

## Minutes

### COMMISSION ON STATE MANDATES

Location of Meeting: Room 447  
State Capitol, Sacramento, California  
September 27, 2013

Present: Member Eraina Ortega, Chairperson  
Director of the Department of Finance  
Member Richard Chivaro, Vice Chairperson  
Representative of the State Controller  
Member Andre Rivera  
Representative of the State Treasurer  
Member Ken Alex  
Director of the Office of Planning and Research  
Member Sarah Olsen  
Public Member  
Member Carmen Ramirez  
City Council Member

Absent: Member Don Saylor  
County Supervisor

*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. Member Saylor was absent.

#### **APPROVAL OF MINUTES**

Item 1            July 26, 2013

Member Chivaro made a motion to adopt the minutes. With a second by Member Ramirez, the July 26, 2013 hearing minutes were adopted by a vote of 6-0.

#### **PUBLIC COMMENT FOR MATTERS NOT ON THE AGENDA**

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

#### **CONSENT CALENDAR**

*If there are no objections to any of the following action items designated by an asterisk (\*), the Executive Director will include each one on the Proposed Consent Calendar that will be presented at the hearing. The Commission will determine which items will remain on the Consent Calendar.*

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

#### **PARAMETERS AND GUIDELINES AND PARAMETERS AND GUIDELINES AMENDMENTS**

Item 6\*            *Habitual Truants*, 01-PGA-06 and 09-PGA-01

Education Code Section 48262 and 48264.5

Statutes 1975, Chapter 1184; Statutes 1994, Chapter 1023;  
Statutes 2001, Chapter 734

Clovis Unified School District and San Jose Unified School District,  
Requestors

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

**STATEWIDE COST ESTIMATE**

Item 7\*      *Tuberculosis Control, 03-TC-14*

Health and Safety Code sections 121361, 121362 and 121366

Statutes 1993, Chapter 676; Statutes 1994, Chapter 685;  
Statutes 1997, Chapter 116; and Statutes 2002, Chapter 763

County of Santa Clara, Claimant

Executive Director Halsey announced that after the agenda for this hearing was released, the parties agreed to place Item 6 on the Consent Calendar. Chairperson Ortega asked if there was any objection to adding Item 6 to the Consent Calendar and if there were any comments from the public. No objection was made and there was no public comment. Member Olsen made a motion to adopt the consent calendar. With a second by Member Chivaro, the consent calendar was adopted by a vote of 6-0.

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

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

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

Item 2      Appeal of Executive Director Decisions

There were no appeals to consider.

**TEST CLAIMS**

Item 3      *Accounting for Local Revenue Realignment, 05-TC-01*

Health & Safety Code Sections 33681.12, 33681.13, 33681.14, 33681.15;  
Revenue & Taxation Code Sections 96.81, 97.75, 97.76, 97.77, 97.31,  
98.02, 97.68, 97.70, 97.71, 97.72, 97.73

Statutes 2003, Chapter 162; Statutes 2004, Chapter 211; Statutes 2004,  
Chapter 610

County of Los Angeles, Claimant

This test claim pertains to the administrative activities required to implement three revenue-shifting programs instituted by the Legislature: the Educational Revenue Augmentation Fund (ERAF III) shift; the Vehicle License Fee (VLF) Swap; and the Triple Flip.

Commission Counsel Matt Jones presented this item and recommended that the Commission adopt the staff analysis and proposed statement of decision, approving reimbursement for counties for the costs of administrative activities required by the test claim statutes for two years, and approving reimbursement for the city and county of San Francisco on an ongoing basis.

Parties were represented as follows: Hasmik Yaghobyan, representing the claimant; Geoffrey Neill on behalf of the California State Association of Counties; Michael Byrne and Susan Geanacou, representing the Department of Finance.

Following discussion among the Commission members, staff, and parties, Member Chivaro made a motion to adopt the staff recommendation. With a second by Member Alex, the motion to adopt the staff recommendation partially approving the test claim was adopted by a vote of 5-0, with Member Ramirez abstaining.

Item 4      *General Health Care Services for Inmates, 07-TC-12*  
Penal Code Section 4011.10  
Statutes 2005, Chapter 481 (SB 159) and Statutes 2006,  
Chapter 303 (SB 896)  
County of Orange, Claimant

This test claim pertains to a 2005 test claim statute and 2006 amendment thereto that allows local law enforcement agencies, including county sheriffs, chiefs of police, and directors or administrators of local detention facilities, to contract with hospitals providing emergency health care services for local law enforcement patients.

Senior Commission Counsel Tyler Asmundson presented this item and recommended that the Commission adopt the staff recommendation to deny the test claim.

Parties were represented as follows: James Harman, representing the claimant; Kim Pearson, Division Director, Orange County Health Care Agency's Correctional Health Services Division; Michael Byrne and Susan Geanacou, representing the Department of Finance.

Following discussion among the Commission members, staff, and parties, Member Olsen made a motion to adopt the staff recommendation to deny the test claim. With a second by Member Chivaro, the motion to adopt the staff recommendation denying the test claim was adopted by a vote of 6-0.

#### REQUEST FOR MANDATE REDETERMINATION

Item 5      *Sexually Violent Predators (CSM-4509), 12-MR-01*  
Welfare and Institutions Code Sections 6601 through 6605, and 6608  
Statutes 1995, Chapter 762 (SB 1143); Statutes 1995, Chapter 763  
(AB 888); Statutes 1996, Chapter 4 (AB 1496)  
As Alleged to be Modified by: Proposition 83,  
General Election, November 7, 2006  
California Department of Finance, Requestor

This redetermination request alleges that the state's liability under a previously determined test claim has been modified based on a subsequent change in law as defined in Government Code section 17570.

Commission Counsel Matt Jones presented this item and recommended that the Commission adopt the new test claim decision to supersede the previously adopted test claim decision based on a subsequent change in law.

Parties and interested parties were represented as follows: Susan Geanacou and Michael Byrne, representing Requester, the Department of Finance; Hasmik Yaghobyan, on behalf of County of Los Angeles; Todd Spitzer, Orange County Supervisor; Craig Osaki, on behalf of the Los Angeles County Public Defender's Office; Timothy Barry, on behalf of the San Diego County Sheriff's Office, District Attorney's Office, and Public Defender's Office; Geoffrey Neill, on behalf of the California State Association of Counties.

Following discussion among the Commission members, staff, parties, and a member of the public, Member Ramirez made a motion to adopt the findings in the proposed statement of decision, all except for the period of reimbursement and the issue of retroactivity with respect to the County of Los Angeles or any other county that has a binding order. With a second by Member Alex, the findings in the proposed statement of decision, except for the period of reimbursement and the issue of retroactivity were adopted by a vote of 4-1, with Member Rivera abstaining and Member Olsen voting nay.

**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 8 Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commission, or to a Hearing Officer  
*Note: This item will only be taken up if an application is filed.*

No applications were filed.

**STAFF REPORTS**

- Item 9 Legislative Update (info)

Program Analyst Kerry Ortman presented this item.

- Item 10 Chief Legal Counsel: Chief Legal Counsel: Recent Decisions, Litigation Calendar

Chief Legal Counsel Camille Shelton presented this item.

- Item 11 Executive Director: Workload, 2014 Meeting Calendar, and Tentative Agenda Items for Next Meeting (info/action)

Executive Director Heather Halsey presented this item. Member Olsen made a motion to adopt the proposed 2014 meeting calendar. With a second from Member Chivaro, the 2014 meeting calendar was unanimously adopted.

**CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 AND 11126.2 (action).**

**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):

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. R9-207-000, 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. *California School Board Association (CSBA) v. State of California et al., Alameda County Superior Court Case No. RG11554698 [2010-2011 Budget Trailer Bills, Mandates Process for K-12 Schools, Redetermination Process]*
3. *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). 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]*

#### PERSONNEL

To confer on personnel matters pursuant to Government Code section 11126(a)(1):

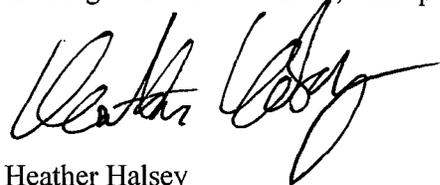
The Commission adjourned into closed executive session pursuant to Government Code section 11126(e) to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation published in the notice and agenda; to confer and receive advice from legal counsel regarding potential litigation, and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

#### REPORT FROM CLOSED EXECUTIVE SESSION

At 11:52 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) 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 potential litigation, and to confer on personnel matters pursuant to Government Code section 11126(a)(1).

#### ADJOURNMENT

Hearing no further business, Chairperson Ortega adjourned the meeting at 11:53 a.m.



Heather Halsey  
Executive Director

PUBLIC MEETING  
COMMISSION ON STATE MANDATES



TIME: 10:00 a.m.  
DATE: Friday, September 27, 2013  
PLACE: State Capitol, Room 447  
Sacramento, California



REPORTER'S TRANSCRIPT OF PROCEEDINGS



Reported by:  
Daniel P. Feldhaus  
California Certified Shorthand Reporter #6949  
Registered Diplomate Reporter, Certified Realtime Reporter

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**Commission on State Mandates – September 27, 2013**

**A P P E A R A N C E S**

**COMMISSIONERS PRESENT**

ERAINA ORTEGA  
*(Commission Chair)*  
Chief Deputy Director  
Department of Finance

KEN ALEX  
Director  
Office of Planning & Research

RICHARD CHIVARO  
Representative for JOHN CHIANG  
State Controller

M. CARMEN RAMIREZ  
Oxnard City Council Member

ANDRÉ RIVERA  
Representative for BILL LOCKYER  
State Treasurer

SARAH OLSEN  
Public Member



**COMMISSION STAFF PRESENT**

HEATHER HALSEY  
Executive Director  
(Item 11)

JASON HONE  
Assistant Executive Director

CAMILLE SHELTON  
Chief Legal Counsel  
(Item 10)

TYLER ASMUNDSON  
Commission Counsel  
(Item 4)

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF

*continued*

MATTHEW JONES  
Commission Counsel  
(Item 3 and Item 5)

KERRY ORTMAN  
Program Analyst  
(Item 9)



PUBLIC TESTIMONY

**Appearing Re Item 3:**

For Requestor Department of Finance:

SUSAN GEANACOU  
Senior Staff Attorney  
Department of Finance  
915 L Street  
Sacramento, California 95814

MICHAEL BYRNE  
Department of Finance  
915 L Street  
Sacramento, California 95814

For County of Los Angeles:

HASMIK YAGHOBYAN  
SB 90 Administration  
County of Los Angeles Auditor Controller's Office  
500 West Temple, Room 525  
Los Angeles, California 90012

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 3:** *continued*

For California State Association of Counties:

GEOFFREY NEILL  
Senior Legislative Analyst  
Revenue & Taxation  
California State Association of Counties  
1100 K Street, Suite 101  
Sacramento, California 95814

**Appearing Re Item 4:**

For the County of Orange:

JAMES C. HARMAN  
Deputy County Counsel  
County of Orange  
P.O. Box 1379  
Santa Ana, California 92702

KIM PEARSON, R.N.  
Deputy Agency Director  
Correctional Health Services Division  
County of Orange  
405 West Fifth Street  
Santa Ana, California 92701

For Department of Finance:

SUSAN GEANACOU  
Senior Staff Attorney  
Department of Finance

MICHAEL BYRNE  
Department of Finance

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing Re Item 5:**

For Requestor Department of Finance:

SUSAN GEANACOU  
Senior Staff Attorney  
Department of Finance

MICHAEL BYRNE  
Department of Finance

For County of Los Angeles:

HASMIK YAGHOBYAN  
SB 90 Administration  
County of Los Angeles Auditor Controller's Office

CRAIG OSAKI  
Los Angeles Public Defender's Office  
210 West Temple Street  
Los Angeles, California 90012

For San Diego County Sheriff, P.D., and D.A.:

TIMOTHY BARRY  
County of San Diego  
County Counsel's Office  
1600 Pacific Highway, Room 355  
San Diego, California 92101

For Orange County:

TODD SPITZER  
Orange County Supervisor  
Orange County Board of Supervisors  
333 W. Santa Ana Blvd.  
Santa Ana, California 92701





Commission on State Mandates – September 27, 2013

I N D E X

<u>Proceedings</u>	<u>Page</u>
I. Call to Order and Roll Call . . . . .	10
II. Approval of Minutes	
Item 1 July 26, 2013 . . . . .	11
III. Public Comment for Matters Not on the Agenda	11
IV. Proposed Consent Calendar	
Items 6 and 7 . . . . .	12
V. Appeal of Executive Director Pursuant to California Code of Regulations, Title 2, Section 1181(c)	
Item 2 Appeal of Executive Director's Decision ( <i>None</i> ) . . . . .	13
VI. Hearings and Decisions on Test Claims and Parameters and Guidelines Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7	
A. Test Claim	
Item 3 <i>Accounting for Local Revenue Realignments</i> 05-TC-01 County of Los Angeles . . . . .	13
Item 4 <i>General Health Care Services for Inmates</i> 07-TC-12 County of Orange . . . . .	29

Commission on State Mandates – September 27, 2013

I N D E X

<u>Proceedings</u>	<u>Page</u>
VI. Hearings and Decisions on Test Claims and Parameters and Guidelines Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 7	
B. Mandate Redetermination	
Item 5 <i>Sexually Violent Predators</i> (CSM 4509) 12-MR-01 Department of Finance . . . . .	40
C. Parameters and Guidelines and Parameters and Guidelines Amendments	
Item 6* <i>Habitual Truants</i> 01-PGA-06 and 09-PGA-01 Clovis Unified School District and San Jose Unified School District ( <i>Consent item</i> ) . . . . .	12
VII. Informational Hearing Pursuant to California Code of Regulations, Title 2, Chapter 2.5, Article 8	
A. Statewide Cost Estimate	
Item 7* <i>Tuberculosis Control</i> 03-TC-14 County of Santa Clara ( <i>Consent item</i> ) . . . . .	12
VIII. 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	
Item 8   Assignment of County Application to Commission, a Hearing Panel of One or More Members of the Commissions, or to a Hearing Officer ( <i>None</i> ) . . . . .	97

Commission on State Mandates – September 27, 2013

I N D E X

<u>Proceedings</u>	<u>Page</u>
IX. Reports	
Item 9 Legislative Update . . . . .	97
Item 10 Chief Legal Counsel: Recent Decisions, Litigation Calendar . . . . .	98
Item 11 Executive Director: Workload, Budget, and Tentative Agenda Items for Next Meeting . . . . .	98
X. Public Comment . . . . .	--
XI. Closed Executive Session . . . . .	100
A. Pending Litigation	
B. Personnel	
XII. Report from Closed Executive Session . . . . .	100
Adjournment . . . . .	101
Reporter's Certificate . . . . .	102



**Commission on State Mandates – September 27, 2013**

1 BE IT REMEMBERED that on Friday, September 27,  
2 2013, commencing at the hour of 10:00 a.m., thereof, at  
3 the State Capitol, Room 447, Sacramento, California,  
4 before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR,  
5 the following proceedings were held:

6 --oOo--

7 CHAIR ORTEGA: Good morning, everyone.

8 I would like to call the Commission on State  
9 Mandates meeting to order.

10 If you could please call the roll.

11 MS. HALSEY: Mr. Alex?

12 MEMBER ALEX: Here.

13 MS. HALSEY: Mr. Chivaro?

14 MEMBER CHIVARO: Here.

15 MS. HALSEY: Ms. Olsen?

16 MEMBER OLSEN: Here.

17 MS. HALSEY: Ms. Ortega?

18 CHAIR ORTEGA: Here.

19 MS. HALSEY: Ms. Ramirez?

20 MEMBER RAMIREZ: Here.

21 MS. HALSEY: Mr. Rivera?

22 MEMBER RIVERA: Here.

23 MS. HALSEY: Mr. Saylor is absent today. He  
24 has a fire in his district, and was not able to come.

25 CHAIR ORTEGA: Thank you.

**Commission on State Mandates – September 27, 2013**

1           The first item on the agenda is the minutes  
2           from July 26<sup>th</sup>.

3           Are there any objections or corrections to  
4           the minutes?

5           *(No response)*

6           CHAIR ORTEGA: No?

7           MEMBER CHIVARO: Move.

8           CHAIR ORTEGA: A motion.

9           MEMBER RAMIREZ: Second.

10          CHAIR ORTEGA: A second.

11          All those in favor?

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

13          CHAIR ORTEGA: Any opposed?

14          *(No response)*

15          CHAIR ORTEGA: Okay, thank you.

16          MS. HALSEY: And now we'll take public comment  
17          for matters not on the agenda. Please note the  
18          Commission cannot take action on items not on the agenda.  
19          However, it can schedule issues raised by the public for  
20          consideration at future meetings.

