 MR. HOWELL: No.

4 MR. SPANO: No.

5 CHAIR ORTEGA: Okay, thank you.

6 All right, any additional public comment on this

7 item?

8 *(No response)*

9 CHAIR ORTEGA: All right, seeing none, is there a
10 motion?

11 MEMBER CHIVARO: I'll move the staff recommendation.

12 MEMBER MORGAN: Second.

13 CHAIR ORTEGA: Moved by Mr. Chivaro, and a second
14 by Mr. Morgan.

15 Please call the roll.

16 EXECUTIVE DIRECTOR HALSEY: Mr. Morgan?

17 MEMBER MORGAN: Yes.

18 EXECUTIVE DIRECTOR HALSEY: Mr. Chivaro?

19 MEMBER CHIVARO: Yes.

20 EXECUTIVE DIRECTOR HALSEY: Mr. Hariri?

21 VICE CHAIR HARIRI: Yes.

22 EXECUTIVE DIRECTOR HALSEY: Ms. Ortega?

23 CHAIR ORTEGA: Yes.

24 EXECUTIVE DIRECTOR HALSEY: Mr. Saylor?

25 MEMBER SAYLOR: Yes.

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1 EXECUTIVE DIRECTOR HALSEY: Oh, Ms. Olsen? Sorry.

2 MEMBER OLSEN: Yes.

3 CHAIR ORTEGA: Okay, the motion passes.

4 We'll move on to Item 4.

5 MS. BLAIR: Good morning. These consolidated
6 incorrect reduction claims address the Controller's
7 reduction of vendor costs claimed for board and care and
8 treatment services for out-of-state residential placement
9 of seriously, emotionally disturbed, or SED, pupils in
10 facilities organized and operated for profit.

11 Two sets of parameters and guidelines govern these
12 claims.

13 During all the fiscal years at issue in these
14 claims, both the parameters and guidelines only allow
15 vendor payment for SED pupils placed in an out-of-state
16 program, organized and operated on a nonprofit basis.
17 Since the facilities providing the service are for-profit
18 facilities, the costs are not reimbursable under the
19 parameters and guidelines, and the reduction is correct
20 as a matter of law.

21 Staff recommends the Commission adopt the proposed
22 decision to deny these IRCs.

23 Will the parties and witnesses please state your
24 names for the record?

25 MR. HARMAN: Good morning. James Harman, Assistant

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1 County Counsel, County of Orange.

2 MR. SPANO: Good morning. Jim Spano, State
3 Controller's Office, Division of Audits.

4 MR. RYAN: Chris Ryan, State Controller's Office,
5 Division of Audits.

6 CHAIR ORTEGA: Thank you.

7 Mr. Harman?

8 MR. HARMAN: Thank you, Madam Chair.

9 First of all, before proceeding, I just wanted to
10 thank the Commission staff and the Commission for
11 granting the continuance. The Commission staff was very
12 helpful in allowing our continuance for today's hearing.
13 So thank you very much. And please extend our gratitude
14 to your staff.

15 Really, the issue here before the Commission is,
16 these out-of-state placements are a state mandate. The
17 Controller reduced our claim on the idea that the County
18 used for-profit vendors in providing these out-of-state
19 services.

20 The County used nonprofit vendors. And even in the
21 Controller's audit, they agreed that Youth Care of Utah
22 and Charter of Provo were, in fact, nonprofit entities.
23 Those entities, in turn, used for-profit facilities in
24 those out-of-state areas for some of the services that
25 were there.

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1 And also, we have Kids' Behavioral Health of Alaska,
2 which the proposed decision concedes, the County did
3 produce evidence that this was a nonprofit entity during
4 the time period in question.

5 From our point of view, Madam Chair and Members of
6 the Commission, this commission really does have
7 independent authority to issue a ruling, and as
8 Commissioner Saylor said, ones based on fairness.

9 Counties are out there, providing these services.
10 It's a federal -- a federal rule that comes down. And
11 then the state comes in with this enhanced rule, if you
12 will, of requiring counties to provide these services for
13 pupils. But you can't do so in-state so there's this
14 enhanced rule that for out-of-state placements, now,
15 these -- and only counties, by the way, are under this
16 rule -- have to have these services done by nonprofit
17 vendors.

18 Well, the County of Orange did that. We used
19 nonprofit vendors. Our vendors, in turn, used placements
20 that were out-of-county -- or out-of-state, rather; and
21 some of those, evidently, were for-profit.

