BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 23300-23397, as added or amended by Statutes 1974, Chapter 1392, Sections 2 and 3; Statutes 1975, Chapter 1247; Statutes 1976, Chapter 1143; Statutes 1977, Chapter 1175; Statutes 1978, Chapter 465; Statutes 1979, Chapter 370; Statutes 1980, Chapter 676; Statutes 1981, Chapter 1114; Statutes 1984, Chapter 226; Statutes 1985, Chapter 702; Statutes 1986, Chapter 248; Statutes 1994, Chapter 923; Statutes 2002, Chapter 784; and Statutes 2004, Chapter 227 Governor's Press Release dated May 10, 2004 Filed on October 13, 2006 By the County of Santa Barbara, Claimant.	Case No.: 06-TC-02 *County Formation Cost Recovery* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted April 19, 2013*) (*Served April 25, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on April 19, 2013. Ms. Anne Rierson, Deputy County Counsel, appeared on behalf of the County of Santa Barbara. Ms. Carla Shelton appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to deny the test claim at the hearing by a vote of 6 to 0.

Summary of the Findings

Government Code section 23300 et seq., as enacted in Statutes 1974, chapter 1392, sections 2 and 3, as amended by Statutes 1975, chapter 1247; Statutes 1976, chapter 1143; Statutes 1977, chapter 1175; Statutes 1978, chapter 465; Statutes 1979, chapter 370; Statutes 1980, chapter 676; Statutes 1981, chapter 1114; Statutes 1984, chapter 226; Statutes 1985, chapter 702; Statutes 1986, chapter 248; Statutes 1994, chapter 923; Statutes 2002, chapter 784; and Statutes 2004, chapter 227; and the alleged executive order, Governor's Press Release, dated May 10, 2004, do not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. The test claim statutes and alleged executive order do not impose any reimbursable state-mandated activities upon local government, and increased costs alone are not reimbursable absent a mandated new program or higher level of service imposed upon an eligible local government claimant.

All requirements of the County Formation Law first enacted in Statutes 1974, chapter 1392 are denied, having been enacted prior to January 1, 1975. In addition, the subsequent amendments to the test claim statutes enacted between 1975 and 2004 do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. Many of the amendments were not substantive, while others imposed requirements upon the state, or the proponents of a new county

A subset of statutes enacted on or after January 1, 1975 arguably impose new requirements on the county to hold a second election to name the officials of the newly formed county, and select a county seat, if the first election results in the voters' approval of the new county. But, because in this case, the proposition in the first election failed, claimant has not incurred costs for the activities related to a second election. Because there is no evidence in the record that the claimant or any other county incurred increased costs mandated by the state to implement these statutes, they are denied.[1]

Several amendments are alleged to have imposed activities and costs upon the Mission County Formation Review Commission, which is not an eligible claimant because it is not subject to the tax and spend provisions of the California Constitution. Costs incurred by the review commission are shifted to the county by statute; but without a corresponding new program or higher level of service imposed on the county, those costs are not reimbursable pursuant to the courts' interpretation of article XIII B, section 6. Moreover, the costs are shifted pursuant to provisions of Statutes 1974, chapter 1392, which were enacted prior to January 1, 1975, and never amended and, thus, not eligible for reimbursement under article XIII B, section 6(a)(3). Finally, the Legislature's findings and determinations when enacting the County Formation Law regarding the existence of reimbursable state-mandated program under the former Revenue and

[1] However, if another county in the future incurs costs for the second election, that county may file a test claim including evidence of the costs incurred with the Commission within 12 months of first incurring costs.

Taxation Code are not dispositive, and that public policy is not a sufficient justification for finding a reimbursable state mandate.

COMMISSION FINDINGS

I. Chronology

10/13/2006	Claimant, County of Santa Barbara, filed the test claim with the Commission.
10/31/2006	Commission staff deemed the filing complete.
12/06/2006	The Department of Finance (DOF) submitted written comments on the test claim.
01/03/2007	Claimant submitted a rebuttal to DOF's comments.
10/30/2012	Commission staff issued the draft staff analysis and proposed statement of decision, setting the matter for the January 25, 2013 hearing.
11/13/2012	Claimant requested an extension of time to file comments and a postponement of the hearing.
11/14/2012	Claimant's request for an extension of time and postponement of hearing was granted. Matter was set for hearing on April 19, 2013.
01/17/2013	DOF submitted written comments on the draft staff analysis.
01/18/2013	Claimant submitted written comments on the draft staff analysis.

II. Background

This test claim seeks reimbursement for costs incurred by Santa Barbara County pursuant to a failed attempt to partition the county and create, from the northern area of the county, a new local government, Mission County. Claimant Santa Barbara County (hereafter "claimant" or "county") incurred costs related to complying with the County Formation Law, including the formation and staffing of a County Formation Review Commission, the determination of eleven economic impact and feasibility criteria identified in Government Code section 23332, and the conduct of a popular election to determine whether the new county should be created.

The process of forming a new county, under the County Formation Law, is triggered when proponents of the new county circulate petitions throughout the existing county or counties that would be partitioned, and collect a certain number of signatures, in proportion to the whole number of registered voters in the existing county or counties, within a defined time period. When certified by the county clerk to be complete, the petitions are forwarded to the County Board of Supervisors, and then to the Governor, who is required by statute to appoint a review commission to study the economic and fiscal impacts of partitioning the county, as provided. An election is then held to determine if a new county should be created. The costs of the review commission's study, by statute, fall to the new county, if created; but if defeated, the costs fall to the existing principal county.

In this case, proponents of the new Mission County began circulating petitions in April 2003. On December 10, 2003, the Santa Barbara County Clerk, Recorder, and Assessor certified the petitions "sufficient to proceed." The County Board of Supervisors transmitted the petition to then-Governor Schwarzenegger on January 8, 2004. The Governor appointed five commissioners, as provided for under section 23331, to serve on the Mission County Formation Review Commission. The appointment was announced in a press release on May 10, 2004, wherein the Governor charged the county formation commission with completing a "comprehensive assessment and report for the community regarding the impact of the proposed Santa Barbara County split on the region."[2]

The review commission was required to make determinations regarding the eleven criteria listed in section 23332, as noted above, and began meeting on May 17, 2004.[3] The review commission requested a loan of operating funds from the State Controller's Office (SCO) in the amount of $400,000, to be repaid with interest. The funds were appropriated in the 2004 Budget Act, enacted July 31, 2004.[4] On August 19, 2004, County Administrator Michael Brown sent a letter to the SCO requesting that these funds be made available to his office, on behalf of the "Santa Barbara County Formation Commission."[5] On September 27, 2004 the review commission voted unanimously to extend its term upon approval by the Governor, which was subsequently granted. [6] The commission and county staff completed the required assessment, made the required determinations, and created the Final Report of the Mission County Formation Review Commission, dated March 28, 2005. The report was presented to the County Board of Supervisors, and the county secured the measure for the June 2006 ballot, at which time the measure was defeated.[7]

The claimant has alleged the entirety of the County Formation Law, Government Code section 23300-23397 as enacted in Statutes 1974, chapter 1392, p. 3039, sections 2 and 3, and the

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[2] Exhibit A, Test Claim p. 1.

[3] Exhibit A, Test Claim p. 2.

[4] Statutes 2004, chapter 208 (SB 1113) § 2.00 [Line Item 9210-102-0001 states: "The amount appropriated in this item is for allocation by the State Controller to the Santa Barbara county Formation commission pursuant to [provisions of the County Formation Law]…The amount appropriated in this item is a loan and shall be repaid with interest within one year from the date upon which the issue of county formation is voted on by the people."].

[5] Exhibit E, Letter to the State Controller's Office requesting $400,000 warrant to be sent to the County Administrator's Office, dated August 19, 2004.

[6] Exhibit A, Test Claim p. 2; Exhibit D, Letter Requesting Extension of Time from Mission County Formation Review Commission to Governor Schwarzenegger, dated Sept. 27, 2004.

[7] Exhibit A, Test Claim p. 2.

Governor's Press Release of May 10, 2004. Several amendments to the County Formation Law are considered as well.[8]

Test claim statutes

The County Formation Law, commencing with Government Code section 23300, provides that "[n]ew counties *may be formed* and created from portions of one or more existing counties solely pursuant to the provisions of this chapter."[9] The 1974 statute, as enacted, provides as follows:

- Section 23320 provides that "proceedings for the creation of a proposed county shall be initiated by petition" of qualified electors.[10]
- Section 23321 describes the number of signatures required, depending on the population of the proposed county in relation to the county or counties to be partitioned.[11]

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8 In the draft staff analysis, Commission staff concluded that only the 1974 statute had been properly pled, and therefore declined to take jurisdiction of any later amendments to the County Formation Law that may have created reimbursable activities. Commission staff stated the posture taken as follows:

> Claimant has alleged a number of activities and costs that were enacted in later amendments to the County Formation Law, but has not pled the statutes that amended the law. Government Code sections 17521 and 17553 require that a test claim specifically identify the statute or executive order that allegedly imposes costs mandated by the state. Thus, the Commission does not have jurisdiction over the statutes that have not been pled. This decision determines only whether the 1974 County Formation Law as added and the Governor's 2004 press release constitute a reimbursable state-mandated program.

The claimant objected to this position, arguing that the initial test claim filing complied with the test claim requirements since the test claim attached the applicable code sections, as amended post-1975, and alleged in the test claim narrative the constitutional requirement to reimburse the county for activities that resulted from the post-1975 amendments.

Claimant did, however, fail to list the statutes and chapters pled in Box 4 of the test claim form, and to attach copies of the statutes and chapters pled, as required. Nevertheless, staff finds that the discussion in the narrative of the test claim combined with the, undated print-out of the code, as it presumably appeared when the test claim was filed, is sufficient to put the parties on notice that the post-1975 amendments were intended to be pled. As described in the analysis below, under section A.2., the post-75 statutes are analyzed and considered in this statement of decision as if properly pled.

[9] Government Code section 23300 (Stats. 1974, ch. 1392 § 2).

[10] Government Code section 23320 (Stats. 1974, ch. 1392 § 2).

[11] Government Code section 23321 (Stats. 1974, ch. 1392 § 2).

- Sections 23325-23329 require that a petition be filed with the clerk of the county or counties from which the new county is to be formed; that the clerk of the county or counties verify the petitions and the signatures therein; and that the clerk certify the petition to the board of supervisors of the affected counties.[12]
- Section 23330 then requires the board of the principal county to "forthwith transmit a copy of the petition to the Governor."[13]
- Section 23331 provides that the Governor, upon receipt of the petition pursuant to section 23330, "shall create a County Formation Review Commission… and appoint five persons to be members of the commission."[14]
- Section 23332 provides that, once appointed, the commission "shall determine all of the following:"

  (a) A fair, just, and equitable distribution, as between each affected county and the proposed county, of the indebtedness of each affected county.

  (b) The fiscal impact of the proposed county creation on each affected county.

  (c) The economic viability of the proposed county.

  (d) The final boundaries of the proposed county.

  (e) A procedure for the orderly and timely transition of service functions and responsibilities from the affected county or counties to the proposed county.

  (f) The division of the proposed county into five supervisorial districts.

  (g) The division of the proposed county into a convenient and necessary number of judicial, road and school districts, the territory of which shall be defined. To the extent possible, existing judicial, road and school districts located within the territory of the proposed county shall be maintained.

  (h) The county officials to be elected at the election on the proposed county creation.

  (i) That the boundaries of the proposed county do not create a territory completely surrounded by any affected county.

  (j) The location of the county seat of the proposed county.[15]
- Section 23335 requires that the members of the commission meet within 10 days and elect a chairman and appoint a secretary.[16]

[12] Government Code sections 23325-23326; 23328 (Stats. 1974, ch. 1392 § 2).

[13] Government Code section 23330 (Stats. 1974, ch. 1392 § 2).

[14] Government Code section 23331 (Stats. 1974, ch. 1392).

[15] Government Code section 23332 (Stats. 1974, ch. 1392 § 2).

- Section 23336 requires the commission to "hear any protests and objections to the creation of the proposed county," in a noticed public hearing.[17]
- Section 23339 gives the commission subpoena power.[18]
- Section 23340 requires the cooperation of "all officers and employees any affected county."[19]
- Section 23341 provides that the commission shall adopt a resolution and transmit its report within 180 days.[20]
- Section 23343 provides that the commission "shall receive as compensation" a $50 per diem along with actual expenses incurred. Sections 23343 also, notably, provides that "[i]f the proposed county is created, all expenses of the commission…shall be borne by the new county, or, if the proposed county is not created, by each affected county, in equal shares."[21]
- Sections 23350-23374 provide for an election to be held to determine whether to form the county.[22]
- Section 23374, in particular, provides that the costs of the election "shall be paid by the principal county, if the creation of the proposed county is defeated, or by the proposed county if it is created pursuant to this chapter."[23]

After the original enactment of the County Formation Law in 1974, the Legislature enacted several substantive amendments, which are analyzed to determine whether they mandate new requirements and result in costs mandated by the state. These post-1975 amendments include:

- Section 23331 was amended by Statutes 1975, chapter 1247, to provide that the Governor must appoint the members of a review commission within 120 days after receipt of a certified petition.[24]

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[16] Government Code section 23335 (Stats. 1974, ch. 1392 § 2).

[17] Government Code section 23336 (Stats. 1974, ch. 1392 § 2).

[18] Government Code section 23339 (Stats. 1974, ch. 1392 § 2).

[19] Government Code section 23340 (Stats. 1974, ch. 1392 § 2)

[20] Government Code section 23341 (Stats. 1974, ch. 1392 § 2).

[21] Government Code section 23343 (Stats. 1974, ch. 1392 § 2).

[22] Government Code sections 23350-23374 (Stats. 1974, ch. 1392 § 2).

[23] Government Code section 23374 (Stats. 1974, ch. 1392 § 2).

[24] Government Code section 23331 (as amended, Stats. 1975, ch. 1247).

- Section 23341 was amended by Statutes 1975, chapter 1247, to provide that a review commission may vote to extend its term of 180 days by up to 180 additional days, upon approval by the Governor.[25]

- Section 23344, added in 1975, provides that the commission may borrow money for operating expenses, and that the loan must be repaid within one year of the election on the county formation issue.[26]

- Section 23340.5, added in 1978, provides that the commission may appoint counsel and fix compensation.[27]

- Sections 23301, 23324, 23332-23334, 23336-23338, 23350-23352, 23354-23355, 23359, 23363, 23368-23369, and 23373 were amended, and sections 23374.1 through 23374.19 were added, in Statutes 1979, chapter 370, in order to bifurcate the election process, as discussed below, to first determine whether a new county shall be formed at an initial required election, and later determine the county seat of the approved county and the officials to be elected to positions in the approved county at a subsequent election, contingent upon the result of the first.[28]

- Section 23332 was amended again by Statutes 1984, chapter 226, to provide that a review commission's report and determinations must include, when dividing the proposed county into five supervisorial districts, "The boundaries of the districts shall be established in a manner which results in a population in each district which is as equal as possible to the population in each of the other districts within the county."[29]

- Finally, section 23332 was amended again by Statutes 1985, chapter 702, to provide that a review commission's determinations must include

  (h) Which county offices shall be filled by election at the subsequent election of officials for an approved county conducted pursuant to Article 4.5 (commencing with Section 23374.1), and which of the offices shall be filled by appointments made by the board of supervisors of the approved county. At a minimum, 'the county offices to be filled by election shall be those which by law, are required to be filled by election.

  ¶ …¶

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[25] Government Code section 23341 (as amended, Stats. 1975, ch. 1247).

[26] Government Code section 23344 (added, Stats. 1975, ch. 1247).

[27] Government Code section 23340.5 (added, Stats. 1978, ch. 465).

[28] Statutes 1978, chapter 465.

[29] Government Code section 23332(f) (Stats. 1984, ch. 226).

(k) The appropriations limit for the proposed county in accordance with Section 4 of Article XIII B of the California Constitution.[30]

A number of other minor, largely technical amendments made to section 23300 et seq. are mentioned briefly below.[31]

III. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant alleges that the test claim statutes and alleged executive order constitute a reimbursable state-mandated program. Claimant alleges that the county was mandated by the state to incur costs in connection with the statutes and the executive order. As explained below, claimant identifies $996,007 in actual costs of the county formation process incurred June 2006, pursuant to the defeat of the county formation ballot measure. Claimant notes that these costs accrued during a period spanning fiscal years 2002-2003 through 2005-2006, but that the costs were "incurred," for the purposes of Government Code section 17551, after the June 2006 election. Claimant also estimates $24,680 in interest, due in June 2007, on the $400,000 loan provided by the SCO to the Mission County Formation Review Commission. There are no further costs identified by the claimant going forward, and no statewide cost estimate is applicable to these facts; only the county incurred costs, and no other entity will incur currently foreseeable costs pursuant to the test claim statute.[32]

Claimant requests reimbursement for the following:

(1) Staffing and administrative costs *of the review commission*, including fees for legal counsel and salaries and benefits of the commission staff. These costs are alleged to include $340,982 for staffing and $161,782 for other administrative costs.

(2) Fiscal and Indebtedness studies of the Final Report, requiring "countywide collaboration of all departments to understand and calculate service level delivery by geographic location matched to associated revenues and costs for those services." These costs are alleged to total $328,538.

(3) Indirect costs, including 10% of salaries of department heads and other staff. These costs are alleged to amount to $43,606.

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[30] Government Code section 23332(h);(k) (Stats. 1985, ch. 702).

[31] E.g., Statutes 1994, chapter 923 (SB 1546) [amended sections 23353, 23359, and 23365 replacing all references to the "clerk" of the affected county with "elections officer"]; Statutes 1997, chapter 164 [added article 3.5 to chapter 3 of Division 1 of title 3 of the Government Code, consisting of sections 23345 through 23348, addressing a specific county division review commission for Los Angeles County, and are not applicable to this test claim].

[32] Exhibit A, Test Claim at p. 4.

(4) Election costs totaling $121,099.[33]

Claimant relies on section 3 of Statutes 1974, Chapter 1392, alleging that the county should be reimbursed "because the Legislature clearly stated when it enacted the County Formation Law that there are state-mandated local costs that require reimbursement." The Legislature stated in its enactment that "there are state-mandated local costs in this act in 1975 and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code."[34]

Claimant further alleges that the formation process is a "new program," triggered by the 2004 executive order by Governor Schwarzenegger. Alternatively, claimant alleges that the duties performed by the county and the Formation Review Commission constitute "a higher level of service of an existing program."

Claimant also asserts that "the State should approve the subvention of funds for public policy reasons." Claimant alleges that the state mandated the activities and costs incurred "to support the public's participation in determining the form of county government that would best serve them." Claimant alleges that these are "unusual costs imposed on the County by the State to provide services to the public, in an amount that is substantial for the County to absorb."

The claimant states that no funding for this program was provided; aside from the loan from SCO, all costs of the county formation process were absorbed by the county's general purpose funds.[35]

In rebuttal comments submitted in response to the draft staff analysis, the claimant argues that case law conclusively establishes that the County Formation Law is a reimbursable state-mandated program, and that the repeal of former Revenue and Taxation code provisions, and the enactment of Government Code section 17500 et seq. do not preclude reimbursement. The claimant also argues that the Governor's 2004 press release implements the County Formation Law as it existed in 2004, irrespective of any defect in the claimant's pleadings. The claimant further argues that its test claim filing complied with the requirements by attaching copies of the applicable code sections that were amended by the Legislature after January 1, 1975, and providing sufficient information in its narrative to constitute notice of the statutes pled. And finally the claimant reiterates the position asserted in the test claim filing and the rebuttal comments submitted in response to DOF's comments on the test claim: that the test claim statutes and the Governor's executive order impose reimbursable state-mandated costs on the county.[36]

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[33] Exhibit A, Test Claim at p. 3.

[34] Section 3 of Statutes 1974, chapter 1392.

[35] Exhibit A, Test Claim pp. 4-6.

[36] Exhibit E, Claimant Comments on Draft Staff Analysis.

B. Department of Finance's Position

DOF submitted written comments on December 6, 2006, in which DOF asserts that the activities involved in the test claim are not reimbursable on the following grounds:

- The 1974 statutes alleged predate the subvention requirement of article XIII B, section 6. Any costs incurred in complying with those statutes are not reimbursable. DOF notes that the Governor's appointment of the Mission County Review Commission occurred in May 2004, but that the statute authorizing those appointments was enacted prior to January 1, 1975.
- The Mission County Review Commission is not an eligible claimant under article XIII B, section 6 and applicable provisions of the Government Code.
- Interest owing on the loan received by the review commission is not reimbursable because the statutes authorize a review commission to request a loan from the state, but do not require it to do so.
- The test claim "may have been filed after the statute of limitations pursuant to Government Code section 17551(c)." DOF notes that section 17551 requires that a test claim be filed not later than 12 months of the effective date of the statute or 12 months of first incurring costs, whichever is later. DOF notes that the test claim alleges costs from May 10, 2004 to June 30, 2006, "which extends beyond the 12 month filing period."[37]

DOF submitted written comments on the draft staff analysis and proposed statement of decision on January 17, 2013, in which DOF expressed "no concerns with the Commission's draft staff analysis." DOF stated that it "concurs with the Commission's recommendation to deny the test claim."[38]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.

[37] Exhibit B, Department of Finance Comments, pp. 1-2.

[38] Exhibit D, DOF Comments on Draft Staff Analysis/Proposed Statement of Decision.

(3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[39] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[40] However section 6 is limited: by its terms it *authorizes* the Legislature to provide for, but does not *require*, reimbursement of costs incurred pursuant to statutes enacted prior to 1975.[41]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[42]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[43]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[44]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs,

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[39] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[40] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[41] See *County of Contra Costa v. State of California* (Cal. Ct. App. 3d Dist. 1986) 177 Cal.App.3d 62 (Fn1) [citing *County of Los Angeles v. State* (1984) 153 Cal.App.3d 568, 573, (Legislature's decision to make reimbursable "certain specified statutes enacted after January 1, 1973 [but before January 1, 1975]…constituted the exercise of the Legislative discretion authorized by article XIII B, section 6, subdivision (c), of the California Constitution") internal quotations omitted].

[42] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[43] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.)

[44] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[45]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[46] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[47] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[48]

A. Jurisdiction Issues

(1) Although the test claim filing did not meet the specific pleading requirements of Government Code section 17553 and section 1183 of the Commission's regulations, the claimant's narrative and attachments are sufficient to satisfy notice pleading requirements, and to provide sufficient notice of the statutes and requirements for which reimbursement is sought.

The test claim filing form submitted by Santa Barbara County cites the following under "test claim statutes or executive orders cited:"

A) California Government Code Sections 23300-23397, effective January 1, 1975.

B) Section 3 of Stats. 1974, c. 1392, p. 3039 (excerpt attached).

C) Press Released dated May 10, 2004 from Governor Schwarzenegger appointing members of the Mission County Formation Review Commission.

In comments filed on the test claim, DOF recommended that the Commission deny the test claim because "[s]ections 23300 through 23397 of the Government Code were enacted prior to January 1, 1975, with minor amendments in subsequent years." DOF continued: "[t]he Governor's appointments of the County Commission members in May 2004 implemented those Government Code Sections for Santa Barbara County but the appointments were made pursuant to a statute enacted prior to January 1, 1975." DOF concluded that "[a]ccordingly, a subvention of funds is not required."[49]

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[45] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[46] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

[47] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[48] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose*, *supra*].

[49] Exhibit B, DOF Comments on Test Claim.

The claimant responded to DOF's comments in rebuttal comments, arguing that while article XIII B, section 6 does not require reimbursement for statutes enacted prior to January 1, 1975, section 6 does provide that the Legislature "may, but need not provide a subvention of funds for legislative mandates enacted prior to January 1, 1975," and that "the Commission is not barred from approving the test claim because of the date of enactment of the applicable statute."[50] The claimant also stressed again, in its rebuttal comments, that section 3 of Statutes 1974, chapter 1392 provided that "there are state-mandated local costs in this act in 1975 and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code." The claimant argued that this expression of the Legislature at the time the County Formation Law was enacted should control. And the claimant argued that the Governor's 2004 executive order "mandated either a new program or higher level of service of an existing program."

At the time this test claim was filed, Government Code section 17553 expressly stated that a test claim must include "[a] written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate."[51] And, the test claim was required to be supported with copies of "[t]he test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate."[52] Furthermore, section 1183(d) of the Commission's regulations requires that test claims be filed on a form developed by the executive director and contain all of the elements and supplemental documents required by the form and statute. Claimant did, in fact, file the claim on the form developed by the executive director, which includes filing instructions on the test claim cover page in Box 4 which are relevant here. The instructions for Box 4 state "Please identify all code sections, statutes, bill numbers…that impose the alleged mandate (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 2901])." Likewise Government Code section 17553 directs the claimant to identify in the written narrative the specific sections of statutes or executive orders alleged to impose a mandate, and to support the written narrative with copies of "the test claim *statute that includes the bill number* alleged to impose or impact a mandate."[53]

The claimant did not reference "specific sections of *statutes*" enacted after 1975, but instead referenced, both on the cover page of the test claim filing, and throughout the narrative, the *code sections* that constitute the County Formation Law. Furthermore, for Box 4 on the test claim filing form, the code sections are cited as "Government Code Sections 23300-23397, effective January 1, 1975," and the only statute and chapter cited is Statutes 1974, chapter 1359, which, as discussed below, is not eligible for reimbursement. And, rather than attaching copies of the statutes and chapters constituting the pertinent amendments to the County Formation Law, the claimant attached an excerpt of Government Code section 23300 et seq., without any effective

[50] Exhibit C, Claimant's Rebuttal Comments, at p. 1.

[51] Government Code section 17553(b)(1) (As amended by Stats. 2004, ch. 890 (AB 2856)).

[52] Government Code section 17553(b)(3)(A) (As amended by Stats. 2004, ch. 890 (AB 2856)).

[53] Exhibit A, Test Claim Filing, Cover Page.

dates, bill numbers, or any other information, in an attempt to provide notice of the test claim *statutes* being pled.

Based on the arguments submitted by DOF and the claimants, and the test claim filing including the form and attachments submitted, Commission staff, in the draft staff analysis, presumed that the claimant had pled only the statutes and chapters enacted in 1974. The draft staff analysis concluded that the Legislature "may," but had not, provided for reimbursement of statutes enacted prior to January 1, 1975. Staff relied upon Government Code section 17514, which provides that "costs mandated by the state" are those costs incurred on or after January 1, 1980, as a result of statutes enacted on or after January 1, 1975. Furthermore, the date of enactment, not the effective date, is dispositive, for purposes of article XIII B, section 6, and Government Code section 17514.[54] The draft staff analysis declined to take jurisdiction of any subsequent amendments to the test claim statutes, which were not properly pled, in a manner consistent with the Government Code and the Commission's regulations.

The test claim filing is not clear and, with respect to the post-1975 statutes, does not comply with the specific filing requirements in Government Code section 17553 and section 1183(d) of the Commission's regulations. However, the California Supreme Court has held that "[p]leadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears."[55] Here, as discussed above, the test claim, read as a whole, and given the meaning derived from the context of the narrative and the attached code sections, and claimant's comments on the draft, can be interpreted to implicate many of the later-enacted amendments to the County Formation Law. The claimant discussed certain alleged activities and costs in the narrative, such as the loan of operating funds from the Controller, authorized by section 23344 (added in Statutes 1975, chapter 1247), and the extension of the review commission's term by an additional 120 days, authorized by section 23341 (amended by Statutes 1975, chapter 1247). These activities cannot be found in Statutes 1974, chapter 1359; thus their discussion raises the specter of reimbursement for some activities and costs added after 1974.[56] And it can be gleaned, through extensive comparative examination of the amendments to the County Formation Law, that the undated code sections that the claimant printed and attached to the test claim filing are a "snapshot" of Government Code section 23300 et seq., as those sections existed between 2002 and 2004. For example, Government Code section 23332 was amended in Statutes 1985, chapter 702 to provide that the review commission must determine an appropriations limit for the new county, which the attached excerpt of the code reflects. Additionally, Government Code section 23396 was amended in Statutes 2002, chapter 784, and that amended text is included in the claimant's attachment. Finally, Government Code section 23344 was amended in 2004 (Stats. 2004, ch. 227 (SB 1102, effective August 16, 2004)) to provide that a review commission could seek a

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[54] *County of Orange v. Flournoy* (Cal. Ct. App. 3d Dist. 1974) 42 Cal.App.3d 908, 912-913.

[55] *Speegle v. Board of Fire Underwriters of the Pacific* (1946) 29 Cal.2d 34, at p. 42.

[56] See e.g., Exhibit A, Test Claim Filing, at p. 2.

loan of up to $400,000 for operating expenses; but the version of section 23344 attached to this test claim filing indicates a limit of $100,000 for the same loan, indicating that the excerpted code sections represent the law prior to August 16, 2004.

Accordingly, the Commission has jurisdiction to determine whether the County Formation Law, as added and amended by statutes enacted before the test claim filing (from 1974 to 2005) constitutes a reimbursable state-mandated program.

(2) The test claim was timely filed.

Subdivision (c) of section 17551 provides, in pertinent part:

> Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.[57]

Section 1183(c) of the Commission's regulations defines "within 12 months" to mean "by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."[58] DOF has argued, in its comments, that the test claim "may have been filed after the statute of limitations pursuant to Government Code section 17551(c)."[59]

This test claim was filed October 13, 2006. Based on the filing date of the test claim, any costs incurred before July 1, 2005 would fall outside the 12 month statute of limitations as provided in sections 17551(c) and 1183(c).[60] DOF asserts that the costs claimed for reimbursement were incurred between May 10, 2004 to June 30, 2006, the earliest of which would extend beyond the 12 month filing period and beyond the statute of limitations.[61]

In this test claim, there are costs that would have been incurred by the county under the test claim statutes before July 1, 2005, but are not pled in the test claim. For example, Statutes 1979, chapter 370 substantially amended section 23324, imposing new requirements upon the county clerk of the principal county to publish the notice of intention to form a new county, to specify the date of a public hearing on the issue, and to act as a moderator at the public hearing. According to the test claim, petitions for the creation of Mission County began circulating in April 2003. The notice of intention therefore must have been filed, if the statute was adhered to, prior to the circulating of petitions, and the selection of an appropriate place for a public hearing and publishing of the notice must have also followed soon after, based on the plain language of the statute. And although the test claim is silent, the public hearing that the county clerk was

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[57] Government Code section 17551(c) (Statutes 1984, chapter 1459 § 1).

[58] Code of Regulations, Title 2, section 1183(c) (Register 2010, No. 44).

[59] Exhibit B, Department of Finance Comments, pp. 1-2.

[60] Government Code section 17551(c) (Statutes 1984, chapter 1459 § 1).

[61] Exhibit B, DOF Comments, p. 2. See also Code of Regulations, Title 2, section 1183(c).

expected to moderate should have taken place within 30 to 60 days of the filing of the notice of intention (which must have occurred, at the latest, in April 2003).

Therefore, all of the activities imposed upon the county clerk by the 1979 amendment to section 23324, as described above, must have occurred between April 2003 and the end of the month of June, placing those activities and costs in fiscal year 2002-2003. The test claim was filed October 13, 2006. According to the Government Code section 17551 and the Commission's regulations, costs incurred prior to the 2005-2006 fiscal year are therefore not eligible for reimbursement.

Similarly, all activities required by sections 23320 through 23330, as those sections are added or amended by Statutes 1974, chapter 1392; Statutes 1977, chapter 1175; and Statutes 1979, chapter 370, are denied, because those activities, occurring before the creation of a review commission, and required directly of the county, would have occurred prior to July 1, 2005. Based on the filing date of the test claim, any costs incurred before July 1, 2005 fall outside the 12 month statute of limitations as provided in sections 17551(c) and 1183(c), and are not eligible for reimbursement.

The remaining costs claimed, however, have been filed within the statute of limitations and were incurred after the review commission was appointed by the Governor and after the election for the formation of the new proposed county. The claimant seeks reimbursement for staffing and administrative costs of the Mission County Formation Review Commission following the election defeating the proposal; costs of completing the fiscal and indebtedness studies related to the proposed county; indirect costs; and election costs. The claimant argues, in its rebuttal, that the county did not "incur" these costs, for purposes of reimbursement, until the ballot measure was defeated in June 2006, leaving the county liable for the costs of the Review Commission, and the election, pursuant to Government Code sections 23343 and 23374.[62]

The claimant's view of events is consistent with the plain language of the statutes: the Mission County Formation Review Commission no longer exists, and any financial liabilities fell to the county by operation of sections 23343 and 23374, as enacted by Statutes 1974, chapter 1392,[63] after the election of June 2006. Therefore reimbursement for the costs claimed by the county as a result of the failed ballot measure would not be precluded based upon an October 2006 test claim filing.

Because the county was not made responsible for the costs and liabilities of the Mission County Formation Review Commission and the election activities performed by the county until after the

[62] Exhibit C, Claimant's Rebuttal to DOF Comments, p. 2.

[63] Government Code section 23343 (Stats. 1974, ch. 1392) ["If the proposed county is created, all expenses of the commission, together with the reasonable costs of stationery, postage, and incidental expenses shall be borne by the new county, or, if the proposed county is not created, by each affected county, in equal shares."]; Government Code section 23374 (Stats. 1974, ch. 1392) ["All costs of an election shall be paid by the principal county, if the creation of the proposed county is defeated, or by the proposed county if it is created pursuant to this chapter."].

June 2006 ballot measure failed, the Commission finds that section 17551(c) does not bar the test claim. The test claim does not allege any of the costs discussed above that might be barred under section 17551(c); all costs specifically alleged were incurred by the county in June 2006, and the test claim was filed in October that same year, well within the 12 month period for filing.

B. The County Formation Law, as Enacted in 1974, Does Not Constitute a Reimbursable State-Mandated Program Within the Meaning Of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.

The claimant requests reimbursement for Government Code sections 23300-23397, as added in 1974, as triggered by the Governor's 2004 order establishing the Mission County Formation Review Commission. DOF has argued that because the County Formation Law was enacted prior to January 1, 1975, the executive order implementing the County Formation Law (and thereby creating the Mission County Formation Review Commission), cannot be subject to reimbursement. The claimant has argued in rebuttal that the Commission is not barred from approving the test claim on the 1974 statute: article XIII B, section 6 provides that the Legislature "may, but need not" provide for reimbursement of costs incurred pursuant to pre-1975 statutes. The claimant further urges that the focus should be the 2004 executive order, notwithstanding the fact that the executive order implements a pre-1975 statute, not normally subject to subvention.[64] The claimant also argues, in comments submitted in response to the draft staff analysis, that the courts of appeal have conclusively established that the County Formation Law constitutes a reimbursable mandate.