21          CHAIR ORTEGA: Any public comment?

22          *(No response)*

23          CHAIR ORTEGA: No?

24          Thank you.

25          MS. HALSEY: Next, we have a proposal to add

**Commission on State Mandates – September 27, 2013**

1 another item to the Consent Calendar.

2 After the agenda for this hearing was released,  
3 the parties agreed to place Item 6, consolidated  
4 parameters and guidelines amendments on *Habitual Truants*,  
5 on consent.

6 CHAIR ORTEGA: Any objections to adding Item  
7 Number 6 to the Consent Calendar?

8 *(No response)*

9 CHAIR ORTEGA: Any comments from the public?

10 *(No response)*

11 CHAIR ORTEGA: Okay, are there any questions,  
12 generally, about the Consent Calendar?

13 *(No response)*

14 CHAIR ORTEGA: If not, do we have a motion?

15 MEMBER OLSEN: So moved.

16 CHAIR ORTEGA: It's moved.

17 MEMBER CHIVARO: Second.

18 CHAIR ORTEGA: Second.

19 MS. HALSEY: The Consent Calendar consists of  
20 Items 6 and 7.

21 CHAIR ORTEGA: All those in favor?

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

23 CHAIR ORTEGA: Any objections?

24 *(No response)*

25 CHAIR ORTEGA: Abstentions?

**Commission on State Mandates – September 27, 2013**

1                   (No response)

2                   CHAIR ORTEGA: Thank you.

3                   MS. HALSEY: Let's move to the Article 7  
4 portion of the hearing.

5                   Will the parties and witnesses for Items 2, 3,  
6 4, and 5 please rise?

7                   (Parties and witness stood.)

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

12                   (Chorus of "I dos" was heard.)

13                   MS. HALSEY: Thank you.

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

17                   Item 3, Commission Counsel Matt Jones will  
18 present a test claim on *Accounting for Local Revenue*  
19 *Realignments*.

20                   MR. JONES: Good morning.

21                   This test claim alleges reimbursable  
22 state-mandated increased costs incurred by counties as  
23 a result of the administrative activities required to  
24 implement three revenue-shifting programs instituted by  
25 the Legislature: The educational revenue augmentation

**Commission on State Mandates – September 27, 2013**

1 fund shift, the vehicle license fee swap, and the triple  
2 flip.

3 The proposed statement of decision approves  
4 reimbursement for administrative functions of county  
5 auditor/controller offices to create new accounts and  
6 shift funds between school districts and local agencies  
7 as directed by statute.

8 Some of the revenue-shifting activities state  
9 that they're only meant to occur during fiscal years  
10 2004-05 and 2005-06, while some are ongoing.

11 In addition, the statutes provide authority  
12 for counties to charge cities for the costs of the  
13 ongoing mandated activities after the first two years.  
14 Therefore, for all counties except the City and County of  
15 San Francisco, which has no subordinate city against  
16 which to levy the fees, reimbursement is capped in the  
17 2006-2007 fiscal year.

18 Staff recommends that the Commission adopt the  
19 staff analysis and proposed statement of decision as its  
20 test-claim statement of decision, approving reimbursement  
21 for counties for the costs of administrative activities  
22 required by the test-claim statutes for two years, and  
23 approving reimbursement for the City and County of  
24 San Francisco on an ongoing basis.

25 Staff further recommends that the Commission

**Commission on State Mandates – September 27, 2013**

1 authorize staff to make any non-substantive technical  
2 changes to the proposed statement of decision following  
3 the hearing.

4 Will the parties and witnesses please state  
5 your names for the record?

6 MS. YAGHOBYAN: Hasmik Yaghobyan on behalf of  
7 County of Los Angeles.

8 MR. NEILL: Geoffrey Neill on behalf of the  
9 California State Association of Counties.

10 MR. BYRNE: Michael Byrne, Department of  
11 Finance.

12 MS. GEANACOU: Susan Geanacou, Department of  
13 Finance.

14 CHAIR ORTEGA: Ms. Yaghobyan?

15 MS. HALSEY: Excuse me, Mr. Neill, is your  
16 microphone working?

17 MR. NEILL: I don't know.

18 CHAIR ORTEGA: It is.

19 MS. YAGHOBYAN: I just would like to thank the  
20 staff, and we concur with their recommendation.

21 MR. NEILL: I actually -- we filed late  
22 comments, and we knew they wouldn't be entered into the  
23 analysis. But the proposal before the Commission says  
24 that because there's fee authorities, it's not a mandate  
25 except in the City and County of San Francisco; but

**Commission on State Mandates – September 27, 2013**

1 allowing one level of government to charge another level  
2 of local government for a charge doesn't mean it's not a  
3 mandate, it just shifts the costs onto different local  
4 agency. So cities ought to be able to claim their costs  
5 under this mandate.

6 Furthermore, the counties still retains a share  
7 of the mandated costs because counties can only bill out  
8 to cities the portion that benefits those cities.  
9 Because a portion of the benefit remains with the county  
10 for these tax allocations, the county still retains a  
11 share of the cost. So counties ought to be able to claim  
12 that share of the cost. Since they only have partial fee  
13 authority, they still have to pay for some of the  
14 administrative actions. Even the fee authority that they  
15 do have is just on cities, so the cities ought to be able  
16 to claim those costs.

17 MR. BYRNE: Michael Byrne, Department of  
18 Finance.

19 Finance concurs with the Commission's draft  
20 analysis recommendation.

21 CHAIR ORTEGA: Okay, thank you.

22 Are there any questions from the Members?

23 MEMBER OLSEN: I'd like to hear staff's  
24 response to CSAC.

25 MR. JONES: Well, if I understand CSAC's

**Commission on State Mandates – September 27, 2013**

1 comment and their comments today correctly, they  
2 are essentially arguing that the fee authority that is  
3 written into the statute in this case, which allows  
4 county auditors to charge the cities -- the subordinate  
5 cities within their county for the costs of the  
6 revenue-shifting activities, which are the entire scope  
7 of this mandate.

8 The fee authority that is granted to counties,  
9 they're essentially arguing it's just a revenue shift --  
10 it's just a cost shift to the cities and that the cities  
11 should then be reimbursed.

12 There are a couple problems with that.

13 One is that the cities have not filed any test  
14 claim on these statutes. The counties were the only  
15 claimant.

16 And then the other problem is that the cities  
17 don't have any activities under these statutes. The  
18 cities only are, you can say, subject to or burdened by  
19 the costs, and it's the counties that are the ones  
20 performing the activities.

21 You know, we've got case law that's pretty  
22 clear on that point, that costs alone are not a mandate.  
23 And, in fact, you can look, for example, at, I believe,  
24 Redevelopment Agency of San Marcos, which shifted money  
25 away from school districts in the first *ERAF*. And that's

**Commission on State Mandates – September 27, 2013**

1 related to this because this is *ERAF* Number 3. This is  
2 the third time we've taken money from school districts  
3 and moved it somewhere else.

4 And in that case -- or, actually, excuse me, in  
5 that case it was from the redevelopment agencies to the  
6 school districts. And the redevelopment agencies were  
7 held not to be reimbursable claimants -- or eligible  
8 claimants for reimbursement there, in part, because there  
9 wasn't any activity. It was just basically pulling funds  
10 away from them.

11 And so in the same vein here, you've got cities  
12 that are, yes, losing some revenue, arguably, but it's  
13 been done by the county. Number one, it's not forced but  
14 it's authorized for the county to charge the cities. And  
15 then secondly, the cities do not have any activities.  
16 And then finally, as I said, the cities haven't filed a  
17 test claim. This is a county test claim.

18 MEMBER OLSEN: Correct me if I'm wrong, but I  
19 think there is one other issue; and that is that counties  
20 are only able to charge the cities in their jurisdiction  
21 proportionately for the amount of the shift that affected  
22 the cities themselves, and that there's a residual  
23 portion that continues to affect the counties; is that  
24 correct?

25 MS. HALSEY: I do want to -- I'm sorry for

**Commission on State Mandates – September 27, 2013**

1 interrupting. I just want to point out this is the first  
2 time this argument is being raised. It wasn't even  
3 raised in the late comments.

4 MR. NEILL: It was.

5 MS. HALSEY: I have them.

6 MEMBER OLSEN: Yes, it's in the late comments.

7 MS. HALSEY: Was it?

8 The part about it being a burden on the  
9 counties?

10 MEMBER OLSEN: Yes.

11 MR. NEILL: Yes.

12 MS. HALSEY: I'm sorry then.

13 MR. JONES: The statute isn't that specific.

14 The statute merely says that the counties can  
15 charge the cities with the costs of the administrative  
16 activities -- or the costs of the services provided, or  
17 something along those lines. I don't remember the exact  
18 language.

19 But in any case, it's pretty clear that the  
20 plain language of the statute allows the counties to  
21 charge cities for the costs incurred by the county  
22 auditor/controller's office to move this money around as  
23 directed by the statute.

24 We have, you know, more case law on fee  
25 authority -- *Connell*, for example, and *Clovis*, both of

**Commission on State Mandates – September 27, 2013**

1 which suggest that whatever practical limitations there  
2 are to exercising that fee authority, are not relevant to  
3 the question under section 17556(d), of whether there is  
4 fee authority and whether there should be costs mandated  
5 by the state.

6 So it may be that the cities are not able to  
7 pay the costs of this program. It may be that the  
8 counties can ask for that money and they're not going to  
9 get it, and they're not going to get blood from a stone.  
10 But the point is that the case law doesn't really permit  
11 us to consider those factors; it's just a question of  
12 whether there is authority in the statute. And, as a  
13 matter of law, there is in this case.

14 MR. NEILL: Can I ask a clarifying question?

15 So if the state imposed a mandate on counties  
16 and said that we could charge -- say, it was a -- say,  
17 it was a big public-safety mandate, large dollars, and  
18 it said that we could charge each offender \$1 for this  
19 big mandate. Say, the mandate costs tens of thousands  
20 of dollars per offender.

21 You're saying that because there's fee  
22 authority for the \$1, we couldn't claim the rest of the  
23 costs? Because you're saying that --

24 MR. JONES: Not at all.

25 MR. NEILL: -- the partial fee authority that

**Commission on State Mandates – September 27, 2013**

1 we have to charge cities, it would be illegal for us to  
2 charge the cities more than their proportionate share?  
3 And because -- even though the fee authority doesn't  
4 grant us the authority to charge the full cost of the  
5 program, we still can't claim the remainder of the costs?

6 MR. JONES: First of all, the statute in this  
7 case isn't limited to a dollar amount. And I'm not sure  
8 where you're getting the idea that it's proportionate to  
9 anything other than the services actually provided to the  
10 city. And then the language of this --

11 MR. NEILL: Because a fee -- the specific --  
12 a fee is defined in the Constitution as only being the  
13 charge. You can only charge a fee in proportion to the  
14 benefit received.

15 MS. SHELTON: Could I? Let me clarify the  
16 general rules on fee authority under 17556(e).

17 Basically, if there's a fee established that  
18 is sufficient to pay for the cost of the state-mandated  
19 activities, there are no costs mandated by the state.  
20 It is a question of law, and it depends on the language  
21 of the fee authority authorized by the statute.

22 Here, the fee authority applies to all services  
23 that we have found to be mandated and to be a new program  
24 or higher level of service. So by law, they're allowed  
25 to charge a fee for all costs incurred for those

**Commission on State Mandates – September 27, 2013**

1 services.

2 If there was a statute that you suggested that  
3 had a cap, then certainly there is an argument to be made  
4 that our costs are higher than the cap. And here,  
5 there's no cap.

6 If there were a cap, you would need to file  
7 evidence in the record to show that your costs exceed the  
8 amount that you're able to charge. But that's not the  
9 situation here. There is no cap. By law, the authority  
10 allows you to charge fees for all services performed.

11 MEMBER OLSEN: So if I could be indulged here.

12 CHAIR ORTEGA: Yes, and then I'd like to hear  
13 from Mr. Byrne who also wants to make a comment.

14 MEMBER OLSEN: Okay, I'm going to go to the  
15 CSAC late filing here, and under point one, the second  
16 main paragraph -- and I just want somebody to tell me if  
17 this is -- you know, if the Commission has a different  
18 point of view, if Commission staff has a different point  
19 of view.

20 "However, counties are only authorized to  
21 charge fees on a city in proportion to that city's share  
22 of increased revenue. This leaves a portion of the  
23 increased costs still imposed on the county, since the  
24 county also receives a share of the increased revenue.  
25 In many counties, if not every county, the county

**Commission on State Mandates – September 27, 2013**

1 receives more property taxes than any single city within  
2 its jurisdiction. This leaves the largest portion of the  
3 administrative costs still a burden to the county."

4 MS. SHELTON: I'm going to let Matt respond to  
5 that. Because it sounds like what the CSAC letter is  
6 doing, is interpreting the plain language of the  
7 fee-authority statute here. And it sounds like there  
8 may be a difference of opinion on that, on that  
9 interpretation.

10 CHAIR ORTEGA: Can I go to Mr. Byrne, please?

11 MR. BYRNE: Yes. The actual language of  
12 Rev. and Tax Code 9775 states, "For the 2006-07 fiscal  
13 year, and each fiscal year thereafter, a county may  
14 impose a fee, charge, or other levy on a city for these  
15 services, but the fee, charge, or other levy shall not  
16 exceed the actual cost of providing these services."

17 MS. SHELTON: And that is typical language of  
18 17556(e), fee authority, that by law, it means there are  
19 no costs mandated by the state.

20 CHAIR ORTEGA: Mr. Jones?

21 MR. JONES: It sounds to me, actually, like  
22 Mr. Neill is suggesting that the definition of "fee" and  
23 "assessment" and "tax" that we have recently added to  
24 Article XIIID might be coming into play.