22 It's on that basis that the County has presented its
23 IRC claim. And on that basis, we would ask that this
24 commission deny the recommendation, and ask that the
25 recommendation -- or, rather, ask that the order be

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1 rewritten, and this Commission's decision be rewritten
2 consistent with the County's IRC claim.

3 CHAIR ORTEGA: Okay, thank you, Mr. Harman.

4 Mr. Spano or Mr. Ryan?

5 MR. RYAN: The State Controller's Office supports
6 the staff's conclusion and recommendation.

7 CHAIR ORTEGA: Any comments from commissioners?

8 *(No response)*

9 CHAIR ORTEGA: This is identical to an item we've
10 previously heard on this.

11 Anything else from --

12 MEMBER CHIVARO: I move the staff recommendation.

13 CHAIR ORTEGA: Okay, moved by Mr. Chivaro.

14 MEMBER MORGAN: Second.

15 CHAIR ORTEGA: Second by Mr. Morgan.

16 Is there any additional public comment?

17 *(No response)*

18 CHAIR ORTEGA: All right, anything else from
19 commissioners?

20 *(No response)*

21 CHAIR ORTEGA: Okay, please call the roll.

22 EXECUTIVE DIRECTOR HALSEY: Mr. Chivaro?

23 MEMBER CHIVARO: Yes.

24 EXECUTIVE DIRECTOR HALSEY: Mr. Hariri?

25 VICE CHAIR HARIRI: Yes.

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1 EXECUTIVE DIRECTOR HALSEY: Mr. Morgan?

2 MEMBER MORGAN: Yes.

3 EXECUTIVE DIRECTOR HALSEY: Ms. Olsen?

4 MEMBER OLSEN: Yes.

5 EXECUTIVE DIRECTOR HALSEY: Ms. Ortega?

6 CHAIR ORTEGA: Yes.

7 EXECUTIVE DIRECTOR HALSEY: Mr. Saylor?

8 MEMBER SAYLOR: Yes.

9 CHAIR ORTEGA: Thank you.

10 EXECUTIVE DIRECTOR HALSEY: Item 5, Senior

11 Commission Counsel Paul Karl Lukacs will present a
12 request for reconsideration of an adopted decision on
13 *Handicapped and Disabled Students* and *Handicapped and*
14 *Disabled Students II*.

15 MR. LUKACS: Good morning. At our last hearing,
16 the Commission heard two IRCs under the *Handicapped and*
17 *Disabled Students Programs I* and *II*.

18 The Commission denied both IRCs as untimely filed.
19 The claimant in those two IRCs is now requesting that
20 the Commission schedule a reconsideration of those IRCs
21 on the grounds that it was allegedly a legal error for
22 the Commission to raise the limitations issue when the
23 Controller had not raised the limitations issue.

24 The only question before the Commission today is
25 whether or not to schedule such a rehearing, and a

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1 supermajority of five votes is needed to do that.

2 Staff recommends that the Commission deny the
3 request because the claimant has not provided a
4 satisfactory explanation of why the claimant failed to
5 raise this legal argument earlier.

6 Would the parties and witnesses please state your
7 names for the record?

8 MR. LEE: Good morning, Your Honors. Peter Lee on
9 behalf of Los Angeles County.

10 MR. SPANO: Jim Spano, State Controller's Office,
11 Division of Audits.

12 MR. RYAN: Chris Ryan, State Controller's Office,
13 Division of Audits.

14 CHAIR ORTEGA: Okay, thank you.

15 Mr. Lee?

16 MR. LEE: Thank you.

17 Your Honors, under the Commission's own regulation
18 which governs this body, the only criteria for a request
19 for consideration is whether or not there was an error of
20 law in the adopted decision.

21 And just to go over some of the regulations, Your
22 Honor, 2 CCR 1187.15(b) provides that *"any party,*
23 *interested party, or Commission member may request that*
24 *the Commission reconsider and change an adopted decision*
25 *to correct an error of law."*

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1 The Commission staff is arguing that there is an
2 implicit diligence requirement in these regulations. And
3 we're asserting that because of the plain language of the
4 regulation, there is no such diligence requirement.

5 And they cite to a *Baldwin* court case, which I'll
6 go over, and how the rationale in that court case does
7 now apply to this body, which relies on CCP code
8 section 1080, which applies to a trial court's motion for
9 consideration.