The bulk of the County Formation Law, Government Code section 23300 et seq., was enacted in September of 1974, and made effective January 1, 1975.[65] At that time, former Revenue and Taxation Code section 2231 provided, in pertinent part:

> The state shall pay to each local agency and each school district an amount to reimburse the local agency or the school district for *the full costs, which are mandated by acts enacted after January 1, 1973,* of any new state-mandated program or any increased level of service of an existing mandated program.[66]

'Increased level of service' was in turn defined to mean "any requirement mandated by state law or executive regulation after January 1, 1973, which makes necessary expanded or additional costs to a local agency or a school district." In accordance with this broad reimbursement language, the Legislature declared, in section 3 of the 1974 County Formation Law, that "there are state-mandated local costs in this act in 1975-1976 and subsequent years that require

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[64] Exhibit C, Claimant's Rebuttal to DOF Comments, pp. 1-2.

[65] Government Code section 23300 et seq. (Statutes 1974, chapter 1392 § 1 [filed with Secretary of State September 26, 1974]).

[66] Former Revenue and Taxation Code section 2231 (Stats. 1973, ch. 358) [emphasis added].

reimbursement under Section 2231 of the Revenue and Taxation Code which can be handled in the regular budget process."[67]

In 1979, the voters enacted article XIII B, section 6, providing for a constitutional requirement of reimbursement to local government for state-mandated increased costs.[68] For a time, the constitutional requirement and the statutory requirement under the Revenue and Taxation Code existed concurrently.[69] The Revenue and Taxation Code sections have since been repealed, leaving only the reimbursement requirement of article XIII B, section 6 and the Government Code. Article XIII B, section 6 provides that "the Legislature *may, but need not*, provide a subvention of funds for… legislative mandates enacted prior to January 1, 1975, *or executive orders or regulations initially implementing* legislation enacted prior to January 1, 1975. The date of *enactment* of a statute, not the *effective date*, is dispositive, for purposes of state subvention requirements.[70]

Between the adoption of article XIII B, section 6 in 1979, and the repeal of the Revenue and Taxation Code provisions in 1985, former Revenue and Taxation Code sections 2207 and 2231 continued to provide, for a time, reimbursement for statutes enacted after January 1, 1973. In *County of Contra Costa v. State of California*, the court of appeal explained the extension of a statutory reimbursement requirement as follows:

> After the adoption of article XIII B, section 6, the Legislature in 1980 amended Revenue and Taxation Code sections 2207 and 2231, and expanded the definition of "costs mandated by the State" by including certain specified statutes enacted after January 1, 1973. (Statutes 1980, Chapter 1256 § 5.) In *County of Los Angeles v. State of California* (1984) 153 Cal.App.3d 568, the court concluded that "this reaffimance constituted the exercise of the *Legislative discretion authorized by article XIII B, section 6, subdivision (c)*, of the California Constitution [to provide subvention of funds for mandates enacted prior to January 1, 1975]."

Thus the court in *Contra Costa* observed that the *extension of a statutory reimbursement requirement* to mandates imposed by statutes enacted after January 1, 1973 was within the Legislature's discretion, and not inconsistent with article XIII B, section 6, which provides that

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[67] Statutes 1974, chapter 1392, section 3.

[68] California Constitution, Article XIII B, section 6, Adopted November 6, 1979.

[69] Government Code section 17500 et seq. was enacted in Statutes 1984, chapter 1459, with the intention to "create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs." Revenue and Taxation Code sections 2231 and 2231.5 were repealed by Statutes 1986, chapter 879. Revenue and Taxation Code sections 2207 and 2207.5 were repealed by Statutes 1989, chapter 589.

[70] *County of Orange v. Flournoy* (Cal. Ct. App. 3d Dist. 1974) 42 Cal.App.3d 908, 912-913.

the Legislature "may, but need not" extend reimbursement to statutes enacted prior to January 1, 1975.[71]

In *Los Angeles Unified School District v. State of California* the court recognized that, pursuant to the repeal of the relevant Revenue and Taxation Code provisions, the Government Code and article XIII B, section 6 now control reimbursement. The district's original claim for reimbursement in that case relied on former Revenue and Taxation Code provisions, but when those statutory provisions were repealed before the matter reached the Second District on appeal, the court heard the case on the alternative ground of reimbursement under article XIII B, section 6. The court found that article XIII B, section 6 "*does not require reimbursement* for expenditures pursuant to a statute enacted [prior to January 1,1975]," and that due to the replacement of former Revenue and Taxation Code provisions with Government Code section 17500 et seq., "there is no present legislative intent to provide subvention as to pre-1975 statutes."[72] Thus, under the analysis of *County of Contra Costa* and *Los Angeles Unified School District*, the current text of Government Code section 17514 demonstrates a choice by the Legislature, within its discretion, that it will not provide subvention for statutes enacted prior to January 1, 1975, and will not permit the Commission to approve reimbursement for pre-1975 statutes.[73]

The claimant argues, in comments submitted in response to the draft staff analysis, that reliance on *Los Angeles Unified*, *supra*, is misplaced.[74] The claimant asserts that the following language is applicable to this case:

> [W]hen a right of action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right *unless the right has been reduced to final judgment* or unless the repealing statute contains a saving clause protecting the right in a pending litigation.[75]

The claimant argues that the county's right to reimbursement under the County Formation Law has been reduced to final judgment by the court of appeal, and that the judgment of the court conclusively establishes the right to reimbursement, irrespective of the repeal of former Revenue and Taxation Code sections 2207 and 2231. The claimant cites *County of Los Angeles v. State of California* (1984) 153 Cal.App.3d 568, in which the court stated:

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[71] *County of Contra Costa v. State of California* (Cal. Ct. App. 3d Dist. 1986) 177 Cal.App.3d 62, 67 (Fn 1).

[72] *Los Angeles Unified School District v. State of California* (Cal. Ct. App. 2d Dist. 1991) 229 Cal.App.3d 552, at pp. 554 (Fn 2); 555-557.

[73] See *County of Contra Costa v. State of California, supra*, at p. 67 (Fn 1).

[74] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 2.

[75] *Los Angeles Unified School District v. State of California* (Cal. Ct. App. 2d Dist. 1991) 229 Cal.App.3d 552, at p. 557.

> Statutes of 1974, chapter 1392, (Gov. Code § 23300 et seq.) established procedures for the creation of new counties. Those procedures imposed state-mandated local costs for 1975-1976 and succeeding years. '...[T]here are state-mandated local costs in this act in 1975-76 and subsequent years that require reimbursement under Section 2231 of the Revenue and Taxation Code which can be handled in the regular budget process.' (Stats. 1974, ch. 1392, § 3, p. 3039.)[76]

The claimant argues that the Commission should here be required to approve reimbursement under the Government Code and article XIII B, section 6, because a court of competent jurisdiction has previously found the County Formation Law to impose a reimbursable state mandate. The claimant argues:

> The issue of whether the County Formation Law is a reimbursable mandate was actually and necessarily litigated. We believe the decision in the above-cited *County of Los Angeles* case that the County Formation Law is a reimbursable state mandate should be given preclusive effect under the res judicata and collateral estoppel doctrines.[77]

The related doctrines of res judicata and collateral estoppel, as cited by the claimant, may apply to bind a later court, or in this context, the Commission, if certain elements are met, and injustice would not result. The California Supreme Court has described the elements of res judicata and collateral estoppel as follows:

> As generally understood, the doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy. The doctrine has a double aspect. In its primary aspect, commonly known as claim preclusion, it operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. In its secondary aspect, commonly known as collateral estoppel, the prior judgment ... operates in a second suit ... based on a different cause of action ... as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.[78]

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[76] *County of Los Angeles v. State of California* (Cal. Ct. App. 2d Dist. 1984) 153 Cal.App.3d 568, at p. 570.

[77] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 2.

[78] *Boeken v. Phillip Morris USA* (2010) 48 Cal.4th 788, at p. 797 [internal quotations and citations omitted] [Citing *People v. Barragan* (2004) 32 Cal.4th 236, 252–253].

Here, the claimant is seeking to apply the "secondary aspect," as discussed above: in the second action (here, a test claim), based on a new or different cause of action (a new attempt to divide an existing county by the process described in the law), the holding of the prior action is proffered to conclusively establish a disputed issue of fact or law.[79] As stated by the California Supreme Court, the claim or issue must be identical to the issue raised in the prior action, the prior action must result in a judgment on the merits, and the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, in the prior action.

In this case, the claimant argues, in its comments, that it "was a party to a final appellate court judgment on the merits." The county continues: "[a]s a party, the County of Santa Barbara previously prevailed against the State in a final appellate court judgment finding the County Formation Law to be a reimbursable state mandate."[80] The claimant was named as a party to the prior action, and "the courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government."[81] Therefore, the element of privity is established, with respect to both the claimant, and the state.

Additionally, the prior action can be seen as a judgment on the merits: the court in *County of Los Angeles* considered whether the statutory right of reimbursement conflicted with article XIII B, section 6, as alleged by the state and determined that the County Formation Law (cited as "chapter 1392") constituted a reimbursable state mandate under provisions of the Revenue and Taxation Code.[82] The claimant concludes, in its comments on the draft staff analysis, that "[t]he issue of whether the County Formation Law is a reimbursable mandate was actually and necessarily litigated."[83]

But collateral estoppel is not available where the issue of law in the later action is not identical to that raised in the prior action. Here, the holding of the prior action, *County of Los Angeles*, *supra*, relies on former Revenue and Taxation Code sections, which, as discussed above, have been repealed. Section 2207 of the former Revenue and Taxation Code, at the time *County of Los Angeles* was heard, defined "costs mandated by the state" much more broadly than the current Government Code section 17514. Former Section 2207 provided:

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[79] The primary aspect, claim preclusion, is not applicable to these facts, because the current test claim relies on a new cause of action, i.e., new costs incurred under a test claim statute.

[80] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 2.

[81] *Carmel Valley Fire Protection Dist. v. State of California* (Cal. Ct. App. 2d Dist. 1987) 190 Cal.App.3d 521, at p. 535 [citing *Lerner v. Los Angeles City Board of Education* (1963) 59 Cal.2d 382, at p. 398].

[82] *County of Los Angeles v. State of California* (Cal. Ct. App. 2d Dist. 1984) 153 Cal.App.3d 568, at pp. 571-574 [discussion of amendment and re-enactment of definition of "costs mandated by the state" in Revenue and Taxation Code section 2207, and extending statutory right of reimbursement to statutes enacted after January 1, 1973].

[83] Exhibit E, Claimant Comments on Draft Staff Analysis, at p. 2.

"Costs mandated by the state" means any increased costs which a local agency is required to incur as a result of the following:

(a) Any law enacted after January 1, 1973, which mandates a new program or an increased level of service of an existing program.

(b) Any executive order issued after January 1, 1973, which mandates a new program.

(c) Any executive order issued after January 1, 1973, which (i) implements or interprets a state statute and (ii), by such implementation or interpretation, increases program levels above the levels required prior to January 1, 1973.

(d) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a federal statute or regulation and, by such implementation or interpretation, increases program or service levels above the levels required by such federal statute or regulation.

(e) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which implements or interprets a statute or amendment adopted or enacted pursuant to the approval of a statewide ballot measure by the voters and, by such implementation or interpretation, increases program or service levels above the levels required by such ballot measure.

(f) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which (i) removes an option previously available to local agencies and thereby increases program or service levels or (ii) prohibits a specific activity which results in the local agencies using a more costly alternative to provide a mandated program or service.

(g) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which requires that an existing program or service be provided in a shorter time period and thereby increases the costs of such program or service.

(h) Any statute enacted after January 1, 1973, or executive order issued after January 1, 1973, which adds new requirements to an existing optional program or service and thereby increases the cost of such program or service if the local agencies have no reasonable alternatives other than to continue the optional program.[84]

This test claim, by contrast, turns on the reimbursement requirements of article XIII B, section 6 and Government Code section 17514. Government Code section 17514, which superseded and replaced section 2207 of the Revenue and Taxation Code, provides, in its entirety:

> "Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute

[84] Former Revenue and Taxation Code section 2207 (Stats. 1980, ch. 1256).

enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

Government Code section 17514 conspicuously omits language in the definition provided by former Revenue and Taxation Code section 2207. Government Code section 17556 now addresses the fine distinction between a federal mandate and a state mandate; and between a voter-enacted ballot initiative and a state mandate, phrasing the distinction in prohibitive terms, rather than the opaque conditional language found in the above-cited provisions of section 2207. More significantly for this test claim, Government Code section 17514 clearly provides for reimbursement of an executive order *implementing any statute enacted on or after January 1, 1975*, while the former Revenue and Taxation Code provisions were interpreted to provide for reimbursement of an executive order issuing on or after January 1, 1973, irrespective of the date of the statute in question. Therefore, the issue of law in the present test claim is not identical to the issue in the prior action (*County of Los Angeles*, *supra*), and collateral estoppel does not conclusively establish a right to reimbursement.

Based on the foregoing, the Commission finds that reimbursement is not required for any activities or costs incurred by the county pursuant to the statutes enacted prior to January 1, 1975, consistent with article XIII B, section 6 and Government Code section 17514. The following code sections were enacted in Statutes 1974, chapter 1392:

- Government Code section 23300, which provides that new counties may be formed and created solely pursuant to the provisions of this chapter, was enacted in Statutes 1974, chapter 1392, and never amended. Section 23300, as enacted in Statutes 1974, chapter 1392, is therefore denied.
- Government Code sections 23320 through 23324, providing for the initiation of and the technical requirements of a new county formation petition, including the number of signatures required, and the time frame for collecting those signatures. Sections 23320 through 23324, as enacted in Statutes 1974, chapter 1392, are denied.
- Government Code sections 23325 through 23330, providing for receipt and review of a new county formation petition by the county clerk, were enacted in Statutes 1974, chapter 1392, and never amended. Sections 23325 through 23330, as enacted in Statutes 1974, chapter 1392, are therefore denied.
- Government Code sections 23331 through 23339, providing for the creation of a county formation review commission, and the appointment of members; providing that the commission shall determine ten economic, fiscal, and organizational criteria of the proposed county; providing the technical requirements of the review commission's meetings and public hearing(s); providing for exclusions of territory contiguous to the boundary of the proposed county by request of a property owner or any registered elector; and providing for subpoena power of the review commission. Sections 23331 through 23339, as enacted in Statutes 1974, chapter 1392, are denied.

- Government Code section 23340 was enacted in Statutes 1974, chapter 1392, to provide that all officers and employees of any affected county shall cooperate with, and perform any functions or produce any documents required by, a county formation review commission. Section 23340, as enacted in Statutes 1974, chapter 1392, is denied.
- Government Code section 23343, which provides that "[i]f the proposed county is created, all expenses of the commission, together with the reasonable costs of stationery postage, and incidental expenses shall be borne by the new county, or, if the proposed county is not created, by each affected county, in equal shares," was enacted in Statutes 1974, chapter 1392, and never amended. Section 23343 is therefore denied.
- Government Code section 23350, providing for the board of supervisors of each affected county to issue an order and proclamation and notice of election, to be held "the next established election date in the principal county not less than 74 days after receipt of the commission's determinations, for the purpose of determining whether the proposed county shall be created." Section 23350, as enacted in Statutes 1974, chapter 1392, is denied.
- Government Code sections 23351 through 23355, providing for the publication of the notice of election and its contents; and defining whom shall be eligible voters and what the ballots shall contain. Sections 23351 through 23355, as enacted in Statutes 1974, chapter 1392, are denied.
- Government Code sections 23357 through 23360, providing that the law governing the election shall be the general election laws of the state; providing for the selection of arguments to appear on the ballot; and providing for the ballot pamphlets and sample ballots to be mailed to qualified electors. Sections 23357 through 23359, as enacted in Statutes 1974, chapter 1392, are denied.
- Government Code sections 23361 through 23364, providing technical requirements of the election to be held. Sections 23361 through 23364, as enacted in Statutes 1974, chapter 1392, are denied.
- Government Code sections 23367 through 23369, providing for the duties of election officers; providing for a certified copy of the results of the canvass; and providing for a resolution of the county board of supervisors upon a vote in favor of the creation of the new county; and sections 23372, providing for filing of a resolution with the State Board of Equalization and the Secretary of State, and 23373, providing for a resolution upon the defeat of the new county. Sections 23367 through 23369, 23372 through 23373, as enacted in Statutes 1974, chapter 1392, are denied.
- Government Code section 23374, providing that the costs of an election shall be paid by the principal county if the proposed county is defeated, or by the proposed new county, if created, was enacted in Statutes 1974, chapter 1392, and never amended. Section 23374 is therefore denied.

- Government Code sections 23375 through 23386, providing for the transfer of services, indebtedness, and revenue collection from the affected counties to the new county, were enacted in Statutes 1974, chapter 1392, and never amended. Sections 23375 through 23386 are therefore denied.
- Government Code sections 23394, 23395, and 23397, addressing the organization of courts of the new county, if created, were enacted in Statutes 1974, chapter 1392, and never amended. Sections 23394, 23395, and 23397 are therefore denied.

C. Government Code Section 23300 Et Seq., as Amended After 1975, and the Governor's Press Release Dated May 10, 2004 Do Not Impose a Reimbursable State-Mandated Program.

The following analysis will address the activities and costs arising from statutes enacted on or after January 1, 1975.

(1) Amendments enacted by Statutes 1975, chapter 1247 do not impose any state-mandated programs upon local government.

Statutes 1975, chapter 1247 amended section 23331 to provide that the Governor must appoint the members of the review commission within 120 days following receipt of the petition certification. There are no requirements imposed upon local governments by this amendment.

Statutes 1975, chapter 1247 also amended section 23341 to provide that a review commission may be granted up to 180 additional days to complete its determinations and transmit its report to the affected counties, upon a majority vote of the commission and the approval of the Governor. The claimant does not identify the portion of its expenses attributable to the 120 day extension of the commission's term, but does include the letter requesting the Governor approve an extension, dated September 27, 2004. The commission members took office May 10, 2004, and their term would have expired November 10, 2004, but for a vote to extend the term until February 10, 2005. The letter states that the commission had made "significant progress to date," but that an extension of time was deemed necessary to complete the work required.[85] The review commission presented its report to the Santa Barbara County Board of Supervisors on March 15, 2005.[86] Some amount of the commission's expenses must be considered to have been incurred between the time the original 180 day term expired, and the date that the commission's report was submitted to the county. Because an extension of time was discretionary, rather than mandated by the state, any costs incurred during the extension cannot be considered state-mandated. The California Supreme Court has noted that:

> [A]s is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by

[85] Exhibit A, Test Claim Filing, Letter from the Mission County Review Commission to Governor Arnold Schwarzenegger, dated September 27, 2004.

[86] Exhibit X, Minutes of the Santa Barbara County Board of Supervisors, March 15, 2005.

> state law, but only those costs resulting from a *new program or an increased level of service imposed upon them by the state*.[87]

The key issue is whether the program or service is *imposed upon* the local government entity eligible to claim reimbursement under article XIII B, section 6, or is a program or service that the local government has the *discretion* to undertake. In *City of Merced v. State of California*, the city argued that it was subject to a reimbursable mandate when required by statute to compensate a business owner for the loss of business goodwill pursuant to exercising the power of eminent domain to take the underlying property. The Board of Control (predecessor to the Commission) determined that the requirements of the eminent domain statute imposed a reimbursable mandate, but the court of appeal concluded that the exercise of the eminent domain power was a discretionary act, and that therefore no activities were mandated.[88] In accord is *Department of Finance v. Commission on State Mandates* (*Kern*), in which a state statute required districts maintaining school site councils to comply with the state's open meetings laws, including preparing and posting an agenda in advance, and keeping council meetings open to the public. The court recognized that the notice and hearing requirements could be found to generate activities not previously required, but there was no mandate under the law to establish a school site council in the first instance, and therefore the activities and costs claimed were not mandated. The California Supreme Court reaffirmed *City of Merced*, and held that where activities alleged to constitute a mandate are conditional upon participation in another or an underlying voluntary or discretionary program, or upon the taking of discretionary action, there can be no finding of a mandate.[89]

The language of section 23341, as amended by Statutes 1975, chapter 1247, is clearly and indisputably discretionary: section 23341, as amended, provides as follows:

> The commission shall adopt a resolution making its determination and transmit its report in writing to the board of supervisors of each affected county, within 180 days of the date of notice and acceptance by the last appointed member and shall be signed and attested to by all the members of the commission. The commission *may be granted* up to 180 additional days to comply with the provisions of this section, *upon a majority vote* of the commission and the approval of the Governor.[90]

The language here states that the commission "may be granted" extra time. It does not provide for the commission's term to be extended involuntarily. There is no new program or higher level of service mandated by this amendment, and the remaining requirements are denied, as discussed above, because they pre-date the January 1, 1975 subvention requirement of article XIII B,

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[87] *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835 [emphasis added].

[88] *City of Merced v. State of California* (Cal. Ct. App. 5th Dist. 1984) 153 Cal.App.3d 777.

[89] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 743.

[90] Government Code Section 23341 (Stats. 1974, ch. 1392; Stats. 1975, ch. 1247).

section 6 and Government Code section 17514. Thus, section 23341, as amended by Statutes 1975, chapter 1247, does not impose a state-mandated program.

The same result obtains with respect to section 23344, added by Statutes 1975, chapter 1247, providing that a review commission *may borrow* funds for operating expenses. Section 23344, as added by Statutes 1975, chapter 1247, provides as follows:

> (a) The commission *may borrow* those moneys as may be necessary to meet its expenses until the costs of the commission have been determined pursuant to Section 23343.
>
> (b) As an alternative to the procedure authorized by subdivision (a), the Controller, upon appropriation by the Legislature from the General Fund, shall *loan those moneys as the commission shall determine necessary* to meet its expenses until the costs have been determined pursuant to Section 23343. The loan shall be at an interest rate equal to that of the Pooled Money Investment Fund at the time the loan is made.[91]

The claimant here seeks reimbursement for the interest owing on a $400,000 loan of operating funds, estimated in the test claim filing in the amount of $24,860.[92]

These activities were undertaken at the *discretion* of the Mission County Review Commission; they are not state-mandated activities, under the tests articulated in *City of Merced*, *supra*, and *Kern, supra*. Even if all other activities were found to be mandated by the state, and hence, reimbursable, reimbursement would not be required for the interest on the loan taken at the discretion of the review commission, or the portion of operating costs attributable to the period of time after the commission voted for an extension of its term.

The Commission finds that these statutes do not impose a state-mandated program within the meaning of article XIII B, section 6. Sections 23331 and 23341, as amended by Statutes 1975, chapter 1247; and 23344, as added by Statutes 1975, chapter 1247, are therefore denied.

(2) Amendments enacted by Statutes 1976, chapter 1143 do not impose any state-mandated programs upon local government.

Statutes 1976, chapter 1143 added section 23306.5 to the Government Code, which provides that "[n]otwithstanding the provisions of subdivision (c) of Section 23306, a county may be created from the territory of Nevada County provided that the territory which is proposed to be transferred from such county does not exceed 25 percent of the total territory of such county." The Commission finds that this amendment provides for an exemption from the minimum square mileage restriction of section 23306, but does not impose any state-mandated requirements upon

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[91] Government Code section 23344 (Stats. 1975, ch. 1247; Stats. 1978, ch. 465; Stats. 2004, ch. 227).

[92] Exhibit A, Test Claim, p. 4.

any local government. Section 23306.5, as amended by Statutes 1976, chapter 1143, is therefore denied.

(3) Amendments enacted by Statutes 1977, chapter 1175 do not impose any state-mandated programs upon local government.

Statutes 1977, chapter 1175 amended sections 23320 and 23321, addressing the requirements of a petition to initiate proceedings to determine whether to form a new county. Sections 23320 and 23321 provide requirements that must be satisfied by the proponents of a new county formation measure, and the amendments also address only the requirements that must be satisfied by those same proponents. The amended sections do not impose any requirements on local government. Statutes 1977, chapter 1175 also made a small technical change to section 23350, substituting "statewide primary or general election date" for "established election date in the principal county." The Commission finds that none of the amendments made by Statutes 1977, chapter 1175 impose state-mandated programs within the meaning of article XIII B, section 6. Sections 23320, 23321, and 23350, as amended by Statutes 1977, chapter 1175, are therefore denied.

(4) Amendments enacted by Statutes 1978, chapter 465 do not impose any state-mandated programs upon local government.

Statutes 1978, chapter 465 added section 23340.5, which provides:

> Anything in a county or city and county charter to the contrary notwithstanding, the commission, in lieu of using the county counsel of the affected county, *may appoint a counsel and fix and order paid such counsel's compensation* to provide legal assistance to the commission in the performance of any functions requested by the commission and necessary for the performance of its duties.[93]

The claimant includes in its "Cost Accumulation Report" $87,267 for "Legal counsel – Biering," and $31,708 for "Legal counsel – Stark."[94] Prior to the 1978 addition of this section, a review commission had no apparent authority to appoint counsel. However, as discussed above, where a cost is incurred based on discretionary action authorized by a statute, reimbursement is not required.[95] Here the amendment authorizes, but does not require, a review commission to appoint counsel and order compensation. The Commission finds that section 23340.5, as added by Statutes 1978, chapter 465, does not impose a state-mandated program, within the meaning of article XIII B, section 6.

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[93] Government Code section 23340.5 (Stats. 1978, ch. 465).

[94] Exhibit A, Test Claim, Mission County Formation Review Cost Accumulation Report.

[95] See *City of Merced v. State of California, supra* (Cal. Ct. App. 5th Dist. 1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates, supra* (*Kern*) (2003) 30 Cal.4th 727, 743.

Statutes 1978, chapter 465 also amended section 23344, addressing the borrowing of operating funds by a review commission. The amended section changed "Controller" to "State Controller," and provided for an additional $300,000 to be transferred from the General Fund to the County Formation Revolving Fund, which "may be expended for any obligation incurred by any commission at any time." This amendment does not impose any state-mandated requirements upon local government, and is therefore denied.

(5) Amendments enacted by Statutes 1979, chapter 370 do not impose any reimbursable state-mandated new programs or higher levels of service upon local government.

a. Non-substantive amendments that do not impose any new state-mandated requirements

Statutes 1979, chapter 370 amended section 23301 to add a definition of "approved county," and added section 23330.5, which prohibits a new petition regarding the same territory for five years after a petition is certified. These amendments and additions to the County Formation Law do not impose any requirements upon local government.

b. Costs incurred as a result of amendments to the responsibilities of a county formation review commission are not reimbursable because a review commission is not a claimant eligible for reimbursement under article XIII B, section 6 or Government Code section 17500 et seq.

Statutes 1979, chapter 370 amended sections 23332 through 23334, and 23336 through 23338. These sections address the responsibilities of a county formation review commission. Section 23332, as amended by Statutes 1979, chapter 370, clarifies that the review commission must determine the boundaries of the proposed county *pursuant to inclusions and exclusions of territory requested by property owners or registered electors*, and must determine the county officials to be elected at the election of such officials (rather than at the election on the county formation measure).[96] Section 23333, as amended, requires a review commission to consider projected revenues of the proposed county and each affected county. Section 23334 was amended to provide that the unfunded liability of a county retirement system should be considered a factor in calculating that county's indebtedness.[97] Section 23336 was amended to provide that, in addition to hearing protests and objections to the proposed county, the review commission shall also hear any support for the proposed county at the hearing. Section 23337 was amended to provide that at the hearing a review commission shall hear all support for the creation of the proposed county, and may grant or deny any request for exclusion from, or inclusion in, the proposed county. Section 23337.5 was amended to provide that an owner of real property contiguous to the boundary of the proposed county may make a written request for exclusion from, or inclusion in, the proposed county. Section 23338 provided that any registered elector of the territory may make a similar request. Prior to these amendments both sections

[96] Government Code section 23332(d) (as amended by Stats. 1979, ch. 370).

[97] Government Code section 23334 (as amended by Stats. 1979, ch. 370).

23337.5 and 23338 provided only for requests for real property or other territory to be excluded from the new county, and did not provide for a request for *inclusion* in the proposed county.[98]

But none of these requirements impose a state-mandated new program or higher level of service upon local government, because a county review commission is not an eligible claimant before the Commission, and because the county, ultimately responsible for the resulting costs, incurs liability pursuant to a statute enacted prior to January 1, 1975, and never amended. DOF noted this distinction in its initial comments on the test claim: "[t]he determinations required of the County Commission are not reimbursable to the claimant since the County Commission is not an eligible claimant subject to Article XIIIB, Section 6 of the California Constitution."

Courts have recognized the purpose of article XIII B, section 6 is "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[99] Reimbursement is required under article XIII B, section 6 only for school districts, and local agencies that are subject to the tax and spend limitations of articles XIII A and XIII B; and then only when the costs in question can be recovered solely from "proceeds of taxes," or general revenues controlled by the local agency.[100]

While a county formation review commission appears from the test claim statutes to have some degree of autonomy while in existence, it is equally clear that a formation review commission does not have statutory authority to independently raise its own tax revenues.[101] Because a county formation review commission, under the test claim statute, is neither a school district nor a local government subject to tax and spend limitations of articles XIII A and XIII B, DOF's assertion is correct, that the Mission County Formation Review Commission is not an eligible claimant.[102]

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[98] Government Code sections 23336-23338 (as amended by Stats. 1979, ch. 370).

[99] *County of San Diego, supra*, 15 Cal. 4th 68, 81 (citing *Lucia Mar, supra*, 44 Cal.3d 830). See also, *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980-981, 985 (*Redevelopment Agency*); and C*ity of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 280-281 (*City of El Monte*).

[100] *County of Fresno, supra*, 53 Cal.3d 482, 486-487; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (Cal. Ct. App. 4th Dist. 1997) 55 Cal.App.4th 976, 986.

[101] See Government Code sections 23339 (Statutes 1974, chapter 1392 § 2) [commission having subpoena power]; 23343 (Statutes 1974, chapter 1392 § 2) ["all expenses of the commission…shall be borne by the new county, or, if the proposed county is not created, by each affected county, in equal shares"]; 23344 (Stats. 1975, ch. 1247; Stats. 1978, ch. 465; Stats. 2004, ch. 227) [authority to borrow money for operating costs].

[102]Exhibit B, Department of Finance Comments, p. 2.

Even though the county is now the claimant before the Commission, the costs shifted from the Mission County Review Commission remain ineligible for reimbursement, for two reasons: first, the cost-shifting that leaves the county liable for the review commission's expenses and debt is accomplished by way of section 23343, which was enacted prior to January 1, 1975 in Statutes 1974, chapter 1392, and never amended, and is therefore itself outside the constitutional subvention requirement of article XIII B, section 6 and Government Code section 17514. Section 23343 does not impose a new program or higher level of service upon the county; it imposes only costs. Section 23343, as discussed above, is therefore not subject to the subvention requirement of article XIII B, section 6, and must be denied.

Secondly, unless coupled with a state-mandated activity or task, costs alone are not reimbursable when shifted from one local entity to another. The courts have continued to hold that *not* all costs incurred by a local entity as a result of a new program are reimbursable under article XIII B, section 6. "Section 6 was not intended to entitle local entities to reimbursement for all increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the State."[103] In *Lucia Mar Unified School District v. Honig*, the California Supreme Court held that "as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state." However, in the context of the costs of a program for which costs were shifted from the state to the school districts, the court recognized that "whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state…the result seems equally violative of the fundamental purpose underlying section 6."[104] Accordingly, and pursuant to later interpretations by the courts, a test claim statute may impose a reimbursable state-mandated program in one of two ways:

(1) The test claim statute orders or commands a local agency or school district to engage in an activity or task,[105] and the required activity or task is new, constituting a "new program," or creates a "higher level of service" over the previously required level of service;[106] or

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[103] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816; *Lucia Mar Unified School District v. State of California* (1988) 44 Cal.3d 830, 835; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735); *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189-1190.

[104] *Lucia Mar, supra*, 44 Cal3d at p. 836.

[105] *Long Beach Unified School District v. State of California* (1991) 225 Cal.App.3d 155, 174.

[106] *San Diego Unified School Dist., supra*, (2004) 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835-836.

(2) A reimbursable state-mandated program has been found to exist in some instances when the state shifts fiscal responsibility for a mandated program to local agencies but no actual activities have been imposed by the test claim statute or executive order.[107] As of November 3, 2004, article XIII B, section 6, subdivision (c), of the California Constitution defines a "mandated new program or higher level of service" as including "a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility."[108]

However, while shifting of costs, in whole or in part, *from the state to a local government* can constitute a new program or higher level of service, the Sixth District Court of Appeal in *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802 held that reimbursement is not required for a cost shift *between or among local government entities or agencies*. In that case, a statute authorized counties to charge cities and other local agencies the costs of booking into county jails persons who had been arrested by employees of the cities or local agencies.[109] The City relied on *Lucia Mar's* holding that a cost-shift could impose a new program or higher level of service, but the court in *City of San Jose* distinguished the holding of *Lucia Mar*, stating:

> The flaw in City's reliance on *Lucia Mar* is that in our case the shift in funding is not from the State to the local entity but from county to city. In *Lucia Mar*, prior to the enactment of the statute in question, the program was funded and operated entirely by the state. Here, however, at the time [the test claim statute] was enacted, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county.[110]

As the court in *City of San Jose, supra*, makes clear, "[n]othing in article XIII B prohibits the shifting of costs between local governmental entities."[111]

Similarly, in *City of El Monte v. Commission on State Mandates* (Cal. Ct. App. 3d Dist. 2000) 83 Cal.App.4th 266, the court held that legislation directing local governments to apportion property taxes in a certain way between redevelopment agencies and schools was "merely the most recent adjustment in the historical fluidity of the fiscal relationship between local governments and schools." The court in *City of El Monte* relied on *City of San Jose*, finding that "the shift of a portion of redevelopment agency funds to local schools did not create a reimbursable state

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[107] *Lucia Mar, supra*, (1988) 44 Cal.3d 830, 836.

[108] Enacted by the voters as Proposition 1A, November 2, 2004.

[109] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1806

[110] *Id*., at p. 1812.

[111] *City of San Jose, supra*, 45 Cal.App.4th 1802, 1815.

mandate."[112] Accordingly, *Grossmont Union High School Dist. v. California Department of Education* expressly provides that shifting of costs from one *local entity* to another *without an increase in service to the public* is not a reimbursable mandate.[113] The case law thus makes clear that reimbursement is required only for those costs resulting from a *new program or higher level of service mandated upon the local government entity* subject to the revenue limits of articles XIII A and XIII B, *or costs shifted from the state to the local government*.