25 But I wonder if there's anything to the idea

**Commission on State Mandates – September 27, 2013**

1 that this all happened in 2004-2005, 2005-2006, which is  
2 prior to Prop. 218 and Prop. 26.

3 So the definitions of "fee," "assessment," and  
4 "tax" that are currently in XIIIID I'm not certain would  
5 apply in this case to the fee authority that we have in  
6 Revenue and Tax 9775.

7 And maybe Camille can speak to that.

8 MS. SHELTON: I think that's a little bit of a  
9 red herring, only because Prop. 218 and Article XIIIIC and  
10 D really defined more things -- more fees to be taxes.  
11 And here, it is truly a fee. And no court has come out  
12 and said it was a tax. So until you have a court  
13 decision on that ruling, it's the plain language we have  
14 is controlling. And it's a fee.

15 CHAIR ORTEGA: Ms. Yaghobyan?

16 MS. YAGHOBYAN: Actually, what Mr. Geoffrey  
17 Neill is suggesting -- he had already spoke with me --  
18 it's not that the fee be charged to the cities for the  
19 services we do, because there is other costs that we have  
20 to endure for our portion.

21 He is talking about that portion of the costs.  
22 But after I spoke with our people, that costs is not  
23 material, we decided not to claim that or to not include  
24 that in our test claim. But that doesn't mean no other  
25 local agencies or counties would not have costs.

**Commission on State Mandates – September 27, 2013**

1           So the costs he is referring is not the fee  
2           that is charged to the others. It's the cost for  
3           ourselves, for our portion. But we just didn't want to  
4           do.

5           MR. NEILL: If we're going with the specific  
6           language of the statute, it actually only authorizes --  
7           if we're just reading it as plainly as possible, it only  
8           authorizes us to charge a city. It only allows each  
9           county to charge one city the fee.

10          I mean, as long as -- if we're going to be this  
11          strict about it, it says that we can charge a city the  
12          costs -- our costs.

13          MR. JONES: That's a pretty strained  
14          interpretation, I think.

15          MR. NEILL: I think yours is, too. I think  
16          saying that -- I mean, it's long established that taxing  
17          agencies, whether it's the Board of Equalization, whether  
18          it's counties -- whoever it is -- they can only charge  
19          the fees to the people who get the benefit, in proportion  
20          to that benefit.

21          MR. JONES: We need to be careful about using  
22          the word "benefit" there.

23          We're talking services provided by the county  
24          which -- let's be honest, these are services that -- the  
25          county is taking money from the cities. The cities

**Commission on State Mandates – September 27, 2013**

1 aren't going to consider it a benefit under any  
2 circumstances under this statute. So the word "benefit"  
3 is also a red herring there.

4 But you're talking about -- the statute that  
5 Mr. Byrne just read says specifically that counties can  
6 charge the subordinate cities the fee for the cost of the  
7 services administered to the cities. And the services  
8 administered under section 97.68, and I think 97.70 is  
9 the other one, which are the VLF swap and the triple-flip  
10 swap, both of those statutes discuss creating these  
11 accounts for shifting money. They talk about shifting  
12 money from one place to another, and then back to a third  
13 place. And clearly, there are some activities on the  
14 county.

15 But if you're suggesting that the fee authority  
16 is somehow going to fall short of that, you're going to  
17 have to submit some evidence in the record -- which there  
18 isn't any, up to this point -- that there are other  
19 reimbursable activities that aren't covered by that fee  
20 authority.

21 And so far, there has been nothing submitted  
22 that suggests that.

23 CHAIR ORTEGA: Ms. Olsen?

24 MS. SHELTON: Just one more point to add: That  
25 what -- what CSAC is suggesting that there is going to be

**Commission on State Mandates – September 27, 2013**

1 other ancillary activities that are tied to these  
2 mandated activities, and they are suggesting that the fee  
3 does not attach to that.

4 Mandates law is very strictly legal. You have  
5 to apply the fees strictly to those activities that are  
6 mandated. And if that applies, then there are no costs  
7 mandated by the State.

8 So by the plain -- you have to interpret the  
9 plain language of the statute and pull the activities  
10 from the plain language of the statute.

11 And our interpretation of the fee authority for  
12 those services means the fee applies to those activities  
13 that are required.

14 MEMBER OLSEN: I get that.

15 I don't think I've heard anybody address really  
16 specifically this issue of this residual cost that cannot  
17 be shifted through fees to the local governments that  
18 receive a benefit from this activity; that there is some  
19 residual cost to at least some counties, if not all  
20 counties, because they, too, were affected by these  
21 shifts.

22 MS. SHELTON: But the point I was trying to  
23 make, when you say a "residual cost," that's not how the  
24 fee authority in 17556(e) works. There's no -- you have  
25 to point, you have to tag the fee authority to the

**Commission on State Mandates – September 27, 2013**

1 mandated activity. Those are the only activities that  
2 we're talking about.

3 Any residual activity that's not required by  
4 the plain language of the statute is not relevant for  
5 this issue.

6 MEMBER OLSEN: So you're saying that for this  
7 issue, the counties have -- all the counties, with the  
8 exception of the City and County of San Francisco -- have  
9 the ability to charge fee authority for their full costs  
10 of administering this program, even --

11 MS. SHELTON: For administering the required  
12 activities, yes.

13 MEMBER OLSEN: And they could charge cities in  
14 their jurisdiction, fees that would cover the full cost,  
15 even though there is a portion of the program that  
16 benefits counties as opposed to cities?

17 MR. JONES: As a matter of law, yes, that's  
18 correct.

19 MEMBER OLSEN: Okay.

20 CHAIR ORTEGA: Any other comments from the  
21 commissioners?

22 *(No response)*

23 CHAIR ORTEGA: From the public?

24 *(No response)*

25 CHAIR ORTEGA: Do we have a motion on this

**Commission on State Mandates – September 27, 2013**

1 item?

2 MEMBER CHIVARO: Move staff recommendation.

3 MEMBER RAMIREZ: May I just add this? I am  
4 going to abstain from this because my city is dealing  
5 with it now. So I'll be abstaining.

6 CHAIR ORTEGA: Thank you.

7 We have a motion.

8 Do we have a second?

9 MEMBER ALEX: Second.

10 CHAIR ORTEGA: Okay, please call the roll.

11 MS. HALSEY: Mr. Alex?

12 MEMBER ALEX: Aye.

13 MS. HALSEY: Mr. Chivaro?

14 MEMBER CHIVARO: Aye.

15 MS. HALSEY: Ms. Olsen?

16 MEMBER OLSEN: Aye.

17 MS. HALSEY: Ms. Ortega?

18 CHAIR ORTEGA: Aye.

19 MS. HALSEY: Ms. Ramirez is abstaining.

20 MEMBER RAMIREZ: Abstain.

21 MS. HALSEY: And Mr. Rivera?

22 MEMBER RIVERA: Aye.

23 MS. HALSEY: The motion carries.

24 Moving on to Item 4, Senior Commission Counsel

25 Tyler Asmundson will present a claim on *General Health*

**Commission on State Mandates – September 27, 2013**

1     *Care Services for Inmates.*

2             This item was postponed from the July 26<sup>th</sup>  
3     hearing at the request of claimant.

4             MR. ASMUNDSON: Good morning.

5             This test claim requests reimbursement for  
6     costs incurred by local law-enforcement agencies for  
7     treatment of law-enforcement patients receiving emergency  
8     medical care. Staff recommends that the Commission deny  
9     this test claim.

10            As amended by the test-claim statute, Penal  
11     Code section 4011.10 authorizes local agencies, including  
12     county sheriffs, police chiefs, and directors or  
13     administrators of local detention facilities to contract  
14     with hospitals, providing emergency health-care services  
15     for law-enforcement patients.

16            It also sets statutory limits on the amount  
17     that hospitals that do not contract with local agencies  
18     may charge for emergency health-care services at a rate  
19     equal to 110 percent of the hospital's actual cost, or  
20     10 percent above their actual costs.

21            The test-claim statutes were enacted to save  
22     taxpayer dollars by enabling county sheriffs and police  
23     chiefs reasonable control over medical costs for inmates,  
24     suspects, and victims of crime.

25            Although the claimant has filed a declaration

**Commission on State Mandates – September 27, 2013**

1 showing that it has incurred increased costs as a result  
2 of the test-claim statutes, they do not impose any  
3 mandated activities on the claimant or mandate the county  
4 to increase its level of service provided to the public.

5 A statute that simply results in increased  
6 costs without mandating local agencies to perform new  
7 activities or a higher level of services does not require  
8 reimbursement under the Constitution.

9 Staff recommends that the Commission adopt the  
10 proposed decision to deny the test claim.

11 Will the parties and witnesses please state  
12 your names for the record?

13 MR. HARMAN: Good morning, Members of the  
14 Commission. James Harman, Deputy County Counsel, County  
15 of Orange.

16 And I'm joined by Kim Pearson, registered  
17 nurse, who is the division director for the Orange County  
18 Health Care Agency's Correctional Health Services  
19 Division.

20 Members of the Commission, thank you very much  
21 for the opportunity to speak this morning, and thank you  
22 for allowing the continuance, for my father to have his  
23 surgery and have me there for him. I do appreciate your  
24 indulgence.

25 We're presenting our case this morning because

**Commission on State Mandates – September 27, 2013**

1 4011.10 of the Penal Code provides a new program for the  
2 County of Orange to pay for emergency medical services  
3 for its inmates that didn't exist before its enactment.

4 The Orange County Health Care Agency provides  
5 health-care services for inmates booked into Orange  
6 County jails. That hasn't changed from before Penal Code  
7 section 4011.10 was enacted or after. We provide that  
8 care.

9 But before the Penal Code provision was  
10 enacted, the County had the power to negotiate rates for  
11 emergency medical services with its providers.

12 We negotiated and paid for those services at  
13 what we call our "MSI rates," our medical services for  
14 indigents rates. And the providers agreed to those.  
15 They provided the service; we paid for it. And that was  
16 the system we had in place in Orange County. That was  
17 the program we had.

18 But once the Penal Code provision that's the  
19 subject of this hearing was passed, Orange County now had  
20 to have a new program. And that new program requires the  
21 County to pay for those medical services at 110 percent  
22 of the claimed costs that those providers have. So  
23 Orange County can no longer have, at our previous  
24 arrangement, our previous program of MSI rates. Now,  
25 we're under a new program mandated by the State to pay at

**Commission on State Mandates – September 27, 2013**

1 110 percent of those costs.

2 Now, the statute does say in its plain  
3 language, the counties have the power to negotiate rates  
4 with their providers. But it's an illusory power. It's  
5 an illusory promise that the Legislature gives to the  
6 County of Orange. Because essentially that's the least  
7 that the providers can get, is 110 percent. What  
8 incentive do the providers have to contract for anything  
9 less than that? For instance,  
10 MSI rates, or something in between MSI rates and  
11 110 percent.

12 Now, this test claim was filed in 2008 before  
13 Ms. Pearson's time and mine. But in that year alone, it  
14 was calculated that these costs, these mandated costs  
15 were \$1.8 million.

16 Our estimate at this point is, the County of  
17 Orange has lost \$15 million out of its general fund,  
18 keeping in mind the County of Orange is a "donor county,"  
19 who receives less property-tax revenue out of the  
20 property-tax dollar than any other county in the state.  
21 So when it hits us, it hits us hard.

22 Without this financial incentive -- or without  
23 the incentive to contract with providers, the County is  
24 left powerless to be able to negotiate a lower rate for  
25 providing emergency inmate medical care. If we had

**Commission on State Mandates – September 27, 2013**

1 those dollars and we could negotiate those rates, and if  
2 the state were to reimburse us of those funds, imagine  
3 what we could do for correctional medical care. We  
4 wouldn't necessarily have a Cadillac program for our  
5 inmates, but Ms. Pearson's team would be able to provide  
6 enhanced services for things like diabetes control or HIV  
7 care. Those kinds of things that would not only help the  
8 public fisc in providing medical services for inmates  
9 while they're in jail, but would also enhance their  
10 health benefits, so that once they're released, they're  
11 less of a burden on the public health system.

12 This is part of a larger context of mandates  
13 that are going back and forth between Sacramento and  
14 counties, along with AB 109 and some of the other things  
15 that local entities are suffering from. And, for  
16 instance, with AB 109 and PC 4011.10, there is like a  
17 multiplier effect now for the County of Orange, because  
18 now with more inmates, more emergency medical care, being  
19 forced to pay at 110 percent, it really squeezes the  
20 County when it come to our general fund in providing  
21 these inmate medical services.

22 Members of the Commission, we have detailed our  
23 position clearly here. I would note one distinction in  
24 this mandate, and to demonstrate how it's a new and  
25 different program for the County versus the State itself.

**Commission on State Mandates – September 27, 2013**

1           As the Commission pointed out, when the State  
2 has on its books providing medical care for its inmates,  
3 it allows the State, or requires that the State pay at  
4 Medicare rates. So it's essentially a floor, which would  
5 provide an incentive for providers to maybe negotiate  
6 something better with the State.

7           For us, it's exactly the opposite. The State  
8 has imposed a minimum that the providers will get. That  
9 they're going to get, at a minimum, 110 of costs. And so  
10 they have no reason to negotiate for anything less from  
11 us, for emergency medical care services; keeping in mind  
12 that maybe not all providers want inmates and providing  
13 medical care. So we're already starting, you know, at a  
14 step behind.

15           So this is the position, that 4011.10, which  
16 has many good public policy benefits behind it. And we  
17 certainly don't dispute that; and we don't dispute the  
18 wisdom of the Legislature in passing this. But the  
19 Legislature also said that if this Commission finds that  
20 it's a state mandate, then those mandates should be  
21 reimbursed. And that's what the County is asking for.

22           And what we're also asking for is that the  
23 Commission review our position in light of the proposed  
24 statement of decision that staff has written up. And  
25 we'd ask you to exercise your independent judgment and

**Commission on State Mandates – September 27, 2013**

1 sustain the County's test claim and direct that a new  
2 proposed judgment be drafted for this Commission.

3 Thank you.

4 MR. BYRNE: Michael Byrne, Department of  
5 Finance.

6 Finance concurs with the staff recommendation  
7 that the claim be denied.

8 MEMBER RIVERA: A question. The providers,  
9 have they refused to negotiate with you since this  
10 provision has been in place?

11 MR. HARMAN: I'm not aware that they've refused  
12 to negotiate, but they certainly have no incentive to  
13 negotiate at this point.

14 MEMBER RIVERA: I understand. Yes, I  
15 understand they have no incentive. But have you reached  
16 out to them and asked them if they're willing to have a  
17 different contract with you?

18 MR. HARMAN: Under the statute, we have to pay  
19 them at that rate.

20 MEMBER ALEX: So I'm looking at the statute --  
21 and, obviously, you have more specific experience with  
22 it; but, there are situations where emergency services  
23 could be provided by a particular hospital or trauma  
24 center or whatever. And you could conceivably have a  
25 contract for those services, that you will take inmates

**Commission on State Mandates – September 27, 2013**

1 from "X" or "Y" facility to that particular center. And  
2 it does strike me that that does create some ability to  
3 negotiate.