10 Section 2 CCR 1187.15(c) provides four requirements
11 for a reconsideration: One, the name and address of the
12 requesting party; two, a copy of the Commission's adopted
13 decision; number three, a detailed statement of the
14 reasons for the request, including an explanation or
15 the reason for the request for reconsideration and all
16 documentation the requester intends to submit to support
17 the request; and number four, a description of the
18 proposed change.

19 This subdivision C also shows that the Commission's
20 regulations only requires an explanation that the
21 Commission made an error of law. And this interpretation
22 is supported by subdivision F of that regulation, which
23 provides that before the Commission considers a request
24 for consideration, Commission staff shall prepare a
25 written analysis regarding whether the adopted decision

1 is contrary to law, which shall include, but not be
2 limited to, review of the written comments followed by
3 other state agencies, interested parties, and the
4 requester.

5 Here, Your Honors, we're requesting that the
6 Commission made an error of law when the record shows,
7 adopted decision shows that the State Controller never
8 raised the issue of statute of limitation.

9 In previous cases, which was cited in the adopted
10 decisions, it was the SCO that raised the statute of
11 limitations. They asserted it. And the general rule is,
12 if you don't raise the issue of the statute of
13 limitations, it is waived.

14 And in the Commission's own decision, it cites to a
15 2010 appellate case law, *Ladd versus Warner Brothers*
16 *Entertainment*, and quotes that decision by stating,
17 statute of limitations is an affirmative defense.

18 And based upon that argument, we're asking the court
19 to have a rehearing on whether or not there was an error
20 of law.

21 The second argument is that the Commission made
22 error of law when the Commission relied on a U.S. Supreme
23 Court case that only pertains to the U.S. Federal Court
24 of Claims, where they have a special jurisdiction.

25 There is the whole 200 years of U.S. Supreme Court's

1 jurisprudence, which basically says, statute of
2 limitation is a fundamental and absolute jurisdictional
3 issue. But that only applies to that court claims, the
4 federal court claims. And that Supreme Court case also
5 acknowledged that the general rule is, a statute of
6 limitation is an affirmative defense that must be raised
7 or otherwise it is waived. And the record clearly shows
8 that the statute of limitation was not raised by the
9 State Controller; rather, it was raised by the Commission
10 on a sua sponte -- it was raised on its own.

11 The Commission staff relies on the *Baldwin* case and
12 the Code of Civil Procedure section 1008, which basically
13 states that you need some sort of due-diligence
14 requirements of why this issue was not brought before the
15 court.

16 We submit, Your Honors, again, that the Commission's
17 authority is based upon the regulation and the Government
18 Code statutes, and not Code of Civil Procedure 1008,
19 which only applies to the trial courts.

20 And CCP 1008 and the Commission's regulations are
21 very distinguishable. One, under CCP 1008, the requester
22 for a motion for reconsideration must show new or
23 different facts, circumstances, or law.

24 For the Commission's reconsideration, it's only an
25 alleged error of law. So we're not introducing any new

1 facts here, we're not introducing any new evidence; we're
2 only alleging that there is an error of law.

3 Two, CCP 1008 applies to both interim and final
4 orders of the trial court, which can be numerous.

5 Here, the only -- the request for reconsideration
6 only applies to the adopted decision, which are limited
7 in numbers.

8 Third, the *Baldwin* court relied on legislative
9 history to interpret CCP 1008. Usually, courts will look
10 at legislative history to interpret statutes that are
11 vague. And the *Baldwin* court basically stated that the
12 legislative history indicates that the goal of 1008 was
13 designed to reduce the number of motions to reconsider,
14 and renewals of previous motions heard by judges in the
15 state.

16 Here, Your Honor, the regulation on the Commission
17 on State Mandates is clear, it's only -- you can only
18 bring a request for reconsideration for an alleged error
19 of law. And that's what we're asserting here. And the
20 argument that we need to have a diligence requirement
21 does not apply because the plain language of the
22 regulation is clear.

23 And, in fact, I think the purpose is to correct an
24 error of law, because the regulation is broader. For
25 CCP 1008, it is limited to the parties of the action.

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1 Under this regulation -- under this Commission's
2 regulations, even interested parties can bring a request
3 for consideration. And interested parties are defined as
4 "A local agency, school district, or state agency with
5 a beneficial interest in the matter." And that's defined
6 in 2 CCR 1181.2(i).