Here, the costs alleged under sections 23332 through 23338, as amended by Statutes 1979, chapter 370, were incurred as a result of activities conducted by the Mission County Formation Review Commission. The costs incurred resulting from these activities cannot be directly reimbursable under article XIII B, section 6, because the Mission County Formation Review Commission is not subject to the tax and spend limitations of articles XIII A and XIII B.

The County of Santa Barbara, however, filed this test claim, seeking costs incurred by the county under the County Formation Law. The county argues that it incurred the costs of administering the county formation review after the defeat of the new county formation measure at the June 2006 election.[114] The county argues, therefore, that it now bears responsibility for the costs involved; it has "incurred" those costs, and is therefore an eligible claimant. But as discussed above, where costs are shifted from one local entity to another, without a corresponding state-mandated increase in service, reimbursement for the costs incurred in that shift is not required. Moreover, the statute that triggered the shift in costs between these local entities was enacted before January 1, 1975.

The Commission finds that Government Code sections 23332 through 23334, and 23336 through 23338, as amended by Statutes 1979, chapter 370, do not impose a reimbursable state-mandated program upon an eligible local government claimant, within the meaning of article XIII B, section 6.

c. Amendments to Article 4 of the County Formation Law enacted in Statutes 1979, chapter 370, and the addition of Article 4.5 of the County Formation Law by Statutes 1979, chapter 370, do not mandate a new program or higher level of service upon the county.

Finally, Statutes 1979, chapter 370 enacted a number of changes to sections 23350 through 23373, addressing the conduct of an election to determine whether to form the proposed county, and added sections 23374.1 through 23374.19, providing for a separate election, to occur after the voters approve the formation of a new county, to select county officers and the location of a county seat.

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[112] City of El Monte, supra, at p. 280.

[113] *Grossmont Union High School Dist. v. California Department of Education* (Cal. Ct. App. 3d Dist. 2008) 169 Cal.App.4th 869

[114] Exhibit C, Claimant's Rebuttal to DOF Comments, p. 2.

Section 23350, as enacted in 1974, required the board of supervisors of each affected county, upon receiving the determinations of a review commission, to order and give proclamation of an election to be held not less than 74 days after receipt of the commission's determinations. Statutes 1977, chapter 1175 amended section 23350 to provide that an election on the county formation measure "may be consolidated with either the next statewide primary election or statewide general election."[115] Statutes 1979, chapter 370 amended section 23350 again to delete the language "or general election," and thus provide that a county formation measure should only be included in a statewide primary election.[116] None of these amendments mandates a new program or higher level of service on the county. The current section merely provides, instead of holding the election at the next "established election date in the principal county," that the election shall take place at the "next statewide primary or general election date." This is, at most, a clarifying change, and therefore the amendments do not mandate a new program or higher level of service beyond that imposed by the 1974 enactment. Section 23350, as amended by Statutes 1977, chapter 1175, Statutes 1979, chapter 370, Statutes 1984, chapter 226, and Statutes 1985, chapter 702, is denied.

Statutes 1979, chapter 370 enacted a non-substantive, technical change to section 23351 and, therefore, does not mandate a new program or higher level of service on the county.[117]

Statutes 1979, chapter 370 amended section 23352 to provide that if the election to determine whether to create the proposed county is successful, an election to select county officers shall be held in the approved county at the next general election date, as provide in Article 4.5 (commending with section 23374.1). As discussed below, there are no actual or estimated costs alleged in this test claim resulting from the amendment to section 23352, or from the addition of sections 23374.1 through 23374.19; the second election provided for was not required, because the first election failed to approve the new county. Section 23352 could be argued to result in a state-mandated increased level of service, to the extent that a second election must be held if the first is successful, but there is no showing of any costs mandated by the state by any county in this test claim, and therefore section 23352, as amended, must be denied.[118]

Statutes 1979, chapter 370 amended section 23354 to provide that registration and transfers of registration shall be made and shall close in the manner provided for by law for registration and

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[115] Government Code section 23350 (Stats. 1974, ch. 1392; Stats. 1977, ch. 1175).

[116] Government Code section 23350 (Stats. 1974, ch. 1392; Stats. 1977, ch. 1175; Stats. 1979, ch. 370).

[117] Government Code section 23351 (Stats. 1974, ch. 1392; amended by Stats. 1979, chapter 370) [The 1979 amendment added the words "provided for pursuant to this article," modifying the "proclamation and notice of election."].

[118] Government Code section 23352 (Stats. 1974, ch. 1392; amended by Stats. 1979, chapter 370; Stats. 1985, ch. 702). If, in the future, section 23352 is implemented and a second election is conducted, a new test claim can be filed within 12 months of incurring increased costs as a result of the statute. (Gov. Code, § 17551(c).)

transfers of registration for a primary election; the former section stated the manner provided for a general election. There are no state-mandated requirements imposed upon local government from the plain language of these amendments. Section 23354, as amended by Statutes 1979, chapter 370, is denied.

Statutes 1979 amended section 23355, regarding the contents of the ballot. The former section provided as follows:

> Ballots at the election shall contain the words:
>
> (a) "For the new county of (giving name of proposed county) Yes," and "For the new county of (giving name of proposed county) No." Each voter shall stamp a cross (+) opposite the words "Yes," or "No."
>
> (b) "For as county seat (name of county seat as determined by commission) Yes" and "For (name of county seat as determined by commission) as county seat No." Each voter shall stamp a cross (+) opposite the words "Yes," or "No."

Statutes 1979, chapter 370 amended section 23355 to delete subdivision (b), above, and provided in new section 23374.5 that the county seat should be determined at the subsequent election for county officers, if the county formation measure is approved. Section 23355, as amended by Statutes 1979, chapter 370, imposes a lesser requirement upon county election officials, and thus, does not mandate a higher level of service. Section 23355, as amended in 1979, is therefore denied.

Statutes 1979, chapter 370 also amended section 23359, which provides the contents of the ballot pamphlets that shall be mailed to electors. The 1979 amendments removed the requirement to include on the ballot pamphlets, for the first election on the issue whether to form the new county, the names of persons nominated to fill county offices if the proposed county is created. There is no new program or higher level of service to the public mandated by providing fewer elements on the ballot pamphlet. Section 23359, as amended by Statutes 1979, chapter 370, is denied.

Statutes 1979, chapter 370 amended section 23363 to provide that election officers appointed by the affected county or counties must reside in the affected county and in the boundaries of the proposed new county. This amendment only limits who may be appointed, and does not mandate a new program or higher level of service to the public. Section 23363, as amended by Statutes 1979, chapter 370, is denied.

Statutes 1979, chapter 370 made a non-substantive, technical change to section 23368, substituting “the proposition,” for “each of the propositions,” in recognition of the fact that the election called for under sections 23350-23374 addresses now only the issue of whether the proposed county should be formed. Section 23368, as amended by Statutes 1979, chapter 370, does not mandate a new program or higher level of services and, therefore, is denied.

Statutes 1979, chapter 370 amended section 23369, providing for a declaration of the results of the election. The former section provided:

> If upon a canvass of the total votes cast in all the affected counties at the election, it appears that within each affected county more than 50 percent of the total number of all votes cast in such affected county, and more than 50 percent of the total number of all votes cast in the proposed county, are in favor of creation of the proposed county, the board of supervisors of the principal county, by resolution, shall:
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> (a) Declare the results of the election and that the proposed county shall be deemed created pursuant to the general laws of this state as a county under the name of (naming it), upon the 9lst day after the election on creation of the proposed county was held. On the day the proposed county is deemed created, it shall be responsible for and discharge all the duties, powers and functions of a county as required by law, except as provided in this chapter.
>
> (b) Declare the results of the election in the county seat. If more than 50 percent of the total number of all votes cast within each affected county are in favor of the county seat, such location shall be the county seat until removed in the manner provided by law. Where the proposed county seat is not affirmed by the voters, the board of supervisors of the consolidated county shall designate a temporary county seat until removed in the manner provided by law.
>
> (c) Name the persons receiving the highest number of votes cast for the several offices to be filled at the election and declare those persons duly elected to the respective officers and that they shall enter upon the duties of their offices upon the date which the proposed county shall be deemed legally created as provided in subdivision (a), and prescribe the amount of the bonds such elected officers shall provide upon taking office.
>
> (d) State the effective date or dates upon which the various service responsibilities and functions for the proposed county shall be transferred from each affected county to the proposed county. Such date or dates shall be established in accordance with the terms and conditions established by the commission and in such a manner as to provide for the orderly and expeditious transition of responsibilities and functions but shall in no event exceed two fiscal years from the date on which the proposed county shall be deemed legally created as provided in subdivision (a).

Statutes 1979, chapter 370 amended section 23369, again as a part of bifurcating the election on the county formation measure and the selection of county officers of the proposed county, as follows:

> If upon a canvass of the total votes cast in all the affected counties at the election, it appears that within each affected county more than 50 percent of the total number of all votes cast in such affected county, and more than 50 percent of the total number of all votes cast in the proposed county, are in favor of creation of

the proposed county, the board of supervisors of the principal county, by resolution, shall:

(a) Declare the results of the election and that the proposed county shall not be deemed created until the election of its officers at the next general election. At such time as the officers of the county are elected and qualified, the proposed county is deemed created, and it shall be responsible for and discharge all the duties, powers and functions of a county as required by law, except as provided in this chapter.

(b) State the effective date or dates upon which the various service responsibilities and functions for the proposed county shall be transferred from each affected county to the proposed county. Such date or dates shall be established in accordance with the terms and conditions established by the commission and in such a manner as to provide for the orderly and expeditious transition of responsibilities and functions but shall in no event exceed two fiscal years from the date on which the proposed county shall be deemed legally created as provided in subdivision (a)[119]

Removing subdivisions (b) and (c) from the 1974 statute, and amending subdivision (a) to provide that the new county will not be deemed created until county officers are elected and qualified does not mandate a new program or higher level of service upon local government. The amendments in fact impose fewer requirements upon local government than under prior law. Section 23369, as amended by Statutes 1979, chapter 370, is denied.

Finally, Statutes 1979, chapter 370 added sections 23374.1 through 23374.19, which provide for a second election process to take place after a proposed county is approved by the voters in a first election, in order to select a county seat for the approved county, and officers for the approved county. The subsequent election is to be conducted in a manner substantially similar to the first, according to these sections. These sections might be argued to impose a new program or higher level of service upon local government because a second election occurs if the voters approve the formation of a new county, but there is no evidence of increased costs mandated by the state on any county in this test claim for the second election. In this case, the second election process was not necessary to undertake, the first election having failed to approve the new county. The Commission finds that there is no evidence of increased costs mandated by the state resulting from sections 23374.1 through 23374.19; and, thus, these sections are therefore denied.

(6) Amendments enacted by Statutes 1984, chapter 226 do not impose any state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6.

Statutes 1984, chapter 226 amended sections 23350 and 23351, temporarily shortening the time frame between receipt of the review commission's determinations and report and the election on the county formation measure, in order that the County of El Dorado could conduct a vote on a

[119] Government Code section 23369 (as amended by Stats. 1979, ch. 370).

county formation measure without adhering to statutory timelines;[120] those provisions were allowed to sunset as of January 1, 1985, before the period of reimbursement for this claim, and as a result are not in issue in this test claim.

However, Statutes 1984, chapter 226 also amended section 23332, which, as discussed above, provides for the determinations that must be made by a review commission.[121] Aside from a number of technical, non-substantive changes, Statutes 1984, chapter 226 added to section 23332(f) the requirement that the five supervisorial districts that a review commission must determine "shall be established in a manner which results in a population in each district which is as equal as possible to the population in each of the other districts within the county." This requirement is imposed upon a review commission, and not the county itself. As discussed above, where the requirements of the test claim statutes are imposed upon a review commission, which is not an eligible claimant, the county cannot claim reimbursement for costs incurred through a shift from one local government entity to another because no new program or higher level of service is mandated by the shift. Moreover, section 23343, which causes the shift in liability from the review commission to the county (either the new county or the principal county) was enacted in Statutes 1974, chapter 1392, and never amended, and is therefore itself outside the constitutional subvention requirement, as established above. Section 23332, as amended by Statutes 1984, chapter 226, is denied.

(7) Amendments enacted by Statutes 1985, chapter 702 do not impose any state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6.

Statutes 1985, chapter 702 added a definition of the word "contiguous" to section 23301. No new state-mandated requirements are imposed by this change. Section 23301, as amended by Statutes 1985, chapter 702, is denied.

Statutes 1985, chapter 702 amended section 23332 to clarify that the county officers of the approved county would be elected at a separate election conducted pursuant to Article 4.5 (added in Statutes 1979, chapter 370, as discussed above), and that the review commission must name which offices shall be filled at that subsequent election and which may be filled by appointment; and amended section 23332 to add subdivision (k) to the determinations to be made by a review commission. Subdivision (k) requires that a review commission determine an appropriations limit for the proposed county in accordance with section 4 of Article XIII B of the California Constitution. As discussed above, new requirements placed on a review commission are not reimbursable, because a review commission is not an eligible claimant, and costs shifted from one local government entity to another do not mandate a new program or higher level of service on the county within the meaning of article XIII B, section 6. And, as discussed above, section 23343, which requires the shift of liability for these costs from the review commission to either the new or the principal county, depending on the outcome of the election, was enacted in

[120] Statutes 1984, chapter 226, section 5.

[121] Government Code section 23332(a-j) (Stats. 1974, ch. 1392).

Statutes 1974, chapter 1392, and never amended, and therefore must itself be denied. Section 23332, as amended by Statutes 1985, chapter 702, is denied.

Statutes 1985, chapter 702 amended section 23340 to provide that all officers and employees of *any state agency, board or commission* shall cooperate with the commission; the prior section, enacted in 1974, required the cooperation of officers and employees of any affected county. There are no new state-mandated requirements imposed upon local government by the 1985 amendment. Section 23340, as amended by Statutes 1985, chapter 702, is denied.

Statutes 1985, chapter 702 amended section 23342 to provide that a review commission "may impose additional terms and conditions as it deems necessary to ensure an efficient and effective transition. All terms and conditions shall be final and binding in each affected county and the proposed county should the proposed county be legally established as provided in this chapter." This statute authorizes, but does not require, a local government to impose mandated costs upon another entity of local government. Section 23342, as amended in 1985, does not impose any state-mandated requirements on local government.

Statutes 1985, chapter 702 amended sections 23350, 23352, 23369, and 23374.1 to provide that an election to determine whether to form the new county, and the subsequent election to choose a county seat and select county officials for the approved county, may take place at either the next statewide primary or the next statewide general election. There might, arguably, be new requirements imposed upon local government by these changes; a successful vote on a new county formation measure would trigger a second election. But here, the claimant has not has not filed any evidence of any county incurring increased costs mandated by the state pursuant to this bifurcated election process, because the first phase was defeated. Sections 23350, 23352, 23369, and 23374.1, as amended by Statutes 1985, chapter 702, are denied.

(8) Amendments to the County Formation Law imposed by Statutes 1980, chapter 676, Statutes 1981, chapter 1114, Statutes 1986, chapter 248, Statutes 1994, chapter 923, Statutes 2002, chapter 784, and Statutes 2004, chapter 227 do not impose reimbursable state-mandated costs within the meaning of article XIII B, section 6.

Statutes 1980, chapter 676 amended section 23353, correcting a typographical error in which the word "or" was used where "of" was meant, and adding modifying language to clarify the contents of the notice of election: for example, where the prior section stated that a "notice of election shall ¶…¶ [a] statement that only one argument for and one argument against shall be selected and printed in the ballot…" the amended section added the word "include" before "a statement." The same change was made in each of the subdivisions (h-j). There are no new state-mandated requirements imposed upon local government by the amended section.

Statutes 1981, chapter 1114 amended sections of the County Formation Law addressing the form of ballots and the qualifications of electors.[122] Section 23354 was amended to replace "registered electors" with "voters," and to provide that voters would be eligible to vote if registered in the county "29 days" prior to the election, rather than "30 days" prior. An identical

[122] Government Code sections 23354-23355; 23374.4-23374.5 (Stats. 1981, ch. 1114).

change is effected in section 23374.4. There are no new state-mandated requirements imposed upon local government by these amendments; the amended sections only define who is eligible to vote in the election on the county formation measure, and the in election on the proposed county seat and officials for the approved county.

Sections 23355 and 23374.5 were amended with respect to the form of the ballot. Prior section 23355 provided as follows:

> Ballots at the election shall contain the words:
>
> "For the new county of (giving name of proposed county) Yes," and "For the new county of (giving name of proposed county) No " Each voter shall stamp a cross (+) opposite the words "Yes," or "No"

As amended by Statutes 1981, chapter 1114, section 23355 provided:

> Ballots at the election shall contain the statement:
>
> "For the new county of (giving name of proposed county). Opposite the statement, and to its right, the words "Yes" and "No" shall be printed on separate lines, with voting squares. If a voter stamps a cross (+) in the voting square after the printed word "Yes," his or her vote shall be counted in favor of the adoption. If he or she stamps a cross (+) in the voting square after the printed word "No," his or her vote shall be counted against the adoption.

A nearly identical amendment was made to section 23374.5. These amendments are not substantive, but only clarify the effect of a voter's mark on the ballot, and alter the language of the ballot somewhat. There is no new program or higher level of service mandated by slight alterations to the ballot language. Sections 23354, 23355, 23374.4, and 23374.5, as amended by Statutes 1981, chapter 1114, are denied.

Statutes 1986, chapter 248 amended section23358 to replace the phrase "such board" and "such council" with "the board" and "the council," and corrected the mis-labeling of subdivision (d) to subdivision (c), where there was no subdivision (c) in the prior version of the statute. Section 23358, as amended by Statutes 1986, chapter 248, does not impose any new mandated requirements on local government and is therefore denied.

Statutes 1994, chapter 923 substituted the term "elections official" for "clerk" in several sections.[123] There are no new mandated requirements imposed by this change, and therefore sections 23353, 23359, 23365, 23374.3 and 23374.13, as amended by Statutes 1994, chapter 923, are denied.

Statutes 2002, chapter 784 amended section 23396 to provide that the "Trial Court Employment Protection and Governance Act" applies to the selection and appointment of superior court employees in a proposed county, where the prior section had provided that a presiding judge "may appoint officer, attaches, and other employees as are necessary." This amendment is not

[123] Government Code sections 23353; 23359; 23365; 23374.3 & 23374.13.

alleged to impose any increased costs in this test claim, because the proposed county was never approved and formed, and therefore no new superior court was established. There is no evidence that section 23396 imposes any state-mandated activities that result in increased costs mandated by the state and, therefore, section 23396, as amended by Statutes 2002, chapter 784, is denied.

Statutes 2004, chapter 227 amended section 23344 to provide that a county formation review commission may borrow up to $400,000 from the state controller to meet its expenses until the costs have been "determined pursuant to Section 23343." As discussed above, section 23344 provides authority for a review commission to borrow funds for its operating expenses; it does not require a commission to borrow such funds. Moreover, the funds borrowed, and any interest owed, are transferred to the county by way of section 23343, which, as discussed above, was enacted in Statutes 1974, chapter 1392, and never amended, and therefore is not subject to the subvention requirement of article XIII B, section 6. Section 23344, as amended by Statutes 2004, chapter 227, is denied.

(9) The Governor's executive order, dated May 10, 2004, implementing the test claim statutes by appointing the members of the commission and charging them in accordance with Government Code sections 23331-23344, does not impose a state-mandated new program or higher level of service on the county.

As discussed above, the claimant alleges that the Governor's executive order appointing the five members of the Mission County Formation Review Commission imposed reimbursable state-mandated costs upon the county. While in a strictly causative sense it is true that the county would not have incurred the costs alleged here *but for* the appointment of the Mission County Formation Review Commission, reimbursement for those costs is not required under article XIII B, section 6, however, because all activities that the Governor's order imposed were directed to the review commission, rather than the county, and all other activities conducted and costs incurred by the county arise from 1974 statutes that pre-date the constitutional subvention requirement. Both of these elements of the analysis are discussed at length above, and will be only summarized here to the extent necessary to apply the rule to the facts.

An executive order is defined in Government Code section 17516 as "any order, plan, requirement, rule, or regulation issued by…The Governor…"[124] And Government Code section 17514 defines "costs mandated by the state" to include:

> …[A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.[125]

[124] Government Code section 17516 (Stats. 1984, ch. 1459; Stats. 2010, ch. 288 (SB 1169)).

[125] Government Code section 17514 (Stats. 1984, ch. 1459).

Based on the plain language of section 17514, an executive order is only reimbursable when it satisfies two conditions: it implements a statute enacted on or after January 1, 1975, and it mandates a new program or higher level of service, as compared with prior law.

Here, the alleged executive order states as follows:

> Governor Arnold Schwarzenegger today announced the appointment of John "Jack" Boysen, June Christensen; Dick Frank; Harriet Miller and Ted Tedesco to the Mission County Formation Commission.
>
> ¶…¶
>
> The Mission County Formation Commission is charged with completing a comprehensive assessment and report for the community regarding the impact of the proposed Santa Barbara County split on the region. The Commission is comprised of two residents from the proposed new County, two residents from the affected County, and one member from outside both areas. The Commission will explore the fiscal impacts and economic viability of a split, make determinations, provide a forum for public input, propose new supervisorial districts and a new county seat along with other significant findings. The Commission will also determine the conditions for formation that will go on the ballot and apply should the voters choose to create a new County. The Commission's purpose is for fact-finding and reporting only; it does not offer a recommendation for or against formation. Within 180 days of appointment by the Governor, the Commission will transmit its report in writing to the Santa Barbara County Board of Supervisors, or, upon the Governor's approval, the Commission may be granted an additional 180 days to submit its final report.[126]

The bulk of the County Formation Law, as discussed, is beyond the constitutional subvention requirement, having been enacted in Statutes 1974, chapter 1392. The executive order, therefore, implements a statute that, with respect to the majority of its substantive requirements, pre-dates the constitutional subvention requirement of article XIII B, section 6. The provisions that have been substantively amended on or after January 1, 1975, as discussed, do not impose reimbursable state-mandated new programs or higher levels of service upon any eligible claimant, and therefore the executive order, to the extent that it implements those amendments, also does not impose a reimbursable state mandate.

Moreover, the executive order, to the extent that it directly imposes any requirements at all, implements only the provisions of the test claim statute addressing the requirements of a review commission. As discussed at length above, a review commission is not an eligible claimant, and

[126] Exhibit A, Test Claim, Governor's Press Release, dated May 10, 2004.

therefore any costs incurred by a review commission, despite having been shifted to the county pursuant to Government Code section 23343 as enacted in 1974, are not reimbursable.[127]

Finally, the executive order, as quoted above, does not impose any independent requirements beyond those imposed by the test claim statutes. As shown throughout this analysis, none of the requirements of the test claim statutes are properly reimbursable, and therefore the executive order cannot impose a reimbursable state mandate by virtue of implementing statutes which themselves are not subject to reimbursement within the meaning of article XIII B, section 6.

The Commission finds the Governor's 2004 executive order does not impose a reimbursable state-mandated new program or higher level of service upon the county.

D. Legislative Findings and Declarations Made When Enacting the County Formation Law, and Policy Arguments in Favor of Reimbursement, are Not Relevant to the Legal Determination Whether the Statutes and Alleged Executive Order Impose a Reimbursable State-Mandated Program Under Article XIII B, Section 6 of the California Constitution.

The claimant asserts that the Commission should approve the test claim because "[t]he Legislature clearly stated when it enacted the County Formation Law that the State must reimburse the counties for the costs of complying with the act."[128] The claimant points out[129] that the Legislature stated in the uncodified text of the County Formation Law that:

> There are no state-mandated local costs in this act that require reimbursement under section 2231 of the Revenue and Taxation Code because there are no duties, obligations, or responsibilities imposed upon local entities in 1974-75 by this act. However, there are state-mandated local costs in this act in 1975-76 and subsequent years that require reimbursement under section 2231 of the Revenue and Taxation Code which can be handled in the regular budget process.[130]

The Legislature's findings and declaration on this matter may be dispensed with on two grounds. First, the reimbursement regime in effect at the time the Legislature stated its finding relied upon a statutory reimbursement requirement in the Revenue and Taxation Code, which was more broadly applicable than the constitutional reimbursement regime that replaced it.[131] The

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[127] Government Code section 23343 (Stats. 1974, ch. 1392); *City of San Jose, supra,* 45 Cal.App.4th 1802, at p. 1815 ["Nothing in article XIII B prohibits the shifting of costs between local governmental entities."].

[128] Exhibit A, Test Claim p. 5.

[129] See Exhibit A, Test Claim p. 5; Exhibit C, Claimant's Rebuttal to DOF Comments, pp. 1-2.

[130] Statutes 1974, chapter 1392 section 3.

[131] Revenue and Taxation Code section 2231 (Statutes 1973, chapter 358, § 3, p. 783); Article XIII B, section 6 was adopted November 1979; Government Code section 17500 et seq. (Statutes 1984, chapter 1459 § 1).

California Supreme Court stated in *County of Los Angeles*, *supra*, that it considered the earlier language to provide a broader definition of "costs."[132] Former Revenue and Taxation Code section 2231, as it read at the time the County Formation Law was enacted in 1974, provided, in pertinent part:

> (a) The state shall pay to each local agency and each school district an amount to reimburse the local agency or the school district for the full costs, which are mandated by acts enacted after January 1, 1973, of any new state-mandated program or any increased level of service of an existing mandated program.
>
> ¶…¶
>
> (e) "Increased level of service" means any requirement mandated by state law or executive regulation after January 1, 1973, which makes necessary expanded or additional costs to a local agency or a school district.[133]

Given that the broader definition of "costs" was repealed and replaced, (twice; once in 1975,[134] and again in 1984)[135] it is presumed that the Legislature intended the new language to control.[136]

Secondly, whether a statute requires reimbursement is a question of law, to be decided by the Commission, or the courts on review, and "legislative disclaimers, findings, and budget control language are not determinative."[137] Thus the question of reimbursement must be evaluated in this test claim by the Commission, exclusively, pursuant to article XIII B, section 6 of the California Constitution, on the basis of the statutes and case law that guide Commission

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[132] *County of Los Angeles*, *supra*, (1987) 43 Cal.3d 46, 53-54. [citing repeal and revision of Revenue and Taxation Code section 2231 (Stats. 1973, ch. 358 § 3); repealed and re-enacted as Revenue and Taxation Code section 2231 (Stats. 1975, ch. 486 § 7)].

[133] Former Revenue and Taxation Code section 2231 (Stats. 1973, ch. 358).

[134] Former Revenue and Taxation Code section 2231(Stats. 1973, ch. 358); Repealed and replaced, Statutes 1975, chapter 486.

[135] Former Revenue and Taxation Code section 2231 (Stats. 1975, ch. 486) was superseded by Government Code section 17514 (Stats. 1984, ch. 1459).

[136] See Government Code section 9605 (Stats. 1974, ch. 544 § 9) [presumption that an amendment is made to change a law]. See also *County of Los Angeles v. State of California*, *supra*, (1987) 43 Cal.3d 46, at p. 55.

[137] *County of Los Angeles v. Commission on State Mandates*, (Cal. Ct. App. 2d Dist. 2003) 110 Cal.App.4th 1176, 1186; 1194. See also, Government Code section 17552, which states that "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."

decisions generally, and without regard for the expression of the Legislature in the 1974 statute.[138]

The claimant also argues that "the State should approve the subvention of funds for public policy reasons." The claimant argues that the County Formation Law required the county to "form a Commission, make determinations, and hold an election to support the public's participation in determining the form of county government that would best serve them." But public policy is not a sufficient ground upon which to approve a test claim.

In *City of San Jose*, court of appeal stated:

> We appreciate that as a practical result of the authorization under section 29550, City is required to bear costs it did not formerly bear. We cannot, however, read a mandate into language which is plainly discretionary….Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the legislature can serve to invalidate particular legislation. Under these principles, there is no basis for applying section 6 as an equitable remedy to cure perceived unfairness resulting from political decisions on funding priorities.[139]

Thus, in *City of San Jose*, the court made clear that reimbursement must be limited to the terms of article XIII B, section 6, and not applied to correct an unfair apportionment of financial responsibility, or to satisfy public policy.

IV. Conclusion

Based on the foregoing, the Commission concludes that Government Code section 23300 et seq., as enacted in Statutes 1974, chapter 1392, sections 2 and 3, and amended by Statutes 1975, chapter 1247; Statutes 1976, chapter 1143; Statutes 1977, chapter 1175; Statutes 1978, chapter 465; Statutes 1979, chapter 370; Statutes 1980, chapter 676; Statutes 1981, chapter 1114; Statutes 1984, chapter 226; Statutes 1985, chapter 702; Statutes 1986, chapter 248; Statutes 1994, chapter 923; Statutes 2002, chapter 784; and Statutes 2004, chapter 227; and the Governor's 2004 Press Release, dated May 10, 2004, appointing the Mission County Formation Review Commission do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

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[138] *Kinlaw*, *supra*, 53 Cal.3d 482, 487; Government Code section 17551 and 17552.

[139] *City of San Jose v. State of California*, *supra*, 45 Cal.App.4th 1802, 1817.

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RE: **Adopted Statement of Decision**

County Formation Cost Recovery, 06-TC-02
Government Code Sections 23300 et al.
County of Santa Barbara, Claimant

On April 19, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: April 25, 2013

Heather Halsey, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 37254, 52378, 52379, 52380 Statutes 2007, Chapter 526 and Statutes 2007, Chapter 730. California Code of Regulations, Title 5, Section 1204.5 Register 2004, No. 21, eff. May 19, 2004; Register 2005, No. 33, eff. Aug. 16, 2005; Register 2006, No. 11, eff. Mar. 16, 2006; and Register 2007, No. 51, eff. Dec. 20, 2007 Filed on October 14, 2008 By San Jose Unified School District, Claimant.	Case No.: 08-TC-02 *High School Exit Examination II* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 24, 2013*) (*Served May 28, 2013)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 24, 2013. Art Palkowitz appeared on behalf of claimant. Susan Geanacou appeared on behalf of the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the final staff analysis and proposed statement of decision to deny the test claim by a vote of 7-0.

Summary of the Findings

The Commission finds that Education Code sections 37254, 52378, 52379 and 52380, as amended by Statutes 2007, chapters 526 and 730, and section 1204.5 of the title 5 regulations, as amended in 2007 (Register 2007, No. 51) do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

The statutes require school districts to perform counseling, instruction, and reporting activities "as a condition of receiving funds" to help pupils pass the California High School Exit Exam. Pursuant to the court's determination in *Kern*,[1] the test claim statutes do not legally compel school districts to comply with the required activities. In addition, there is no evidence in the

[1] *Department of Finance v. Commission on State Mandates (Kern.)* (2003) 30 Cal.4th 727.

record that school districts are practically compelled to comply with these statutes and regulation.

The Commission also finds that the 2007 amendments of section 1204.5 of the title 5 regulations do not constitute a state-mandated program because the amendments are merely clarifying, or impose requirements that do not constitute a new program or higher level of service.

The Commission further finds that the test claim, with respect to section 1204.5 of the title 5 regulations as adopted in 2004 and amended in 2005 and 2006 were not filed within the one-year statute of limitations required by Government Code section 17551(c) and, thus, the Commission does not have jurisdiction to make findings on those versions of the regulation.

Accordingly, the Commission denies this test claim.

COMMISSION FINDINGS

I. Chronology

10/14/08	Claimant, San Jose Unified School District, filed the test claim with the Commission.[2]
10/22/08	Commission staff issued the notice of complete test claim and schedule for comments.
12/04/08	Department of Finance (Finance) filed comments on the test claim.
03/20/13	Commission staff issued the draft staff analysis and proposed statement of decision.
04/10/13	Claimant filed comments on the draft staff analysis and proposed statement of decision.
05/20/13	Claimant filed comments on the final staff analysis and proposed statement of decision.

II. Background

This test claim addresses activities related to the California High School Exit Examination (CAHSEE), and the Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program, both of which assist pupils to pass the CAHSEE.

A. The High School Exit Exam

The requirement to administer the CAHSEE was initially enacted in 1999. The background for the examination was summarized in the 2006 case of *O'Connell v. Superior Court* as follows:

[2] The potential period of reimbursement begins on July 1, 2007 (Gov. Code, § 17557(e)) or later with statues and regulations with subsequent effective dates. The effective date of Statutes 2007, chapter 526 was October 12, 2007. The effective date of Statutes 2007, chapter 730 was January 1, 2008. The operative date of the 2007 version of California Code of Regulations, title 5, section 1204.5, was December 20, 2007.

> In March 1999, the California Legislature found that "[l]ocal proficiency standards" set by individual school districts were "generally set below a high school level and [were] not consistent with state adopted academic content standards." (Stats.1999, 1st Ex.Sess.1999–2000, ch. 1, § 1(a).) The Legislature concluded that "[i]n order to significantly improve pupil achievement in high school and to ensure that pupils who graduate from high school can demonstrate grade level competency in reading, writing, and mathematics, the state must set higher standards for high school graduation." (Stats.1999, 1st Ex.Sess.1999–2000, ch. 1, § 1(b).)
>
> In order to further this goal, the Legislature directed that defendant "Superintendent of Public Instruction, with the approval of [defendant] State Board of Education, shall develop a high school exit examination in English-language arts and mathematics in accordance with ... statewide academically rigorous content standards adopted by [defendant] State Board of Education...." (Ed.Code, § 60850, subd. (a).) The examination developed under that mandate has come to be known as the CAHSEE. The CAHSEE is administered to all public high school students starting in grade 10, and each student is permitted to continue to take the CAHSEE at each subsequent administration, several times a year, until he or she has passed both sections. (§ 60851, subd. (b).) School districts are required to offer "supplemental instructional programs for pupils ... who do not demonstrate sufficient progress toward passing the [CAHSEE]." (§ 37252, subd. (a); see also § 60851, subd. (f).) [3]

The CAHSEE has two parts: English-language arts and mathematics through algebra I. By law, each part is aligned with California's academic content standards adopted by the State Board of Education (SBE). All eligible pupils[4] in California public schools must satisfy the CAHSEE requirement, as well as all other state and local graduation requirements, to receive a high school diploma.

The state budget act provides funds to administer the CAHSEE. Because of the mandate finding in the first *High School Exit Exam* test claim (00-TC-06, discussed below), every fiscal year since 2004-2005, the state budget act has included the following language as part of the CAHSEE appropriation: "Local education agencies accepting funding from these schedules shall reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them from these schedules."[5]

---

[3] *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452.

[4] An eligible pupil is "a person enrolled in a California public school in grade 10, 11, or 12, including those pupils placed in a nonpublic school through the individualized education program (IEP) process pursuant to Education Code section 56365, who has not passed both the English-language arts section and the mathematics section of the CAHSEE." (Cal. Code Regs, tit. 5, § 1200, subd. (e)).