4 Have you explored that at all?

5 MR. HARMON: Well, I think when it comes to --  
6 and I'll ask Ms. Pearson to explain better the idea of  
7 what really are the realities of being able to transport  
8 inmates to one particular facility, keeping in mind that  
9 Orange County has five different facilities, one of which  
10 is -- or, actually, two of which are geographically  
11 distinct. And so you couldn't just simply say: there is  
12 one central hospital for the County of Orange. And also  
13 keeping in mind the County of Orange does not have a  
14 county hospital.

15 But I would leave it to Ms. Pearson to describe  
16 how inmate emergency medical care is provided in the  
17 County.

18 MS. PEARSON: So in terms of the emergency  
19 department, there are various hospitals with different  
20 levels of care, as trauma center Level 1, Level 2,  
21 et cetera. So depending on what the nature of the injury  
22 is or the nature of the condition, that helps mandate  
23 which hospital that they go to.

24 Particularly in the jail situation, we end up  
25 frequently with inmate-upon-inmate assaults, and there

**Commission on State Mandates – September 27, 2013**

1 are head and neck injuries. Well, those individuals must  
2 go to a trauma center that has a neurosurgeon. So it's  
3 not an issue of, do we have a contract with them or not.  
4 They are possibly the closest facility, as well as the  
5 facility that has the level of service that's needed.  
6 And based on EMTALA, they take those patients and they do  
7 stabilize them because they have to do that. It has  
8 nothing to do with the contract with us or not. They  
9 just charge us 110 percent at that point.

10 And as to the other question, we have put out  
11 an RFP for services, and we do not get responses.

12 CHAIR ORTEGA: Are there any other questions?  
13 Yes?

14 MS. GEANACOU: If I may.

15 Susan Geanacou, Department of Finance.

16 I just want to stress here that the test-claim  
17 statute does not require the counties to perform any new  
18 program or higher level of service. To the extent the  
19 test-claim statute has had a cost or revenue alone impact  
20 on the counties, that is cost or revenue alone is the  
21 sole impact, to the extent there's been a loss of  
22 negotiating advantage here, which may or may not have  
23 happened. It will reflect in costs or revenue loss  
24 alone, and no new program or higher level of service  
25 required -- is not required.

**Commission on State Mandates – September 27, 2013**

1 CHAIR ORTEGA: Thank you.

2 Anything else from the Members?

3 Ms. Olsen?

4 MEMBER OLSEN: Well, it seems to me that this  
5 is a real issue, but it's not a real issue for the  
6 Commission. It seems to me, from what I've heard, it's  
7 an issue for the Legislature, and that the issue before  
8 the Commission today is fairly clear, which is that there  
9 is no new program, no higher level of service. And  
10 that's really what we have to make our judgment on.

11 I'm really sympathetic to the problems it's  
12 caused for you, but I don't see that this is the right  
13 venue for solving that problem.

14 CHAIR ORTEGA: Any additional comments?

15 *(No response)*

16 CHAIR ORTEGA: Anything from the public?

17 *(No response)*

18 CHAIR ORTEGA: Do we have a motion?

19 MEMBER OLSEN: I'll move the staff  
20 recommendation.

21 CHAIR ORTEGA: Thank you.

22 MEMBER CHIVARO: Second.

23 CHAIR ORTEGA: We have a motion and a second to  
24 approve the staff recommendation.

25 Please call the roll.

**Commission on State Mandates – September 27, 2013**

1 MS. HALSEY: Mr. Alex?

2 MEMBER ALEX: Aye.

3 MS. HALSEY: Mr. Chivaro?

4 MEMBER CHIVARO: Aye.

5 MS. HALSEY: Ms. Olsen?

6 MEMBER OLSEN: Aye.

7 MS. HALSEY: Ms. Ortega?

8 CHAIR ORTEGA: Aye.

9 MS. HALSEY: Ms. Ramirez?

10 MEMBER RAMIREZ: Aye.

11 MS. HALSEY: Mr. Rivera?

12 MEMBER RIVERA: Aye.

13 MS. HALSEY: The motion carries.

14 Item 5, Matt Jones, Commission Counsel, will  
15 present this item. It's a request for mandate  
16 redetermination on *Sexually Violent Predators*.

17 MR. JONES: Item 5. The Commission conducted  
18 the first hearing of the two-step hearing process on the  
19 redetermination request on July 26<sup>th</sup>, 2013. It found  
20 that the requester, the Department of Finance, had made  
21 an adequate showing that the request had a substantial  
22 possibility of prevailing at the second hearing.

23 At this second hearing, the issue before the  
24 Commission is whether to adopt the new test-claim  
25 decision to supersede the previously adopted test-claim

**Commission on State Mandates – September 27, 2013**

1 decision based on a subsequent change in law.

2 Staff finds that Proposition 83 constitutes a  
3 subsequent change in law that modifies the State's  
4 liability for the test claim. However, staff finds that  
5 Proposition 83 does not eliminate all liability under the  
6 program, and staff therefore identifies two activities  
7 that remain reimbursable.

8 Staff recommends that the Commission adopt the  
9 staff analysis and proposed statement of decision as its  
10 new test-claim decision, ending reimbursement for most of  
11 the test-claim activities as of July 1, 2011.

12 Staff also recommends that the Commission  
13 direct staff to prepare new expedited parameters and  
14 guidelines to reflect the State's modified liability  
15 under the new test-claim decision.

16 And staff further recommends that the  
17 Commission authorize staff to make any non-substantive  
18 technical changes to the proposed new test-claim decision  
19 following the hearing.

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

22 MS. YAGHOBYAN: Hasmik Yaghobyan on behalf of  
23 County of Los Angeles.

24 MR. SPITZER: Todd Spitzer, Orange County  
25 Supervisor and former member of the State Legislature.

**Commission on State Mandates – September 27, 2013**

1 MR. OSAKI: Craig Osaki, Deputy Public  
2 Defender, from the Los Angeles County Public Defender's  
3 Office.

4 MR. BARRY: Timothy Barry, Office of County  
5 Counsel, on behalf of the County of San Diego.

6 MR. NEILL: Geoffrey Neill, CSAC.

7 MS. GEANACOU: Thank you. Susan Geanacou,  
8 Department of Finance.

9 MR. BYRNE: Michael Byrne, Department of  
10 Finance.

11 CHAIR ORTEGA: And since the Department of  
12 Finance is the claimant here, we'll start with Mr. Byrne  
13 or Ms. Geanacou.

14 MS. GEANACOU: Yes, I'll start.

15 Thank you.

16 This is Finance's request for a new test-claim  
17 decision on the *Sexually Violent Predators* mandate.

18 Finance's request asserted that the duties  
19 comprising the *Sexually Violent Predators* mandate were  
20 all either expressly included in Proposition 83 or  
21 necessary to implement it.

22 Commission staff now agrees with Finance on  
23 six of eight of those activities in that they are no  
24 longer reimbursable by the State, and recommends that  
25 two of eight of those activities remain reimbursable

**Commission on State Mandates – September 27, 2013**

1 mandates.

2 Finance accepts that recommendation and urges  
3 the Commission to adopt the final staff analysis.

4 I will just recite briefly a chronology of the  
5 events here, hopefully to make your decision more clear.

6 In 1998, the statement of decision adopted by  
7 the Commission established this as a reimbursable  
8 mandate.

9 In 2006, the voters approved Proposition 83.

10 Four years later, in 2010, the Legislature  
11 enacted a process, now in Government Code section 17570,  
12 to allow for a new test-claim decision following a  
13 subsequent change in law, affecting state liability for  
14 mandate reimbursement. Here, that subsequent change in  
15 law is Proposition 83 approved by the voters.

16 Government Code section 17556(f) says that:

17 "The Commission shall find no costs mandated by the State  
18 if the statute or executive order imposes duties that are  
19 necessary to employment or are expressly included in a  
20 ballot measure approved by the voters in a statewide or  
21 local election."

22 And based on the voters' approval of  
23 Proposition 83, Finance continues to assert that many of  
24 the *Sexually Violent Predators* mandated activities  
25 identified by the Commission staff are no longer

**Commission on State Mandates – September 27, 2013**

1 reimbursable based on Government Code sections 17556(f)  
2 and 17570.

3 Finance has considered the comments filed  
4 following the first hearing in July, and believes, in  
5 light of our filing for a new decision, there is no legal  
6 basis on which to continue the State's liability for the  
7 six *Sexually Violent Predators* activities identified by  
8 the Commission staff.

9 The staff's recommendation should be approved.

10 CHAIR ORTEGA: Thank you.

11 MS. YAGHOBYAN: Hasmik Yaghobyan, on behalf of  
12 County of Los Angeles.

13 As we have been expressing our disagreement,  
14 we disagree with the staff's recommendation for many  
15 reasons, one of which is just not being fair. Because we  
16 believe the reason the Commission was put in place to  
17 resolve the issue between the state and the locals were,  
18 the Commission was supposed to be partial [*sic*].

19 But we don't believe that we see that here  
20 because when the Department of Finance initiated this  
21 redetermination process, our first comment was: Well,  
22 this has been -- it's been almost seven years. Even if  
23 there was a change in law, which we don't believe there  
24 was, still, Department of Finance, why did they wait  
25 seven years, or six and a half years?

**Commission on State Mandates – September 27, 2013**

1           The Commission responded, "Well, there was no  
2 mechanism."

3           Okay, we said, "Well, there was mechanism, at  
4 least after 2010, Government code section 17570. Still  
5 they didn't do anything. They still waited '10, '11,  
6 '12, and '13, January."

7           And then the Commission responded, "Okay, even  
8 if they came late, what is your loss?"

9           Well, our loss is here. It's like almost  
10 \$12 million a year for just the County of L.A. alone for  
11 this program.

12           We don't think we would have even a good  
13 society if there was no such statute of limitation for  
14 any crimes or anything. People would be worried about  
15 being sued for the rest of their lives. And a code  
16 section which applies to the past, present, and future  
17 on its face, if it's not unconstitutional, we don't  
18 believe -- we don't know what else it is.

19           Because the Commission goes on and on for some  
20 of the activities and refers them as being  
21 constitutionally required. But when it come to the code  
22 section itself, they say, we don't know if it's  
23 constitutional or not, we just have to take it on its  
24 face until the court -- a judge rules whether it's  
25 constitutional or not; which it is clear, like I said, if

**Commission on State Mandates – September 27, 2013**

1 the law applies to the past, the present, and the future,  
2 if it's not unconstitutional, what else is it?

3 The second thing that we think is not fair is  
4 just that we as locals, we have 12 months or one year  
5 after the incurrence of the cost of new statute of law to  
6 file a test claim. And even if we file a test claim, it  
7 is very particular to just the word by word, what is  
8 necessary. Or not even necessary, what is new? And  
9 there could be pages of code sections that we recited  
10 from previous law, we cannot claim anything.

11 But, on the other hand, in this case, even a  
12 recitation of other codes that there were no changes.  
13 Even as the Commission said, there was not even a comma  
14 change, still they are considered to be new laws.  
15 However, we have one year. But the Department of  
16 Finance, they just initiated this process in January.  
17 And we are in September, and we are getting almost final  
18 decision.

19 The County of L.A. has a test claim which was  
20 filed in 2000, *ICAN*. It's been 13 years. We have no  
21 resolution yet. So we don't know what the Commission's  
22 responsibilities are in this process.

23 So for the same reason, my colleague is going  
24 to explain more about the necessity of activities that  
25 the Commission rule is not necessary in order to have a

**Commission on State Mandates – September 27, 2013**

1 probable cause. However, for the reason I stated, we  
2 urge the Commission to deny the recommendation that the  
3 staff is making.

4 Thank you.

5 CHAIR ORTEGA: Thank you.

6 MR. OSAKI: Good morning. My name is Craig  
7 Osaki. I'm the deputy in charge of the SVP branch in  
8 Los Angeles County with the Public Defender's office.

9 I currently practice in the field. I supervise  
10 20 lawyers in the field. I've also conducted trainings  
11 across the state for the past few years now.

12 Today, I'm here to speak to a few issues  
13 regarding the practice that may have an impact on your  
14 decision.

15 First, I want to address the reimbursement for  
16 retaining the experts, investigators, and professionals  
17 for the preparation of a probable-cause hearing.

18 In an SVP case, there are three things or three  
19 elements that must be proven: There has to be evidence  
20 of a conviction of a qualifying sexually violent offense;  
21 there has to be a diagnosed mental disorder as defined in  
22 the code; and then also the individual has to be likely  
23 to commit another SVP-type offense again. And that's  
24 been defined as, they have to have a serious and  
25 well-founded risk of re-offending.

**Commission on State Mandates – September 27, 2013**

1           Now, these SVP cases are very expert-driven.  
2           The psychologists often testify, and they have to look at  
3           the facts of the case, they do a clinical interview, they  
4           have to look into a person's background, review thousands  
5           of pages, conduct multiple actuarial -- there are  
6           multiple actuarial tools that are administered. And at a  
7           probable-cause hearing, the D.A. must prove by way of a  
8           strong suspicion that the individual meets these three  
9           elements.

10           The defense is allowed to confront and  
11           cross-examine these experts and provide additional  
12           information to challenge the allegations. But we would  
13           not be able to do so if we weren't provided with the  
14           experts and the necessary professionals to do so.

15           I know that the staff has allowed for the  
16           reimbursement of probable-cause hearings because there is  
17           a right-to-counsel at these hearings. But these  
18           individuals also have a right to competent counsel; and  
19           having competent counsel requires the retention of  
20           experts and professional services.

21           And I would urge that at least those  
22           additional -- at least reimbursement for those things  
23           also be included for consideration.

24           Another issue that I do wish to discuss is the  
25           6603 trial provisions. My understanding of the staff

**Commission on State Mandates – September 27, 2013**

1 analysis is that preparation and attendance in trial is  
2 not reimbursable because the trial is necessary to  
3 implement Prop. 83. I don't deal with mandates a lot too  
4 often, but I understand that that was the position.

5 But I wanted to advise the Commission and staff  
6 members that there are circumstances when a trial is not  
7 necessary. We have had cases where the district  
8 attorney, the defense attorney, the Court, through  
9 consultation with the psychologist -- we all kind of get  
10 together, and we conduct a form of plea bargain. And  
11 sometimes we say -- the district attorney will say, "You  
12 know what? Your client has been doing really well. We  
13 don't think he should be released now. But, you know, if  
14 he does well in treatment for another year, perhaps we'll  
15 consider releasing him in one or two years, say."

16 And the individual will admit to the petition,  
17 and then we will -- and a trial is waived at that point  
18 in time.

19 We also have an unfortunate situation that we  
20 find occurring more and more often. You have to remember  
21 that in these SVP cases, these individuals have served a  
22 significant amount of prison time, and that right when  
23 they're about to be released, that's when they file these  
24 petitions.

25 Many of these individuals are old and infirmed.

**Commission on State Mandates – September 27, 2013**

1 They have health issues. They have no support, no money.  
2 And for some of these individuals, we are finding  
3 individuals who will just voluntarily waive their right  
4 to a trial, you know, in these cases, and just  
5 voluntarily submit to commitment in these cases.