7 So the broader parties that could bring a request
8 for reconsideration, the statute -- the regulation itself
9 is limited because you can't bring any facts or evidence;
10 it's only limited to an alleged error of law. And the
11 Commission staff is mandated to analyze why -- whether or
12 not there was an adopted decision that was contrary to
13 law, and not this alleged requirement that is not in the
14 regulation that we need to show diligence.

15 So we're asking the Commission to have a second
16 hearing, to hear the merits of the reconsideration,
17 whether or not there was an error of law.

18 CHAIR ORTEGA: Okay, thank you, Mr. Lee.

19 Are there any questions from commissioners at this
20 point?

21 MEMBER CHIVARO: No.

22 CHAIR ORTEGA: Mr. Saylor?

23 MEMBER SAYLOR: Is there any precedent for the
24 statement that if the Controller hasn't identified the
25 statute of limitations, that we are not able to?

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1 MS. SHELTON: Since the Commission has existed, the
2 Commission's regulations both for test claims and
3 incorrect reduction claim requires a finding whether or
4 not the claim has been timely filed. The County has not
5 made an allegation that those regulations are invalid.
6 And we followed our regulations.

7 MEMBER SAYLOR: Okay.

8 CHAIR ORTEGA: Do you have any comments?

9 MR. LUKACS: I can respond in short or in detail.

10 CHAIR ORTEGA: Sure.

11 MR. LUKACS: The fundamental gravamen of the staff's
12 recommendation is that this is a legal argument. This
13 is a legal argument that the County had repeated
14 opportunities to make before this Commission. They could
15 have made it in written comments before the hearing, they
16 could have made it at the HDS hearings last hearing, and
17 they did not. They did not raise this argument. And
18 Mr. Lee, if I understand his testimony correctly, has not
19 even presented an excuse or a reason why the County did
20 not make this argument.

21 The draft proposed decision was issued on May 20th.
22 In the draft proposed decision, according to Mr. Lee's
23 argument, that is when the Commission, quote,
24 "sua sponte," and in his mind, improperly raised this
25 limitations issue; and yet, this was not addressed in the

1 written filings that the County filed on June 10th, nor
2 was it raised in any manner at the hearing on July 22nd.
3 And I'm not hearing any reason, either.

4 So we believe that the question before the
5 Commission is: Has a satisfactory explanation been
6 provided of why this issue was not raised and argued
7 beforehand? We believe that reconsiderations are a
8 disfavored process. This is seen in the fact that it's
9 a two-step process, where first, you have to decide
10 whether or not to even hold it, before you hear the
11 substance of it; and the fact that there is a
12 supermajority.

13 Now, we have recommended that the Commission utilize
14 the reasonable diligence standard that is used by the
15 superior courts which hear these all the time. And it's
16 for a very simple reason, as the First District said,
17 without a diligence requirement, the number of times that
18 a court could be required to reconsider its prior orders
19 would be limited only by the ability of counsel to
20 belatedly conjure a new legal theory.

21 CHAIR ORTEGA: Okay, quickly.

22 MR. LEE: If I could respond to that.

23 Our whole argument is, based upon the reading of the
24 regulation, there is no implicit diligence requirement.
25 And the rationale that the Commission is citing to is

1 accurate because the Legislature, in its legislative
2 history, told that this law is being amended, CCP 1008,
3 in order to reduce reconsideration motions in the trial
4 courts. So it's a clear legislative history of what
5 that law was intended to do. And the court -- the
6 appellate court interpreted, you know, new or different
7 facts, circumstances, or law to include that implicit
8 diligence requirement.

9 And I also want to quote to footnote 10 of that same
10 decision, the *Baldwin* court case, which provides that --
11 and I'll quote it here -- "*We're not unmindful of the*
12 *awkward consequences likely to flow from this holding,*
13 *which will, in some instances, bar trial judges from*
14 *correcting rulings belatedly shown to be erroneous.*
15 *Judicial inefficiency may also result from the need for*
16 *an appeal that will not have been required if correction*
17 *could have been made by a trial court willing to do so.*
18 *These problems stem not from our holding, however, but*
19 *by the 1992 amendment to section 1008, which solved one*
20 *set of problems by possibly creating another."*

21 And it goes on to say basically these problems are
22 not amenable to a judicial solution, and the answer has
23 to come from the Legislature.