[5] Statutes 2004, chapter 208, Item 6110-113-0001, Provision 8; Statutes 2005, chapters 38, 39, Item 6110-113-001, Provision 8; Statutes 2006, chapters 47, 48, Item 6110-113-001, Provision 6; Statutes 2007, chapters 171 & 172, Provision 7; Statutes 2008, chapters 268, 269, Item 6110-

B. Preexisting Counseling Programs to Help Pupils Pass the CAHSEE

The 1999 legislation that established the CAHSEE also required school districts to offer summer school instructional programs for pupils who do not demonstrate sufficient progress toward passing the CAHSEE.[6] Later legislation enacted in 1999 expanded the "summer school" requirement to authorize school districts to offer the instructional programs after school, Saturdays, or during intersession, or in any combination of summer, after school, Saturdays, or intersession instruction, as long as they were in addition to the regular schoolday.[7] A 2000 statute changed this program's name from the Summer School Instructional Program to the Supplemental Instructional Program and authorized instructional programs to also be offered before school and for those pupils who were enrolled in grade 12 during the previous year.[8] The 2000 statute also altered the funding for supplemental instruction from an average daily attendance basis to a calculation based on hours of supplemental instruction.

In 2005, school districts were authorized to use the Supplemental Instructional Program funds to provide intensive instruction and services to pupils who failed one or both parts of the CAHSEE. "Intensive instruction and services" was defined to include, but not be limited to: individual or small group instruction; hiring additional teachers; purchasing, scoring, and reviewing diagnostic assessments; counseling; designing instruction to meet specific needs of eligible pupils; and appropriate teacher training to meet the needs of eligible pupils.[9] The Superintendent of Public Instruction was to rank schools and give highest priority to those with the highest percentage of pupils who had failed one or both parts of the CAHSEE, and then apportion six hundred dollars ($600) per eligible pupil to school districts on behalf of those schools identified until the funds were exhausted.[10] In 2006, this apportionment was changed to a per-pupil rate for the number of eligible pupils in grade 12, with a maximum per pupil rate of $500, increased annually as specified.[11]

Statutes 2006, chapter 79 enacted the Middle and High School Supplemental Counseling Program "for the purpose of providing additional counseling services to pupils in grades 7 to 12, inclusive."[12] This broader counseling program was added to the preexisting counseling program for pupils not demonstrating sufficient progress toward passing the CAHSEE. The legislation requires schools, as a condition of receiving funds, to:

113-001, Provision 7; Statutes 2009, chapter 1 (4th Ex. Sess), Item 6110-113-001, Provision 7. Statutes 2010, chapter 712, Item 6110-113-0001, Provision 7. Statutes 2011, chapter 33, Item 6110-113-0001, Provision 7.

[6] Education Code section 37252 (Stats. 1999-2000x1, ch. 1).

[7] Education Code section 37252 (d) (Stats. 1999, ch. 78).

[8] Education Code section 37252 (c) and (d) (Stats. 2000, ch. 72).

[9] Education Code section 37254 (d) (Stats. 2005, ch. 234).

[10] Education Code section 37254 (c) (Stats. 2005, ch. 234).

[11] Education Code section 37254 (b) & (c) (Stats. 2006, ch. 79).

[12] Education Code section 52378.

> [I]dentify pupils who are at risk of not graduating with the rest of their class, are not earning credits at a rate that will enable them to pass the high school exit examination, or do not have sufficient training to allow them to fully engage in their chosen career."[13]

The schools are required to take specified measures to help these identified pupils graduate from high school.

C. The Test Claim Statutes and Regulation

Statutes 2007, chapter 526 amended the CAHSEE Intensive Instruction and Services Program (§ 37254) and Middle and High School Supplemental Counseling Program (§§ 52378 & 52380) requirements. These amendments revise the definition of "eligible pupil" as follows: "as follows: "For purposes of this section, "eligible pupil" means a pupil who ~~is required to pass~~ has not met the California High School Exit Examination requirement for high school graduation pursuant to . . . and who has failed one or both part of that examination by the end of grade 12." This statute also revised the funding calculation and changed the definition of "intensive instruction and services" to add the following italicized language to Education Code section 37254(c):

> Intensive instruction and services may include, but are not limited to, all of the following:
>
> (A) Individual or small group instruction.
>
> (B) The hiring of additional teachers.
>
> (C) Purchasing, scoring, and reviewing diagnostic assessments.
>
> (D) Counseling.
>
> (E) Designing instruction to meet specific needs of eligible pupils.
>
> (F) Appropriate teacher training to meet the needs of eligible pupils.
>
> *(G) Instruction in English-language arts or mathematics, or both, that eligible pupils need to pass those parts of the high school exit examination not yet passed. A school district may employ different intensive instruction and services strategies more aligned to the needs and circumstances of pupils who have not passed one or both parts of the high school exit examination by the end of grade 12 as compared to grade 12 pupils with similar needs in a comprehensive high school of the district.*
>
> *(H) The provision of instruction and services by a public or nonpublic entity, as determined by the local educational agency.*

Statutes 2007, chapter 526 also required schools to ensure that pupils who have not passed one or both parts of the CAHSEE are informed of, and have available, services in time for the pupils to avail themselves of those services each term for two consecutive academic years beyond grade 12, and imposes other notification requirements, including the posting of notices in 10th, 11th,

[13] Education Code section 52378 (b) (Stats. 2006, ch. 79).

and 12th grade classrooms regarding pupil eligibility for the CAHSEE remedial services available beyond 12th grade. Additionally, it required schools to ensure that eligible pupils and English learners have the opportunity to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first. Finally, it modified requirements for annual reporting to the Superintendent of Public Instruction (SPI).

The Senate Floor Analysis of Statutes 2007, chapter 526 described it as follows:

> This bill implements a proposed settlement agreement in the *Valenzuela v. O'Connell* lawsuit by placing conditions on the receipt of funding that requires school districts to provide intensive instruction and services to pupils who have not passed the high school exit examination by the end of twelfth grade. [¶]…[¶]
>
> A lawsuit filed by plaintiffs (*Valenzuela v. O'Connell*) contends that pupils that have otherwise met graduation requirements but have not received a diploma due to a failure to pass one or both portions of the CAHSEE have been disadvantaged by an unequal education system that did not adequately teach the materials on the exam. While the suit has not halted the implementation of the CAHSEE as a graduation requirement, the Court of Appeals has recommended that the parties agree to a means of providing equal access and adequate remedial assistance to students that have not passed the exam. The bill reflects an effort to settle the suit.[14]

The *Valenzuela* court concluded, among other things, that "the trial court's determination that plaintiffs were likely to prevail on their primary equal protection claim was supported by substantial evidence and legally proper."[15] Statutes 2007, chapter 526 implemented a resolution to the *Valenzuela* litigation by ensuring that pupils who fail to pass the exit examination have remedial assistance.

Another test claim statute, Statutes 2007, chapter 730, amended Education Code section 52379 as part of an "annual Education 'clean-up' bill that makes various non-controversial revisions to statute."[16] The amendment to section 52379 "[c]orrects wording in the Middle and High School Supplemental Counseling Program to specify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of $10,000."[17]

The CAHSEE regulations are in section 1200 et seq. of title 5 of the California Code of Regulations. Claimant pled section 1204.5, which was adopted in 2004 to give pupils in grades 11 and 12 who have not yet passed one or both parts of the CAHSEE up to two opportunities per year to take the section of the test not yet passed. Eligible pupils, according to the regulation,

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[14] Senate Rules Committee, Third Reading Analysis of AB 347 (2007-2008 Reg. Sess.) as amended September 6, 2007, page 5.

[15] *Valenzuela v. O'Connell* (2006) 141 Cal.App.4th 1452, 1457.

[16] Senate Committee on Education, Analysis of SB 132 (2007-2008 Reg. Sess.) as amended March 26, 2007, page 5.

[17] *Id.*, page 5.

should be offered appropriate remediation or supplemental instruction before being retested. Eligible pupils shall be provided one opportunity to pass the examination after completing the grade 12 requirements.[18] The regulation was amended in 2005 to give pupils in grade 12 up to three opportunities, or two opportunities in grade 12 and one opportunity after grade 12, to take parts of the exam not yet passed.[19] The regulation was amended again in 2006 to give eligible adult students up to three opportunities per year to take the CAHSEE sections not yet passed.[20]

Section 1204.5 was amended again effective December 20, 2007 to clarify the number of times pupils and adult students may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations.[21]

D. Prior Commission Decision on the *High School Exit Exam* Program

On March 25, 2004, the Commission issued a decision on the *High School Exit Exam* test claim (00-TC-06).[22] The Commission found that the test claim legislation imposed a reimbursable state-mandated program on school districts, beginning on July 1, 2000, to perform the following activities:

- Adequate notice: notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the CAHSEE. The notification shall include, at a minimum, the date of the CAHSEE, the requirements for passing the CAHSEE, and the consequences of not passing the CAHSEE, and that passing the CAHSEE is a condition of graduation (Ed. Code, § 60850(e)(1) & (f)(1).);
- Documentation of adequate notice: maintaining documentation that the parent or guardian of each pupil received written notification of the CAHSEE (Cal. Code Regs., tit. 5, § 1208.);
- Determining English language skills: determining whether English-learning pupils possess sufficient English language skills at the time of the CAHSEE to be assessed with the CAHSEE (§ 1217.5);
- CAHSEE administration: administration of the CAHSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the CAHSEE has been

[18] Register 2004, No. 21, operative May 19, 2004.

[19] Register 2005, No. 33, operative August 16, 2005.

[20] Register 2006, No. 11, operative March 16, 2006.

[21] Register 2007, No. 51. CDE, Initial Statement of Reasons, California High School Exit Exam Regulations, February 20, 2007, page 1.

[22] The test claim consisted of Education Code Sections 60850, 60851, 60853, 60855 (Stats. 1999x, ch. 1; Stats. 1999, Ch. 135) and California Code of Regulations, Title 5, Sections 1200 – 1225 in effect March 2003.

passed, and administration of the CAHSEE on SPI-designated dates to pupils in grade 9 only in the 2000-2001 school year who wish to take the CAHSEE (Ed. Code, § 60851(a)), except a teacher's time administering the CAHSEE is not a mandate. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual. (§§ 1200(g) & 1210(b)(3));
- Allowing pupils to have additional time to complete the CAHSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's IEP, and only if this activity is performed by a non-teacher certificated employee, such as an employee holding a service credential. (§ 1215);
- accurately identifying eligible pupils who take the CAHSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
- maintaining a record of all pupils who participate in each test cycle of the CAHSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the CAHSEE taken (§ 1205);
- maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the CAHSEE, and whether or not the pupil passed each section of the CAHSEE (§ 1206);
- designation by the district superintendent, on or before July 1 of each year, of a district employee as the CAHSEE district coordinator, and notifying the publisher of the CAHSEE of the identity and contact information of that individual (§ 1209);
- for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the CAHSEE in the manner required by the publisher (§ 1209); and
- designation annually by the district superintendent a CAHSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the CAHSEE district coordinator to resolve issues that arise as a result of administration of the CAHSEE (§ 1210).
- Also, the CAHSEE district coordinator's duties[23] listed in section 1209 and the CAHSEE test site coordinator's duties[24] listed in section 1210 (except for a teacher's time in administering the CAHSEE during the school day); and

[23] These duties are: (1) responding to inquiries of the publisher, (2) determining district and school CAHSEE test material needs, (3) overseeing acquisition and distribution of the CAHSEE,

- delivery of CAHSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212).

- Test security/cheating: Doing the following to maintain test security:

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(4) maintaining security over the CAHSEE using the procedures in section 1211, (5) overseeing administration of the CAHSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the CAHSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the CAHSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the CAHSEE in the manner required by the publisher.

[24] These duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the CAHSEE to eligible pupils… at the test site; (9) overseeing the collection and return of all testing materials to the CAHSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the CAHSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the CAHSEE district coordinator and the number of examinations collected for return to the CAHSEE district coordinator; (11) overseeing the collection of all pupil …data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three working days of completion of site testing, certifying with the principal to the CAHSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the CAHSEE in the manner and as otherwise required by the publisher.

- for CAHSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the CAHSEE, both while in the testing room and during any breaks (§ 1211(a));
- limiting access to the CAHSEE to pupils taking it and employees responsible for its administration (§ 1211(b));
- having all CAHSEE district and test site coordinators sign the CAHSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations (§ 1211(c));
- abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the CAHSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211(d));
- CAHSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the CAHSEE Test Security Affidavit (§ 1211(e));
- for persons with access to the CAHSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the CAHSEE Test Security Affidavit set forth in subdivision (g) (§ 1211(f));
- CAHSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory (§ 1211(h));
- being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher (§ 1211(i));
- providing secure transportation within the district for test materials once they have been delivered to the district (§ 1211(j)); and
- marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the CAHSEE, and notifying each eligible pupil before administration of the CAHSEE of these consequences of cheating (§ 1220).

- Reporting data to the SPI: providing CAHSEE data to the SPI or independent evaluators or the publisher is a state mandate. Specifically, providing the following information on each pupil tested: (1) date of birth, (2) grade level, (3) gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping

condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, (13) post-high school plans. (§ 1207); and reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and for the district superintendent to certify the accuracy of this information submitted to CDE (§ 1225).

III. Position of the Parties and Interested Parties

A. Claimant's Position

The claimant alleges that the test claim statutes and regulation impose a reimbursable state-mandated program for school districts under article XIII B, section 6 and Government Code section 17514. The claimant seeks reimbursement to:

- Offer pupils who have failed one or both parts of CAHSEE by the end of 12th grade the opportunity to receive intensive support and assistance for two years following the completion of 12th grade. A school district may employ different intensive instruction and services strategies aligned to the needs of the pupil, and intensive instruction and services may be provided on Saturdays, evenings, or at a time and location deemed appropriate by the school district. Intensive instruction and services may include individual or small group instruction; the hiring and training of teachers; purchasing, scoring, and reviewing diagnostic assessments; and the provision of instruction and services by a public or nonpublic entity, as determined by the school district.
- Notify pupils in writing that intensive services are available to eligible pupils for two years following 12th grade. Notice must also be posted in the school site office, district office, and on the school district's website.
- Ensure that each eligible pupil receives an appropriate diagnostic assessment to identify areas of need.
- Submit an annual report to the Superintendent of Public Instruction (SPI) relating to the provision of intensive instruction and services provided.

The test claim is supported by a declaration from Patrick Day, Director of Maintenance, Operations, Purchasing, Contract Management for the San Jose Unified School District that states: "the estimated annual costs to perform the activities required by Education Code sections 37254 and 52378 are approximately $375,000." The declaration recognizes funds appropriated in the Budget Act of 2007, but states that "none of the funds have been specifically identified as applicable to the increased activities required by Statutes of 2007, Chapter 526 and Chapter 730."[25]

Claimant submitted comments on the draft staff analysis on April 10, 2013 that disagreed with the proposed finding regarding the Commission's lack of jurisdiction over Statutes 2007, chapter 526.

[25] Exhibit A, Test Claim, Declaration of Patrick Day, San Jose Unified School District, page 3-4.

B. State Agency Position

Finance, in comments filed in December 2008, points out that the portion of the test claim related to Statutes 2007, chapter 526 violates the statute of limitations in Government Code section 17551. Because the test claim was filed more than one year after the effective date of this statute, Finance concludes that the Commission has no statutory authority to hear and decide on the parts of the test claim relating to Statutes 2007, chapter 526.

Finance also asserts that the test claim statutes do not impose a state-mandated program because the activities required under the CAHSEE Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program are only required if the claimant chooses to receive state funding and participate in the programs.

Finance also states that funding has been provided in every budget act since 2005 for the CAHSEE Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program. According to Finance, in the 2007-2008 school year, claimant applied for and received $304,066 in CAHSEE Intensive Instruction and Services Program funding, and $1,008,269 in Middle and High School Supplemental Counseling Program funding. Finance also states that revenue limits are a source of funds for the test claim.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[26] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[27]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[28]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[29]

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[26] *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

[27] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[28] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, at p. 874.

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[30]

4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [31]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[32] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[33] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[34]

A. The test claim was properly filed within the statute of limitations for Education Code sections 37254, 52378, 52379, and 52380, as amended by Statutes 2007, chapters 526 and 730, and the 2007 version of section 1204.5 of the title 5 regulations.

In order for the Commission to take jurisdiction and make a determination of reimbursement with respect to a statute or executive order pled in a test claim, the test claim must be filed within the applicable statute of limitations required by Government Code section 17551(c) for each statute and executive order. Section 17551(c) states the following:

> Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.[35]

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[29] *San Diego Unified School Dist., supra,* 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[30] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[31] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[32] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[33] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[34] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[35] Government Code, section 17551(c) (Stats. 2004, ch. 890) effective Jan. 1, 2005. According to the Commission's regulations, "within 12 months of incurring increased costs" means filing by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred. (Cal. Code Regs., tit. 2, § 1183(c).)

In this case, there is no issue regarding the Commission's jurisdiction over Education Code section 52379, as amended by Statutes 2007, chapter 730 and section 1204.5 of the title 5 regulations, as amended by Register 2007, Number 51. The test claim was filed within one year of the effective date of this statute and regulation.

However, the parties dispute whether the test claim was filed within the statute of limitations for the remaining test claim statutes: Education Code sections 37254, 52378, and 52380 as amended by Statutes 2007, chapter 526, and section 1204.5 of the regulations as adopted and amended in 2004, 2005, and 2006. The test claim was stamped *received* on October 14, 2008, over one year past the effective dates of these statutes and regulation.

For the reasons below, the Commission finds that the test claim, with respect to Education Code sections 37254, 52378, and 52380, as they were amended by Statutes 2007, chapter 526, was properly filed within the statute of limitations and that the Commission has jurisdiction over these test claim statutes. The Commission also finds that the test claim, with respect to section 1204.5 of the title 5 regulations, as that regulation was adopted in 2004, and amended in 2005 and 2006, was not timely filed and, thus, the Commission does not have jurisdiction to determine whether those versions of the regulation impose a reimbursable state-mandated program.

1. The test claim seeking reimbursement for Education Code sections 37254, 52378, and 52380, as amended by Assembly Bill 347 (Stats. 2007, ch. 526), was timely filed.

Three of the code sections in this test claim (Ed Code §§ 37254, 52378, 52380) were amended by AB 347 (Stats. 2007, ch. 526). AB 347 was an urgency bill that took effect on October 12, 2007, the date it was chaptered.[36] The test claim was received on October 14, 2008, more than 12 months after AB 347's effective date (Oct. 12, 2007). Finance argues that the Commission does not have jurisdiction over the code sections amended by AB 347 because the test claim was filed beyond the 12-month statute of limitations in Government Code section 17551(c).

According to the Commission's mail log records, this test claim was received by mail on October 14, 2008.[37] The Commission's regulations define "filing date," for documents filed by mail, as follows:

> (g) "Filing date" means the date of delivery to the commission's office during normal business hours. For purposes of meeting the filing deadlines required by statute, the filing is timely if:
>
> [¶] . . . [¶]
>
> (1) the filing *was mailed* by first class mail no later than the expiration of the time for filing, or . . . (Emphasis added.)[38]

[36] Government Code, section 9600 (b) states in part that "urgency statutes shall go into effect immediately upon their enactment."

[37] Exhibit A.

[38] California Code of Regulations, title 5, section 1181(g). In 2008, the Commission had not yet implemented the e-filing system.

Under this rule, the date the document is mailed, and not the date the document is received, establishes the date of filing. Thus, in order to comply with the statute of limitations in Government Code section 17551(c) for purposes of the 2007 amendments to Education Code sections 37254, 52378, and 52380, the test claim had to be mailed by October 12, 2008.

The record, however, does not contain evidence showing the date the test claim was mailed. Nevertheless, by reviewing the 2008 calendar for the month of October, the Commission may properly presume that the filing was timely mailed by the October 12, 2008 deadline. The test claim was certified by a representative at San Jose Unified School District on October 7, 2008, and declarations were signed on October 8th and 9th, 2008, and, thus, it can be presumed that the claim was in the possession of the claimant on those dates.[39] The 2008 calendar shows that October 9, 2008 was a Thursday, and October 10, 2008 was a Friday, the last two business days of the week when the mail is picked up and delivered. October 11, 2008, was a Saturday, a day that mail is picked up and delivered, but not considered a business day for schools. October 12, 2008, the deadline for mailing this test claim, was a Sunday, a day when there is *no* mail pick-up or delivery. Monday, October 13, 2008, was Columbus Day, a Federal holiday[40] and a day when there was no mail pick-up or delivery,[41] and the filing was received on Tuesday, October 14, 2008. Since the test claim was delivered by mail, it had to have been mailed before the Sunday, October 12th deadline. The Commission can take judicial notice of these calendar dates and the dates of mail delivery, and find that the test claim was mailed before October 12, 2008, in compliance with the one-year statute of limitations required by Government Code section 17551(c).[42]

Therefore, the Commission has jurisdiction over Education Code sections 37254, 52378, and 52380, as amended by Statutes 2007, chapter 526.

2. The test claim seeking reimbursement for section 1204.5 of the title 5 regulations, as adopted and amended in 2004, 2005, and 2006, was not timely filed and the Commission does not have jurisdiction to make findings on those versions of the regulation.

Although the claimant does not state which version of the regulation (Cal. Code Regs., tit. 5, § 1204.5) is being pled in the test claim, the history of section 1204.5 shows that it was adopted in 2004 (Register 2004, No. 21, effective and operative May 19, 2004) and amended three times before the claim was filed: on August 16, 2005 (Register 2005, No. 33, effective and operative

[39] Both signed by Patrick Day, Director of Maintenance, Operations, Purchasing, Contract Management for the San Jose Unified School District.

[40] See 5 U.S.C. section 6103.

[41] U.S. Postal Service "Mailing Standards of the United States Postal Service Domestic Mail Manual" section 608.3.2. This manual is incorporated into the federal regulations by 39 CFR section 111.1.

[42] Evidence Code section 452(g)(h), allowing judicial notice of facts and propositions that are of common knowledge, are not reasonably subject to dispute, and are capable of accurate determination by resort to resources that are reasonably indisputable; California Code of Regulations, title 2, section 1187.5(c).

Aug. 16, 2005), March 16, 2006 (Register 2006, No. 11, effective and operative Mar. 16, 2006), and December 20, 2007 (Register 2007, No. 51, effective and operative Dec. 20, 1997).

Based on the filing date of the test claim (Oct. 12, 2008), the Commission has jurisdiction only over the version of section 1204.5 of the title 5 regulations that was amended on December 20, 2007 (Register 2007, No. 51) and became effective the same day. The 2004 adoption of section 1204.5, and amendments made in 2005 and 2006 became effective more than 12 months before the filing date of the test claim, and there is no evidence in the record that the claimant first incurred increased costs under those amendments later than the 12-month period after those amendments became effective.

Therefore, the Commission does not have jurisdiction to make findings on section 1204.5 of the title 5 regulations, as adopted and amended in 2004, 2005, and 2006. The 2007 amendment to section 1204.5, however, was timely filed and is analyzed below.

B. The test claim statutes and regulation do not impose a state-mandated program on school districts.

1. The 2007 amendments to the CAHSEE Intensive Instruction Program (Ed. Code, § 37254, Stats. 2007, ch. 526) do not impose a state-mandated program.

The CAHSEE Intensive Instruction Program was adopted in 2005 to assist "eligible pupils" defined as pupils required to pass the CAHSEE but who have failed to pass one or more parts of the exam. The program offers eligible pupils "intensive instruction and services," which was defined as:

> Intensive instruction and services may include, but are not limited to, all of the following:
>
> (A) Individual or small group instruction.
>
> (B) The hiring of additional teachers.
>
> (C) Purchasing, scoring, and reviewing diagnostic assessments.
>
> (D) Counseling.
>
> (E) Designing instruction to meet specific needs of eligible pupils.
>
> (F) Appropriate teacher training to meet the needs of eligible pupils.[43]

The 2005 statute also provided how the SPI was to allocate funds, and required school districts to ensure, as a condition of funding, that eligible pupils receive appropriate diagnostic assessments and intensive instruction and services based on the diagnostic assessments. Districts also had to demonstrate that funds would be used to supplement and not supplant existing services, and report the number of eligible pupils at each high school in the district. Annual district reporting was also required.

Section 37254 was amended in 2006 to revise how funding was allocated to schools, and to amend the reporting requirements.[44]

[43] Education Code section 37254 (Stats. 2005, ch. 234).

The CAHSEE Intensive Instruction Program was amended by the test claim statute, Statutes 2007, chapter 526 (Ed. Code, § 37254) as follows:

- Revised the definition of eligible pupil in subdivision (a) to include "one who has not passed one or both parts of the CAHSEE "by the end of grade 12."
- Revised the funding formula in subdivision (b) to require the SPI to determine a per pupil funding rate by dividing the amount of appropriated funds by the number of eligible pupils in grade 12, as reported by school districts.
- Added two additional services to the definition of "intensive instruction and services" in subdivision (c)(3)(G) and (H) as follows:

  (G) Instruction in English-language arts or mathematics, or both, that eligible pupils need to pass those parts of the high school exit examination not yet passed. A school district may employ different intensive instruction and services strategies more aligned to the needs and circumstances of pupils who have not passed one or both parts of the high school exit *examination by the end of grade 12 as compared to grade 12 pupils with similar needs* in a comprehensive high school of the district.

  (H) The provision of instruction and services by a public or nonpublic entity, as determined by the local educational agency.

- Amended subdivision (d) by requiring school districts, as a condition of receiving funds for intensive instruction and services, to perform the following activities:

  - Ensure that each pupil receives intensive instruction and services based on prior results on the CAHSEE;
  - Ensure that all pupils who have not passed one or both parts of the CAHSEE by the end of grade 12 are notified in writing before the end of each school term of the availability of the services in sufficient time to register for or avail themselves of those services each term for two consecutive academic years thereafter and are notified of the right to file a complaint regarding those services as specified, and post the notice in the school office and on the district Web site, as specified.
  - Ensure that all pupils who have not passed one or both parts of the high school exit examination by the end of grade 12 have the opportunity to receive intensive instruction and services as needed based on the results of the diagnostic assessment and prior results on the high school exit examination, as specified, for up to two consecutive academic years after completion of grade 12 or until the pupil passes both parts of the high school exit examination, whichever comes first. A school district shall employ strategies for intensive instruction and services that are most likely to result in these pupils passing the parts of the high school exit examination that they have not yet passed.
  - Ensure that all English learners who have not passed one or both parts of the high school exit examination by the end of grade 12 have the opportunity to receive

[44] Statutes 2006, chapter 79.

intensive instruction and services provided, as specified. Include services to improve English proficiency as needed based on the results of the diagnostic assessment and prior results on the high school exit examination, as specified, to pass those parts of the high school exit examination not yet passed, for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first. A school district shall employ strategies for intensive instruction and services that are most likely to result in these pupils passing the parts of the high school exit examination that they have not yet passed.

- Submit an annual report to the appropriate county superintendent of schools that describes the manner and frequency in which eligible pupils were notified of the intensive instruction and services provided.

The Commission finds that the 2007 amendments to section 37254 are requirements that were imposed, according to the plain language of section 37254(d), as "a condition of receiving funds." In the 2012-2013 State Budget Act, over $72 million was appropriated for the purposes of Education Code section 37254.[45] Thus, there is no legal requirement for school districts to seek or receive funds for the CAHSEE Intensive Instruction Program. School districts make a local decision to apply for funding.[46] A local decision that results in a school district incurring costs does not constitute a state-mandated program.[47] According to the Supreme Court's interpretation of a state-mandated program in the *Kern* case, downstream requirements that result from a discretionary decision (such as the decision to receive funds) are not mandated by the state.[48]

Moreover, CDE has interpreted the activities in section 37254 as "voluntary" rather than "mandatory."[49] The Commission, like a court, gives great weight to the construction of a statute by the administrative officials charged with its enforcement or implementation.[50]

Finding no legal compulsion, a school district may argue it is practically compelled to comply with the 2007 amendments to section 37254. Practical compulsion requires a concrete showing, with evidence in the record, that a school district faces certain and severe penalties, such as double taxation or other draconian consequences for not complying the test claim statute, or that a school district is left with no reasonable alternative but to comply with the statute in order to

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[45] See Item 6110-204-0001, Provision 1, Statutes 2012, chapters 21 and 29.

[46] CDE, "Guidance: Application for Categorical Funding" last reviewed July 16, 2012. <http://www.cde.ca.gov/fg/aa/co/ca12sguiappcatprog.asp > as of May 1, 2013.

[47] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[48] *Dept. of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731, 742-743.

[49] CDE, "Frequent Questions – Supplemental Instruction" last reviewed April 18, 2013. <http://www.cde.ca.gov/re/lr/pr/faqsi.asp> as of May 1, 2013. CDE interprets other facets of the Supplemental Instructional Program (e.g., Ed. Code, §§ 37252 and 37252.2) as mandatory.

[50] *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

carry out its core mandatory function to provide educational services to K-12 students.[51] The claimant has not provided any evidence of practical compulsion to participate in the CAHSEE Intensive Instruction Program for this test claim.

If a school district decides not to participate in the CAHSEE Intensive Instruction Program, or elects to discontinue participation in the program, there is no evidence in the record that the district would face "certain and severe penalties" such as "double taxation" or other "draconian measures." It simply loses continued funding to assist pupils in passing the CAHSEE through this program.

For these reasons, the Commission finds that Education Code section 37254 (Stats. 2007, ch. 526) does not impose a state-mandated program on school districts.[52]

2. The 2007 amendments to the Middle and High School Supplemental Counseling Program (Ed. Code, §§ 52378 & 52380, Stats. 2007, ch. 526) do not impose a state-mandated program.

The purpose of the Middle and High School Supplemental Counseling Program is to increase the number of school counselors who serve pupils in grades 7 to 12. The new counselors help provide pupils with information on all educational and vocational options available to them. Funding available is first intended to serve pupils in grades 7 to 12, with additional attention to those who have failed or are at risk of failing the CAHSEE, or are at risk of not graduating due to insufficient credits.[53]

Before the 2007 test claim statute was enacted, districts that maintain grades 7 through 12, inclusive, were required to perform two activities under the program as a condition of receiving funds: (1) adopt the program at a public meeting of the governing board, and (2) meet with each pupil to explain the pupil's academic records and educational options, among other things. Education Code section 52378 was amended by the 2007 test claim statute to add the following requirements to the program as a condition of receiving funds:

- The program shall include a provision for a counselor to meet with each pupil and if practicable, the parent or legal guardian of the pupil, to explain the availability of intensive instruction and services as required by section 37254(c), for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first, for pupils who have not passed one or both parts of the CAHSEE by the end of grade 12. (§ 52378(a)(2).)
- Inform the pupil who has not passed one or both parts of the CAHSEE of the option of intensive instruction and services. (§ 52378(b)(4).)

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[51] *Kern High School Dist., supra,* 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 884-887; *Department of Finance (POBRA), supra*, 170 Cal.App.4th 1355, 1362-1368.

[52] Education Code section 37254 was also amended by Statutes 2009, chapter 303, which is not part of this test claim so the Commission makes no finding on it.

[53] CDE, "Frequently Asked Questions" last reviewed February 7, 2013. <http://www.cde.ca.gov/ls/cg/mc/mhscfaq.asp> as of May 1, 2013.

- For a pupil enrolled in grade 12, include in the options for continuing his or her education if he or she fails to meet graduation requirements, the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first. (§ 52378(c)(1)(D).)
- During a conference with each specified pupil, and his or her parent or guardian, where the pupil is informed of the consequences of not passing the CAHSEE, the school counselor shall also apprise the pupil of the remediation strategies, high school courses, and alternative education options available to the pupil. These options shall include the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first. (§ 52378(e)(5).)

Another code section of the Middle and High School Supplemental Counseling Program (Ed. Code, § 52380) was also amended by the 2007 test claim statute to revise the school district reporting requirement, which is required as a condition of receiving funds, to provide assurance that the school district has complied with section 52378(e)[54] and to send the report to the

[54] The full text of section 52378(e) states the following:

> (e) During the individual conference described in subdivision (d), the school counselor shall apprise the pupil identified in paragraphs (1) and (2) of subdivision (b), and his or her parent or legal guardian of the following:
> (1) Consequences of not passing the high school exit examination.
> (2) Programs, courses, and career technical education options available for pupils needed for satisfactory completion of middle or high school.
> (3) Cumulative records and transcripts of the pupil.
> (4) Performance on standardized and diagnostic assessments of the pupil.
> (5) Remediation strategies, high school courses, and alternative education options available to the pupil, including, but not limited to, informing pupils of the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first.
> (6) Information on postsecondary education and training.
> (7) The score of the pupil on the English language arts or mathematics portion of the California Standards Test administered in grade 6, as applicable.
> (8) Eligibility requirements, including coursework and test requirements, and the progress of the pupil toward satisfaction of those requirements for admission to four-year institutions of postsecondary education, including, at least, the University of California and the California State University.

Superintendent of Public Instruction and the county superintendent of schools. The 2007 amendment also required, as a condition of receiving funds, the district to send the report to the Superintendent of Public Instruction and the county superintendent of schools. The 2007 statute added the following underlined provisions:

> As a condition of receipt of funds pursuant to this chapter, a school district shall submit an annual report <u>to the Superintendent and the appropriate county superintendent of schools</u> in a manner determined by the Superintendent that describes the number of pupils served, the number of school counselors involved in conferences, the number and percentage of pupils who participated in conferences and who successfully pass the high school exit examination, and the number and percentage of pupils who participated in conferences and who fail to pass one or both sections of the exit examination, and a summary of the most prevalent results for pupils based on the graduation plans developed pursuant to this chapter. <u>The report also shall contain an assurance that the school district has complied with subdivision (e) of Section 52378.</u>

The Commission finds that Education Code sections 52378 and 52380, as amended by Statutes 2007, chapter 526, do not impose a state-mandated program. These code sections impose requirements, according to the plain language in both sections, which are "a condition of receiving funds." In the 2012-2013 State Budget Act, over $208 million was appropriated for the purposes of Education Code section 52378. There is no legal requirement for school districts to perform the new activities as a condition receiving additional funds for the Middle and High School Supplemental Counseling Program. School districts make a local decision to apply for this funding.[55] A local decision that results in a school district incurring costs does not constitute a state mandate.[56] According to the Supreme Court's interpretation of a state-mandated program in the *Kern* case, downstream requirements that result from a discretionary decision do not impose a state mandate.[57]

Nor is there any evidence that school districts are practically compelled to implement the Middle and High School Supplemental Counseling Program. Practical compulsion requires a concrete showing, with evidence in the record, that a school district faces certain and severe penalties, such as double taxation or other draconian consequences for not complying the test claim statute, or that a school district is left with no reasonable alternative but to comply with the statute in order to carry out its core mandatory function to provide educational services to K-12 students.[58] The claimant has not provided evidence of practical compulsion in the record for this test claim.