6 I provide these examples to show that -- I  
7 understand what the staff was acknowledging, that there  
8 are significant due-process protections; and if an  
9 individual wants a trial, there's a lot of due-process  
10 protections.

11 But I just wanted to make sure that the staff  
12 and the Commission were aware that there are situations  
13 where a trial is not necessary. And if a trial is not  
14 necessary, then I believe that preparation and attendance  
15 for a trial would still be reimbursable as well, and also  
16 the retention of experts and investigators and so forth  
17 should be reimbursable as well.

18 Finally, I do wish to address one issue that's  
19 specific to L.A. County. Prior to the passage of SB 1128  
20 and Prop. 83, the District Attorney, the Public Defender,  
21 and the L.A. Superior Court agreed and stipulated that  
22 cases filed prior to the passage of the law will still  
23 be governed under the old law for the two-year term.

24 In addition, in this agreement, once the  
25 individual finished that two-year term, the District

**Commission on State Mandates – September 27, 2013**

1 Attorney would be allowed to file a recommitment petition  
2 if the individual still qualified as an SVP.

3 Now, the validity of this agreement was  
4 litigated in the California Supreme Court. In 2010,  
5 they reached the decision in *People v. Castillo*,  
6 49 Cal.4th 145. It's the validity of this agreement was  
7 upheld and the terms of its agreement were enforced.

8 Also, I wanted to inform this Commission as  
9 well, with respect to this agreement, there was a  
10 24-month limitation on this agreement. There was a  
11 subsequent agreement that lifted that 24-month agreement.  
12 And so we still have a few cases, still around, that are  
13 still pursuant to this agreement.

14 Also, for those individuals that are subject to  
15 recommitment petitions, we believe that those cases also  
16 are subject to the old law; and, thus, those cases would  
17 still be reimbursable to L.A. County as well.

18 So I'd be happy to answer any questions at this  
19 time. Otherwise, I thank you for your time and  
20 attention.

21 MR. BARRY: Good morning. Timothy Barry,  
22 Office of County Counsel on behalf of the County of  
23 San Diego, including the Office of the Public Defender,  
24 the D.A.'s Office, and the Sheriff.

25 We had raised arguments with respect to the

**Commission on State Mandates – September 27, 2013**

1 constitutional of the applicable statutory provisions  
2 in our original comments. And I understand that it is  
3 the Commission's position that it doesn't have the  
4 authority to address the constitutionality of those  
5 statutes in this forum. And so I will yield to that  
6 position and not raise those arguments here again.

7 The proposed statement of decision correctly  
8 concludes that certain costs related to the probable-  
9 cause hearing required by Welfare and Institutions Code  
10 section 6602 continue to be reimbursable.

11 This includes the cost of transporting each  
12 sexually violent predator to and from the facility, the  
13 secured facility, to the probable-cause hearing on the  
14 issue of whether or not he or she is a sexually violent  
15 predator.

16 This is notwithstanding the fact that that  
17 particular activity was not previously expressly found by  
18 the Commission to be reimbursable.

19 The same rationale that the staff has applied  
20 to the reimbursement for that activity, should apply to  
21 the costs that the counties incur -- the county's  
22 designated counsel and the indigent defense counsel incur  
23 in the retention of experts, investigators, and  
24 professionals in the preparation for the probable-cause  
25 hearing.

**Commission on State Mandates – September 27, 2013**

1           We have submitted a declaration, which is at  
2 pages 344 through 346 from Michael Ruiz, setting forth  
3 how essential it is for counsel, both the prosecutor and  
4 defense counsel, to have the availability of experts,  
5 investigators, and professionals at the probable cause  
6 hearing.

7           As Mr. Osaki pointed out, the individual who is  
8 essentially on trial, has the right to competent counsel.  
9 And part of the competent counsel is that the counsel be  
10 able to retain experts to educate himself or herself with  
11 respect to the nuances and the issues that confront his  
12 or her client.

13           So I would urge -- I understand that in the  
14 staff analysis that's indicated, that this would be more  
15 appropriately raised at the parameters and guidelines  
16 time; but I do think -- I do not see the difference in  
17 the rationale for the activity of transporting prisoners  
18 to and from the probable-cause hearing, how that is  
19 materially different from this other issue with respect  
20 to the retention of professionals, experts, and  
21 investigators for the probable-cause hearing.

22           So I'd urge the Commission to -- again, we  
23 oppose the elimination of the six activities from  
24 reimbursement. But to the extent that you are going to  
25 approve the staff analysis, we would also request that

**Commission on State Mandates – September 27, 2013**

1 the activities for those probable-cause hearings be  
2 included as a -- continue to be included as a  
3 reimbursable mandate.

4 CHAIR ORTEGA: Ms. Shelton?

5 MS. SHELTON: Just to clarify that point while  
6 we're on it.

7 The reason why -- we're not disagreeing with  
8 the arguments that are made with respect to probable-  
9 cause hearing. The reason why we can't address them now  
10 is because the original parameters and guidelines did not  
11 identify those costs as reasonably necessary or necessary  
12 to comply with the mandate.

13 So we don't have jurisdiction to add things in  
14 right yet. It would have to be after -- when the  
15 Commission does have jurisdiction, to address those  
16 P's & G's. And that's the difference between the  
17 transportation and the probable-cause hearing, where  
18 transportation was explicitly provided in the parameters  
19 and guidelines, but the experts and investigators for the  
20 probable-cause hearing was not. We're not disagreeing  
21 substantively.

22 Do you see what I'm saying?

23 CHAIR ORTEGA: Are we ready to move on?

24 MS. SHELTON: Yes, it just needed more. We had  
25 nothing in there -- I'm not disagreeing with it, other

**Commission on State Mandates – September 27, 2013**

1 than I don't want to tweak the parameters and guidelines  
2 until we get to the parameters and guidelines.

3 MS. HALSEY: All we have before us currently,  
4 is the current decision that exists. And it doesn't  
5 address this issue.

6 MR. BARRY: I'm hesitant to argue the point.  
7 But I don't know that the original parameters and  
8 guidelines approves -- expressly approved transportation  
9 costs for prisoners to the probable-cause hearing.

10 MS. HALSEY: It didn't.

11 MR. BARRY: Okay, now, I was under the  
12 impression it didn't. That's why I'm saying the argument  
13 should apply to this position.

14 MR. JONES: Actually, Heather, I think the  
15 original P's and G's identified transportation generally,  
16 and I think it just meant to and from the courthouse for  
17 all of the proceedings.

18 We had to carve-out probable cause in this  
19 case, which seemed reasonable, since we were determining  
20 staff has concluded that the probable-cause hearing  
21 should remain reimbursable. So we carved out the  
22 transportation element for a probable-cause hearing  
23 specifically. It's a little bit different than adding an  
24 entire new activity which, from our perspective, based on  
25 the P's and G's and based on the test-claim SOD,

**Commission on State Mandates – September 27, 2013**

1 providing expert witnesses for a probable-cause hearing  
2 would be a new activity.

3 I believe the comments that were filed that  
4 suggested that these things have been reimbursed and that  
5 the Controller has been allowing reimbursement for those  
6 activities, but they're simply not spelled out in the SOD  
7 or the P's & G's previously. And again, we do -- I can  
8 definitely see the argument that those should be added in  
9 as reasonably necessary activities in the P's & G's  
10 phase. I just don't think we should be doing it here.

11 MS. HALSEY: Yes. The only thing before the  
12 Commission right now is whether the State's liability has  
13 been modified based on a subsequent change in law. And  
14 so if the answer is "yes" and there is a next hearing on  
15 parameters and guidelines, then it's appropriate to talk  
16 about the scope of what those approved activities would  
17 be.

18 CHAIR ORTEGA: Mr. Spitzer.

19 MR. SPITZER: Thank you, Madam Chair.

20 It is really an honor to be here. The  
21 intellectual discussion far exceeds anything that I  
22 experienced in my six years in the Legislature. So I  
23 just want you to know that I appreciate this discussion  
24 very, very much.

25 I think it's important just to tell you just a

**Commission on State Mandates – September 27, 2013**

1 little bit about why I'm here.

2 I was the statewide co-chair of Prop. 83, with  
3 Senator George Runner, who was in the Senate at the time.  
4 I was also Governor Schwarzenegger's co-chair with Rudy  
5 Bermudez at the time of the first High-Risk Sex Offender  
6 Task Force. I was also the co-chair or the principal  
7 author with Judy Chu. When she was in the Assembly,  
8 before she went to Congress, we created the first Sex  
9 Offender Management Board here in the state of  
10 California. I was also the statewide co-chair and  
11 co-author of Marsy's Law, the Victim's Bill of Rights  
12 which amended the California Constitution.

13 I've been a prosecutor, police officer -- I've  
14 been in law enforcement for two decades. I've worked  
15 with a lot of your bosses, and we've been all this  
16 together, on this whole issue of public safety.

17 And what bothers me about this discussion, the  
18 staff analysis, is we have to remind ourselves who these  
19 individuals are that will be affected by this change  
20 today.

21 These are sexually violent predators. There  
22 are real people who are evil, who commit heinous,  
23 horrible crimes that affect people's lives forever, who  
24 are incarcerated; and then because they are deemed so  
25 dangerous, we don't want them back on the street because

**Commission on State Mandates – September 27, 2013**

1 as indicated by the Public Defender, it has been proven  
2 in a court of law that they have a high propensity --  
3 like Mr. Gardner who killed Chelsea King and Amber Dubois  
4 in San Diego -- that they have the highest propensity to  
5 go out and commit another sexually violent act.

6 So there are real, real dangerous people who  
7 are going to be impacted by your vote today; and there  
8 are real victims, people who are dead, who knew laws had  
9 been created, like Chelsea King, as a result of being  
10 murdered by Mr. Gardner who was deemed and is a sexually  
11 violent predator.

12 So this is an incredibly serious decision  
13 today. And it goes way beyond the paper.

14 And I respect the staff work, because I work  
15 with staff as an elected official all the time; and I  
16 respect the Department of Finance's position. But we  
17 need to go back and look at the record.

18 There was a letter transmitted -- and it's in  
19 the supporting documents but it needs to be highlighted.  
20 As part of the legal -- you know, when I ran Marsy's  
21 Law, I had to meet with LAO, and go through all the legal  
22 requirements that LAO is deemed and is necessary to get  
23 the ballot initiative prepared.

24 The Attorney General's office has to prepare  
25 legal documents for this to go into the ballot statement.

**Commission on State Mandates – September 27, 2013**

1           And when you look at the letter that was  
2 transmitted by Liz Hill -- and let me tell you, when I  
3 was in the Legislature, Liz Hill -- so many of us as  
4 partisan advocates try to manipulate the LAO's office our  
5 way, every six ways to Sunday. But if there's any  
6 institution here in Sacramento, which I think is above  
7 reproach, whether it was Mr. Hamm or any of his  
8 predecessors, that LAO's office is here to be right down  
9 the middle and to call it like they see it.

10           And Ms. Hill wrote a letter to then Attorney  
11 General Bill Lockyer, signed by the Department of  
12 Finance, who is now the dean of the Chapman Law School,  
13 Mr. Campbell. That letter was the premise for the  
14 assumption of how -- what the legal issues were that was  
15 going to be represented of the voter and who was going to  
16 pay for it.

17           And in the letter of September 2<sup>nd</sup> -- and I'm  
18 trying to be respectful to this gentleman who has to take  
19 down everything we say, because I'm very sensitive to  
20 court reporters, having been a prosecutor; so I'll try  
21 to, in my exuberance, speak more slowly.

22           In the September 2<sup>nd</sup>, 2005, letter to  
23 Mr. Lockyer from Ms. Hill and Mr. Campbell, in their  
24 respective positions, in the fiscal impact on local  
25 government section, they represented, quote, "to the

**Commission on State Mandates – September 27, 2013**

1 extent that this occurs" -- that is, changes to criminal  
2 penalties, and supervision -- "local governments would  
3 likely experience some criminal justice savings."  
4 Specifically, they delineated, when they talked about the  
5 *Sexually Violent Predator* program, quote, "The provisions  
6 of this measure related to the SVP program could increase  
7 county costs. The additional SVP commitment petitions  
8 that are likely to result from this measure would  
9 increase costs for district attorneys and public  
10 defenders to handle these civil cases. Also, county jail  
11 operating costs would increase to the extent that  
12 offenders who have court decisions pending on their  
13 SVP cases were held in local jail facilities instead of  
14 state mental health facilities."

15 Important part, the last sentence: "Counties  
16 would be reimbursed in full for all of these costs after  
17 they had filed and processed claims with the state."

18 In the summary of fiscal effect, there's three  
19 bullets. And when they delineated to the Attorney  
20 General, quote, "Unknown, but potentially significant  
21 net operating costs or savings to counties for jail,  
22 probation supervision, district attorneys, and public  
23 defenders. The portion of costs related to changes -- to  
24 changes -- in the *Sexually Violent Predators* program  
25 would be reimbursed by the state."

**Commission on State Mandates – September 27, 2013**

1           Okay, look, I've been doing this for twenty  
2 years as an elected official. At some point, we have  
3 got to have an understanding -- and as all the lawyers  
4 in the room, we all know about this -- about detrimental  
5 reliance and understanding. It's when people make  
6 promises and make representations in their official  
7 capacity, we have to respect that.

8           More to the point, when that letter got  
9 transmitted to the analysis that went in the official  
10 voter handbook to the voters for Prop. 83, it was  
11 unequivocally clear, as represented to the voters, in  
12 the section on page 45 of Prop. 83, that analysis, under  
13 "Other impacts on state and local governments," it's  
14 represented that, quote, "There could be other savings to  
15 the extent that offenders in prison for longer periods  
16 require fewer government services or commit fewer crimes  
17 that result in victim-related government costs.  
18 Alternatively, there could be an offsetting loss of  
19 revenue to the extent that offenders serving longer  
20 prison terms would have become tax-paying citizens under  
21 current law."

22           I think that's a stretch, but that's my own  
23 parenthetical comment.

24           "The extent and magnitude of these impacts is  
25 unknown."

**Commission on State Mandates – September 27, 2013**

1           My point in sharing the letter from Ms. Hill  
2           and Mr. Campbell to the Attorney General has a legal duty  
3           to incorporate the legislative analysts and the ballot  
4           title, so that the voters know what they're voting on,  
5           did not say in any way whatsoever, that any of the  
6           changes that were either approved by the Legislature in  
7           the Alquist bill -- because I was in the Legislature when  
8           Elaine carried that bill, and I testified when she was  
9           the chairman of the Senate Public Safety Committee, and  
10          then what we put on the ballot to corroborate and re-  
11          mention, if you will, and talk about some of those  
12          provisions, which you needed to mention so that the  
13          voters would understand the totality of what you were  
14          trying to convey, and then the analysis by all the  
15          players that we rely on -- the Attorney General, the  
16          Legislative Analyst, and the Department of Finance --  
17          all indicated there was no fiscal impact.

18                 CHAIR ORTEGA: Mr. Spitzer, can I interrupt for  
19                 just a minute?

20                 MR. SPITZER: Yes, of course.

21                 CHAIR ORTEGA: Isn't it the case that the law  
22                 has changed since 2005 regarding the reimbursement  
23                 question?