24 So the whole rationale for due diligence came from
25 the Legislature, saying, we want to reduce

1 reconsideration motions, and the appellate court,
2 consistent with that legislative history, interpreted it
3 to include that diligence requirement.

4 Here, we're arguing based upon the regulation, and
5 it's only limited to error of law, that there is no
6 diligence requirement. That is not relevant. The issue
7 is, did the Commission get the law correct? I think that
8 increases judicial efficiency, for example, because there
9 will be less appeals, for example, which is what this
10 appellate court cited to, which they cannot get into
11 because of the legislative history.

12 So we're requesting the court to follow the plain
13 reading of the regulation, and allow for a second hearing
14 to address the merits of the reconsideration.

15 CHAIR ORTEGA: Thank you.

16 Ms. Shelton, can I ask a procedural question?

17 So we have before us a request for reconsideration.
18 Do we need a motion if the request -- if there is not --
19 if we're not moving forward with a rehearing? Do we
20 need a motion on either side to adopt the staff
21 recommendation?

22 MS. SHELTON: Yes, right.

23 CHAIR ORTEGA: Okay. Thank you for the
24 clarification.

25 All right, are there any other comments from

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1 commissioners?

2 MEMBER OLSEN: I'll move the staff recommendation.

3 MEMBER CHIVARO: I'll second.

4 CHAIR ORTEGA: Okay, moved by Ms. Olsen; seconded by
5 Mr. Chivaro.

6 I don't recall if I asked, is there anyone else who
7 wanted to speak on this item?

8 *(No response)*

9 CHAIR ORTEGA: Seeing none, please call the roll.

10 EXECUTIVE DIRECTOR HALSEY: Mr. Chivaro?

11 MEMBER CHIVARO: Yes.

12 EXECUTIVE DIRECTOR HALSEY: Mr. Hariri?

13 VICE CHAIR HARIRI: Yes.

14 EXECUTIVE DIRECTOR HALSEY: Ms. Olsen?

15 MEMBER OLSEN: Yes.

16 EXECUTIVE DIRECTOR HALSEY: Ms. Ortega?

17 CHAIR ORTEGA: Yes.

18 EXECUTIVE DIRECTOR HALSEY: Ms. Saylor?

19 MEMBER SAYLOR: Aye.

20 EXECUTIVE DIRECTOR HALSEY: Mr. Morgan?

21 MEMBER MORGAN: Yes.

22 CHAIR ORTEGA: Thank you.

23 MR. LEE: Thank you.

24 EXECUTIVE DIRECTOR HALSEY: Item 6 is reserved for
25 county applications for a finding of significant

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1 financial distress, or SB 1033 applications. No SB 1033
2 applications have been filed.

3 Item 7 is the legislative report; and there is
4 nothing new to report.

5 Chief Legal Counsel Camille Shelton will present
6 Item 8, the Chief Legal Counsel report.

7 MS. SHELTON: On August 29th, the California Supreme
8 Court did issue its decision in the Department of Finance
9 and State Water Resources Control Board case, dealing
10 with the Commission's test-claim decision on *Municipal*
11 *Stormwater and Urban Runoff Discharges*.

12 The majority of the Court reversed the Court of
13 Appeals decision, and found that the permit constituted
14 a state-mandated program, and remanded back to the lower
15 courts the remaining issues of whether or not the permit
16 activities impose a new program or higher level of
17 service and costs mandated by the State.

18 On September 13th, the State did file a request for
19 rehearing, and that remains pending at this point.

20 We have no other cases scheduled for hearing at this
21 time.

22 EXECUTIVE DIRECTOR HALSEY: Item 9 is the Executive
23 Director's report.

24 After this hearing, we have 15 test claims, all but
25 one of which are regarding NPDES permits. One parameters

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1 and guidelines, and one statewide cost estimate regarding
2 NPDES permits are also pending. And the NPDES matters
3 have been on inactive status pending the resolution of
4 litigation in the Supreme Court.

5 Now that the Supreme Court has issued a decision,
6 Commission staff has begun work on those claims that are
7 not currently pending in the courts. And these include
8 unusually large files and address complex issues of law
9 and fact, and will cause a decline in the number of
10 matters set for the hearing in the upcoming agendas.

11 In addition, we have one parameters-and-guidelines
12 amendment on inactive status pending outcome of
13 litigation in CSBA, which is now pending in the First
14 District Court of Appeal.