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(9) The availability of financial aid for postsecondary education.

[55] CDE, "Frequently Asked Questions" last reviewed February 7, 2013. <http://www.cde.ca.gov/ls/cg/mc/mhscfaq.asp> as of May 1, 2013.

[56] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[57] *Kern High School Dist., supra,* 30 Cal.4th 727, 731, 742-743.

[58] *Kern High School Dist., supra,* 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 884-887; *Department of Finance (POBRA), supra,* 170 Cal.App.4th 1355, 1362-1368.

If a school district decides not to participate in the Middle and High School Supplemental Counseling Program, or elects to discontinue participation in the program, there is no evidence in the record that the district will face "certain and severe penalties" such as "double taxation" or other "draconian measures." It simply loses continued funding to assist pupils through these supplemental counseling services.

For these reasons, the Commission finds that Education Code sections 52378 and 52380 (Stats. 2007, ch. 526) do not impose a state-mandated program on school districts.

3. The 2007 amendment to the Middle and High School Supplemental Counseling Program appropriation provision (Ed. Code, § 52379, Stats. 2007, ch. 730) does not impose a state-mandated program.

Education Code section 52379 was amended by the test claim statute (Stats. 2007, ch. 730) to clarify the funding appropriated under the Middle and High School Supplemental Counseling Program as follows (noted by strikeout and italics):

> (a) Funds appropriated in the annual Budget Act for the purposes of this chapter shall be allocated to school districts based on an equal amount per pupil enrolled in the district in the prior fiscal year, based on the fall California Basic Educational Data System (CBEDS) enrollment data, in grades 7 to 12, inclusive, with the following minimum-grant exceptions:
>
> (1) Five thousand dollars ($5,000) for each schoolsite that has 100 or fewer pupils enrolled in any of grades 7 to 12, inclusive.
>
> (2) Ten thousand dollars ($10,000) for each schoolsite that has ~~between~~ *at least* 101 ~~and~~, *but not more than* 200, pupils enrolled in any of grades 7 to 12, inclusive.
>
> (3) Thirty thousand dollars ($30,000) or an amount per pupil enrolled, whichever is greater, for each schoolsite with more than 200 pupils enrolled in any of grades 7 to 12, inclusive.
>
> (b) Funds allocated pursuant to this section shall supplement, and not supplant, expenditures made by a school district for school counseling programs.
>
> (c) For purposes of this section, a charter school is not eligible to receive a minimum grant but instead shall receive an amount per pupil enrolled in grades 7 to 12, inclusive.
>
> (d) Funds appropriated in the annual Budget Act for the purposes of this chapter shall be used to provide supplemental counseling services delivered by personnel who hold a valid pupil personnel services credential.

The legislative history of this bill indicates that it is "the annual Education 'clean-up' bill that makes various non-controversial revisions to statute."[59] The amendment to section 52379 was described as "Corrects wording in the Middle & High School Supplemental Counseling Program

[59] Senate Committee on Education, Analysis of SB 132 (2007-2008 Reg. Sess.) as amended March 26, 2007, page 5.

to specify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of $10,000."[60]

This code section, as amended in 2007, describes how funding is allocated for the counseling program, but imposes no requirements on a school district. Thus, the Commission finds that Education Code 52379 (Stats. 2007, ch. 790) does not impose a state-mandated program on school districts.

4. The 2007 amendment to the regulation governing grade 11 and 12 and adult student CAHSEE testing dates (Cal. Code Regs., tit.5, § 1204.5, as amended by Reg. 2007, No. 51.) does not impose a state-mandated program.

The test claim regulation was amended operative December 20, 2007 (Reg. 2007, No. 51) as follows.

> § 1204.5 Grades 11 and 12 and Adult Student Testing Dates.
>
> (a) School districts shall provide eligible pupils in grade 11 at least two opportunities per school year to take the section(s) of the examination not yet passed. Eligible pupils in grade 11 ~~who have not yet passed one or both sections of the examination shall have up to two opportunities per year to~~ may take the section(s) of the examination not yet passed up to two times per school year and may take the examination in successive administrations ~~and may elect to take the examination during these opportunities~~.
>
> (b) School districts shall provide eligible pupils in grade 12 at least three opportunities per school year to take the section(s) of the examination not yet passed. Eligible pupils in grade 12 ~~shall have up to three opportunities to take the section(s) of the examination not yet passed. The district shall offer either three opportunities during grade 12 or two opportunities in grade 12 and one opportunity in the year following grade 12 to~~ may take the section(s) of the examination not yet passed up to three times per school year and may take the examination in successive administrations. ~~Eligible pupils in grade 12 may elect to take the examination during district-provided opportunities.~~
>
> (c) School districts shall provide eligible adult students at least three opportunities per school year to take the section(s) of the examination not yet passed. Eligible adult students may ~~shall have up to three opportunities per year to~~ take the section(s) of the examination not yet passed up to three times per school year and may take the examination in successive administrations ~~and may elect to take the examination during these opportunities~~.
>
> (d) ~~Districts shall not test eligible pupils in grade 11 in successive administrations within a school year.~~ Eligible pupils in grades 11 and 12 and eligible adult students should be offered appropriate remediation or supplemental instruction before being retested.

[60] *Id.*, page 5.

This regulation affects eligible pupils and eligible adult students, defined as:

> "Eligible pupil" is a person enrolled in a California public school in grade 10, 11, or 12, including those pupils placed in a nonpublic school through the individualized education program (IEP) process pursuant to Education Code section 56365, who has not passed both the English-language arts section and the mathematics section of the high school exit examination.[61]
>
> "Eligible adult student" is a person enrolled in an adult school operated by a school district who is working to attain a high school diploma and has not passed both the English-language arts section and the mathematics section of the high school exit examination. This term does not include pupils who are concurrently enrolled in high school and adult school.[62]

As indicated in the background, the purpose of the amendment was to clarify the number of times pupils may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations.[63]

The amendments to section 1204.5 do not impose a state-mandated new program or higher level of service. Except for the amendment to subdivision (d) that removes a prohibition on testing grade 11 pupils in successive administrations within a school year, the amendments regarding the number of times a pupil may take the CAHSEE are merely clarifying. The amendments do not increase the number of times per year pupils may take the CAHSEE. Both before and after the 2007 amendment, eligible pupils in grade 11 may take the CAHSEE up to two times per year, eligible pupils in grade 12 may take the CAHSEE up to three times per year, and eligible adult students may take the CAHSEE up to three times per year. There is nothing to indicate that allowing successive administrations for grade 11 pupils in subdivision (d) imposes a higher level of service on a school district beyond that provided under prior law. Therefore, the Commission finds that California Code of Regulations, title 5, section 1204.5 (Register 2007, No. 51, operative Dec. 20, 2007) is not a state-mandated new program or higher level of service.

V. Conclusion

Based on the foregoing, the Commission finds that Education Code sections 37254, 52378, 52379, and 52380, as amended by Statutes 2007, chapters 526 and 730, and section 1204.5 of the title 5 regulations, as amended in 2007 (Register 2007, No. 51) do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further finds that the test claim, with respect to section 1204.5 of the title 5 regulations as adopted in 2004 and amended in 2005 and 2006, was not filed within the one-year

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[61] California Code of Regulations, title 5, section 1200(d) as amended by Register 2007, No. 51, operative December 20, 2007.

[62] California Code of Regulations, title 5, section 1200(c) as amended by Register 2007, No. 51, operative December 20, 2007.

[63] CDE, Initial Statement of Reasons, California High School Exit Exam Regulations, February 20, 2007, page 1.

statute of limitations required by Government Code section 17551(c) and, thus, the Commission does not have jurisdiction to make findings on those versions of the regulation.

Accordingly, the Commission denies this test claim.

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
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RE: **Adopted Statement of Decision**

High School Exit Examination II, 08-TC-02
Education Code Sections 37254, 52378, 52379, 52380
Statutes 2007, Chapter 526 and Statutes 2007, Chapter 730
California Code of Regulations, Title 5, Section 1204.5
Register 2004, No. 21, eff. May 19, 2004; Register 2005, No. 33, eff. Aug. 16, 2005;
Register 2006, No. 11, eff. Mar. 16, 2006; and Register 2007, No. 51, eff. Dec. 20, 2007
San Jose Unified School District, Claimant

On May 24, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Heather Halsey, Executive Director

Dated: May 28, 2013

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Section 4011.10, as enacted by Statutes 2005, Chapter 481 (SB 159), and amended by Statutes 2006, Chapter 303 (SB 896) Filed on June 30, 2008 By Orange County Health Care Agency, Claimant.	Case No.: 07-TC-12 *General Health Care Services for Inmates* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 27, 2013*) (*Served October 2, 2013*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 27, 2013. Mr. James Harman represented claimant, Orange County Health Care Agency. Ms. Kim Pearson, Deputy Agency Director of Correctional Health Services for the Orange County Health Care Agency, also appeared on behalf of claimant. Ms. Susan Geanacou and Mr. Michael Byrne appeared on behalf of the Department of Finance (Finance).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision to deny the test claim at the hearing by a vote of 6 to 0.

Summary of the Findings

This test claim addresses 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. Penal Code section 4011.10, as added and amended by the test claim statutes, also sets statutory limits on the amount that hospitals that do not contract with local agencies may charge for emergency health care services at a rate equal to 110 percent of the hospital's actual costs. Prior to the enactment of the test claim statute, local

law enforcement agencies procuring emergency health care services for law enforcement patients were not expressly authorized to contract with hospitals for emergency health care services and the amount that non-contracting hospitals could charge for these services was not capped.

Claimant requests reimbursement for complying with the Penal Code section 4011.10 rate structure for compensating hospitals when there is no contract, i.e., for having to pay 110 percent of the non-contracting hospital's actual costs for emergency services. Claimant alleges that before the statute was enacted, it had the ability to negotiate reimbursement rates with providers and was able to negotiate an indigent rate "much lower than the test claim statutes' rate structure for non-contracting hospitals."

The Commission denies this test claim. The plain language of Penal Code section 4011.10, as added by Statutes 2005, chapter 481, and amended by Statutes 2006, chapter 303, authorizes local law enforcement agencies, notwithstanding any other provision of law, to contract with hospitals for emergency health care services for local law enforcement patients and capping the amount that non-contracting hospitals can charge for emergency health care services. Penal Code section 4011.10 does not direct or obligate local agencies to contract with hospitals for emergency health care services for law enforcement patients and does not require local agencies to perform any other activities. Rather, section 4011.10 gives local agencies the option to contract for emergency services.

Although claimant may have incurred increased costs as a result of being in a weaker bargaining position due to the statute, reimbursement under the Constitution is not required. A statute that indirectly results in increased costs, without mandating local agencies to perform new activities or a higher level of service, does not require reimbursement under article XIII B, section 6 of the California Constitution. As the courts have determined, "Section 6 was not intended to entitle local entities to reimbursement for all increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the State."[1]

Accordingly, the Commission finds that Penal Code section 4110.10, as added and amended in 2005 and 2006, does not impose a state-mandated program on local agencies.

COMMISSION FINDINGS

I. Chronology

06/30/2008	Claimant, Orange County Health Care Agency, filed the test claim with the Commission.
07/23/2008	Commission staff deemed the filing complete and issued a notice of complete test claim filing and schedule for comments.

[1] *City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802, 1816; see also, *Lucia Mar Unified School District v. State of California* (1988) 44 Cal.3d 830, 835; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876.

08/22/2008	Department of Finance (Finance) filed comments on the test claim.
03/20/2013	Commission staff issued the draft staff analysis and proposed statement of decision, setting the matter for the May 24, 2013 hearing.
03/29/2013	Claimant requested an extension of time to file comments and a postponement of the hearing.
04/02/2013	Claimant's request for an extension of time and postponement of hearing was granted and this matter was set for hearing on July 26, 2013.
05/20/2013	Finance filed comments on the draft staff analysis.
05/28/2013	Claimant filed comments on the draft staff analysis.
07/22/2013	Claimant requested a postponement of the hearing.
07/22/2013	Claimant's request for a postponement of the hearing was granted and this matter was set for hearing on September 27, 2013.

II. Background

This test claim seeks reimbursement for costs incurred by claimant as a result of procuring emergency medical services for law enforcement patients at hospitals that claimant does not contract with for such services. Penal Code section 4011.10 authorizes 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. The test claim statute, Penal Code section 4011.10, also sets statutory limits on the amount that hospitals that do not contract with local agencies may charge for emergency health care services for law enforcement patients at a rate equal to 110 percent of the hospital's actual costs.[2]

Prior law requires that law enforcement patients receive emergency medical care when necessary.[3] However, prior to the enactment of the test claim statute, local agencies were not specifically authorized to contract for emergency health care services for law enforcement patients. As stated by the Legislative Counsel's Digest, section 4011.10 was enacted because:

> Existing law authorizes the Department of Corrections and Rehabilitation to contract with providers of emergency health care services. Existing law specifies that hospitals and ambulance or other nonemergency response services that do not contract with the department shall provide those services at the Medicare rate.
>
> This bill would apply these provisions to county sheriffs, chiefs of police, and directors or administrators of local departments of correction, except that it specify that hospitals that do not contract with local law enforcement agencies

[2] Penal Code section 4011.10(b).

[3] Penal Code section 4011.5.

shall provide their services at a rate equal to 110% of the hospital's actual costs, as specified.[4]

Section 4011.10 was also enacted to:

> …save taxpayers dollars by enabling county sheriffs and police chiefs reasonable control over medical costs for inmates, suspects and victims of crime. This bill would ensure that local law enforcement agencies will be limited to reasonable and allowable costs under Medicare billing practices. This bill is consistent with existing law with respect to state prisoner health care...Under this bill, a county sheriff or police chief can continue to negotiate contracts with health care providers for emergency and non-emergency services for people under their jurisdiction…[5]

The test claim statute was modeled after Penal Code section 5023.5. Section 5023.5, enacted by Statutes 2004, chapter 227 and effective August 16, 2004, allows the California Department of Corrections and Rehabilitation (CDCR) and the California Youth Authority (CYA) to contract with providers of emergency health care services. Hospitals that do not contract with the CDCR or the CYA for emergency health care services must provide these services to these departments at the rate established by Medicare. Neither CDCR nor CYA may reimburse a hospital that provides these services, and that the department has not contracted with, at a rate that exceeds the hospital's reasonable and allowable costs, regardless of whether the hospital is located within or outside of California. Penal Code section 4011.10 was added by Statutes 2005, chapter 481, to allow local public entities other than the CDCR and CYA to contract for emergency health care services.

As originally enacted, Penal Code section 4011.10 stated, in relevant part:

> (b) Notwithstanding any other provision of law, a county sheriff or police chief ***may contract*** with providers of emergency health care services. Hospitals that do not contract with the sheriff or police chief for emergency health care services shall provide these services to their departments at a rate equal to 110 percent of the hospital's actual costs according to the most recent Hospital Annual Financial

[4] Legislative Counsel's Digest, Statutes of 2005, Chapter 481, S. B. No. 159. Section 4011.10 also states that the Legislature intended section 4011.10 to: (1) provide county sheriffs, chiefs of police, and directors or administrators of local detention facilities with an incentive not to engage in practices designed to avoid payment of legitimate emergency health care costs for the treatment or examination of persons lawfully in their custody, and to promptly pay those costs as requested by the provider of services; and (2) encourage county sheriffs, chiefs of police, and directors or administrators of local detention facilities to bargain in good faith when negotiating a service contract with hospitals providing emergency health care services.

[5] Exhibit F, Senate Rules Committee, Third Reading, Senate Bill 159, as amended May 3, 2005, p. 5.

> Data report issued by the Office of Statewide Health Planning and Development, as calculated using a cost-to-charge ratio. (Emphasis added.)

Section 4011.10 was amended by Statutes 2006, chapter 303, as urgency legislation to state, in relevant part:

> (b) Notwithstanding any other provision of law, a county sheriff, police chief or other public agency that contracts for emergency health services, ***may contract*** with providers of emergency health care services for care to local law enforcement patients. Hospitals that do not contract with the county sheriff, police chief, or other public agency that contracts for emergency health care services shall provide emergency health care services to local law enforcement patients at a rate equal to 110 percent of the hospital's actual costs according to the most recent Hospital Annual Financial Data report issued by the Office of Statewide Health Planning and Development, as calculated using a cost-to-charge ratio. (Emphasis added.)

The 2006 amendment did not alter the purpose of section 4011.10 or the Legislature's statement of intent contained in section 4011.10.[6] Both Statutes 2005, chapter 481 and Statutes 2006, chapter 303 contained a January 1, 2009 sunset date for section 4011.10. However, later amendments to this section extended and then eliminated the sunset provision. Although section 4011.10 has been subsequently amended, claimant has not pled these amendments and the amendments are not relevant to the test claim.[7]

III. Position of Claimant and Interested Parties

A. Claimant's Position

Claimant alleges that the test claim statute constitutes a reimbursable state-mandated program or higher level of service within an existing program. Claimant "is the department that pays claims for health care provided to persons in the custody of the Orange County Sheriff."[8] Claimant contracts for some of the care of its inmates, but there are instances when claimant uses the services of hospitals that claimant does not contract with. Claimant requests reimbursement for complying with the Penal Code section 4011.10 rate structure for compensating hospitals when there is no contract, i.e., for having to pay 110 percent of the non-contracting hospital's actual costs for emergency services.

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[6] Statutes 2006, chapter 303.

[7] Statutes 2008, chapter 142 (extending provisions section 4011.10 until January 1, 2014); Statutes 2011, chapter 39 (recasting provisions of section 4011.1 to apply to health care services generally, instead of emergency health care services, and deleting the provision making section 4011.10 inoperative as of January 1, 2014).

[8] Exhibit A, Test claim, dated June 30, 2008, section 5 ("Written Narrative"), p 1.

Claimant alleges that the test claim statute's rate structure for non-contracting hospitals has caused claimant to incur $1,841,893.49 in additional emergency medical costs during the 2007-2008 fiscal year and will cause claimant to incur an amount similar to the $1,841,893.49 in additional medical costs for each year going forward.[9] Prior to the enactment of Penal Code section 4011.10, claimant reimbursed emergency service providers at rates set by claimant's "Medical Services Initiate" (MSI) program, which is a federal, state, and county funded health care program that provides medical care for Orange County's low-income citizens.[10] The test claim appears to indicate that prior to the enactment of the test claim, all hospitals within Orange County billed claimant an indigent rate for treatment of law enforcement patients pursuant to Health and Safety Code section 17000 et seq.[11] Although the test claim does not explain why treatment of all law enforcement patients was previously billed at indigent rates, the indigent rates appear to be much lower than the test claim statute's rate structure for non-contracting hospitals.

Claimant did not provide a statewide cost estimate because after contacting numerous agencies and state-wide associations, it could find no one else with any increased costs to report.[12]

In comments submitted in response to the draft staff analysis, claimant disagreed with the conclusion that Penal Code section 4011.10 does not impose any state-mandated activities upon local agencies. Claimant's comments allege that Penal Code section 4011.10 "imposes new and unique mandated activity on Claimant…to provide medical services to inmates at an increased cost." Claimant states that prior to the enactment of Penal Code section 4011.10, claimant was

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[9] Exhibit A, Test claim, dated June 30, 2008, section 6 ("Declarations"), pp. 3-4, "Declaration of Melissa Tober." Ms. Tober's declaration states that the test claim includes increased costs for both contracting and non-contracting hospitals and that 67% of the increased costs are associated with services provided by non-contracting hospitals. Ms. Tober's declaration does not indicate why the rate charged by Western Medical Center Anaheim, a contracting hospital, increased as a result of Penal Code section 4011.10.

[10] *Id*.; *See also*, Exhibit F, Orange County Health Care Agency Web site, Medical Services Initiative (MSI), http://ochealthinfo.com/about/medical/msi (accessed on July 8, 2013). Claimant's website further states, "The MSI program contracts with all of the County's key clinics and hospitals and provides integrated care through contractual relationships with surgery centers, skilled nursing facilities, urgent care facilities, "minute clinics" and a variety of diagnostic centers and programs. Financial eligibility is determined on a case-by-case basis however, only persons with annual incomes below 200% of the Federal Poverty Level are eligible. In applying for the program, proof of Orange County residency and U.S. citizenship or legal residency is required." Neither the test claim nor claimant's website indicate why all law enforcement patients qualified as indigents under its MSI program.

[11] Exhibit A, Test claim, dated June 30, 2008, Tober Decl., *supra*, pp. 3-4.

[12] Exhibit A, Test claim, dated June 30, 2008, section 5 ("Written Narrative"), p. 2; *See also* section 6 ("Declarations"), pp. 5-6, "Declaration of Allan P. Burdick."

able to procure medical treatment for all law enforcement patients at indigent rates irrespective of whether an inmate was indigent.[13] Claimant further states that Penal Code section 4011.10 "eviscerated" claimant's ability to procure treatment for all law enforcement patients at indigent rates. That is, the test claim statute negatively affected claimant's ability to bargain for indigent rates because the rate cap set by Penal Code section 4011.10--110 percent of the hospitals' actual costs for emergency services--is higher than the indigent rate claimant was previously able to negotiate. Claimant states that as a result of the test claim statute, hospitals will no longer provide medical services at the indigent rate, which has caused claimant to incur increased costs.

B. Department of Finance's Position

Finance submitted written comments on August 22, 2008. Finance argues that the activities involved in the test claim are not reimbursable on the following grounds:

- The test claim may have been filed after the statute of limitations pursuant to Government Code section 17551(c). Finance notes that section 17551 requires that a test claim be filed not later than 12 months of the effective date of the statute or 12 months of first incurring costs, whichever is later. Finance notes that the test claim was filed on June 30, 2008, approximately 30 months after the effective date of the test claim statute and 21 months after the test claim statute was amended in 2006. Finance notes that the test claim states that claimant first implemented the test claim statute on July 1, 2007. Finance admits that it does not have evidence indicating whether claimant first incurred costs prior to July 1, 2007.[14]
- The test claim statute does not impose a new program or higher level of service on local agencies.
- The relevant provisions of the test claim statute are optional and do not require that public agencies to contract with emergency health care and medical response providers.

On May 20, 2013, Finance submitted comments concurring with the recommendation in the draft staff analysis that the test claim should be denied because "the plain language of the Penal Code section 4011.10 does not impose a new program or higher level of service on the local agencies within the meaning of Article XIII B, section 6 of the California Constitution."[15]

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[13] Exhibit E, Claimant comments, pp. 2-3. Claimant's rebuttal comments also state: "Whether every inmate could or should have been considered truly indigent for MSI purposes is irrelevant: HCA and the hospitals *negotiated and agreed* that medical services for inmates would be paid at the MSI rates."

[14] Exhibit B, Department of Finance Comments, pp. 1-2.

[15] Exhibit D, Department of Finance Comments.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service, except that the Legislature *may, but need not*, provide a subvention of funds for the following mandates:
>
> (1) Legislative mandates requested by the local agency affected.
>
> (2) Legislation defining a new crime or changing an existing definition of a crime.
>
> (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[16] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[17]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[18]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[19]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[20]

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[16] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[17] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[18] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[19] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles*, *supra*, 43 Cal.3d 46, 56.)

[20] *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[21]

The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[22] The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[23] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[24]

A. Evidence In The Record Supports The Finding That The Test Claim Was Filed Within The Statute Of Limitations

Although Finance suggests that that Government Code section 17551(c) may bar this test claim because the claim may not have been filed within 12 months of first incurring costs, evidence in the record supports the finding that the test claim was timely filed.

Statutes 2005, chapter 481 became effective on January 1, 2006, and Statutes 2006, chapter 303 became effective on September 18, 2006. The test claim was filed on June 30, 2008, approximately 30 months after the effective date of the test claim statute and 21 months after the test claim statute was amended in 2006.

Government Code section 17551(c) establishes the statute of limitations for the filing of test claims as follows:

> Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.

The test claim was not filed within 12 months following the effective date of the statutes. However, the test claim indicates that claimant "implemented" the test claim statute on July 1, 2007, which resulted in a cost increase of $1,841,893.49 in the 2007-2008 fiscal year.[25] This statement is supported by the Declaration of Melissa Tober, which states that prior to

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[21] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[22] *County of San Diego*, *supra*, 15 Cal.4th 68, 109.

[23] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[24] *County of Sonoma*, *supra*, 84 Cal.App.4th 1265, 1280 [citing *City of San Jose*, *supra*].

[25] Exhibit A, Test claim, dated June 30, 2008, Tober Decl., *supra*, pp. 3-4.

July 1, 2007, claimant paid for emergency health care services for law enforcement patients "at rates equal to reimbursement rates for services provided through Orange County's Medical Services for Indigents Program mandated by Welfare & Institutions Code 17000 . . . .."

Based on the foregoing, the Commission finds that claimant first incurred additional costs beginning on July 1, 2007 - the date claimant first began to pay non-contracting hospitals as required by the test claim statute. The Commission further finds that there is no evidence in the record to support the finding that claimant incurred increased costs prior to July 1, 2007. Accordingly, the Commission finds that the test claim was filed within the statute of limitations provided in Government Code section 17551(c).

B. Penal Code Section 4011.10, As Added and Amended in 2006, Does Not Impose any State-Mandated Activities on Local Agencies

In 2005, the test claim statute added section 4011.10 to the Penal Code to state the following:

> (b) Notwithstanding any other provision of law, a county sheriff or police chief ***may contract*** with providers of emergency health care services. Hospitals that do not contract with the sheriff or police chief for emergency health care services shall provide these services to their departments at a rate equal to 110 percent of the hospital's actual costs according to the most recent Hospital Annual Financial Data report issued by the Office of Statewide Health Planning and Development, as calculated using a cost-to-charge ratio. (Emphasis added.)

Section 4011.10 was amended by Statutes 2006, chapter 303 as urgency legislation to state, in relevant part:

> (b) Notwithstanding any other provision of law, a county sheriff, police chief ***or other public agency*** that contracts for emergency health services, ***may contract*** with providers of emergency health care services for care to local law enforcement patients. Hospitals that do not contract with the county sheriff, police chief, or other public agency that contracts for emergency health care services shall provide emergency health care services to local law enforcement patients at a rate equal to 110 percent of the hospital's actual costs according to the most recent Hospital Annual Financial Data report issued by the Office of Statewide Health Planning and Development, as calculated using a cost-to-charge ratio. (Emphasis added.)

Although the test claim does not explicitly state what new activities the test claim statute requires local agencies to perform, the test claim seeks reimbursement for the increased costs incurred as a result of section 4011.10. The claimant contends that Penal Code section 4011.10 requires local agencies to pay 110 percent of hospitals' actual costs for providing emergency health care services to law enforcement patients. The claimant further alleges that before the statute was enacted, it had the ability to negotiate reimbursement rates with providers and was able to negotiate an indigent rate "much lower than the test claim statutes' rate structure for non-contracting hospitals." The claimant alleges that:

> The State has eviscerated the favorable relationship between [claimant] and the providers. In its place, the State mandated Orange County taxpayers – already burdened as donors to the State – pay a higher rate for inmate medical care than the previous rates providers consensually received. Since [claimant] has no authority to pay less than that amount to non-contracted facilities, those facilities have no reason to enter contracts with [claimant].[26]

The plain language of section 4011.10, however, does not require local agencies to perform any activities or provide an increased level of service to the public. Moreover, subdivision (e) specifies:

> Nothing in this section shall require or encourage a hospital or public agency to replace any existing arrangements that any city police chief, county sheriff, or other public agency that contracts for health services for those departments, has with his or her health care providers.

As noted in legislative history, section 4011.10 was designed to save local agencies money by capping the amount that non-contracting hospitals charge for emergency medical services, which could vary greatly from hospital to hospital prior to the enactment of the test claim statute.[27] Prior to the enactment of section 4011.10, Penal Code section 4011.5 authorized law enforcement agencies to procure emergency medical care when necessary.[28] Section 4011.10 allows local agencies to contract for this emergency medical care and caps the amount that non-contracting hospitals may charge. Section 4011.10 allows local agencies to decide whether or not to contract for emergency health care services for law enforcement patients.

Pursuant to section 4011.10, claimant has the option of contracting for medical services or using non-contracting hospitals for these services. In this case, the claimant has made the decision to contract with one hospital for emergency services for inmates, Western Medical Center Anaheim, but in most cases uses non-contracting hospitals for emergency services. In fiscal year 2007-2008, claimant chose to use the emergency services of 21 non-contracting hospitals. These decisions are based on local discretion, and are not mandated by the state. The test claim statute does not require the claimant to contract, or to use non-contracting hospitals. However, if a non-contracting hospital is used, the statute was designed to save local agencies' money by capping the amount that non-contracting hospitals may charge. As the test claim statute provides local agencies with the option to either contract for emergency services or to use non-contracting hospitals whose ability to charge is capped, the test claim statute does not mandate claimant to perform any activities.

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[26] Exhibit E, Claimant's comments on draft staff analysis and proposed statement of decision, page 2.

[27] Exhibit F, Senate Floor Analysis, Senate Bill 159, as amended August 31, 2005, pp. 5-6.

[28] Penal Code section 4011.5.

Claimant's rebuttal arguments allege that section 4011.10 amounts to a state mandate because section 4011.10 has made it impossible for claimant to convince hospitals to provide services at the lower indigent rate. Claimant's rebuttal comments also clarify that prior to the enactment of section 4011.10, claimant was able to procure medical care for all inmates at indigent rates, whether or not every inmate was truly indigent. As a result, while section 4011.10 was designed to provide local agencies with more bargaining power and lower rates charged to local agencies, section 4011.10 had the opposite effect on claimant because claimant was uniquely situated and able to negotiate care for inmates at very low indigent rates. Although section 4011.10 may have affected claimant differently than the Legislature intended and may have caused claimant to incur increased costs, section 4011.10 does not mandate claimant to perform any activities or to provide an increased level of service to the public. Thus, section 4011.10 simply results in increased costs and does not require reimbursement under the Constitution. As the courts have determined, "Section 6 was not intended to entitle local entities to reimbursement for all increased costs resulting from legislative enactments, but only those costs mandated by a new program or an increased level of service imposed upon them by the State."[29]

Based on the foregoing, Penal Code section 4011.10, as added in 2005 and amended in 2006, does not impose a state-mandated program on local agencies.

V. Conclusion

Based on the foregoing, the Commission concludes that Penal Code section 4011.10, as added by Statutes 2005, chapter 481 and amended by Statutes 2006, chapter 303, does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

[29] *City of San Jose v. State of California (1996)* 45 Cal.App.4th 1802, 1816; see also, *Lucia Mar Unified School District v. State of California* (1988) 44 Cal.3d 830, 835; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876.

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RE: **Adopted Statement of Decision**

General Health Care Services for Inmates, 07-TC-12
Penal Code Section 4011.10
Orange County Health Care Agency, Claimant

On September 27, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: October 2, 2013

Heather Halsey, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60615, 60630, 60640, 60641, 60642.5 as added or amended by Statutes 1995, Chapter 975; Statutes 1997, Chapter 828; Statutes 1999, Chapter 735; Statutes 2000, Chapter 576; Statutes 2001, Chapter 20; Statutes 2001, Chapter 722; Statutes 2002, Chapter 1168; Statutes 2003, Chapter 773; Statutes 2004, Chapter 183; Statutes 2004, Chapter 233; Statutes 2005, Chapter 676; Statutes 2007, Chapter 174; Statutes 2007, Chapter 730; Statutes 2008, Chapter 473; Statutes 2008, Chapter 757

California Code of Regulations, Title 5, Sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868; Register 2005, No. 34 (Sept. 21, 2005), Register 2006, No. 45 (Dec. 8, 2006)[1]

Filed on August 15, 2005, by San Diego Unified School District, Claimant.

Filed on September 21, 2005, by Grant Joint Union High School District, Claimant

Filed on June 25, 2009, by Twin Rivers Unified School District, Claimant

Case Nos.: 05-TC-02, 05-TC-03, and 08-TC-06

Standardized Testing and Reporting II and III

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

(*Adopted December 6, 2013*)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 6, 2013. Art Palkowitz appeared on behalf of claimant San Diego Unified School District. Jillian Kissee and Kathy Lynch appeared on behalf of the Department of Finance.

[1] Test Claim 08-TC-06 refers to regulations effective February 2007, but there were no test claim regulations effective on that date.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the proposed statement of decision to deny the test claim by a vote of 7-0.

Summary of the Findings

Each spring, California students in grades 2 through 11 take a series of standardized tests administered under the Standardized Testing and Reporting program (STAR). The STAR program was first enacted in 1997 and has gone through many changes over the years. These consolidated test claims plead statutes enacted from 1995 through 2008, and amendments to title 5 regulations adopted in 2005 and 2006. The Commission does not have jurisdiction over several statutes and regulations pled, however, because the Commission has already issued a prior final decision on the Education Code sections added by Statutes 1997, chapter 828, and the test claims were filed beyond the statute of limitations for several other statutes and regulations pled. The Commission finds that the following statutes and regulations have been properly pled and are analyzed in this decision to determine whether they impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Education Code section 60640 as amended by Statutes 2003, chapter 773;
- Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641 as amended by Statutes 2004, chapter 233;
- Education Code section 60641 as amended by Statutes 2008, chapter 473;
- Education Code sections 60630, 60640, 60641, and 60642.5 as amended by Statutes 2008, chapter 757; and
- California Code of Regulations, title 5, sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 as amended by Register 2005, No. 34 (eff. September 21, 2005).

The Commission finds that these statutes and regulations require school districts to perform the following new activities:

- Beginning July 1, 2004, administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11. Beginning October 7, 2005, school districts are required to administer the primary language test to those pupils in nonpublic schools in grades 3 to 11, instead of grades 2 to 11. (Ed. Code, § 60640(g), as amended by Stats. 2004, ch. 233.)
- Effective September 21, 2005, district STAR coordinators are required to
    - Immediately notify CDE of any security breaches or testing irregularities in the district before, during, or after the test administration. (Cal. Code Regs., tit. 5, § 857(b)(9); Register 2005, No. 34.)
    - Ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing. (Cal. Code Regs., tit. 5, § 857(b)(10), as added by Register 2005, No. 34.)

- Train test site coordinators to oversee the test administration at each school. (Cal. Code Regs., tit. 5, § 857(b)(12); Register 2005, No. 34.)