24                 MR. SPITZER: Right.

25                 CHAIR ORTEGA: With the mechanism that's being

**Commission on State Mandates – September 27, 2013**

1 created to bring the claim today, I don't think we would  
2 ever look at past ballot write-ups or letters from the  
3 LAO on initiative measures and assume that everything  
4 they were saying at that time was still accurate today,  
5 when there could have been thousands of state statutes  
6 changed, and who knows how many initiatives since then.

7 MR. SPITZER: Right.

8 CHAIR ORTEGA: So that, I think, is pretty  
9 relevant to the point that you're making.

10 MR. SPITZER: That's my third point.

11 So the change in state law that your staff  
12 is relying on, the Government -- the code section that  
13 they're now saying that you can now reevaluate this  
14 scenario, essentially, was incorporated in Senate  
15 Bill 856. So I pulled the Senate Rules Committee  
16 analysis.

17 That bill was a fifty-plus-page trailer bill,  
18 where the language that your staff is now relying on was  
19 inserted amongst numerous provisions. The Senate Rules  
20 Committee analyzed this now new law that everybody is  
21 relying on to not have to fund this anymore, in one  
22 paragraph.

23 Now, I just have to submit to you, as a former  
24 legislator: A trailer bill, one paragraph? Trailer  
25 bills are constructed in the dark of night. They're

**Commission on State Mandates – September 27, 2013**

1 rushed through as part of a budget. Legislators may or  
2 may not understand or see the significance or magnitude  
3 of something slipping in.

4 And when you want to rely on something that  
5 went in as a trailer bill as opposed to what we're used  
6 to, a separate piece of legislation that people know  
7 about, it goes through all the committee processes -- in  
8 fact, if you look at the Senate analysis from the Rules  
9 Committee, there is no analysis from what this bill --  
10 what happened on the Assembly floor. And I'm trusting,  
11 because it was probably a gut-and-amend.

12 My point is this: The reason this Commission  
13 is comprised of elected officials and public members and  
14 other people is because that's why we do what we do in  
15 our capacity as electeds. We take all the information  
16 that comes to us, and then we make decisions about, given  
17 the totality of these circumstances, is it now right,  
18 after this went on the ballot, after it was fully  
19 disclosed, and after the voters voted on it and  
20 understood there would be no additional costs to local  
21 government; and if there were, it would be fully  
22 reimbursed by the State of California, just like it was  
23 before Prop. 83. In fact, if Prop. 83 hadn't passed,  
24 it would still be a state mandate.

25 So now we're going to say, "But we have this

**Commission on State Mandates – September 27, 2013**

1 law that was passed in a trailer bill, fifty-plus pages,  
2 with a paragraph this big in the analysis, and say, 'We  
3 can now wipe out the entire record of that reliance in  
4 that arena.'" I think that's just wrong.

5 And so I'm requesting, respectfully, that we  
6 understand the magnitude of this vote. We will cripple  
7 local governments' ability to prosecute sexually violent  
8 predators.

9 The other thing that the Public Defender  
10 argument, I think -- it's not an argument you'll normally  
11 hear from me as a former prosecutor. But we did this  
12 with the DNA initiative, Prop. 69. It was important to  
13 release innocent people who were exonerated because DNA  
14 exonerated them, they were not the perpetrator of the  
15 crime.

16 We have a duty to provide the Public Defender  
17 with the resources they need to ensure that if somebody  
18 doesn't meet the definition of a sexually violent  
19 predator, they shouldn't be incarcerated for the rest of  
20 their life.

21 So we could potentially ruin future victims'  
22 lives by putting these perpetrators on the street, and we  
23 could ruin an individual's life who is not a sexually  
24 violent predator.

25 I am respectfully urging you not to support

**Commission on State Mandates – September 27, 2013**

1 your staff recommendation.

2 CHAIR ORTEGA: Mr. Neill?

3 MR. NEILL: I would like to speak on the law,  
4 on the Department of Finance's claim. The claim is based  
5 on the statute that Assembly Member Spitzer was referring  
6 to, Government Code section 15570.

7 MR. BARRY: 15570.

8 MR. NEILL: 15570, which says that the  
9 Commission can adopt a new test claim only upon a showing  
10 that a subsequent change in law has modified the State's  
11 liability.

12 So we're relying on their having been a  
13 subsequent change in law. Specifically -- not just any  
14 law, it has to be a subsequent change in law to the laws  
15 that impose the mandates.

16 The main statute that this mandate relies on  
17 is Welfare and Institutions Code 6601 that has the  
18 bulk of the -- that has the kernel of this mandate. It  
19 has the bulk of the mandate in it. Most of the other  
20 stuff flows from 6601.

21 So the Department of Finance's claim is that  
22 there was a subsequent change in law to Welfare and  
23 Institutions Code 6601 made by Proposition 83.

24 In the analysis that staff has provided for you  
25 on page 11, it says that the change to 6601 -- nobody's

**Commission on State Mandates – September 27, 2013**

1 arguing that the change was relevant to the mandate, by  
2 the way. The change in 6601 had nothing to do with  
3 mandated activities. That's not at issue here. What's  
4 at issue is, they're saying that if there is any  
5 amendment to that law, then the whole law is reenacted as  
6 amended.

7 But there was no change to 6601 because of  
8 Prop. 83. The language in statute before Prop. 83 passed  
9 and the language in statute after Prop. 83 passed were  
10 exactly the same.

11 The change that staff puts on page 11 is that  
12 it changed the words to "shall toll the term of an  
13 existing parole." That was already the law. In exactly  
14 the same words before voters passed Prop. 83.

15 A subsequent change in law is defined in  
16 15570 as -- and common sense also dictates this, that  
17 a subsequent change in law includes a change in law.  
18 There was no change to this law.

19 The Commission can only adopt a new test claim  
20 upon a showing that a subsequent change in law changes  
21 State's liability. Without a subsequent change in law,  
22 you cannot make that finding. That law was not changed.

23 Likewise, the change to 6604 was not made by  
24 Prop. 83. It was made by SB 1128, which passed and went  
25 into effect before Prop. 83. Prop. 83 did not change

**Commission on State Mandates – September 27, 2013**

1 that law. Therefore, the Commission can't find that the  
2 subsequent change in law modified the State's liability.

3 Department of Finance's claim also is reliant  
4 on the fact that an amendment to an irrelevant subsection  
5 reenacts -- repeals and reenacts the entire section of  
6 law.

7 But it wasn't amended. It can only be  
8 reenacted as amended if it was amended. Section 6601 and  
9 section 6604 were not amended by Prop. 83. Therefore,  
10 Prop. 83 did not reenact section 6601 and 6604. So the  
11 Commission can't find that the State's liability has  
12 changed because of those sections.

13 Activities 1, 2, and 3, as numbered in the  
14 analysis and in the Department of Finance's claim,  
15 flowed directly from section 6601. The activities found  
16 to be necessary to implement also flow directly from  
17 section 6601. So the State's liability can't have  
18 changed based on this subsequent change in law because  
19 there was no change in law.

20 Furthermore, courts, both in California and  
21 across the country, have regularly found that this  
22 interpretation of full reenactment of an entire statute,  
23 because of a change in one portion of it, is not the  
24 case.

25 The best example I found is *County of*

**Commission on State Mandates – September 27, 2013**

1     *Sacramento v. Pfund.* It's "Pfund," but I think the "P"  
2     is silent. And in that, the Court faced a decision that  
3     was almost exactly like this one, where there was a  
4     change to an irrelevant section of statute, and somebody  
5     was claiming that because of that, the whole thing was  
6     reenacted. And what the Court found was that considering  
7     the entire statute as having been wholly reenacted,  
8     quote, "*is to do violence to the code and all canons of*  
9     *construction.*"

10           So this idea that an amendment to an irrelevant  
11     piece of the law reenacts the whole thing would do that.  
12     And I don't think any of you came here today to do  
13     violence to all the canons of construction.

14           To the constitutionality, Commission analysis  
15     asserts that the Commission must presume that the  
16     statutes enacted by the Legislature are constitutional.  
17     And they cite a couple of cases. But the cases don't  
18     say that -- the cases in those courts -- the courts are  
19     actually referring to themselves. And I don't think the  
20     courts would ever find that courts must presume that  
21     statutes enacted by the Legislature are constitutional.  
22     The court's most important duty is to determine when  
23     statutes are not constitutional.

24           Instead, what those court cases and the entire  
25     chain of court cases behind them, what they do is, they

**Commission on State Mandates – September 27, 2013**

1 describe the circumstances where that's not the case.  
2 You do have to begin from an assumption of validity, of  
3 constitutionality. But when the court cases go on to  
4 describe the circumstances, what they say is that you  
5 must interpret it so that it harmonizes. You don't just  
6 assume it at face value. You interpret it to harmonize  
7 with the Constitution. And when a statute clearly and  
8 unquestionably conflicts with a constitutional  
9 prohibition, it must be voided on its face, it must not  
10 be upheld.

11 In this case, Section 6 of Article XIII B,  
12 which is the basis of all of the proceedings here, says  
13 that whenever the Legislature mandates a new program, the  
14 State shall provide funds to reimburse.

15 There's no question in any of the filings that  
16 the State mandated this new program.

17 There's a statement of decision that shows --  
18 that says that the State mandated this new program.  
19 There is no exception in the Constitution for later  
20 irrelevant amendments to those statutes.

21 If voters had rejected Proposition 83, the  
22 mandates here would have remained exactly the same. So  
23 to assert that the voters established this mandate, when  
24 their actions could not have affected it, is absurd.  
25 You can't say that voters did something, when whether

**Commission on State Mandates – September 27, 2013**

1 they did do it or didn't do it, the actions remain the  
2 same.

3 But all of that is secondary to the fact that  
4 the Department's claim relies on a subsequent change in  
5 law, and based on the passage of Prop. 83, and Prop. 83  
6 did not change the law. The Commission cannot find that  
7 the State's liability has changed for this mandate.

8 CHAIR ORTEGA: Any comments from Members?

9 MEMBER OLSEN: With all due respect to  
10 Mr. Spitzer, especially his passion about the *Sexually*  
11 *Violent Predators* law, I actually think the principle and  
12 the issue here goes well beyond that.

13 I cut my teeth at the LAO, so I'm happy that  
14 you think that's a great office. But my concern here  
15 is the sort of meta-principle, and that is that as an  
16 informed voter, when I'm faced with a proposition, I want  
17 to know the context of the law that I'm voting on. And  
18 I actually read the language of the law. I don't just  
19 read the LAO's advice about it or anything else. I go in  
20 and look at the actual text of the law.

21 And so we're getting into a situation here  
22 where if we're not able to have the context of the law --  
23 that is, the law that existed beforehand -- restated in  
24 the new law, I, as a voter, lose a great deal of  
25 information in terms of making an independent decision.

**Commission on State Mandates – September 27, 2013**

1 And I think that is a really scary thing that we're  
2 talking about today.

3 So I felt really strongly that we need to be  
4 able to have the context of the old law reenacted, and  
5 to be able to know what we're doing in the new stuff  
6 we're putting in on top. That's the first thing.

7 The second thing is, I'd like to know if  
8 there's anybody from the LAO here to testify today?  
9 Because we are hearing a lot about the joint letter from  
10 the LAO and the Department of Finance. And I would --  
11 since the Department of Finance is now the person  
12 requesting this change, I'd certainly like to hear from  
13 the LAO about whether their view about Prop. 83, whether  
14 their view is that something has changed since they wrote  
15 that letter.

16 Is there anybody here who can speak to that?

17 *(No response)*

18 MEMBER OLSEN: So in the absence of that being  
19 able to be addressed, I don't think I can get to "yes" on  
20 this today, just so you know.

21 CHAIR ORTEGA: Anyone else?

22 Ms. Ramirez?

23 MEMBER RAMIREZ: Thank you.

24 And I do appreciate the passion of our counsel  
25 here. Speaking about what this law means to society,

**Commission on State Mandates – September 27, 2013**

1       though, I think that our role here is a little bit more  
2       narrow than solving these -- the funding issues of our  
3       justice system. I know it's very challenging to be  
4       either a prosecutor or a defense counsel in these  
5       situations. But that might be an issue for the whole  
6       Legislature and the society, is how to properly fund the  
7       things we need to have done to protect the public.

8               But I'd really like to ask our staff comments  
9       about the issue that Mr. Spitzer raised of detrimental  
10      reliance.

11             MR. JONES: So I'm sure you all remember, we  
12      discussed this a little bit in the last hearing because  
13      several of the commenters had raised arguments relating  
14      to detrimental reliance, misrepresentation, unclean  
15      hands -- a bunch of different kind of equitable arguments  
16      that are all legal terms of art and so forth.

17             First of all, you all know that this Commission  
18      is not designed to, nor is it really equipped to practice  
19      equity. Your role is merely to follow the law. And in  
20      this case, the law is unfortunately pretty clear, and  
21      it's not on the side of those that are raising these  
22      arguments.

23             But in terms of the misrepresentations  
24      specifically that's been addressed by several of the  
25      commenters -- not just Mr. Spitzer today, but several of

**Commission on State Mandates – September 27, 2013**

1 the commenters have raised the letter that was sent to  
2 the then Attorney General Lockyer, by the LAO and  
3 Department of Finance, and have raised the ballot  
4 pamphlet materials.

5           And while it's true that at the time those  
6 things were written, all the parties expected  
7 reimbursement to continue, and, in fact, expected  
8 reimbursement to increase because they thought that  
9 this would be a more expensive program, one of the  
10 changes that was made, for example, to the code -- and  
11 we can quibble over whether it was done by SB 1128 on  
12 September 20<sup>th</sup>, 2006, or whether the change was made  
13 by Prop. 83 in November of 2006. But one of the changes  
14 that was made, was the definition of an SVP was taken  
15 from one -- or from "two underlying crimes" that were  
16 necessary to "one underlying crime." So in theory, you  
17 have an increase in the volume of these cases because the  
18 definition was loosened, essentially; and then the other  
19 most significant change, perhaps, is changing the  
20 commitment term from two years to indeterminate which, in  
21 the long-term, should taper off that increase in volume  
22 you would expect.

23           But at the time that the Prop. 83 ballot  
24 materials were written, SB 1128 had not been enacted.  
25 That is one point that I think is worth mentioning.

**Commission on State Mandates – September 27, 2013**

1           At the time that the letter was written from  
2           the LAO and Department of Finance to the Attorney  
3           General, there was no mechanism for mandate  
4           redetermination in the law. And that's a point that's  
5           been argued based on some of the prior reconsideration  
6           actions that this Commission has taken, which have been  
7           found to be unconstitutional and a violation of  
8           separation-of-powers principles. But there was no  
9           redetermination mechanism at the time. And so when those  
10          assertions were made regarding mandate reimbursement  
11          continuing -- and, in fact, increasing -- those  
12          assertions were true. And that's essential to a  
13          misrepresentation that it has to be in some way a  
14          misrepresentation of a material fact. And in this case,  
15          those things were true when they were said.

16                 Ms. Ortega has pointed out that the legal  
17          landscape has since changed, obviously, because now we do  
18          have a mandate redetermination procedure. And because of  
19          the legal landscape has changed in that way, that's why  
20          we're able to -- that's why the Department of Finance is  
21          able to bring this claim.