15 And then finally, we have four additional statewide
16 cost estimates and 23 incorrect reduction claims pending.

17 Also of note, since we last met, Senior Commission
18 Counsel Eric Feller's last day was with the Commission
19 on August 12th. He did work with the Commission for
20 15 years; and he will be missed by all of staff.

21 Eric has taken a new job in the Department of
22 Managed Health Care; and we will be recruiting a new
23 attorney for the Commission in the coming months.

24 Currently, the Commission staff expects to complete
25 the IRC backlog, including all IRCs filed to date by

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1 sometime in the summer or fall of 2018, and depending on
2 staffing and other workload.

3 Staff also anticipates completing all of the
4 current -- I'm sorry, I mixed those together. That's
5 both test claims and IRCs.

6 And then finally, I do have an action item for you
7 today, and that is the hearing calendar for 2018.

8 Commission meetings have generally been held on the
9 fourth Fridays of odds months.

10 UNIDENTIFIED MAN: 2017.

11 EXECUTIVE DIRECTOR HALSEY: 2017. Did I say '18?
12 I'm sorry, I'm getting ahead of myself.

13 However, the Commission traditionally holds its
14 November meeting on the first Friday of December because
15 the fourth Friday of November is a state holiday.

16 Staff notes that there is a typo on the date for the
17 October tentative hearing. It should say "2017," which
18 will be corrected after the hearing.

19 Staff recommends that the Commission adopt the
20 proposed 2017 hearing calendar, attached as Exhibit A.

21 CHAIR ORTEGA: Okay, any concerns with any of the --
22 Yes?

23 MEMBER OLSEN: I just want to make sure you check
24 the Friday, May 26th, to find out whether it is Memorial
25 Day weekend.

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1 EXECUTIVE DIRECTOR HALSEY: It is. It's the Friday.

2 MEMBER OLSEN: We have usually changed that one to
3 some other time.

4 EXECUTIVE DIRECTOR HALSEY: Well, we did that this
5 year; and then an equal number of people couldn't show up
6 for the changed date.

7 MEMBER OLSEN: So you're just going to keep it that
8 way? Okay.

9 EXECUTIVE DIRECTOR HALSEY: There wasn't a good date
10 to move it to.

11 If the members do want to change it, we can change
12 it. But what has happened is, we've tried changing it;
13 and every time, then somebody else can't come.

14 It's up to you. If you guys want to change it, we
15 can.

16 MEMBER CHIVARO: I'll move approval of the calendar.

17 MEMBER SAYLOR: Second.

18 CHAIR ORTEGA: Motion by Mr. Chivaro, second by
19 Mr. Saylor.

20 All in favor of the calendar, please say "aye."
21 *(A chorus of "ayes" was heard.)*

22 CHAIR ORTEGA: Okay, passed unanimously.

23 EXECUTIVE DIRECTOR HALSEY: Tentative agenda items.
24 Please check my Executive Director's Report to see if
25 your item is coming up over the course of the next few

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1 hearings, and expect to receive a draft proposed decision
2 for your review and comment at least eight weeks prior to
3 the hearing date.

4 CHAIR ORTEGA: Okay, thank you.

5 Thank you to everyone for attending.

6 The Commission will now meet in closed executive
7 session pursuant to Government Code section 11126(e) to
8 confer with and receive advice from legal counsel for
9 consideration and action, as necessary and appropriate,
10 upon the pending litigation listed on the published
11 notice and agenda; and to confer with and receive advice
12 from legal counsel regarding potential litigation. The
13 Commission will also confer on personnel matters pursuant
14 to Government Code section 11126(a)(1).

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

17 *(The Commission met in closed executive session*
18 *from 11:16 a.m. to 11:22 a.m.)*

19 CHAIR ORTEGA: The Commission met in closed session
20 pursuant to Government Code section 11126(e)(2), to
21 confer with and receive advice from legal counsel for
22 consideration and action, as necessary and appropriate,
23 upon the pending litigation listed on the published
24 notice and agenda, and to confer with and receive advice
25 from legal counsel regarding potential litigation; and

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1 pursuant to Government Code section 11126(a)(1) to confer
2 on personnel matters.

3 With no further business to come before the
4 Commission, we'll be adjourned.

5 Thank you.

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

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REPORTER'S CERTIFICATE

I hereby certify:

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

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

In witness whereof, I have hereunto set my hand on the 7th day of October 2016.



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