- Effective September 21, 2005, the STAR test site coordinators are required to
  - Submit the signed security agreement to the district STAR coordinator prior to the receipt of test materials. (Cal. Code Regs., tit. 5, § 858(b)(4); Register 2005, No. 34.)
  - Ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but excused from testing. (Cal. Code Regs., tit. 5, § 858(b)(9), as added by Register 2005, No. 34.)
  - Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859. (Cal. Code Regs., tit. 5, § 858(b)(11); Register 2005, No. 34.)
  - Train all test examiners, proctors, and scribes for administering the tests. (Cal. Code Regs., tit. 5, §§ 851(e) and 858(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, provide *all* information specified in section 861(a) to the contractor for those pupils enrolled on the first day the tests are administered and who do not in fact take a STAR test. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, provide the following new information to the contractor for each pupil tested:
  - The pupil's full name;
  - Date of English proficiency reclassification;
  - If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient;
  - California School Information Services (CSIS) Student Number once assigned;
  - For English learners, length of time in California public schools and in school in the United States;
  - Participation in the National School Lunch Program;
  - County and district of residence for pupils with Individualized Education Programs (IEPs);
  - Special testing conditions and/or reasons for not being tested. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, establish a periodic delivery schedule, which conforms to section 866(a) and (b), to accommodate test administration periods within the school district. (Cal. Code Regs., tit. 5, § 866(b); Register 2005, No. 34.)

The Department of Finance argues that these requirements do not result in state-mandated costs within the meaning of article XIII B, section 6, because the activities were enacted to implement the testing requirements of federal law, through the No Child Left Behind Act.

The Commission does not need to reach the federal law issue, however. As described in this decision, the Commission finds that the state has appropriated state and federal funds sufficient to pay for the costs of the new required activities. This funding, by law, "shall first be used" to offset costs that may be claimed through the state mandates reimbursement process for the STAR program and there is no evidence in the record of increased costs mandated by the state beyond the funding appropriated to school districts. Thus, there are no costs mandated by the state pursuant to Government Code section 17556(e).

Accordingly, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514. The Commission therefore denies these consolidated test claims.

COMMISSION FINDINGS

I. Chronology

08/15/2005 Claimant San Diego Unified School District (SDUSD) filed the *Star II* test claim (05-TC-02) with the Commission.

09/21/2005 Claimant Grant Joint Union High School District (GJUHSD) filed the *STAR III* test claim (05-TC-03).

10/06/2005 Commission staff consolidated test claims 05-TC-02 and 05-TC-03 and named it the *STAR II* test claim.

11/04/2005 Department of Finance (Finance) requested extension of time to file comments.

02/08/2006 Finance filed comments on test claims 05-TC-02 and 05-TC-03.

06/25/2009 Claimant Twin Rivers Unified School District (TRUSD) filed the *STAR III* test claim 08-TC-06.

09/13/2013 Commission staff consolidated test claim 05-TC-02 and 05-TC-03 with 08-TC-06.

09/24/2013 Commission staff issued the draft staff analysis and proposed statement of decision.

10/11/2013 Claimant requested a 30-day extension of time to file comments.

II. Background

Each spring, California pupils in grades 2 through 11 take a series of standardized tests through the Standardized Testing and Reporting program (STAR). The STAR program was first enacted in 1997 and the test results are a major component used for calculating each school's Academic Performance Index, which measures the growth in academic performance. These results are also used for determining whether elementary and middle schools are making adequate yearly progress in helping pupils become proficient on the California content standards, as required by the federal No Child Left Behind Act of 2001.

The STAR program has gone through many changes over the years. Currently, the STAR program includes four tests: California Standards Tests (CSTs), a series of standards-based assessments in English language arts, mathematics, science, and history/social science at specified grade levels); the California Modified Assessment (CMA), a standards-based test for many pupils with exceptional needs who have individualized education programs (IEPs); the California Alternate Performance Assessment (CAPA), for pupils with significant cognitive disabilities who are unable to take the other two tests; and the Standards-based Tests in Spanish (STS), required for pupils who receive instruction in their primary language or have been enrolled in a school in the United States for less than 12 months. Pupils taking the Standards-based Tests in Spanish are also required to take one of the standards-based tests in English.

Before 2008-2009, the STAR program also included the California Achievement Test, Sixth Edition Survey (CAT/6), a national norm-referenced test. In 2009, the CAT/6 was eliminated and is no longer administered.

The state has provided funding to school districts to administer the STAR program pursuant to Education Code section 60640(h) and section 870 of the title 5 regulations. The funding is generally appropriated to school districts on a per test basis and is intended to pay for the following administrative activities and costs:

1. All staffing costs, including the costs incurred by the district coordinator and the test site coordinator, staff training, and other staff expenses related to testing.
2. All expenses incurred at the school district and test site level related to testing.
3. All transportation costs of delivering and retrieving tests and test materials within the school district.
4. All costs association with mailing the parent reports.
5. All costs associated with pre-identification of answer sheets and consumable test booklets, and other activities intended to provide the complete and accurate data required by section 861 of the regulations.[2]

Federal funding is also available and has been appropriated to school districts for the STAR program.

A. Overview of the Statutes and Regulations Pled.

These test claims plead statutes enacted from 1995 through 2008. The earliest test claim statute, Statutes 1995, chapter 975 (AB 265), established the Leroy Greene California Assessment of Academic Achievement Act, which required the Superintendent of Public Instruction (SPI) and the State Board of Education (SBE) to approve a plan for the creation of incentives to promote the improvement of pupil academic achievements. The Act required, among other things, developing a system of assessments of applied academic skills administered to pupils in grades 4, 5, 8, and 10. It also required the SBE, not later than January 1, 1998, to adopt statewide academically rigorous content standards and performance standards pursuant to specified recommendations in core curriculum areas.

[2] California Code of Regulations, title 5, section 870.

Two years later, Statutes 1997, chapter 828 (SB 376) amended the 1995 statute to repeal the pupil testing incentive program and instead established the STAR Program in grades 2 to 11, inclusive, as specified. Statutes 1997, chapter 828 prohibited SBE from waiving any statutes or regulations that implement the STAR program. It required limited English proficient pupils, under certain conditions, to take a test in their primary language if one was available. It did not require individuals with exceptional needs to be assessed.

SBE designated the Stanford 9 as the norm-referenced achievement test, which was first administered in grades 2 to 11 in spring 1998. In 2002, SBE selected the CAT/6 Survey to replace the Stanford 9 test.

In 1999, the Legislature (Stats. 1999, ch. 735, SB 366) required SBE to adopt a performance standards system that, among other things, was aligned to the state's academically rigorous content standards. Statutes 1999, chapter 735 changed how and when test results were made available and required test publishers to enter into a contract with CDE instead of with each school district. It also required publishers to provide valid and reliable individual pupil and aggregate scores in certain content areas. It required SBE to annually establish the minimum funding to be apportioned to school districts and to annually establish the amount each test publisher is paid per test administered pursuant to the contracts.

The following year, Statutes 2000, chapter 576 (AB 2812), required the SPI to provide for developing an assessment instrument that measures the degree to which pupils achieve the academically rigorous content standards and performance standards, to the extent standards have been adopted by SBE. The standards-based achievement test was required to include, at a minimum, a direct writing assessment once in elementary school and once in middle or junior high school and other items of applied academic skills if deemed valid and reliable and if resources are made available for their use.

Statutes 2001, chapter 20 (SB 245), required the test results to be returned to the district as specified by SBE, rather than, as under prior law, no later than July 30 in the same academic year and calendar year in which the test was administered. It also changed the way make-up tests were provided for pupils who were absent, and changed the deadlines for publishers to make test results available.

Statutes 2001, chapter 722 (SB 233) extended the sunset date for the Assessment Act to January 1, 2005, and deleted obsolete provisions regarding the assessment of applied academic skills. It required the achievement test to contain English and language arts, mathematics, and science and made other conforming changes. The standards-based achievement test was renamed the California Standards Tests (CSTs) and was required to include an assessment in history/social science in at least one elementary or middle school grade level selected by SBE, and in science in at least one elementary or middle school grade level selected by SBE. The statute also modified reporting requirements, and made changes to other testing programs.

In 2002, the Education Code was amended (Stats. 2002, ch. 1168, AB 1818) to state that history-social science shall not be in the grade 9 assessment of the CSTs unless SBE adopts academic content standards for a grade 9 history-social science course.

Statutes 2003, chapter 773 (AB 1485) reduced the administration of the norm-referenced achievement test (CAT/6), effective in the 2004-2005 fiscal year, to grades 3 and 8 (instead of grades 2-11 required under prior law). The CAT/6 testing was changed to grades 3 and 7 by

Statutes 2004, chapter 233. Also in 2004, a code maintenance bill was enacted that made non-substantive changes to Education Code section 60640. (Stats. 2004, ch. 183, AB 3082.)

Statutes 2004, chapter 233 (SB 1448) extended the sunset date for the STAR program from January 1 2005 to January 1, 2011. This bill also extended testing grades 3-11with the CSTs until January 1, 2011 and eliminated second grade testing as of July 1, 2007. The 2004 statute also required administering the CAT/6 (the national norm-referenced test) in grades 3 and 7 (as opposed to grades 3 and 8 in prior law). It amended legislative intent language, reporting requirements, and made other changes. According to the legislative history of SB 1448, "failure to reauthorize the STAR testing program could result in the loss of up to $3 billion in federal funds."[3]

Statutes 2005, chapter 676 (SB 755) required a pupil identified as limited English proficient who is enrolled in any of grades 2 to 11, inclusive, and who either receives instruction in his or her primary language or has been enrolled in a school in the United States for less than 12 months, to take a test in his or her primary language if a test is available. Prior law required limited English proficient pupils to take a test in their primary language if a test is available and if fewer than 12 months have elapsed after their initial enrollment in any public or nonpublic school. The bill also required the SPI, with the approval of SBE, to annually release to the public at least 25% of the test items from the CSTs administered in the previous year.

Statutes 2007, chapter 174 (SB 80) extended the requirement to test second grade with the CSTs (that was scheduled to sunset on July 1, 2007 by Stats. 2004, ch. 233) to January 1, 2011. This bill also extended the sunset date for the CAT/6 national norm-referenced test from July 1, 2007 to July 1, 2011.

Statutes 2007, chapter 730 made non-substantive changes to Education Code section 60640.

Statutes 2008, chapter 757 eliminated the CAT/6 norm-referenced test as a required part of the STAR program, effective September 30, 2008.

The claimants have also pled the regulations implementing the STAR program (Cal. Code Regs., tit. 5, § 850 et seq.) operative September 21, 2005, which made various changes that CDE described in the Notice of Proposed Rulemaking as follows:

> The purposes of the proposed amendments are to provide consistency with the regulations for the California High School Exit Examination (CAHSEE) and the California English Language Development Test (CELDT) by clarifying current language and adding definitions and language as needed to add and amend language regarding the use of variations, accommodations, and modifications; to make technical changes to correct inconsistent language, terms, and capitalization in the existing regulations; to modify the provisions for below-grade-level testing; to incorporate information about the use of released items for the California Standards Tests (CSTs); to modify test material delivery and return dates to eliminate the mixture of working and calendar days; to add the California Alternate Performance Assessment (CAPA) as appropriate; to strengthen some test security language; to add a statement to the STAR Test Security Affidavit

[3] Assembly Floor, Third Reading Analysis of SB 1448 (2003-2004 Reg. Sess.) as amended July 28, 2004, page 3.

> indicting that test examiners and proctors have been trained to administer the tests; to expand the student demographic data collected to meet the requirements for federal and state reporting; to clarify requirements related to including test results in pupils' permanent records as required by *Education Code* Section 60607; to reinforce the confidentiality of summary data that is based on test results for ten or fewer pupils; and to modify the process for completing Apportionment Information Reports required by *Education Code* Section 60640(j).

In the Initial Statement of Reasons, CDE stated that "some of the proposed amendments are required to enable the state to comply with the requirements of the federal No Child Left Behind Act of 2001."

The STAR regulations were amended again (operative Dec. 8, 2006) to revise testing windows for the CSTs, CAT/6 and Standards-Based test in Spanish. The amendments also clarify and ensure consistency, remove the names of specific tests, and incorporate the designated primary language test regulations that were in Article 3 into Articles 1 and 2.[4]

B. The Federal No Child Left Behind Act of 2001.

Some tests in the STAR program meet the assessment and accountability provisions of Title I of the No Child Left Behind Act of 2001 (NCLB),[5] which Congress enacted as a reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA). It requires states that participate and receive federal funds to administer:

> [A] set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007–2008 school year.[6]

Title I of NCLB also requires that the assessments measure pupil proficiency as follows:

> Such assessments shall--
>
> [¶]…[¶] (v)(I) except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during—

[4] CDE, Notice of Proposed Rulemaking, Amendment to Title 5, California Code of Regulations, Regarding Standardized Testing and Reporting Program, May 19, 2006, page 2.

[5] CDE, Standardized Testing and Reporting Program: Annual Report to the Legislature," July 2012, pages 3-4.

[6] 20 USC 6311 (b)(3)(A).

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(II) beginning not later than school year 2007–2008, measure the proficiency of all students in science and be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding;

(vii) beginning not later than school year 2005–2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of the academic assessments by that deadline and that the State will complete implementation within the additional 1-year period;[7]

NCLB also includes the following reporting provisions in Title I, requiring the assessments to:

(xii) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii) that allow parents, teachers, and principals to understand and address the specific academic needs of students, and include information regarding achievement on academic assessments aligned with State academic achievement standards, and that are provided to parents, teachers, and principals, as soon as is practicably possible after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xiii) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged, except that, in the case of a local educational agency or a school, such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.[8]

[7] 20 USC 6011 (b)(3)(C).

[8] 20 USC 6011 (b)(3)(C).

In a case that focused on the educational requirements and funding provisions of Title I of NCLB, a Federal Appellate court stated the following:

> In contrast to prior ESEA iterations, NCLB "provides increased flexibility of funds, accountability for student achievement and more options for parents." 147 Cong. Rec. S13365, 13366 (2001) (statement of Sen. Bunning). The Act focuses federal funding more narrowly on the poorest students and demands accountability from schools, with serious consequences for schools that fail to meet academic-achievement requirements. *Id.* at 13366, 13372 (statements of Sens. Bunning, Landrieu, and Kennedy). States may choose not to participate in NCLB and forgo the federal funds available under the Act, but if they do accept such funds, they must comply with NCLB requirements. See, e.g., 20 U.S.C. § 6311 ("For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan....") (emphasis added); see also *Spellings*,453 F.Supp.2d at 469 ("In return for federal educational funds under the Act, Congress imposed on states a comprehensive regime of educational assessments and accountability measures.").
>
> Title I, Part A, of NCLB, titled "Improving Basic Programs Operated by Local Educational Agencies," continues to pursue the objectives of the ESEA and imposes extensive educational requirements on participating States and school districts, and, likewise, provides the largest amount of federal appropriations to participating States. For example, in fiscal year 2006, NCLB authorized $22.75 billion in appropriations for Title I, Part A, compared to $14.1 billion for the remaining twenty-six parts of NCLB combined. Title I, Part A's stated purposes include meeting "the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance." 20 U.S.C. § 6301(2).
>
> In addition to Title I, Part A, NCLB establishes numerous other programs, including a literacy initiative for young children and poor families (Title I, Part B), special services for the education of children of migrant workers (Title I, Part C), requirements that all teachers be "highly qualified" (Title II, Part A), and instruction in English for children with limited English ability (Title III). . . .
>
> To qualify for federal funding under Title I, Part A, States must first submit to the Secretary a "State plan," developed by the State's department of education in consultation with school districts, parents, teachers, and other administrators. 20 U.S.C. § 6311(a)(1). A State plan must "demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards" against which to measure the academic achievement of the State's students. *Id*. § 6311(b)(1)(A). The standards in the State plan must be uniformly applicable to students in all of the State's public schools, and must cover at least reading or language arts; math; and, by the fourth grade, science skills. *Id.* § 6311(b)(1)(C).
>
> States also must develop, and school districts must administer, assessments to determine students' levels of achievement under plan standards. *Id*.

§ 6311(b)(2) (A). These assessments must show the percentage of students achieving "proficiency" among "economically disadvantaged students," "students from major racial and ethnic groups," "students with disabilities," and "students with limited English proficiency."*Id*. § 6311(b)(2)(C)(v)(II). Schools and districts are responsible for making "adequate yearly progress" ("AYP") on these assessments, meaning that a minimum percentage of students, both overall and in each subgroup, must attain proficiency. 34 C.F.R. § 200.20(a)(1).

A school's failure to achieve AYP triggers other requirements of Title I, Part A. See 20 U.S.C. § 6316(b). If a school fails to make AYP for two consecutive years, it must be identified by the local educational agency for school improvement. 20 U.S.C. § 6316(b)(1)(A). Among other things, a school in improvement status must inform all of its students, including those who have been assessed as proficient, that they are permitted to transfer to any school within the district that has not been identified for school improvement. *Id.* § 6316(b)(1) (E)(i). The school also must develop a two-year plan setting forth extensive measures to improve student performance, including further education for teachers and possible before- or after-school instruction or summer instruction. *Id*. §§ 6316(b)(3)(A)(iii), (ix).

If a school does not achieve AYP after two years of improvement status, it is "identif[ied] ... for corrective action." *Id.* § 6316(b)(7)(C)(iv). Corrective action involves significant changes, such as replacing teachers who are "relevant to the failure to make [AYP]," or instituting an entirely new curriculum. *Id*. § 6316(b)(7)(C)(iv)(I). If, after a year of corrective action, a school still has not reached AYP, the district must restructure the school entirely; options for restructuring include "[r]eopening the school as a public charter school," replacing the majority of the staff, or allowing the State's department of education to run the school directly. *Id.* § 6316(b)(8)(B)(i).

. . . NCLB requires that States use federal funds made available under the Act "only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds." 20 U.S.C. § 6321(b)(1). That is, States and school districts remain responsible for the majority of the funding for public education, and the funds distributed under Title I are to be used only to implement Title I programming, not to replace funds already being used for general programming.[9]

C. Prior Commission Decisions on the STAR Program.

In August 2000, the Commission made a determination on the STAR program, as it existed in 1997, in test claim 97-TC-23 (Stats. 1997, ch. 828). The Commission found that activities related to administering only the norm-referenced test (or CAT/6) and the designated primary language test (or SABE/2) to be reimbursable.

[9] *School Dist. of City of Pontiac v. Secretary of U.S. Dept. of Education* (2009) 584 F.3d 253, 257-258.

In 2004, the Legislature ordered the Commission to reconsider the STAR decision (Stats. 2004, ch. 216, § 34). On reconsideration, the Commission found that the SABE/2 was a federal mandate and, thus, reimbursement was denied for costs to administer that test. The Commission determined that administering the CAT/6 exam in grades 3 and 7 imposed a reimbursable state mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code sections 17514, effective July 1, 2004. The Commission also found that:

- All state funds appropriated for STAR must be used to offset all activities associated with administration of the CAT/6 exam; and that in any fiscal year in which school districts are legally required to, they must, "reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them" from appropriated state funds; [10] and
- School districts are not required to use Title I funds to offset the activities in the STAR statement of decision (i.e., to administer the CAT/6); and
- All federal Title VI funds appropriated for STAR, in any fiscal year in which school districts are legally required to do so, must be used to offset all activities associated with administration of the CAT/6 exam, and that school districts must "reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them" from appropriated federal Title VI funds. [11]

III. Positions of the parties

A. Claimants' positions

The claimants allege that the test claim statutes and regulations impose a reimbursable state-mandated program for school districts under article XIII B, section 6 and Government Code section 17514 to administer the STAR Program.

1. San Diego Unified School District (05-TC-02)

The test claim filed by SDUSD seeks reimbursement for Statutes 2004, chapter 233, which added and amended Education Code sections 60601-60605, 60605.6, 60606, 60607, 60611, 60640, and 60641. The claimant requests reimbursement for the following activities related to the test administration of the Academic Skill Assessment program and the STAR program:

- Review the requirements of the law and any memoranda issued by CDE, and develop and implement procedures;
- Train administrators, teachers, and school district personnel on the requirements and test administration;
- Administer the tests for the Academic Skill Assessment program and the STAR program;

[10] Statutes 2004, chapter 208, Item 6110-113-0001, Schedule 3, Provision 8. Statutes 2005, chapter 38, Item 6110-113-0001, Schedule 2, Provision 8.

[11] Statutes 2004, chapter 208, Item 6110-113-0890, Schedule 2, Provision 11. Statutes 2005, chapter 38, Item 6110-113-0890, Schedules 4, 7 and 10, Provision 10.

- Maintain individual records of the tests in pupil records;
- Report individual results to parents or guardians and to the pupils' schools and teachers;
- Collect, collate, and submit to CDE the information on the STAR program apportionment information report;
- Process requests for exemptions from testing filed by parents and guardians;
- Review IEPs of children with disabilities to determine if the IEPs contain an express exemption from testing;
- Determine the appropriate grade level test for special education pupils and provide appropriate testing adaptations and accommodations for these pupils;
- Enter into and administer the contract with the test publisher for the STAR program.

SDUSD estimates costs of $500,000 to implement the test claim statutes during 2004-2005 and approximately $550,000 to implement them in 2005-2006 and beyond.

SDUSD did not file written comments on the draft staff analysis.

2. Grant Joint Union High School District (05-TC-03)

The test claim filed by GJUHSD requests reimbursement for Statutes 2003, chapter 773, as it added or amended Education Code sections 60640, 60641, and 60642.5, and sections 850-868 of the title 5 regulations[12] that became effective on September 21, 2005. GJUHSD seeks reimbursement to:

- Administer the designated achievement test and standards-based achievement tests to each pupil enrolled in grades 2 to 11;
- Administer the CAPA, as set forth in the pupil's IEP, to each pupil in grades 2 to 11;
- Make arrangements to test pupils in alternative education programs;
- Accept waivers filed by parents or guardians;
- Designate a district and school site STAR coordinator, and implement those coordinator duties;
- Provide the contractor for the designated achievement test and standards-based achievement test with specified information for each pupil;
- Receive and review the apportionment information report with information from the designated achievement test, standards-based achievement test, and the CAPA;
- Forward the STAR pupil report to parents or guardians;
- Maintain individual records of the tests in pupil records;
- Provide the test contractor with specified data for each test site;
- Follow security measures for test administration.

[12] The test claim did not include sections 850.5, 853.5, 854 or 864.

GJUHSD claims that the test claim statutes and regulations cost $110,000 to initially implement and $125,000 in fiscal year 2005-2006 and beyond.

3. Twin Rivers Unified School District (08-TC-06)

TRUSD is a K-12 school district created on July 1, 2008, through the unification of GJUSHD, Del Paso Heights Elementary School District, North Sacramento Elementary School District, and Rio Linda Elementary School District. The test claim filed by TRUSD seeks reimbursement for statutes enacted from 1995 to 2008 that added or amended Education Code sections 60607, 60615, 60630, 60640, 60641, 60642.5, and sections 850 to 863 of the title 5 regulations[13] that were amended, according to claimant, "eff. 2005 and 2/2007."[14]

Test claim 08-TC-06 is supported by a declaration that claimant will incur approximately $300,000 in costs in fiscal year 2008-2009.

TRUSD did not file written comments on the draft staff analysis.

B. State Agencies' Positions

Finance, in comments submitted in February 2006 (on test claims 05-TC-02 and 05-TC-03), states that the statute of limitations has passed for filing a claim for the CSTs and the California Alternate Performance Assessment (CAPA). Finance also asserts that the STAR tests are necessary to ensure California's compliance with NCLB, which is a federal mandate.

No comments have been filed by CDE.

No comments were filed on the draft staff analysis.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[15] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[16]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

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[13] The test claim did not include sections 850.5, 853.5, 854 or 864.

[14] The test claim regulations were actually amended operative September 21, 2005 and December 8, 2006.

[15] *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

[16] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[17]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[18]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[19]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [20]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[21] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[22] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[23]

A. Jurisdictional and Pleading Issues.

There are three test claims under consideration in this analysis. The first test claim (05-TC-02) was filed by SDUSD and pleads Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641, as amended by Statutes 2004, chapter 233. SDUSD's test claim does not present any pleading or jurisdictional issues. Therefore, these code

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[17] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, at p. 874.

[18] *San Diego Unified School Dist., supra,* 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[19] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[20] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[21] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[22] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[23] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

sections as amended in 2004 are analyzed below to determine whether they impose a reimbursable state-mandated program on school districts.

The other two test claims filed by GJUSHD and TRUSD (05-TC-03 and 08-TC-06), however, do present pleading and jurisdictional issues as discussed below.

1. Test claim filed by Grant Joint Union High School District (05-TC-03)

GJUHSD filed its test claim on September 21, 2005, requesting reimbursement as a result of Statutes 2003, chapter 773, as it amended Education Code sections 60640, 60641, and 60642.5, and sections 850-868 of the title 5 regulations that became operative on September 21, 2005.

a) The test claim was not abandoned when GJUHSD ceased to exist because, upon its creation, TRUSD stepped into the shoes of GJUHSD, inheriting the rights and liabilities of the former district.

On November 8, 2007, after the test claim was filed, local voters passed Measure B to unify GJUHSD, Del Paso Heights Elementary School District, North Sacramento Elementary School District, and Rio Linda Elementary School District and to create a new school district, TRUSD, effective July 1, 2008. Thus, effective July 1, 2008, the four existing school districts, including GJUHSD, no longer exist. Since GJUHSD no longer exists and can no longer act as a test claimant, the question of whether test claim 05-TC-03 has been abandoned arises.[24]

The Commission finds that the test claim has not been abandoned. The school district unification passed by Measure B provided that the new unified school district, TRUSD, assumed the rights and responsibilities of all the school districts included within the unification.[25] Thus, for purposes of test claim 05-TC-03, TRUSD assumed the rights of GJUHSD as the test claimant and may continue to request reimbursement for the statutes and regulations properly pled in the claim.[26]

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[24] Section 1183.081 of the Commission's regulations authorizes the Commission's executive director to deem a test claim "abandoned." If, after notice of abandonment, another local agency files a request to substitute for the original test claimant, the new requester is deemed the "test claimant."

[25] County of Sacramento, Analysis of Measure B, June 19, 2007, page 1.

[26] When TRUSD submitted the third test claim, 08-TC-06, it stated in the cover letter an intent to withdraw the second test claim, 05-TC-03, filed by the GJUSHD. According to section 1183.08 of the Commission's regulations, withdrawal is accomplished "upon written application to the executive director any time before a decision is adopted," and requires "written application in accordance with section 1181.2 of these regulations." Claimant's notice of intent to withdraw test claim 05-TC-03 in the cover letter for test claim 08-TC-06 upon Commission staff's "review and acceptance" merely communicates intent to withdraw the test claim in the future. The test claim, however, has not been withdrawn in accordance with the Commission's regulations.

b) Of the statutes and regulations in test claim 05-TC-03, only Education Code section 60640, as amended by Statutes 2003, chapter 773 and sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 of the title 5 regulations as amended by Register 2005, No. 34, have been properly pled.

The test claim mistakenly pleads Education Code section 60641 and 60642.5 as alleged to be amended by Statutes 2003, chapter 773. However, these code sections were not amended by Statutes 2003, chapter 773. Section 60641 was amended by Statutes 2001, chapter 722 and Statutes 2004, chapter 233, and again in 2008 and 2009. Section 60642.5 was amended by Statutes 2001, chapter 722; Statutes 2002, chapter 1168; and Statutes 2008, chapter 757. As further described below, sections 60641 and 60642.5 as amended in 2004 and 2008 have been properly pled in the other consolidated claims, and are analyzed in this decision. However, sections 60641 and 60642.5, as allegedly amended in 2003, do not exist.

The Commission finds that Education Code section 60640, as repealed and replaced by Statutes 2003, chapter 773 has been properly pled. Statutes 2003, chapter 773 had a delayed operative date of July 1, 2004. According to a declaration filed by claimant's predecessor agency GJUHSD, the district first incurred costs as a result of the statute three months after the statutes' operative date in October 2004. There is no evidence in the record rebutting this fact. Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later. Section 1183(c) of the Commission's regulations interprets and implements the 12-month statute of limitations requirement of Government Code section 17551(c), and provides that the latter phrase of the statute, "within 12 months" of first incurring costs, means "by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant." In this case, the claimant alleges it first incurred costs in October 2004 (within fiscal year 2004-2005), and had until June 30, 2006 (the end of the following fiscal year) to file the test claim on the 2003 version of section 60640. The test claim was filed on September 21, 2005, and is, therefore, timely filed for purposes of pleading section 60640 as repealed and replaced by the Statutes 2003, chapter 773.

In addition, the Commission finds that the test claim is timely filed with respect to sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 of the title 5 regulations as amended by Register 2005, No. 34.

Therefore, with respect to test claim 05-TC-03, TRUSD is the test claimant and the following statute and regulations have been properly pled and are within the jurisdiction of the Commission: Education Code section 60640, as amended by Statutes 2003, chapter 773, and sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 of the title 5 regulations effective September 21, 2005 (Register 2005, No. 34).

2. <u>Test claim filed by Twin Rivers Unified School District (08-TC-06)</u>

The third test claim (08-TC-06) was filed by TRUSD on June 24, 2009, and pleads Education Code section 60640 as added or amended from 2003 to 2008; section 60641 as added or amended from 1997 to 2008; section 60642.5 as added or amended from 2000-2008; section 60607, as added or amended from 1995 to 2004; section 60615 as added in 1995; and section

60630 as added or amended from 1995 to 2008. TRUSD also requests reimbursement for the title 5 regulations "eff. 2005 and 2/2007." The test claim regulations were actually amended operative September 21, 2005 (Register 2005, No. 34) and December 8, 2006 (Register 2006, No. 45).

Part of TRUSD's claim is duplicative of the statutes and regulations pled in the other two test claims that have been properly pled and are analyzed in this decision. These include Education Code 60607, as amended by Statutes 2004, chapter 233; Education Code section 60640, as amended by Statutes 2003, chapter 733, and Statutes 2004, chapter 233; Education Code section 60641, as amended by Statutes 2004, chapter 233; and the title 5 regulations effective September 21, 2005 (Register 2005, No. 34).

However, there are jurisdictional and pleading issues with respect to some of the remaining statutes and regulations pled by TRUSD.

a) The Commission does not have jurisdiction over Education Code sections 60607, 60630, and 60641, as amended by Statutes 1997, chapter 828, because the Commission has already issued a prior decision on those statutes.

The Commission does not have jurisdiction over Education Code sections 60607, 60630, and 60641, as amended by Statutes 1997, chapter 828, because these code sections were included in a prior test claim determined by the Commission and approved for reimbursement in *Standardized Testing and Reporting* (*STAR*, 97-TC-23, and reconsidered in 04-RL-9723-01 as directed by the Legislature). A Commission decision that becomes final and has not been set aside by a court cannot be reconsidered.[27]

b) The Commission only has jurisdiction over Education Code sections 60630, 60640, 60641, and 60642.5 as amended by Statutes 2008, chapter 473, and Statutes 2008, chapter 757, and does not have jurisdiction over the other statutes and regulations pled in 08-TC-06 since they were filed outside the statute of limitations.

Government Code section 17551(c) generally requires a test claim to be filed not later than 12 months following the effective date of a statute or executive order. TRUSD filed its test claim on June 25, 2009, and the only statutes that became effective within the one-year statute of limitations are Statutes 2008, chapter 473, and Statutes 2008, chapter 757, which amended Education Code sections 60630, 60640, 60641, and 60642.5. All other statutes and regulations pled by TRUSD became effective between 1995 and 2006, more than one year before the test claim was filed on June 25, 2009 and, thus, raise statute of limitations issues.

TRUSD asserts that the Commission has jurisdiction over all statutes and regulations pled since it first incurred costs on July 28, 2008, within the first month the district unification was effective. [28] In this regard, section 17551(c) does provide that a test claim is timely if it is filed within 12 months of incurring increased costs as a result of a statute or executive order. Section 1183 of the Commission's regulations defines the phrase "within 12 months" of incurring costs

[27] *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

[28] Test Claim 08-TC-06, page 34.

to mean "by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."

TRUSD is therefore attempting to use its status as a newly created school district to seek reimbursement for statutes and regulations that became effective more than 12 months before the test claim was filed. By TRUSD's interpretation, any newly-created local government could file a test claim without being affected by the statute of limitations, since the new local government can only first incur costs from the time of its formation. Because test claims are treated as class action claims, TRUSD seeks to make all school districts eligible for reimbursement based on its status as a newly-formed entity.

The Commission finds that TRUSD's test claim is not timely filed on the older statutes and regulations that became effective between 1995 and 2006. As indicated above, local voters passed Measure B on November 8, 2007, to unify four existing school districts (GJUHSD, Del Paso Heights Elementary School District, North Sacramento Elementary School District, and Rio Linda Elementary School District) and to create a new school district, TRUSD, effective July 1, 2008. Pursuant to the provisions of Measure B, all obligations and responsibilities of the existing four districts became the obligations and responsibilities of the new unified school district, without change in enrollment or the classification of employees of the former districts. Measure B provides that "No students would be required to change schools as a result of the proposed unification;" that "employees of the existing four districts will become employees of the new district;" and pursuant to Education Code sections 35555 and 35556, that the unification shall not affect the classification of certificated and non-certificated employees already employed by any school district affected. The former school districts, by law, were required to comply with all statutes and regulations governing the STAR exam and incur those costs per pupil when the law became effective. The Commission may presume that the law was followed by the former districts and the costs were in fact incurred.[29] Since the obligations and responsibilities of the existing districts for testing and administering the STAR exam became the obligations and responsibilities of TRUSD for the same population of pupils, it cannot be said that the costs resulting from these older provisions in law were new or were first incurred in July 2008, as asserted by the claimant. Under the provisions of Measure B, TRUSD incurred the same per-pupils costs (and received the same per-pupil apportionment from the state) for administering the STAR program as the former districts that were unified to create TRUSD.

Moreover, there is no indication in the plain language of Government Code section 17551(c), or in the legislative history of the two bills that established a statute of limitations for filing test claims, that the Legislature intended to allow the filing of a new test claim on old statutes and regulations long required to be complied with by all local governments, whenever a new local government is created.[30] Such an interpretation would make the statute of limitations on class

[29] There is a presumption that the former districts' official duties were regularly performed. (Evid. Code, § 664.)