22                 MEMBER RAMIREZ: Additionally, could you  
23          comment on Mr. Neill's discussion of the subsequent  
24          irrelevant non-material change to the law?

25                 MR. JONES: Certainly.

**Commission on State Mandates – September 27, 2013**

1           First of all, Mr. Neill is, I think, conflating  
2           the term "subsequent change in law" with the idea of a  
3           "substantive change in law." The words don't mean the  
4           same thing; and in this case, "subsequent change in law"  
5           is defined very clearly in the Government Code.

6           In section 17570 -- which I happen to have  
7           right in front of me -- "A subsequent change in law is  
8           defined as a change in law that requires a finding that  
9           an incurred cost is a cost mandated by the state as  
10          defined by section 17514, or is not a cost mandated by  
11          the state pursuant to section 17556, or a change in  
12          mandates law."

13          Now, that definition doesn't say anything about  
14          the change in law having to relate to the test-claim  
15          statute at issue. And that is, unfortunately, where  
16          Mr. Neill's argument falls off the rails because he is  
17          arguing that because Proposition 83 didn't make a  
18          substantive change to the language or the effect or the  
19          text of the test-claim statute as it was pled in 1995,  
20          and as it was approved by the Commission in 1998, or  
21          alternatively, that it didn't make a substantive change  
22          to the test-claim statute as it read on the day before  
23          the election, he is arguing that you can't find a  
24          subsequent change in law.

25          But that's not the meaning of "subsequent

**Commission on State Mandates – September 27, 2013**

1 change in law," that's not the definition that you have  
2 to work with in the Government Code of the phrase  
3 "subsequent change in law." It has absolutely nothing  
4 to do with the test-claim statute itself, and it need  
5 not -- you need not even move a comma or change a verb or  
6 anything in the test-claim statute.

7 MEMBER RAMIREZ: Thank you very much.

8 MR. NEILL: May I respond?

9 I think you were misrepresenting my point,  
10 because you were conflating two separate points that I  
11 was making.

12 One point: As you read the definition, the  
13 first --

14 MEMBER ALEX: Can you address your comments to  
15 us?

16 MR. NEILL: Yes, absolutely. I apologize.

17 MEMBER ALEX: Thank you.

18 MR. NEILL: I believe staff was misrepresenting  
19 my comments.

20 My main point is that a subsequent change in  
21 law -- as staff read, the primary, before anything else,  
22 what a subsequent change in law requires is a change in  
23 law. And my argument is that section -- the law, called  
24 Welfare and Institutions Code section 6601, was not  
25 changed by Prop. 83.

**Commission on State Mandates – September 27, 2013**

1           The Department of Finance's claim is based --  
2    you can -- I mean, it's there. What they claim is that  
3    Proposition 83 counts as a subsequent change in law for,  
4    among other things, section 6601.

5           However, a subsequent change in law requires a  
6    change in law that it has to fulfill certain other  
7    requirements. And section 6601 was not changed. It  
8    fails the very first test of a subsequent change in law.

9           So all of the other things -- whether it  
10   fulfills all the rest of the requirements falls by the  
11   wayside because the law was not changed.

12           MEMBER ALEX: Let me ask you this: There are  
13   consequences to an initiative voted on by the people.

14           MR. NEILL: Yes.

15           MEMBER ALEX: And one of them, conceivably --  
16   I mean, we have to work this through -- is that it  
17   changes the nature of the mandate.

18           MR. NEILL: It can. Absolutely.

19           MEMBER ALEX: So even without any change, if  
20   a statute then goes in front of the voters as an  
21   initiative, there may be consequences to that, and I  
22   wonder if --

23           MR. NEILL: It could. But the statutory basis  
24   for this Commission's decision today says -- it says,  
25   "The Commission may adopt a new test-claim decision only

**Commission on State Mandates – September 27, 2013**

1 upon a showing that a subsequent change in law modifies  
2 the State's liability."

3 And in this case -- so you have to have a  
4 subsequent change in law.

5 MEMBER ALEX: Okay, I've got it.

6 MR. NEILL: A subsequent change in law has to  
7 change the law, and section 6601 wasn't changed.

8 MEMBER ALEX: Thank you.

9 CHAIR ORTEGA: Ms. Shelton?

10 MS. SHELTON: I think it might be helpful at  
11 this point just to describe the history of this whole  
12 statutory authority for a mandate redetermination.

13 Back in 2004, 2005, and 2006, the Legislature  
14 directed the Commission to reconsider a number of prior  
15 Commission mandate decisions. Several of them were on  
16 the ground that there was a subsequent federal law that  
17 imposed the same requirements as state statutes.

18 Others, like Open Meetings, for example, there  
19 now was an initiative that required all meetings to be  
20 open to the public; and, therefore, the argument that the  
21 Legislature wanted us to accept, was that there was no  
22 reimbursable state-mandated program because now there was  
23 an initiative.

24 Those cases went to court. The *California*  
25 *School Boards Association* challenged, on constitutional

**Commission on State Mandates – September 27, 2013**

1 grounds, that those statutes directing the Commission to  
2 reconsider were unconstitutional. And they won on that  
3 point.

4 In the Court's finding and judgment, they said,  
5 if the Legislature had a statutory scheme for the  
6 Commission to be able to reconsider a prior final  
7 decision, then maybe it would have some merit. Then  
8 there wouldn't be a separation-of-powers violation.

9 So this bill, even though it was a budget  
10 trailer bill, and it was lengthy, the stakeholders  
11 absolutely knew what was going on, because the bill was  
12 enacted as a direct result of the CSBA language and the  
13 Court's language, saying you just need a statutory  
14 process to redetermine.

15 Once that was done, it came into existence in  
16 2010, that allowed the Department of Finance, and  
17 likewise, the claimant community, if it went the other  
18 direction, to file a request for redetermination.

19 The second point is that, yes, by law, the  
20 Commission is required to presume that 17570 is  
21 constitutional because there is a provision in the  
22 California Constitution, and Article III, section 3.5,  
23 directing administrative agencies to presume that a  
24 statutory scheme is constitutional, unless otherwise  
25 determined by a court.

**Commission on State Mandates – September 27, 2013**

1           Here, we have to presume it's constitutional.  
2           It is being challenged. CSBA has brought another  
3           challenge to 17570. That action remains pending in the  
4           Alameda County Superior Court, and hasn't gone anywhere  
5           yet. And so until -- and there is no stay for the  
6           Commission to continue with this process. So at this  
7           point, you're required to presume it's constitutional.

8           MS. HALSEY: And I just wanted to add one  
9           thing. I think Mr. Neill is confusing two things, and  
10          that's why we're having this kind of cross-wise  
11          discussion.

12          But "subsequent change in law" is defined  
13          specifically in 17570 as a change in law that requires a  
14          finding that incurred costs as mandated by the State as  
15          defined by section 17514 is not a cost mandated by the  
16          State pursuant to 17556, or changes to mandates law.

17          And I think the rule he is thinking of is,  
18          there is also a rule of statutory construction that if  
19          a -- for instance, when you do a cleanup of a code and  
20          you move a code section from one part of the code to  
21          another part of the code, but you don't change the  
22          language, it continues, in effect, as though it was never  
23          reenacted.

24          And so those are two separate rules and two  
25          separate definitions.

**Commission on State Mandates – September 27, 2013**

1 MR. NEILL: Can I -- go ahead.

2 MR. SPITZER: I just want to say a couple  
3 things, if I could respond to Commissioner Ramirez's  
4 point.

5 You know, I was a high-school teacher a long  
6 time ago, and I used to teach Luis Valdez's as a migrant  
7 farm-worker plays in the field, acted out to the migrant  
8 farm workers.

9 And there's a lot of principles here that are  
10 at stake, in my opinion. And I really appreciate  
11 Commissioner Olsen's point about reading the ballot  
12 measure in totality.

13 People have a right to look at the Attorney  
14 General's summary -- I mean, it's the Attorney General of  
15 the State of California, you've got to give that some  
16 weight. I mean, I've known Bill Lockyer for a long time.  
17 He is one of the most honorable elected officials I have  
18 ever met and will ever know again.

19 When I know Bill Lockyer, when he puts his  
20 name on this and says "net, net," which means after  
21 reimbursement, unknown -- I mean, in other words, this is  
22 going to be reimbursed -- I would expect him, and would  
23 think that he would uphold that representation to the  
24 voters.

25 This law change is being interpreted and

Commission on State Mandates – September 27, 2013

1 challenged in the courts.

2 I could understand prospectively initiatives  
3 that came after. But what I learned in law school was  
4 that we could rely on what the state of the law was and  
5 what the rules of engagement and games were at that time.

6 That's what I taught my kids when I was a  
7 teacher, and that's what I think we have an obligation to  
8 do.

9 You want to change the rules prospectively  
10 given this statute; but to go back and reconstruct  
11 voter-approved initiatives, I think that's a territory  
12 I'm asking this Commission not to go to.

13 I know the staff is saying it's arguable, but  
14 we know we're going to end up in court on it, we know  
15 it's pending in the jurisdiction that staff has  
16 recommended. Why don't we let that case get played out?  
17 Why would we jeopardize *Sexually Violent Predators* in the  
18 interim?

19 I would argue, keep the status quo, see what  
20 the outcome is of that case, see if that code section is  
21 interpreted a certain way. But put this off to another  
22 day then. Deny the claim at this point in time and say,  
23 "It's inappropriate until we get a settlement on that  
24 legal issue of whether it should be only prospective."  
25 But to jeopardize and potentially allow sexually violent

**Commission on State Mandates – September 27, 2013**

1 predators back onto the street is a big risk.

2 Oh, last thing, just real quick. Senator  
3 Runner, I think you all know, he was the motivator behind  
4 Prop. 83. He was completely unaware of this proceeding.  
5 And I don't know -- I would respectfully request, just as  
6 part of the record -- I'm not going to read it because  
7 I'm not going to take up time -- if I could just submit  
8 his comments so that if the Commissioners were to  
9 consider it, they can do so.

10 MEMBER OLSEN: We have them.

11 MS. HALSEY: They have been submitted and  
12 received by the Commissioners.

13 MR. SPITZER: I did not know that.

14 Thank you very much.

15 CHAIR ORTEGA: Mr. Neill?

16 MR. NEILL: I just want to clarify because,  
17 once again, somebody tried to say what I was saying. I  
18 don't think it was what I was trying to say.

19 I'm not arguing any rules of statutory  
20 construction. What I'm arguing is whether there was a  
21 change in the law.

22 Proposition 83, nothing that -- I'm not saying  
23 it wasn't substantive, I'm not saying whether it was  
24 relevant to the mandate. Section 6601 was not changed in  
25 any way -- no word of 6601 was changed by Prop. 83.

**Commission on State Mandates – September 27, 2013**

1           The words in Welfare and Institutions Code  
2           6601 were exactly the same the day before Prop. 83 was  
3           passed and the day after. There was no change in law.

4           I'm not saying it wasn't substantive. There's  
5           no rules of statutory construction. A subsequent change  
6           in law requires the change in law; and this law was not  
7           changed.

8           MEMBER ALEX: Okay, not to be argumentative,  
9           but I just want to give you an example of where there may  
10          be -- without changing a word, you could have a very  
11          significant change in consequence.

12          If you moved a provision from a statute into  
13          the State Constitution -- which is, itself, fairly  
14          massive -- it could change the meaning and the purpose of  
15          those exact, same words.

16          MR. NEILL: I agree.

17          MEMBER ALEX: So there are situations, just  
18          to --

19          MR. NEILL: But that's not what happened here.

20          MEMBER ALEX: Okay.

21          MR. NEILL: There was a statute, that was  
22          Welfare and Institutions Code 6601, it remains Welfare  
23          and Institutions Code 6601, the language remains exactly  
24          the same before and after. And we have to -- with the  
25          Department -- you're going to be deciding on what the

**Commission on State Mandates – September 27, 2013**

1 Department of Finance has claimed. And what they have  
2 claimed is that Proposition 83 effected a subsequent  
3 change in law to, among other things, section 6601. And  
4 that is not the case. It did not effect a change to  
5 section 6601.

6 MS. HALSEY: The change, actually, is that now  
7 it's a requirement of a proposition of the voters, and it  
8 can't be eliminated by the Legislature. That's the  
9 change in law.

10 CHAIR ORTEGA: Mr. Jones?

11 MR. JONES: Just to add to what Heather just  
12 said, if you look at section 33 of Proposition 83, which  
13 is on page 492 of your exhibits -- I apologize for the  
14 length, we've got lot of comments on this one.

15 On page 492 of your exhibits, section 33 of  
16 Prop. 83 states that "The provisions of this act shall  
17 not be amended by the Legislature except by a statute  
18 passed in each house by a roll-call vote entered in the  
19 journal, two-thirds of the membership of each house  
20 concurring."

21 So one change that I think is not insignificant  
22 is that Proposition 83 made sections 6601 and 6604 and  
23 6605, and I think also 6608 -- essentially made it a lot  
24 harder for the Legislature to repeal those provisions.

25 And in addition to which, the purpose of

**Commission on State Mandates – September 27, 2013**

1 mandate reimbursement has always been, and will always  
2 be, to reimburse the local government for actions of the  
3 State Legislature, not for actions of the voters.

4 And if the Legislature were to -- well, so the  
5 Legislature did, actually. The Legislature created this  
6 program. The Legislature always had the ability to  
7 repeal this program if it didn't want to pay for it. It  
8 no longer has that ability, to an extent.

9 And certainly, it doesn't have that ability to  
10 the same extent that it did when the Legislature created  
11 the program.

12 Section 17556 is very clear, Article XIII B is  
13 very clear, when the voters enact a statute or a program,  
14 it is not reimbursable by the Legislature. And the  
15 reason for that is quite simply because the Legislature  
16 doesn't have the power to overrule the voters. The  
17 Legislature's power is limited, the voter's power is very  
18 much not.

19 CHAIR ORTEGA: And I think Mr. Jones' point  
20 goes directly to the question that is before the  
21 Commission, which is: Did the State's liability change  
22 as a result of Prop. 83?

23 So, Mr. Barry, you had something else?

24 MR. BARRY: I just wanted to refer, for your  
25 reference, that we've detailed, at pages 204 through 206

**Commission on State Mandates – September 27, 2013**

1 of the exhibits, each code section, and the fact, whether  
2 there has been any change to any of the applicable code  
3 sections; and if so, what those changes were.

4 There were no substantive changes to the law.  
5 I understand that we're talking about substantive as  
6 opposed to changes in form rather than substance. That's  
7 effectively what we have here.

8 And the only way you get to this decision today  
9 is because of the addition, I think, of the sentence to  
10 17556(f), in 2005, which says that it shall apply,  
11 regardless of whether the statute was enacted before or  
12 after the date on which the ballot measure was approved  
13 by the voters.

14 Very clearly -- and I think that's where we're  
15 going -- I mentioned this at the last hearing -- that you  
16 can't have a statute that has -- that's so overly broad  
17 and inclusive, that it does harm and is contrary to the  
18 purpose and intent of Article XIII B, Section 6, that the  
19 State be required to provide a subvention of funds for  
20 these activities.

21 And I think that provision, especially that  
22 sentence, goes beyond the constitutional bounds, and does  
23 violate that provision of the Constitution.