[30] Statutes 2002, chapter 1124 first established a statute of limitations for filing test claim as "three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision." Statutes 2004, chapter 890 amended section 17551(c) to provide that "test claims shall be filed not later than 12 months following the effective date of a statute or

action claims pointless. The Legislature used the term "*increased* costs" in section 17551(c) and not merely "costs" because local governments eligible to claim reimbursement already exist and have the right to file a test claim seeking reimbursement from the state on behalf of all other local governments similarly affected by the statute or executive order. As the courts have held, the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. In such circumstances, the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.[31]

Therefore, the Commission finds that the TRUSD test claim was not timely filed with respect to the following statutes and regulations: Education Code sections 60607 (as added and amended by Stats. 1995, ch. 975, and Stats. 2001, ch. 722); 60615 (as added by Stats. 1995, ch. 975); 60630 (as added and amended by Stats. 1995, ch. 975 and Stats. 2001, ch. 722); 60640 (as amended by Stats. 2004, ch. 183; Stats. 2005, ch. 676; and Stats. 2007, chs. 174 and 730); 60641 (as amended by; Stats. 1999, ch. 735; and Stats. 2001, chs. 20 and 722); and 60642.5 (as added and amended by Stats. 2000, ch. 576; Stats. 2001, ch. 722, Stats. 2002, ch. 1168); and California Code of Regulations, title 5, sections 850 et seq. (as amended by Register 2006, No. 45).

3. Conclusion regarding the statutes and regulations in these consolidated claims that have been properly and timely pled.

The Commission finds that, for purposes of this consolidated test claim, the following statutes and regulations have been properly pled and are analyzed below to determine whether they impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Education Code section 60640 as amended by Statutes 2003, chapter 773;
- Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641 as amended by Statutes 2004, chapter 233;
- Education Code section 60641 as amended by Statutes 2008, chapter 473;
- Education Code sections 60630, 60640, 60641, and 60642.5 as amended by Statutes 2008, chapter 757; and
- California Code of Regulations, title 5, sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 as amended by Register 2005, No. 34 (eff. September 21, 2005).

B. Do the test claim statutes and regulations impose a reimbursable state-mandated program?

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executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."

[31] *Mundy v. Superior Court* (1995) 31 Cal.App.4th 1396, 1402.

1. New requirements imposed by the test claim statutes and regulations

The statutes and regulations that have been properly pled are analyzed below to determine if they impose any new requirements, increasing the level of service provided by school districts. If not, reimbursement is not required under article XIII B, section 6.[32]

a) Education Code section 60640, as amended by Statutes 2003, chapter 773

Education Code section 60640 establishes the STAR program and governs the administration of the test. Before the 2003 amendment, section 60640 required each school district to administer an achievement test (national norm-referenced test or CAT/6) and a standards-based achievement test to each of its pupils in grades 2 to 11. Statutes 2003, chapter 773 changed the requirement beginning July 1, 2004, to administer the national norm-referenced achievement test (CAT/6) to pupils in grades 3 and 8 rather than to all pupils in grades 2 through 11, and continued the requirement that the standards-aligned achievement test be administered to pupils in grades 2 to 11. The purpose of the amendment is described in the legislative history as follows:

> This bill revises state standardized testing requirements so that, effective with the 2004-05 school year, the "off the shelf" norm referenced test will only be administered in grades 3 and 8. The norm-referenced test is not aligned to California standards, whereas the more comprehensive test that is aligned to California's adopted content standards will still be administered in grades 2 through 11.
>
> These provisions were previously approved in the Education Committee as part of the budget trailer bill, AB 1266. The reduced administration of the "of the shelf" test was originally proposed to save costs in the 2003-04 year. Since the new testing schedule will not become effective until 2004-05, this proposal is no longer necessary to implement the 2003-04 Budget Act.[33]

Based on the plain language of the statute, Education Code section 60640 as amended by Statutes 2003, chapter 773, does not impose any new requirements on school districts, but reduces existing requirements.

b) Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641 as amended by Statutes 2004, chapter 233

In 2004, the Legislature reauthorized the STAR program to prevent "the loss of up to $3 billion in federal funds" and made various changes to the statutes governing the program.[34] According to the legislative history of the statute,

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[32] *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875.

[33] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 1485 (2003-2004 Reg. Sess.), amended September 8, 2003.

[34] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of SB 1448 (2003-2004 Reg. Sess.), as amended July 28, 2004.

> This bill, sponsored by the State Superintendent of Public Instruction, proposes to reauthorize the STAR program for grades 3 through 11 until January 1, 2011 and sunset second grade testing on July 1, 2007. Without this bill, the state's assessment program will cease on January 1, 2005. Failure to continue the STAR testing program may result in a significant loss of federal NCLB funds.[35]

As described below, the Commission finds that the amendments made by Statutes 2004, chapter 233 to Education Code section 60640(g) impose one new requirement on school districts.

1) Education Code section 60601 as amended in 2004 extends the sunset date for the STAR program until January 1, 2011, but does not impose any new requirements on school districts.

Education Code section 60601 was amended in 2004 to extend the sunset date for the STAR program from January 1, 2005, until January 1, 2011. As amended, section 60601 states the following: "This chapter shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2011, deletes or extends that date."

Amending the sunset date continues the operation of existing law, but does not itself, impose any new state-mandated duties on school districts.[36] Therefore, the Commission finds that section 60601, as amended by Statutes 2004, chapter 233, does not impose any requirements on school districts.

2) Education Code sections 60602 and 60603 as amended in 2004 provide statements of legislative intent and define terms, but do not require school districts to perform any activities.

Education Code sections 60602 and 60603 provide a statement of legislative intent and define terms for the STAR program. The 2004 statute amended section 60602(a) as follows:

> (B) It is the intent of the Legislature in enacting this chapter to provide a system of individual assessment of pupils that has ~~as its primary purpose~~, the primary purpose~~,~~ of assisting teachers, administrators, pupils, and their parents, ~~and teachers to identify individual academic strengths and weaknesses, in order~~ to improve teaching and learning. ~~It is further the intent of the Legislature in enacting this chapter to determine the effectiveness of school districts and schools, as measured by the extent to which pupils demonstrate knowledge of the fundamental academic skills, as well as the ability to apply those skills.~~ In order to accomplish these goals, the Legislature finds and declares that California should adopt a coordinated and consolidated testing program to do all of the following:
>
> (1) The Legislature recognizes that, in addition to statewide assessments that will occur as specified in this chapter, school districts will conduct additional ongoing pupil diagnostic assessment and provide information regarding pupil

[35] Senate Rules Committee, Office of Senate Floor Analysis, Third Reading Analysis of SB 1448 (2003-2004 Reg. Sess.), as amended July 28, 2004.

[36] *Perkins Mfg. Co. v. Clinton Const. Co. of California* (1931) 211 Cal. 228, 238.

performance based on those assessments on a regular basis to parents or guardians and schools. The Legislature further recognizes that local diagnostic assessment is a primary mechanism through which academic strengths and weaknesses are identified.

In addition, subdivisions (d) and (e) were added to section 60602 as follows:

(d) It is the intent of the Legislature, insofar as is practically feasible and following the completion of annual testing, that the content, test structure, and test items in the assessments that are part of the Standardized Testing and Reporting Program become open and transparent to teachers, parents, and pupils, to assist all stakeholders in working together to demonstrate improvement in pupil academic achievement. A planned change in annual test content, format, or design, should be made available to educators and the public well before the beginning of the school year in which the change will be implemented.

(e) It is the intent of the Legislature that the results of the California Standards Tests be available for use, after appropriate validation, academic credit, or placement and admissions processes, or both, at postsecondary educational institutions.

The definitions in Education Code section 60603 were also amended by the 2004 statute. Section 3 of the bill added a definition of "diagnostic assessment," as follows:

(6) "Diagnostic assessment" means interim assessments of the current level of achievement of a pupil that serves both of the following purposes: (A) The identification of particular academic standards or skills a pupil has or has not yet achieved. (B) The identification of possible reasons that a pupil has not yet achieved particular academic standards or skills.

Section 3 of the bill also amended the definition of "End of course exam," to delete a reference to the Golden State Exams as follows: "End of course exam means a comprehensive and challenging assessment of pupil achievement in a particular subject area or discipline ~~such as the Golden State Exams.~~" The amendments made by section 3 of the bill became inoperative on July 1, 2007 and were repealed as of January 1, 2008.

Section 4 of the bill added another section 60603 to the Education Code beginning July 1, 2007, and amended the definition of "Diagnostic assessment" to add the word "frequent" as follows:

(6) "Diagnostic assessment" means frequent, interim assessments of the current level of achievement of a pupil that serves both of the following purposes: (A) The identification of particular academic standards or skills a pupil has or has not yet achieved. (B) The identification of possible reasons that a pupil has not yet achieved particular academic standards or skills.

In addition, the definition of "statewide pupil assessment program," in section 60603(a)(11) was amended to require testing pupils in grades 3 to 11, inclusive, rather than grades 2 to 11 under the original statute.

The Commission finds that Education Code sections 60602 and 60603 (as amended and added by Stats. 2004, ch. 233) do not impose any requirements on school districts.

3) Education Code section 60604 as amended and added in 2004, imposes duties on the SPI, but does not require school districts to perform any activities.

Statutes 2004, chapter 233, sections 5 and 6 amend Education Code section 60604 to make it inoperative on July 1, 2007, and add a new section 60604 effective July 1, 2007, to eliminate the CSTs for second grade pupils. Education Code section 60604(a)(2) provides that beginning July 1, 2007, the Superintendent of Public Instruction (SPI) shall design and implement a statewide pupil assessment program that includes the following:

> A method of working with publishers to ensure valid, reliable, and comparable individual, grade-level, school-level, district-level, county-level, and statewide scores in grades ~~2~~ 3 to 11, inclusive, that is based on the achievement test designated pursuant to subdivision (b) of Section 60605.

Education Code section 60604 imposes duties on the SPI, but does not impose any new requirements on school districts.

4) Education Code section 60605 as amended and added by Statutes 2004, chapter 233, imposes duties on the SBE, but does not impose any requirements on school districts.

Under prior law, Education Code section 60605 required the SBE to adopt statewide academically rigorous content standards in the core curriculum areas of reading, writing, and mathematics to serve as a basis for assessing the academic achievement of individual pupils and schools. By November 1, 1998, SBE was required to adopt statewide performance standards "in the core curriculum areas of history/social science and science." The remaining provisions in section 60605 specify how the standards were to be adopted, how the assessments for the standards were to be adopted, and other requirements, such as holding regional hearings on the standards and adopting regulations for the assessments. Section 60605(b)(1) also requires the test to include all specified basic academic skills in grades 2 to 7, and the core curriculum areas of English and language arts, mathematics, and science in grades 9 to 11, inclusive.

Statutes 2004, chapter 233 included two versions of section 60605. Section 7 of the bill made non-substantive changes and added, in section 60605(h), a sunset provision that stated that "this section shall become inoperative on July 1, 2007, and, as of January 1, 2008, is repealed, unless a later enacted statute . . . deletes or extends the dates on which it becomes inoperative and is repealed."

Section 8 of the bill amended section 60605 to become operative on July 1, 2007, and added a requirement to section 60605(b)(1) that SBE notify publishers of the opportunity to submit for consideration tests of achievement. The tests were to include all the basic academic skills in reading, spelling, written expression and mathematics in grades 3 to 8 (rather than grades 2 to 8 under prior law) and the core curriculum areas of English and language arts, mathematics, and science in grades 9 to 11, inclusive.

Based on the plain language of Statutes 2004, chapter 233, Education Code section 60605, as amended and added, imposes duties on the SBE, but does not impose any requirements on school districts.

5) Education Code sections 60605.6 and 60606 as amended and added by Statutes 2004, chapter 233 impose duties on state agencies, but do not require school districts to perform any activities.

Under prior law, the SPI, subject to available funds in the annual Budget Act and upon SBE approval, was required in section 60605.6 to contract for the development and distribution of workbooks for tenth graders that contained information on the high school exit exam. Separate workbooks for grades 2 to 11 were to be distributed for the national norm-referenced achievement test (CAT/6, the test described in former section 60642) and the standards-based achievement tests (CSTs, the test described in section 60642.5), with specified content and sample questions to assist pupils and their parents with standards-based learning.

Section 9 of Statutes 2004, chapter 233 amended section 60605.6 to add a sunset provision making the section inoperative on July 1, 2007, and made other non-substantive changes. Section 10 of the statute added section 60605.6, effective July 1, 2007, containing identical provisions as the section 60605.6 set to sunset in section 9, except that the workbooks for the CAT/6 and the CSTs were to be distributed to pupils in grades 3 to 11, instead of 2 to 11.

Section 60605.6 as amended and added by Statutes 2004, chapter 233, imposes requirements on the SPI to "contract for the development and distribution" of the workbooks, but does not impose any requirements on school districts.

Statutes 2004, chapter 233 also amended existing section 60606 and made it inoperative on July 1, 2007, and added a new section 60606 operative July 1, 2007, both of which require the SBE, after designing the CSTs and writing tests, to submit the tests to the Statewide Pupil Assessment Review Panel for review. Section 60606 requires the panel to consist of six members who are appointed to serve two-year uncompensated terms, and who review the tests for compliance with Education Code section 60614. Section 60614 prohibits the assessments from containing "any questions or items that solicit, or invite disclosure of a pupil's, or his or her parents' or guardians', personal beliefs or practices in sex, family life, morality, or religion nor shall it contain any question designed to evaluate personal behavioral characteristics." The panel's findings and recommendations are to be reported to SBE within ten days of receiving the tests. If the panel fails to report within the required ten days, the test is "deemed acceptable to the panel."[37]

Education Code section 60606, as amended and added by the 2004 test claim statute, imposes duties on the SBE, but does not impose any requirements on school districts.

6) Education Code sections 60607 and 60641, as amended by Statutes 2004, chapter 233, do not impose new requirements on school districts.

Since 1995, each pupil has been required to have an individual record of achievement or accomplishment as specified in Education Code section 60607 that contains the results of the achievement test that is part of the STAR program. The records of accomplishment are required to be private and may not be released to any person other than a parent or guardian or teacher, counselor or administrator directly involved with the pupil, without the express written consent of the parent or guardian, or a pupil that has reached the age of majority or is emancipated. The

[37] Former Education Code section 60606(d), now in Education Code section 60606(e).

legislative intent expressed prior to the enactment of Statutes 2004, chapter 233 was for school districts and schools to use the test results to "provide support to pupils and parents or guardians in order to assist pupils in strengthening their development as learners, and thereby to improve their academic achievement and performance in subsequent assessments."[38]

Preexisting law (§ 60641(a)) also required CDE to ensure that school districts report in writing the individual results of each pupil test administered to the pupil's parent or guardian, school, and teachers, and to include the test results in the pupil's records. Individual pupil test results may only be released with the permission of the pupil's parent or guardian.

Statutes 2004, chapter 233 amended section 60607(c) to provide that a pupil or his or her parent or guardian may authorize the release of pupil results to a postsecondary educational institution for purposes of credit, placement, or admission as follows:

> (c) (1) Any pupil results or a record of ~~achievement~~ accomplishment shall be private, and may not be released to any person, other than the pupil's parent or guardian and a teacher, counselor, or administrator directly involved with the pupil, without the express written consent of either the parent or guardian of the pupil if the pupil is a minor, or the pupil if the pupil has reached the age of majority or is emancipated.
>
> (2) (A) Notwithstanding paragraph (1), a pupil or his or her parent or guardian may authorize the release of pupil results or a record of accomplishment to a postsecondary educational institution for the purposes of credit, placement, or admission.
>
> (B) Notwithstanding paragraph (1), the results of an individual pupil on the California Standards Test may be released to a postsecondary educational institution for the purposes of credit, placement, or admission.

Nearly identical language was also added to Education Code section 60641(a)(3)(B). In addition, Statutes 2004, chapter 233 amended section 60641(a)(3)(A) to add the following underlined text:

> However, except as provided in this section, individual pupil test results may only be released with the permission of either the pupil's parent or guardian if the pupil is a minor, or the pupil if the pupil reached the age of majority or is emancipated.

Statutes 2004, chapter 233 also added section 60641(d), requiring CDE to ensure that the CSTs that are "augmented for the purpose of determining credit, placement, or admission of a pupil in a postsecondary educational institution inform a pupil in grade 11 that he or she may request that the results from the assessment be released to a postsecondary educational institution." The reference in section 60641(d) to an augmented CSTs is part of the Early Assessment Program (EAP) (Ed. Code, § 99300 et seq.), which is a collaborative effort among K-12 schools, the California State University, California Community Colleges, SBE, and CDE. Under the EAP, 11th graders are encouraged to take an "augmented version" of the CSTs that includes additional English-language arts and math questions and a written essay. The results of the augmented version, once scored, indicate a pupil's readiness for college-level English-language arts and

[38] Education Code section 60607(b) as added by Statutes 1995, chapter 975.

math. Those whose scores indicate they are not ready are encouraged to take classes during their senior year to improve and strengthen their skills. The goal of the EAP is to have high school graduates enter the California State University or a California community college fully prepared to do college-level work.[39]

The purpose of these amendments to release test results was stated as follows: "It is the intent of the Legislature that the results of the California Standards Tests be available for use, after appropriate validation, academic credit, or placement and admissions processes, or both, at postsecondary educational institutions."[40]

The Commission finds that Education Code sections 60607 and 60641, as amended by the Statutes 2004, chapter 233 do not impose new requirements on school districts. Preexisting law requires furnishing, releasing, or granting access to pupil records,[41] including standardized test results,[42] to parents of current or former pupils (or pupils 18 or over or who attend an institution of postsecondary education),[43] and requires school districts to have procedures for granting parental requests for furnishing copies of *all* pupil records.[44] Access to pupil records includes "a request to release a copy of any record."[45] The list of people who have access to pupil records without written consent includes a "pupil 16 years of age or older or having completed the 10th grade who requests access."[46] School districts are allowed to "make a reasonable charge in an amount not to exceed the actual cost of furnishing copies of any pupil record;" with some exceptions for former pupil records that are provided free of charge.[47]

In addition, parental authorization to release records is not new. Under preexisting law, in Education Code section 60607(c), as amended by Statutes 2001, chapter 722, parents could consent to have their child's record released to "any person," which could have included admissions officers at postsecondary institutions.

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[39] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of SB 946 (2007-2008 Reg. Sess.) as amended Aug. 14, 2008, page 2.

[40] Education Code section 60602(e) (added by Stats. 2004, ch. 233).

[41] Pupil records include "any item of information directly related to an identifiable pupil , other than directory information [as defined] which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, § 49061(b).)

[42] California Code of Regulations, title 5, section 432(b).

[43] Education Code section 49061(a), as last amended by Statutes 2003, chapter 862.

[44] Education Code section 49069, as amended by Statutes 1977, chapter 36.

[45] Education Code section 49061(e), as last amended by Statutes 2003, chapter 862.

[46] Education Code section 49076(a)(6), as last amended by Statutes 2003, chapter 862.

[47] Education Code section 49065, as last amended by Statutes 1977, chapter 36. "No charge shall be made for furnishing (1) up to two transcripts of former pupils' records or (2) up to two verifications of various records of former pupils. No charge may be made to search for or to retrieve any pupil record."

Moreover, the Statutes 2004, chapter 233 amendment to section 60641(d), requiring CDE to ensure that a test that is augmented for the purpose of determining credit, placement, or admission of a pupil in a postsecondary educational institution, inform a pupil in grade 11 that he or she may request that the results from the assessment be released to a postsecondary educational institution, is a requirement imposed on CDE and not a requirement on school districts.

Accordingly, the Commission finds that Education Code sections 60607 and 60641, as amended by Statutes 2004, chapter 233, do not impose new requirements on school districts.

7) Education Code section 60611, as amended by Statutes 2004, chapter 233, does not impose new requirements on school districts.

Since it was added by Statutes 1995, chapter 975, Education Code section 60611 has prohibited cities, counties, a city and county, district superintendents of schools, or principals or teachers, from carrying on any program of specific preparation of pupils for any statewide pupil assessment program or a particular test. Statutes 2004, chapter 233 added subdivision (b) to section 60611 as follows:

> City, county, city and county, district superintendent of schools, principal, teacher of an elementary and secondary school, including a charter school, *may* use instructional materials provided by the department or its agents in the academic preparation of pupils for the statewide pupil assessment if those instructional materials are embedded in an instructional program that is intended to improve pupil learning. (Emphasis added.)

The plain language of this amendment authorizes, but does not require school districts to use instructional materials to prepare pupils for the statewide pupil assessment.[48] Thus, the Commission finds that section 60611(b) as added by Statutes 2004, chapter 233 does not impose any required activities on school districts.

Statutes 2004, chapter 233 also deleted the first word ("No") in Education Code section 60611(a):

> ~~No~~ (a) A city, county, city and county, ~~or~~ district superintendent of schools, or principal or teacher of any elementary or secondary school, including a charter school shall carry on any program of specific preparation of ~~the~~ pupils for the statewide pupil assessment program or a particular test used therein.

The plain language of the amendment to section 60611(a) that deleted the first word "no," made the statute read as if school districts were required to carry on a program of specific preparation for statewide pupil assessment. However, the deletion of the word "no" was a drafting error. A legislative committee report stated that a subsequent statute (Stats. 2005, ch. 676) "[c]orrects an error made by Chapter 233, of 2004 [the test claim statute] in order to clarify existing law that *prohibits* the use of specific test preparation programs that are not part of a larger curriculum."[49]

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[48] Education Code section 75: "'Shall' is mandatory and 'may' is permissive."

[49] Senate Committee on Education, Analysis of SB 755 (2005-2006 Reg. Sess.) as amended February 22, 2005, page 2.

In addition, the Legislative Counsel's Digest for the test claim statute (SB 1448, Stats. 2004, ch. 233), states:

> Existing law prohibits a city, county, city and county, or district superintendent of schools or principal or teacher of any elementary or secondary school from carrying on any program of specific preparation of the pupils for the statewide pupil assessment program or a particular test used in the statewide pupil assessment program.
>
> This bill would, in addition, place that prohibition on a charter school, but would exempt from that prohibition instructional materials provided by the State Department of Education if those instructional materials are embedded in an instructional program that is intended to improve pupil learning.[50]

The Legislative Counsel's Digest mentions extending the prohibition for specific preparation to a charter school, but makes no mention of requiring schools to "carry on any program of specific preparation" as the plain, but unintended, language of the Statutes 2004, chapter 233 amendment to section 60611(a) would indicate.[51]

In short, the legislative history Statutes 2004, chapter 233 and of subsequent corrective legislation (Stats. 2005, ch. 676) makes clear that Statutes 2004, chapter 233 erroneously omitted the word "no" in Education Code section 60611(a). The Commission, like a court, may disregard a statute's drafting error where the legislative intent is clear and correction will best carry out the legislative intent.[52]

Accordingly, the Commission finds that Education 60611, as amended by the 2004 test claim statute, does not impose new requirements on school districts

8) Education Code section 60640(g) as amended and added by Statutes 2004, chapter 233 imposes a new requirement on school districts to administer the primary language test to pupils of limited English proficiency enrolled in grades 2 to 11 in a *nonpublic* school for less than 12 months.

i. Administering the national norm-referenced achievement test (CAT/6) to grades 3 and 7, instead of grades 3 and 8 does not impose new requirements on school districts. (Ed. Code, § 60640(b), as amended by Stats. 2004, ch. 233)

As indicated above, Education Code section 60640 establishes the STAR program and governs the administration of the test. Before Statutes 2004, chapter 233 was enacted, Statutes 2003, chapter 733 amended section 60640 to require each school district to administer to each of its pupils in grades 3 and 8 the national norm-referenced achievement test designated by SBE pursuant to section 60642 and a standards-based achievement test designated by SBE pursuant to

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[50] The Legislative Counsel's Digest may be used to determine legislative intent. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 35.

[51] See also California Code of Regulations, title 5, section 854 that prohibits specific preparation materials for the STAR exams except as provided by CDE.

[52] *Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 368.

section 60642.5 for pupils in grades 2 to 11, inclusive. That provision was to become operative on July 1, 2004.

Section 15 of Statutes 2004, chapter 233amended section 60640(b), commencing July 1, 2004, to change the grade requirements for the administration of the national norm-referenced achievement test (or CAT/6). Statutes 2004, chapter 233 requires each school district to administer the national norm-referenced achievement test to pupils in grades 3 and 7, instead of grades 3 and 8, and makes the statute inoperative on July 1, 2007. Section 16 of the bill then added section 60640 back to the Education Code, commencing on July 1, 2007, to continue the same requirement to administer the test to pupils in grades 3 and 7. CDE requested that the test not be administered to pupils in grade 8 because by the time the test scores of 8th graders were available to their middle or junior high schools, the pupils had already graduated from the school.[53] Section 60640(b), as amended in 2004 (Stats. 2004, ch. 233), does not increase the testing requirements of school districts since it simply requires that the test be administered in the 7th, rather than 8th grade. Therefore, the Commission finds that Education Code section 60640 as amended by Statutes 2004, chapter 233 does not impose new requirements on school districts.

ii. Administering the primary language test to pupils with limited English proficiency (Ed. Code, §§ 60640(f)(g), as amended by Stats. 2004, ch. 233)

As indicated above, immediately before the enactment of Statutes 2004, chapter 233, the law required school districts to administer to pupils in grades 3 and 8 the national norm-referenced achievement test (CAT/6), and to pupils in grades 2 through 11, a standards-based achievement test.[54] In addition to the national norm-referenced achievement test and the standards-based achievement test (CSTs), the law also required school districts to administer a primary language test, if one was available, to pupils of limited English proficiency who had been enrolled in any of grades 2 to 11 in any public school in the state for *less than* 12 months before the administration of the test. School districts had the option of administering a primary language test to English learner pupils enrolled in a public school for *more than* 12 months before the administration of the test.[55] In addition, pupils in special education programs were required to be tested, unless specifically exempted by their IEP, and school districts had the option of testing these pupils with a designated primary language test if the pupil was limited English proficient.[56]

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[53] Senate Committee on Education, Analysis of SB 1448 (2003-2004 Reg. Sess.) amended April 15, 2004, pages 3-4.

[54] Education Code section 60640, as amended by Statutes 2003, chapter 733.

[55] Education Code section 60640, as originally enacted by Statutes 1997, chapter 828. Former California Code of Regulations, title 5, section 880(a) also stated the following: "In addition to the designated achievement test and the standards-based achievement tests, school districts shall administer to English language learners who are enrolled in any of grades 2 to 11, inclusive, a designated primary language test if less than 12 months have elapsed after initial enrollment in any public school in this state and it a test has been designated in the pupil's primary language."

[56] Education Code section 60640(e), as amended by Statutes 2002, chapter 492, which provides the following: "Pursuant to paragraph (17) of subsection (a) of Section 1412 of Title 20 of the United States Code, individuals with exceptional needs, as defined in Section 56026, shall be

Statutes 2004, chapter 233 made some changes to these provisions for fiscal year 2004-2005. Section 15 of Statutes 2004, chapter 233 added subdivision (f)(3) to section 60640 to require CDE to "use funds made available pursuant to Title VI of the federal No Child Left Behind Act of 2001 and appropriated by the annual Budget Act for the purpose of developing and adopting primary language assessments that are aligned to the state academic content standards." The added provision specifies that the exams be developed and adopted for reading/language arts and mathematics in the dominant primary language of limited-English proficient pupils, determined by the count in the annual language census of limited-English-proficient pupils. Statutes 2004, chapter 233 also added other provisions in section 60640(f)(3) regarding the administration of the primary language assessment, choosing a contractor to develop the assessment, the grade order of developing the assessment, retention of ownership rights to the assessment and test items, a CDE report on developing and implementing the initial primary language assessment, and recommendations for future assessments and funding requirements. These amendments to section 60640(f)(3) are imposed on CDE, and do not require school districts to perform any activities.

In addition, Statutes 2004, chapter 233 added Education Code section 60640(f)(3)(B) to provide the following: "Once a dominant primary language assessment is available for use for a specific grade level, it shall be administered in place of the assessment designated pursuant to paragraph (1) for that grade level." Paragraph (1) of subdivision (f) is the provision that allows schools, at their option, to have pupils who have been enrolled in a public school district for more than 12 months with limited English proficiency, take a second achievement test in their primary language. Subdivision (f)(1) states the following:

> (f)(1) *At the option of the school district*, pupils with limited English proficiency who are enrolled in any of grades 2 to 11, inclusive, may take a second achievement test in their primary language. Primary language tests administered pursuant to this subdivision and subdivision (g) shall be subject to the requirements of subdivision (a) of Section 60641. These primary language tests shall produce individual pupil scores that are valid and reliable. (Emphasis added.)

Thus, the Commission finds that Education Code section 60640(f)(3)(B) does not impose any required activities on school districts. School districts that choose to have these pupils take a second test in their primary language do not incur state-mandated costs because the schools are participating in a voluntary program.[57]

In addition, Section 15 of Statutes 2004, chapter 233, amended section 60640(g) as follows:

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included in the testing requirement of subdivision (b) with appropriate accommodations in administration, where necessary, and those individuals with exceptional needs who are unable to participate in the testing, even with accommodations, will be given an alternate assessment." See also, Former California Code of Regulations, title 5, section 881(b) (Register 2001, No. 19), which provided that "Pupils in special education programs may be tested with a designated primary language test, if applicable, unless the individualized education program for the pupil specifically exempts the pupil from testing."

[57] *Kern Unified School Dist.* (2003) 30 Cal.4th 727, 745.

> A pupil of limited English proficiency who is enrolled in any of grades 2 to 11, inclusive, shall be required to take a test in ~~their~~ his or her primary language if a test is available, and if fewer than 12 months have elapsed after ~~their~~ his or her initial enrollment in any public or nonpublic school in the state.

The reference in the statute to a nonpublic school is new, and by the plain language of the statute, expands the requirement to administer the achievement test in the pupil's primary language (which is taken in addition to the national norm-referenced achievement test and the standards-based achievement test administered in English) to those pupils initially enrolled in a *nonpublic* school for less than 12 months. Education Code section 56034 defines a nonpublic school as a private, nonsectarian (nonreligious) school that enrolls individuals with exceptional needs pursuant to an IEP. Under federal law, every child is entitled to a free and appropriate public education in the least restrictive setting that meets the child's needs. When a child has exceptional needs that cannot be met in a public school setting, that child may be educated in a nonpublic school at public expense.[58] Education Code section 56365 states that the services shall be provided pursuant to state and federal law and under contract with the local educational agency, "to provide the appropriate special educational facilities, special education, or designated instruction and services required by the individual with exceptional needs if no appropriate public education program is available." The tuition of a pupil in a nonpublic school is paid by the public local education agency that places the pupil in the nonpublic school based on the pupil's individual needs. Placement in nonpublic schools can be made outside of the state pursuant to section 56365(e), after documentation of efforts by the local educational agency to utilize public schools or to locate an appropriate nonpublic, nonsectarian school or agency program within the state. Section 56365(b) states that "pupils enrolled in nonpublic, nonsectarian schools and agencies under this section shall be deemed enrolled in public schools . . . ."

The Commission finds that the requirement to administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11 is a new requirement imposed on school districts beginning July 1, 2004. Under prior law, school districts had the option of administering a primary language test to special education pupils who were English learners pursuant to former section 881 of the title 5 regulations. Administering the primary language test, in addition to the national norm-referenced achievement test and the standards-based achievement test, is now required for those pupils enrolled for less than 12 months in a nonpublic school. Pursuant to section 60640(k), the requirement was to become inoperative on July 1, 2007. However, effective October 7, 2005, Education Code section 60640(g) was amended again by Statutes 2005, chapter 676 to provide that a pupil, in grades 3 to 11, receiving instruction in his or her primary language or who has been enrolled "in a school in the United States" for less than 12 months shall be required to take the primary language test as follows:

> A pupil identified as limited English proficient pursuant to the administration of a test made available pursuant to Section 60810 who is enrolled in any of grades 3 to 11, inclusive, and who either receives instruction in his or her primary language

[58] 20 United States Code, sections 1400, et seq; Code of Federal Regulations, title 20, section 300.146.

> or has been enrolled in a school in the United States for less than 12 months shall be required to take a test in his or her primary language if a test is available.

As indicated in part A of this decision, the Commission does not have jurisdiction to determine if the 2005 statute imposes a reimbursable state-mandated program. Thus, with respect to the language in the statute requiring the primary language test for pupils who "receive instruction in his or her primary language," findings cannot be made. However, the requirement to administer the primary language test to those pupils, in grades 3 to 11, enrolled in a nonpublic school for less than 12 months continues with the plain language of the 2005 statute, which states that the primary language test is required for those enrolled in "a school in the United States" for less than 12 months. "A school in the United States" includes a nonpublic school, which by definition in Education Code section 56365(b), deems those pupils enrolled in a public school.[59]

Accordingly, the Commission finds that Education Code section 60640(g), as amended by section 15 of Statutes 2004, chapter 233, imposes the following new requirement on school districts beginning July 1, 2004:

- To administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11. Beginning October 7, 2005, school districts are required to administer the primary language test to those pupils in nonpublic schools in grades 3 to 11, instead of grades 2 to 11.

c) Education Code sections 60630, 60640, 60641, and 60642.5 as added and amended by Statutes 2008, chapters 473 and 757

Statutes 2008, chapter 757 was an education budget trailer bill that amended Education Code section 60640 (Stats. 2008, ch. 757) to remove the requirement for school districts to assess pupils with the national norm-referenced achievement test (CAT/6) in grades 3 and 7. Specifically, Statutes 2008, chapter 757, removed from section 60640(b) reference to the "achievement test designated by the State Board of Education pursuant to Section 60642" and removed other references to section 60642 in section 60640 (f)(1) and (f)(3)(C). Removing these provisions requires less testing and imposes no new requirements on school districts.

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[59] Section 16 of the 2004 test claim statute then added a new section 60640 to the Education Code for the 2007-2008 fiscal year, and required that the standards-based achievement test be administered to pupils in grades 3 to 11, instead of students in grades 2 to 11. With respect to pupils with limited English proficiency, section 60640(g), required the following for fiscal year 2007-2008:

> (g) A pupil identified as limited English proficient pursuant to the administration of a test provided by Section 60810, who is enrolled in any of grades 3 to 11, inclusive, and has not been reclassified as proficient in English pursuant to reclassification procedures required to be developed by Section 313, shall be required to take a test in her or her primary language if a test is available and if fewer than 12 months have elapsed after his or her initial enrollment in any public school in the state.

Section 16 never took effect, however, because of the amendment to the statute by Statutes 2005, chapter 676.

Statutes 2008, chapter 757 also makes non-substantive amendments to section 60642.5, which, since 2000, has required the SPI to provide for development of the standards-based achievement test (CSTs). The subject areas and grades to be tested are listed in section 60642.5, along with the criteria SBE must consider in approving a contract for development or administration of the CSTs.