24 MS. SHELTON: I was going to say on that point,  
25 in this current CSBA lawsuit, they are also challenging

**Commission on State Mandates – September 27, 2013**

1 all the before-and-after sentences in 17556. So, again,  
2 that is pending.

3 MR. BARRY: And Mr. Spitzer's comment, why not  
4 let that play out in the courts? Until we have a  
5 decision as to the viability of those code sections, it  
6 would seem to make sense to allow these mandates to  
7 continue to be reimbursable.

8 And if the courts find that they're  
9 constitutional, there is no reason that this couldn't be  
10 revisited by the Commission at a later time.

11 CHAIR ORTEGA: I don't think that's our charge  
12 to wait and see what happens in the court.

13 MS. SHELTON: There is no stay on the process.  
14 That case has been sitting there for three and a half,  
15 four years now, and it keeps getting amended every time  
16 the budget changes. And this is a challenge from  
17 schools, so they may be affected a little bit differently  
18 than local agencies.

19 So, you know, I don't have a legal reason to  
20 stay it. It would be your decision.

21 MS. GEANACOU: I'd also like to make an  
22 observation, please. Susan Geanacou for Finance.

23 I just observed that the Commission staff  
24 analysis on page 25, about a third of the way down the  
25 page, notes that Proposition 83 amended and reenacted

**Commission on State Mandates – September 27, 2013**

1 wholesale sections 6601, 6604, 6605, and 6608 of the  
2 Welfare and Institutions Code. So just to note that,  
3 that is consistent with what we're arguing, and is in  
4 contrast to some of the testimony you've heard over the  
5 last few minutes.

6 CHAIR ORTEGA: Any other comments from Members?

7 MS. SHELTON: But just a concern -- is it  
8 Mr. Osaki raised issues with respect to a California  
9 Supreme Court decision dealing with the retroactive  
10 effect of Prop. 83 --

11 MS. HALSEY: The *Castillo* case.

12 MS. SHELTON: -- the *Castillo* case. That's  
13 new, a new argument. And it might change the period of  
14 reimbursement recommended for -- in this proposed  
15 statement of decision.

16 We had case law, different Court of Appeal  
17 decisions, finding that Prop. 83 took effect once the  
18 two-year term was over, so that the next -- under prior  
19 law, so that the next petition filing would be operated  
20 under Prop. 83. Is that correct?

21 MR. JONES: Actually, it was even broader than  
22 that. Some of the case law that we found when addressing  
23 the retroactivity issues raised primarily by L.A. County  
24 actually suggest that -- in fact, clearly state that the  
25 indeterminate sentencing rule, specifically of Prop. 83

**Commission on State Mandates – September 27, 2013**

1 ,can be applied without retroactivity issues to all  
2 pending and future SVP cases.

3 So even an SVP who was -- whose petition was  
4 filed on November 4<sup>th</sup>, 2006, the Court clearly states  
5 that retroactivity is not a problem by changing the  
6 petition from a two-year commitment to, ultimately,  
7 finding for an indeterminate commitment for that  
8 individual.

9 And the reason for that is because  
10 retroactivity is based on the last act or event that  
11 occurs before the law takes -- before the impact of the  
12 law, essentially. And the last event or act in this case  
13 is the mental state of the defendant on the day he is  
14 committed.

15 So on the date of the determination made by the  
16 Court, the Court can determine that this person is an  
17 SVP, fits the definition of an SVP. So even if the  
18 petition was filed the day before Proposition 83, that  
19 person can still be committed to an indeterminate  
20 sentence.

21 So whatever stipulation the County of L.A. made  
22 between defense and prosecution, I'm not certain that  
23 it's consistent with the case law, and I'm not sure that  
24 it really affects mandate reimbursement at all.

25 MS. SHELTON: And I know we're just talking

**Commission on State Mandates – September 27, 2013**

1 about this for the first time, so kind of indulge me just  
2 for a second.

3 I think when you have a Supreme Court ruling in  
4 a particular jurisdiction, though, it might become the  
5 law of the case for that jurisdiction. And so I'm  
6 thinking, with that jurisdiction, their period of  
7 reimbursement may be different, but...

8 MR. OSAKI: Yes, and I wanted to clarify, the  
9 staff analysis, when they were discussing this issue,  
10 where we're referencing Court of Appeal decisions. What  
11 I was referencing was *People v. Castillo*, a California  
12 Supreme Court case, that specifically dealt with an  
13 agreement in L.A. County, because we were dealing with  
14 various issues at that time. And that each party had  
15 reasons for entering into such an agreement.

16 Now, it was challenged at the Court of Appeal,  
17 and we actually lost. L.A. County did lose at the Court  
18 of Appeal, and then that was taken up to the Supreme  
19 Court. And the Supreme Court said, "No, this is an  
20 enforceable agreement and a valid agreement."

21 And so to the extent that we still have these  
22 cases that are still pursuant to the stipulation, I do  
23 believe that those are still reimbursable. And we do  
24 have published case -- a published California Supreme  
25 Court case to that effect.

**Commission on State Mandates – September 27, 2013**

1 MR. JONES: Staff hasn't really had much time  
2 to address this, but this sounds an awful lot like a  
3 current issue to me, that the County made a decision to  
4 make an agreement between prosecutor and --

5 MS. HALSEY: Matt, may I interrupt?

6 We have not analyzed this, and we have not  
7 talked about this in our office.

8 I do think if the members are concerned about  
9 this, we might want to take it back to analyze this  
10 point.

11 CHAIR ORTEGA: And can you say what that would  
12 mean in terms of the staff recommendation today?

13 MS. HALSEY: It would mean that we would  
14 recommend that you defer your decision until next hearing  
15 for the vote. We've done that before.

16 MS. SHELTON: She means substantively.

17 Substantively, right now, the period of  
18 reimbursement that is affected by the filing of the  
19 request is July 1, 2011, by statute.

20 If potentially the court order is binding and  
21 becomes a law of the case for a particular jurisdiction,  
22 if it were to go that way, then that date may not apply  
23 to the County of L.A. only.

24 MS. HALSEY: For those cases subject to that.

25 CHAIR ORTEGA: Could we take action, should

**Commission on State Mandates – September 27, 2013**

1       there be a motion, take action today, and then address  
2       this --

3               MS. HALSEY: This is a mandate issue, so it's  
4       not a P's & G's issue.

5               CHAIR ORTEGA: I'm not suggesting that we would  
6       defer it to the P's & G's; but that if there needs to be  
7       some modification of today's action, to address this  
8       issue that needs to come before us?

9               MS. SHELTON: You could bifurcate your ruling,  
10       and not adopt a -- I mean, you could make findings on  
11       issues in this proposed decision and defer your ruling on  
12       this particular issue to the next hearing, in which case  
13       we would present another proposed statement of decision  
14       just on the period of reimbursement and the issue of  
15       retroactivity.

16              CHAIR ORTEGA: For Los Angeles?

17              MS. SHELTON: For Los Angeles, right. Or if  
18       there's any other jurisdiction, I don't know.

19              CHAIR ORTEGA: Okay.

20              MEMBER RAMIREZ: I have a question.

21              CHAIR ORTEGA: Yes, Ms. Ramirez.

22              MEMBER RAMIREZ: Actually, of Commissioner  
23       Olsen.

24              You seemed to earlier be interested in seeing  
25       whether or not the LAO had something to offer.

**Commission on State Mandates – September 27, 2013**

1 MEMBER OLSEN: Yes.

2 MEMBER RAMIREZ: So is there a procedure for us  
3 to do that?

4 MS. SHELTON: They receive notice of all of our  
5 hearings. And they have in the past sometimes come to  
6 testify. And so they just are not here today.

7 MS. HALSEY: But the Commission could request  
8 them to appear, though.

9 MEMBER ALEX: Can I ask, Camille, is there any  
10 legal implication -- you know, if the LAO says A or  
11 anti-A, does it have any effect on our obligation in  
12 making a determination as to what the mandate is?

13 MS. SHELTON: No.

14 MEMBER ALEX: Thank you.

15 CHAIR ORTEGA: Okay, any other comments?

16 *(No response)*

17 CHAIR ORTEGA: Is there a motion?

18 MEMBER RAMIREZ: I'll move the bifurcation as  
19 stated.

20 MS. SHELTON: Can I help phrase that motion?

21 MEMBER RAMIREZ: Yes, please. Thank you.

22 MS. SHELTON: Is your motion to adopt the  
23 findings in the proposed statement of decision, all  
24 except the period of reimbursement and the issue of  
25 retroactivity with respect to the County of Los Angeles

**Commission on State Mandates – September 27, 2013**

1 or any other county that has a binding order?

2 MEMBER RAMIREZ: Yes, that's what I wanted to

3 say.

4 MR. SPITZER: It was very eloquent.

5 MEMBER RAMIREZ: As usual.

6 MR. SPITZER: As usual.

7 CHAIR ORTEGA: Is there a second?

8 MEMBER ALEX: I'll second.

9 CHAIR ORTEGA: Please call the roll.

10 MS. HALSEY: Mr. Alex?

11 MEMBER ALEX: Aye.

12 MS. HALSEY: Mr. Chivaro?

13 MEMBER CHIVARO: Aye.

14 MS. HALSEY: Ms. Olsen?

15 MEMBER OLSEN: No.

16 MS. HALSEY: Ms. Ortega?

17 CHAIR ORTEGA: Aye.

18 MS. HALSEY: Ms. Ramirez?

19 MEMBER RAMIREZ: Aye.

20 MS. HALSEY: Mr. Rivera?

21 MEMBER RIVERA: Abstain.

22 CHAIR ORTEGA: Is that four?

23 MS. HALSEY: Yes.

24 The motion carries.

25 CHAIR ORTEGA: Thank you, everyone, for being

**Commission on State Mandates – September 27, 2013**

1 here today.

2 MR. SPITZER: Thank you for your time.

3 CHAIR ORTEGA: Items 6 and Item 7 were on the  
4 consent agenda?

5 MS. HALSEY: Yes. Item 8 is reserved for  
6 county applications for a finding of significant  
7 financial distress or SB 1033 applications. No SB 1033  
8 applications have been filed.

9 Item 9, Commission staff member Kerry Ortman  
10 will present the Legislative Update.

11 MS. ORTMAN: Good morning. Commission staff  
12 has been following these two bills related to the  
13 mandates process.

14 AB 392: Existing law requires the Controller  
15 to prorate claims at the amount appropriated for  
16 reimbursement is not sufficient to pay all of the claims  
17 approved by the Controller. Existing law also requires  
18 the Controller to report to the Department of Finance and  
19 various legislative entities when it is necessary to  
20 prorate claims. This bill deleted that reporting  
21 requirement, and requires the Controller to determine the  
22 most cost-effective allocation method if \$1,000 or less  
23 is appropriated for a program. On August 12<sup>th</sup>, 2013,  
24 this bill was chaptered by the Secretary of State.

25 AB 1292 is a spot bill that we've been

**Commission on State Mandates – September 27, 2013**

1 following. We have contacted the author's office and  
2 were told that they have no plans to propose changes to  
3 the mandate process. We will continue to monitor that  
4 legislation.

5 CHAIR ORTEGA: Thank you.

6 MS. HALSEY: Item 10, which Chief Legal Counsel  
7 Camille Shelton will present the Chief Legal Counsel  
8 report.

9 MS. SHELTON: I don't have anything new to  
10 report. We're still waiting for the Second District  
11 Court of Appeal decision in the *Municipal Stormwater*  
12 *Urban Runoff Discharge* case. They have until October 22  
13 to issue their decision.

14 CHAIR ORTEGA: Thank you.

15 MS. HALSEY: And Item 11 is Executive  
16 Director's report on workload, meeting calendar, and  
17 tentative agenda items for the next meeting.

18 After today's hearing, we'll have ten test  
19 claims, four P's & G's, three PGAs, eight statewide cost  
20 estimates, and 81 IRCs, and three-point-something mandate  
21 redeterminations pending.

22 We're making good progress towards eliminating  
23 the backlog and hearing claims in a timely manner.

24 I do anticipate that we will hear all of our  
25 2012 claims in early 2014. So it's getting much shorter.

**Commission on State Mandates – September 27, 2013**

1           For an action item today, we have the meeting  
2           calendar for 2014.

3           Commission meetings have traditionally been  
4           held on the fourth Friday of odd months for many years.  
5           The November meeting is usually set for the first Friday  
6           in December to avoid holidays, and the fourth Friday of  
7           May 2014 is May 23<sup>rd</sup>, which is Memorial Day weekend --  
8           or the beginning of Memorial Day weekend, and may be a  
9           conflict for parties and members. And, therefore, staff  
10          proposes holding the May meeting on the following Friday,  
11          May 30<sup>th</sup>.

12          So with that, we have our proposed calendar for  
13          fourth Fridays except for what would be the November  
14          hearing and the May hearing.

15          CHAIR ORTEGA: Do we have a motion on the 2014  
16          calendar?

17          MEMBER OLSEN: I'll move it.

18          MEMBER CHIVARO: Second.

19          CHAIR ORTEGA: Thank you.

20          All those in favor?

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

22          CHAIR ORTEGA: Opposed?

23          *(No response)*

24          CHAIR ORTEGA: Okay.

25          MS. HALSEY: Great. And then we have tentative

**Commission on State Mandates – September 27, 2013**

1 agenda items listed on the Executive Director's report.

2 There is a lot coming up. I know we lost a lot  
3 of our audience; but please take a look and see if these  
4 are your items because we have a pretty heavy agenda  
5 anticipated for December, and then also maybe January.  
6 So time to get comments in.

7 And that's it for me.

8 CHAIR ORTEGA: Okay, so we are going to recess  
9 to closed executive session.

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

17 The Commission will also confer on personnel  
18 matters pursuant to Government Code section sections  
19 11126(a)(1).

20 We will reconvene in open session in  
21 approximately 15 minutes. So if we can ask all the  
22 public to exit.

23 *(The Commission met in closed executive*  
24 *session from 11:48 a.m. to 11:52 a.m.)*

25 CHAIR ORTEGA: We are returning to open

**Commission on State Mandates – September 27, 2013**

1 session. The Commission met in closed executive session  
2 pursuant to Government Code section 11126(e)(2) to confer  
3 with and receive advice from legal counsel, for  
4 consideration and action, as necessary and appropriate,  
5 upon the pending litigation listed on the published  
6 notice and agenda; and to confer with and receive advice  
7 from legal counsel regarding potential litigation, and  
8 pursuant to Government Code 11126(a)(1) to confer on  
9 personnel matters.

10 And no action was taken in the closed session.

11 And with no further business to discuss, I  
12 believe I can take a motion to adjourn.

13 MEMBER OLSEN: So moved.

14 MEMBER CHIVARO: Second.

15 CHAIR ORTEGA: All in favor?

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

17 CHAIR ORTEGA: Thank you, everyone.

18 *(The meeting concluded at 11:53 a.m.)*

19 --oOo--

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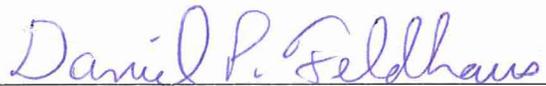
**REPORTER'S CERTIFICATE**

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 21<sup>st</sup> of October 2012.



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