In addition, Statutes 2008, chapter 757 makes non-substantive amendments to section 60630. Section 60630 requires the SPI to prepare and submit an annual report to the Legislature and the SBE with an analysis of the results and test scores of the STAR program that may include specified factors. Since 1997, section 60630(b) has required school districts to "submit to the State Department of Education whatever information the department deems necessary to carry out this section." Statutes 2008, chapter 757 made the following non-substantive amendment to subdivision (b): "School districts shall submit to the ~~State Department of Education~~ department whatever information the department deems necessary to carry out this section."

Thus, Statutes 2008, chapter 757 amendments to sections 60630 and 60642.5 removed references to the national norm-referenced achievement test in these statutes and made no other substantive changes that require school districts to perform any new activities.

Finally, the Legislature amended section 60641 in 2008, through chapters 473 and 757. Chapter 473 amended section 60641(a)(3)(B) to add the following underlined text: "Notwithstanding subparagraph (A), a pupil or his or her parent or guardian may authorize the release of individual pupil results to a postsecondary educational institution for the purpose of credit, placement, determination of readiness for college-level coursework, or admission." Chapter 473 also amended section 60641(d) as follows:

> The department shall ensure that a California Standards Test that is augmented for the purpose of determining credit, placement, or ~~admission~~ readiness for college-level coursework of a pupil in a postsecondary educational institution inform a pupil in grade 11 that he or she may request that the results from that assessment be released to a postsecondary educational institution.

These amendments do not impose any required activities on school districts.

Statutes 2008, chapter 757, amended section 60641 by deleting references to section 60642, the national norm-referenced test in section 60641(a) and (b), and made other non-substantive changes. Statutes 2008, chapter 757 did not impose any requirements on school districts.

d) Amendments to the Title 5 regulations by Register 2005, No. 34.

SBE adopted regulations in 2005 to amend sections 850 *et seq.,* of the title 5 regulations relating to the STAR program, effective on September 21, 2005. According to the Initial Statement of Reasons for the regulations, the 2005 amendments were adopted to:

> . . . clarify the specific student demographic data that districts must provide, provide information about the use of questions publicly released for the California Standards Tests, add requirements for the California Alternate Performance Assessment (CAPA), modify all dates associated with the Program to working days, and modify the process for collecting information required for providing apportionments to districts for costs associated with the Program. Changes to the regulations were also made in order to ensure consistency among the assessment

> programs, including the California High School Exit Examination (CAHSEE) and the California English Language Development Test (CELDT). Additionally, some of the proposed amendments are required to enable the state to comply with the requirements of the federal No Child Left Behind Act of 2001.[60]

To address federal guidelines that authorize states, beginning in the 2004-2005 school year, to not include a pupil with a significant medical emergency in the participation rate calculation, the 2005 regulations included a definition for significant medical emergency. The regulations also defined data provided by each school district to the test contractor for each pupil in grades 2 through 8 who is not tested due to a significant medical emergency. The 2005 amendments to the regulations are analyzed below.

1) Definitions (Cal. Code Regs., tit. 5, § 850)

Section 850 sets forth definitions for 19 terms used in the STAR testing program. Register 2005, No. 34, amended this section to "update and clarify the definitions." This regulation defines terms, but does not impose any required activities on school districts. The definitions that are relevant to any new required activity are discussed further below.

2) Pupil Testing (Cal. Code Regs., tit. 5, § 851)

Section 851(a) was amended to add the standards-based achievement test (CSTs) required to be administered to pupils enrolled in grades 2 to 11 as follows:

> (a) School districts shall administer the designated achievement test and standards-based achievement tests to each eligible pupil enrolled in any of grades 2 to 11, inclusive, in a school district on the date testing begins in the pupil's school.

Administration of the standards-based achievement test (CSTs), however, is not a new requirement. Immediately before the effective date of the 2005 amendment to section 851, school districts were required to test pupils in grades 2-11 with "the standards-based achievement test provided for in Section 60642.5," beginning in the 2004-2005 fiscal year as follows:

> (b) Commencing in the 2004–05 fiscal year and each fiscal year thereafter, and from the funds available for that purpose, each school district, charter school, and county office of education shall administer to each of its pupils in grades 3 and 8 the achievement test designated by the State Board of Education pursuant to Section 60642 and *shall administer to each of its pupils in grades 2 to 11, inclusive, the standards-based achievement test provided for in Section 60642.5*. The State Board of Education shall establish a testing period to provide that all schools administer these tests to pupils at approximately the same time during the

[60] CDE, Initial Statement of Reasons, Standardized Testing and Reporting (STAR) Program, revised June 23, 2004.

instructional year, except as necessary to ensure test security and to meet the final filing date. (Emphasis added.)[61]

Section 853(b) of the preexisting regulations also required administering the standards-based achievement tests in accordance with the manuals and instructions provided by the contractor. Thus, California Code of Regulations, title 5, section 851(a) as amended by Register 2005, No. 34, does not impose new requirements on school districts.

Section 851(b) was added by Register 2005, No. 34, to require school districts to administer the CAPA to those pupils with significant cognitive disabilities in grades 2 through 11, and ages 7 through 16 in ungraded programs. The CAPA is an alternative assessment individually administered to assess these pupils' achievement on a subset of California's Academic Content Standards.[62] Section 851(b) states the following:

> (b) School districts shall administer the CAPA, as set forth in the pupil's IEP, to each eligible pupil in any of grades 2 to 11, inclusive, in a school district during the period specified by the test contractor. Pupils in ungraded special education classes shall be tested, if they are 7 to 16 years of age.

The requirement to administer the CAPA is not new, however. Since 2002, Education Code section 60640(e) has provided, pursuant to the federal Individuals with Disabilities Education Act (IDEA), that individuals with exceptional needs shall be included in the testing requirements of the STAR program with appropriate accommodations in administration, where necessary. The statute further provides that those individuals with exceptional needs who are unable to participate in the testing, even with accommodations, shall be given an alternate assessment.[63] CAPA was first administered in 2003[64] and was governed by section 853(b), as it existed when the 2005 regulations became effective, to provide that the CAPA shall be administered and returned by school districts in accordance with the manuals and instructions provided by the contractor, and in accordance with testing variations, accommodations, and modifications specified in section 853.5. Therefore, section 851(b) of the title 5 regulations as amended by Register 2005, No. 34, does not impose new requirements on school districts.

In addition, former section 851(d) was renumbered to section 851(e) and amended to provide the following:

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[61] Education Code section 60640(b), as added by Statutes 2003, chapter 773, beginning in the 2004-2005 fiscal year.

[62] California Code of Regulations, title 5, section 850(d) and (h).

[63] Statutes 2002, chapter 492 added subdivision (e) to section 60640 to state the following: "Pursuant to Section 1412(a)(17) of Title 20 of the United States Code, individuals with exceptional needs, as defined in Section 56026, shall be included in the testing requirement of subdivision (b) with appropriate accommodations in administration, where necessary, and those individuals with exceptional needs who are unable to participate in the testing, even with accommodations, shall be given an alternate assessment." This provision currently remains in section 60640.

[64] CDE memorandum "State Board of Education-Adopted CAPA Performance Level," February 2009.

> No test may be administered in a ~~private~~ home or ~~location~~ hospital ~~unless the test is administered by either a certificated employee of the district or an employee of a nonpublic school pursuant to Education Code section 66365 who holds a credential and the employee signs a security affidavit~~ except by a test examiner. No test shall be administered to a pupil by the parent or guardian of that pupil. This subdivision does not prevent classroom aides from assisting in the administration of the test under the supervision of a credentialed school district employee provided that the classroom aide does not assist his or her own child and that the classroom aide signs a security affidavit.

A "test examiner" is defined in section 850(k), a subdivision that was added by Register 2005, No. 34, to mean "an employee of a school district or an employee of a nonpublic school *who has been trained to administer the tests* and has signed a STAR Test Security Affidavit. For the CAPA, the test examiner must be a certificated or licensed school staff member." (Emphasis added.)

Thus, under former section 851, the tests could be administered by either a certificated employee of the district or an employee of a nonpublic school who holds a credential and signs a security affidavit. This section as amended by Register 2005, No. 34 now requires that the test be administered by a test examiner who, by definition, can still be an employee of a school district or an employee of a nonpublic school, but is now required for the first time to be trained to administer the tests. Pursuant to section 858(b)(12) as amended by Register 2005, No. 34, and discussed further below in the analysis, the STAR test site coordinator is required to provide the training to the test examiner. According to the 2005 STAR District and Test Site Coordinator Manual, the "2005 STAR Examiner Training video should be used as part of the training."[65]

Thus, section 851(e) of the 2005 title 5 regulations, as amended by Register 2005, No. 34, imposes a new requirement for school districts to train test examiners on the administration of the STAR tests.

3) Pupil Exemptions (Cal. Code Regs., tit. 5, § 852)

Section 852 authorizes a parent to submit to a school a written request to excuse his or her child from any or all parts of any of the STAR tests. The regulation also prohibits school districts or district employees from soliciting or encouraging exemptions from testing. Register 2005, No. 34 amended section 852 by *deleting* the following sentence from subdivision (b) and moving the substance of the language to section 850(d)(2):

> (b) Pupils in special education programs shall be tested with the designated achievement test and the standards-based achievement tests unless the individualized educational program for the pupil specifically states that the pupil will be assessed with the California Alternate Performance Assessment or (CAPA).

Section 850(d)(2) now defines an eligible pupil for the CAPA as "any pupil with a significant cognitive disability in grades 2 through 11, and ages 7 through 16 in ungraded programs, whose IEP states that the pupil is to take the CAPA."

[65] CDE, STAR District and Test Site Coordinator Manual, Version 2-2005, page 20.

This amendment is not substantive. Therefore, section 852 as amended by Register 2005, No. 34 does not impose any new required activities on school districts.

4) Administering below grade level testing for pupils with IEPs (Cal. Code Regs., tit. 5, § 853)

Register 2005, No. 34 amended section 853(c) for the 2004-2005 school year with respect to out-of-level, or below-grade-level testing of special education pupils with IEPs. States are required to demonstrate adequate yearly progress, measured in part by large-scale assessment programs and made public through accountability data. In an attempt to create more inclusive large-scale assessment practices for pupils who have not been exposed to grade-level curriculum, some states have added out-of-level testing as a component of large-scale assessment programs. Out-of-level testing is the administration of a test at a level that is above or below the pupil's grade level in school. Typically, this means testing only pupils with disabilities below the grade in which their same-age peers are enrolled.[66]

The Register 2005, No. 34 regulations amended section 853(c) as follows:

> (c) For the ~~2003-04~~ 2004-05 school year ~~only~~, pupils with IEPs specifying below-grade-level testing in grades ~~5~~ 4 though 11 may be tested one or two grades below their enrollment grade. Pupils with IEPs specifying below-grade-level testing in grade three may be tested one grade level below their enrollment grade. The test level must be specified in the ~~student's~~ pupil's IEP. ~~Out-of-level~~ Below-grade-level testing shall be used only if the ~~student~~ pupil is not receiving grade-level ~~instruction~~ curriculum as specified by the California academic content standards, and is so indicated on the IEP. ~~Students~~ Pupils tested ~~out-of-level~~ below-grade-level must complete all tests required for the grade at which they are tested and shall be administered ~~only one level of the tests~~ the tests for only one grade level. ~~Out-of-level testing is not allowed for pupils in grades 2, 3, and 4. No out-of-level testing shall be allowed at any grade beginning with the 2004-05 school year.~~

Under prior law, section 853(c) allowed below-grade-level testing (either one or two grades below the pupil's enrollment grade) for pupils in grades 5 to 11, if specified in the pupil's IEP and the pupil is not receiving "grade level instruction." No out-of-level testing was allowed for pupils in grades 2 through 4, and no out-of-level testing was allowed for the 2004-2005 school year.

The Register 2005, No. 34 amendment expanded the pupils eligible to take below grade level testing for the 2004-2005 school year to pupils in grade 4 (who may be tested one or two grades below the enrollment grade), and to pupils in grade 3 (who may be tested one grade level below the enrollment grade), if below-grade-level testing is specified in the IEP and the pupil is not receiving grade level "curriculum that is specified by the California academic content standards."

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[66] National Center on Educational Outcomes, "Reporting Out-of-Level Test Scores: Are These Students Included in Accountability Programs," October 2003. <http://www.cehd.umn.edu/NCEO/onlinepubs/OOLT10.html> [as of November 13, 2013.]

CDE explained this amendment in the Final Statement of Reasons as follows:

> The change in Section 853(c) is not a restriction. For the last two years below-grade-level testing was allowed only for students in grades five through eleven and beginning with the 2004-05 school year no below-grade-level testing was to be allowed. The proposed amendment to the regulations expands the option of below-grade-level testing to grades three and four and allows its use during the 2004-05 school year.[67]

The plain language of the regulation ("may be tested") and the Final Statement of Reasons both indicate that below-grade-level testing is an option allowed for testing pupils with IEPs.[68] Therefore, section 853 (Register 2005, No. 34) does not impose any requirements on school districts.

5) Testing Period (Cal. Code Regs., tit. 5, § 855)

Section 855 defines the testing period, designating a 21-day window during which testing is to be completed. The Register 2005, No. 34 amendment to section 855 deleted the definition of an eligible pupil for purposes of the writing assessment, and moved that definition to section 850(d)(4).[69] Section 855 as amended by Register 2005, No. 34 does not impose any requirements on school districts.

6) Test ordering and handling (Cal. Code Regs., tit. 5, §§ 864.5-867.5)

There are five sections of the regulations that govern how test materials are ordered (§ 864.5), transported (§ 865), delivered to the school district (§ 866), delivered to each test site (§ 867) and retrieved by contractors (§ 867.5).

i) Test Order Information (Cal. Code Regs., tit. 5, § 864.5)

Section 864.5 requires school districts to submit order information for each test site to the contractor in order to provide for the schools' testing needs. The Register 2005, No. 34 amendments to section 864.5 are shown in strikeout and underline as follows:

> (a) The school district shall provide to the ~~publisher~~ contractor, no later than December 1 of the year immediately prior to the year of test administration, the following data for each test site of the school district, by grade level:
>
> ~~(1) CBEDS enrollment~~
>
> ~~(2) Current enrollment~~
>
> (1) Number of pupils to be tested
>
> (2)~~(3)~~ Valid county district school (CDS) codes
>
> (3)~~(4)~~ Number of tests without adaptation

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[67] SBE, "Standardized Testing and Reporting (STAR) Program; Adopt Amendments to Title 5 Regulations" Agenda Item #6, Final Statement of Reasons, September 2004, page 3.

[68] Education Code section 75: "'Shall' is mandatory and 'may' is permissive."

[69] The definition is currently in section 850(h)(4).

(4)~~(5)~~ Numbers of special version tests with adaptations by type of adaptation including, but not limited to, Braille and large print.

(5)~~(6)~~ Number of directions for administration needed, by grade level.

(6)~~(7)~~ First date of testing in the school district, including the dates for each ~~testing wave~~ test administration period, if applicable.

~~(8) Date or dates on which delivery of materials to the school district is requested.~~

(b) Each school district that elects pre-identification of answer documents shall ~~provide to the publisher no fewer than 45 days prior to the first date of testing in the school district,~~ submit an electronic file that includes all of the information required in Section 861. The file must be submitted in accordance with the timeline, format, and instructions provided by the contractor.

(c) If the testing materials are lost or destroyed while in the possession of the school district, and the ~~publisher~~ contractor provides the school district with replacement materials, the school district is responsible for the cost of all replacement materials.

(d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests ~~scored, the number of parent requests pursuant to Education Code section 60615, and the number of individualized education program exemptions pursuant to Education Code section 60640(e)~~ submitted for scoring including tests for non-tested pupils and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the ~~publisher~~ contractor by the Department as part of the contract ~~with the publisher~~ for the current year.

These amendments do not impose any new required activities on school districts that increase the level of service provided to the public.

Section 864.5(a)(1) now requires school districts to report to the publisher the "number of pupils tested," rather than enrollment information. There is nothing in the record to indicate that reporting the "number of pupils tested" provides a higher level of service to the public than reporting enrollment under the CBEDS program and current enrollment information required under prior law. CBEDs data is enrollment data collected by school districts and reported to CDE an "information day" in October. School enrollment for CBEDs is determined by an unduplicated count by grade, gender, and racial/ethnic designation of pupils enrolled on Information Day and reported to the state.[70] Both are methods provide information to the test contractor for purposes of ordering a sufficient number of tests.

The amendments to sections 864.5(a)(5) and (a)(7) renumbered those provisions to subsections (4) and (6) respectively, and made non-substantive, clarifying changes that do not impose any new required activities. Section 864(a)(5) was amended to provide that "(4)~~(5)~~ Numbers of

[70] See generally, CDE, CBEDs Administrative Manual.

special version tests with adaptations by type of adaptation including, but not limited to, Braille and large print." Similarly, section 864.5(a)(7) was clarified to change "testing wave" to "test administration period."

In addition, the Register 2005, No. 34 regulations deleted former section 864.5(a)(8), which had required the district to report to the test publisher the requested date or dates of delivery for test materials, but did not impose any new required activities.

Therefore, California Code of Regulations, title 5, section 864.5(a), as amended by Register 2005, No. 34, does not impose new required activities on school districts.

The Register 2005, No. 34 regulations also amended section 864.5(b) as follows:

> Each school district that elects pre-identification of answer documents shall ~~provide to the publisher no fewer than 45 days prior to the first date of testing in the school district,~~ submit an electronic file that includes all of the information required in Section 861. The file must be submitted in accordance with the timeline, format, and instructions provided by the contractor.

This amendment to 864.5(b) does not impose any requirements on school districts. The plain language makes the file submission requirements conditional on the school district's discretionary decision to elect pre-identification answer documents. Requirements imposed due to participating in a discretionary program are not reimbursable state mandates.[71]

Finally, the amendment to section 864.5(d) altered the penalty formula if the school district places an excessive order for tests for any school, as follows:

> (d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests ~~scored, the number of parent requests pursuant to Education Code section 60615, and the number of individualized education program exemptions pursuant to Education Code section 60640(e)~~ submitted for scoring including tests for non-tested pupils and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the ~~publisher~~ contractor by the Department as part of the contract ~~with the publisher~~ for the current year.

The payment of the penalty for excessive orders is not new and does not provide a higher level of service to the public. In addition, the payment of the penalty depends on the actions of the school district, and is not triggered by a state-mandated requirement.

Accordingly, California Code of Regulations, title 5, section 864.5, as amended by Register 2005, No. 34, does not impose any new required activities.

ii) Transportation of Exams (Cal. Code Regs., tit. 5, § 865)

District test site coordinators are responsible for transporting STAR exams to test sites, as specified in section 865. The regulation was amended by Register 2005, No. 34 as follows:

[71] *Kern Unified School Dist., supra,* 33 Cal. 4th 859, 880.

(a) Upon arrival of the test materials at a single location designated by each school district, the school district's ~~STAR program~~ district STAR coordinator shall provide the ~~publisher~~ contractor with a signed receipt certifying that all cartons were received.

(b) The security of the test materials that have been duly delivered to the school district is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the ~~publisher~~ contractor for return to the contractor.

(c) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district. The school district is responsible for secure delivery of test materials to non-public schools to which district pupils with disabilities are assigned.

The Commission finds that the amendments to subdivisions (a) and (b) are clarifying amendments and do not impose any new required activities. In addition, there is nothing in the record to indicate that the school district providing a signed receipt to the carrier "certifying that all cartons were received" (in §865(a)) provides a higher level of service to the public than providing the publisher with "a signed receipt" as required under the prior version of section 865(a). The amendment clarifies what the receipt contains.

In addition, the following sentence was added in the Register 2005, No. 34 amendment to section 865(c): "The school district is responsible for secure delivery of test materials to non-public schools to which district pupils with disabilities are assigned." CDE received a comment on the proposed regulation requesting that nonpublic schools receive test materials directly from the contractor. CDE gave the following response in the Final Statement of Reasons:

> Education Code Section 60640(b) requires each school district, charter school, and county office of education to administer to each of its pupils the tests within the STAR Program. Education Code Section 56366 states that the role of the nonpublic, nonsectarian school or agency shall be maintained and continued as an alternative special education service available to districts, special education local plan areas, county offices, and parents. The nonpublic, nonsectarian school or agency is required to provide all services specified in students' Individualized Education Programs (IEPs). School districts, charter schools, and county offices of education retain responsibility for ensuring that students enrolled in them are tested as part of the STAR Program. Additionally, California County/District/ School (CDS) Codes are used for all aspects of the STAR Program including ordering materials and reporting results. Since nonpublic, nonsectarian schools or agencies are not assigned CDS codes; the Program contractor cannot work directly with the nonpublic, nonsectarian schools and agencies.[72]

As stated in the discussion of Education Code section 60640(g) above, Education Code section 56034 defines a nonpublic school as a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an IEP. Under federal law, every child is entitled to a free and

[72] CDE, Final Statement of Reasons, Standardized Testing and Reporting (STAR) Program Regulations, September 8, 2004, page 2.

appropriate public education in the least restrictive setting that meets the child's needs. When a child has exceptional needs that cannot be met in a public school setting, that child may be educated in a nonpublic school at public expense.[73] Education Code section 56365 states that the services shall be provided pursuant to state and federal law and under contract with the local educational agency, "to provide the appropriate special educational facilities, special education, or designated instruction and services required by the individual with exceptional needs if no appropriate public education program is available." The tuition of a pupil in a nonpublic school is paid by the public local education agency that places the pupil in the nonpublic school based on the pupil's individual needs. Education Code section 56365(b) states that "pupils enrolled in nonpublic, nonsectarian schools and agencies under this section shall be deemed enrolled in public schools . . . ."

The Commission finds that the addition of the sentence in section 865(c) stating that "the school district is responsible for secure delivery of test materials to non-public schools to which district pupils with disabilities are assigned," is clarifying of existing law and does not impose any new requirements on school districts. Since 2002, Education Code 60640(e) has required that individuals with exceptional needs be included in the testing requirements of the STAR program.[74] Immediately before the adoption of the Register 2005, No. 34 regulations, school districts were required to make the "necessary" arrangements to test all eligible pupils in alternative education programs or programs conducted off campus.[75] The prior regulations also specified that no test may be administered in a private home or location unless it was administered by either a certified employee of the school district or an employee of a nonpublic school who holds a credential and signs a security agreement.[76] Thus, under prior law, public school districts were required to make arrangements "necessary" to test pupils in nonpublic schools, an alternative education program, and the tests could be administered by an employee of a nonpublic school. Making arrangements necessary to test the pupils in a nonpublic school includes securing delivery of the tests. The regulation as amended by Register 2005, No. 34 simply clarifies that the public school district, where the pupil is considered enrolled, secures the delivery of the test to the nonpublic school.

Accordingly, California Code of Regulations, title 5, section 865, as amended by Register 2005, No. 34, does not impose new requirements on school districts.

iii. School District Delivery (Cal. Code Regs., tit. 5, § 866)

Section 866 governs delivery of test materials to school districts. Section 866 was amended by Register 2005, No. 34 as follows:

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[73] 20 United States Code, sections 1400, et seq.; Code of Federal Regulations, title 20, section 300.146.

[74] Statutes 2002, chapter 492.

[75] Former California Code of Regulations, title 5, section 851(b), renumbered without amendment to section 851(c) by the 2005 regulations.

[76] Former California Code of Regulations, title 5, section 851(d), which was amended and renumbered to section 851(e) by the 2005 regulations.

(a) No school district shall receive its multiple-choice test materials more than ~~twenty-five (25)~~ twenty (20) or fewer than ten (10) ~~calendar~~ working days prior to the first day of testing in the school district. A school district that has not received multiple-choice test materials from the ~~test publisher~~ contractor at least ten (10) ~~calendar~~ working days before the first date of testing in the school district shall notify the ~~publisher~~ contractor and the Department on the tenth working day before testing is scheduled to begin that the school district has not received its materials. Deliveries of multiple-choice test materials to single school districts shall use the schedule in Section 867.

~~(b) School districts shall return all designated achievement tests and standards-based achievement rests and test materials to the publisher within five (5) working days of the last test date in the school district, including makeup testing days or six (6) days after any statutory deadline, whichever date is earlier.~~

(b)~~(c)~~ A school district and the ~~publisher~~ contractor ~~may~~ shall establish a periodic delivery ~~and retrieval~~ schedule to accommodate ~~wave test administration dates~~ test administration periods within the school district. Any schedule established must conform to Sections 866(a) and (b) for each test administration period.

(c) No school district shall receive its writing test materials more than ten (10) or fewer than five (5) working days before the day on which the writing tests are to be administered.

The amendments made to subdivisions (a) and (c) change when school districts receive the multiple choice and writing test materials, but do not impose any new required activities on school districts.

The amendment to subdivision (b), however, does impose a new requirement on school districts to establish a periodic delivery schedule with the contractor to accommodate test administration periods within the district. Before the Register 2005, No. 34 amendment, the activity was discretionary. Thus, section 866(b) imposes the following new requirement on school districts:

- Establish a periodic delivery schedule, which conforms to section 866(a) and (b), to accommodate test administration periods within the school district.

iv. Test site delivery and return (Cal. Code Regs., tit. 5, § 867)

Section 867 governs test delivery from the district to the test site and return of tests to the designated district location. The Register 2005, No. 34 amendments made the following changes:

(a) No school or other test site shall receive any multiple-choice test or related test materials more than ten (10) ~~working days n~~or fewer than five (5) working days prior to the first day of testing scheduled at the school or test site.

~~(b) Upon completion of a testing wave at a site, including makeup testing, all tests and test materials shall be returned to the school district location designated by the STAR program district coordinator.~~

(b) All multiple-choice testing materials shall be returned to the school district location designated by the district STAR coordinator no more than two (2) working days after testing is completed for each test administration period.

(c) ~~Designated achievement tests and standards-based achievement tests and test materials shall not be retained at the test site for more than two (2) working days after the last day of test administration including makeup testing days or after any statutory deadline, whichever is earlier.~~ No school or other test site shall receive any writing test materials more than six (6) or fewer than two (2) working days before the test administration date.

(d) Writing test materials shall be returned to the district STAR coordinator no more than one day after the day scheduled for makeup testing.

These amendments change delivery and return deadlines, but do not add any new required activities. Under prior law, school districts were required to receive tests and testing materials, and return the materials to the district STAR coordinator after testing was complete.[77] The change in the delivery and return deadlines does not provide a higher level of service to the public.

v. Retrieval of materials by contractor (Cal. Code Regs., tit. 5, § 867.5)

Section 867.5 requires school districts to ensure that test materials are inventoried, packaged, labeled and returned to the test contractor. The Register 2005, No. 34 amendment reduces the number of days (from six to five) after the statutory deadline for school districts to have their multiple-choice test materials returned to the contractor. The Register 2005, No. 34 amendment (in subdivision (b)) also specifies a separate, two-day timeframe for returning writing tests and test materials, as follows:

(a) The school district shall ensure that multiple-choice testing materials are inventoried, packaged, and labeled in accordance with instructions from the ~~publisher~~ contractor, and returned to a single school district location for pickup by the ~~publisher~~ contractor within five (5) working days following completion of testing in the school district and in no event later than five (5) working days after ~~any applicable statutory deadline~~ each test administration period. All school districts must have their multiple-choice testing materials returned to the ~~publisher~~ contractor no later than ~~six (6)~~ five (5) working days after any statutory deadline.

(b) School districts shall return all writing tests and test materials to the contractor no more than two (2) working days after the makeup day specified for the writing test.

Although the amendment changes the deadlines for returning materials, the activity of returning test materials to the contractor is the same as prior law in section 867.5(a). Thus, the Register 2005, No. 34 amendments to section 867.5 do not impose a new activity on school districts.

7) Duties of the District STAR coordinator (Cal. Code Regs., tit. 5, § 857)

Each school year, the superintendent of a school district is required to designate an employee of the district to act as the district STAR coordinator. The district coordinator serves as the school

[77] Former California Code of Regulations, title 5, section 867(b)(c). In addition, former California Code of Regulations, title 5, section 897, governed the return procedure for the designated primary language test. Section 897 repealed in 2006 (Register 2006, No. 45.)

district representative and the liaison between the school district, the test contractor, and CDE for all matters relating to the STAR program.[78] The Register 2005, No. 34 regulations made substantive amendments and added new requirements to the district coordinator's responsibilities in subdivision (b) as described below.

Section 857(b)(2) was amended as follows:

> Determining school district and individual school test and test material needs in conjunction with schools within the district and the ~~test publisher~~ contractor, using ~~California Basic Education Data System (CBEDS) and~~ current enrollment data and communicating school district test and test material needs to the publisher contractor on or before December 1.

The amendments to section 857(b)(2) do not require school districts to perform a new activity or higher level of service. Determining test material needs for schools within the district using "current enrollment data," does not provide a higher level of service to the public when compared to prior law, which required the district STAR coordinator under former section 857(b)(2), to determine the district and schools' testing needs using CBEDs data. As indicated above, CBEDs data is enrollment data and, thus, the district coordinator is performing the same function of determining testing needs based on enrollment.

Section 857(b)(3) was amended by setting deadlines when the district STAR coordinator is required to oversee the distribution of tests and test materials to the test sites. This amendment establishes deadlines, but does not impose any new required activities on school districts.

The first sentence of section 857(b)(4) was also amended to clarify that the district STAR coordinator is required to coordinate the testing and makeup days for those pupils of the district enrolled in a nonpublic school as follows:

> Coordinating the testing and makeup testing days for the school district and for those pupils of the district who are enrolled in nonpublic schools within any required time periods with the school test site coordinators. Overseeing the collection of all pupil data as required to comply with Section 861.

The added language in the first sentence of subdivision (b)(4) does not impose a new requirement on school districts. Under existing law, school districts were required to administer the testing requirements of the STAR program to all pupils, including those individuals with exceptional needs.[79] As stated above, pupils enrolled in a nonpublic school are considered enrolled in the local educational agency that placed them. In addition, school districts were required to make all necessary arrangements to test all eligible pupils in the district, including those in alternative education programs.[80] The language requiring the district STAR coordinator to coordinate testing and makeup testing days for the district, including those pupils enrolled in a nonpublic school, clarifies the law, but does not impose a new requirement.

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[78] California Code of Regulations, title 5, section 857(a).

[79] Education Code section 60640(e), as amended by Statutes 2002, chapter 492.

[80] Former California Code of Regulations, title 5, section 851(b), renumbered without amendment to section 851(c) by the Register 2005, No. 34 regulations.

In addition, the second sentence to section 857(b)(4) was added to state the following: "Overseeing the collection of all pupil data as required to comply with Section 861." This sentence clarifies existing law, but does not require school districts to perform a new activity. Under preexisting law, section 861 of the regulations required the "school district" to submit the pupil data required under section 861 to the publisher or contractor of the STAR exams. In addition, former section 857(c), which was removed by the 2005 amendment, required the district coordinator to certify to CDE that the district had "collected all data and information as required by Sections 861 and 862." Thus, the amendment to section 857(b)(4) for the district coordinator to oversee pupil data collection merely clarifies who at the district level oversees data collection, but does not result in a new school district activity.

The Register 2005, No. 34 amendment to section 857(b)(5) and (b)(6) alters the district coordinator's duties to submit the security agreement to the contractor, and to expressly include administering and providing security for the CAPA as follows:

> (b) The ~~STAR program~~ district STAR coordinator's responsibilities shall include, but not be limited to, all of the following duties: [¶]…[¶]
>
> (5) Maintaining security over the designated achievement test~~, and~~ the standards-based achievement tests, the CAPA and test data using the procedure set forth in Section 859. The ~~STAR program~~ district STAR coordinator shall sign the security agreement set forth in Section 859 and submit it to the contractor prior to receipt of the test materials from the contractor.
>
> (6) Overseeing the administration of the designated achievement test, and the standards-based achievement tests, and the CAPA to eligible pupils.

Submitting the security agreement to the contractor does not impose a new requirement or provide a higher level of service to the public because under former section 857(c), the district STAR coordinator was required to certify to CDE "that the school district has maintained the security and integrity of the designated achievement test and the standards-based achievement tests." There is nothing in the record to indicate that submitting the security agreement to the contractor is a higher level of service than certifying to CDE that the district has maintained the security and integrity of the STAR tests.

As for administering and providing security for the CAPA, preexisting law, in section 853(b), states:

> (b) The standards-based achievement tests and the California Alternate Performance Assessment shall be administered and returned by school districts in accordance with the manuals and other instructions provided by the contractor, and in accordance with testing variations, accommodations, and modifications specified in Section 853.5. The procedures shall include, but are not limited to, those designed to insure the uniform and standard administration of the tests to pupils, the security and integrity of the test content and test items, and the timely provision of all required student and school level information.[81]

[81] Register 2004, No. 6, operative February 3, 2004.

Preexisting law required school districts to administer the CAPA and to "insure . . . the security and integrity of the [CAPA] test content and test items." The test claim regulation identifies who at the district level is responsible for administration and security. Thus, the Register 2005, No. 34 amendments to section 857(b)(5) and (b)(6) regarding the CAPA administration and security, do not impose new requirements on school districts.

The Register 2005, No. 34 amendment also added section 857(b)(9), which requires for the first time the district STAR coordinator to immediately notify CDE "of any security breaches or testing irregularities in the district before, during, or after the test administration." Under prior law (in former § 857(c)), the district superintendent and district coordinator were required to certify to CDE with respect to the CSTs and CAT/6 the following:

> [T]hat the school district has maintained the security and integrity of the designated achievement test and the standards-based achievement tests; collected all data and information as required by Sections 861 and 862; returned to the test publisher all test materials, answer documents, and other materials included as part of the designated achievement test and the standards-based achievement tests in the manner and as otherwise required by the test publisher;

Thus, the activity required by section 857(b)(9) to notify CDE of security breaches or testing irregularities is a new requirement.

Section 857(b)(10) was also added by Register 2005, No. 34 to state the following: "Ensuring that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing." This requirement is also new. Under prior law, the district site coordinator was required to determine the school district and individual school test and test material needs using current enrollment data.[82] The district coordinator was also required to oversee and certify the collection and return of all test materials and test data to the publisher.[83] But the district coordinator was not required to ensure that an answer document was submitted for scoring for each eligible pupil *enrolled* in the district on the first day of testing. Not all pupils take the STAR tests. Pupils who are enrolled on the first day of testing may be excused from the tests if a parent or guardian submits to the school a written request to excuse his or her child from any or all parts of any of the STAR tests pursuant to section 852. In addition, pupils with significant medical emergencies that preclude the pupil from taking the test or makeup test can also be excused from the STAR testing. And under former section 858(9), the test site coordinator, under existing law, was required to ensure that an answer document was submitted for each pupil *tested*. There was no requirement to submit answer documents for each pupil enrolled. Thus, the requirement imposed on the district coordinator to ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing is a new requirement.

Finally, section 857(b)(12), as added by Register 2005, No. 34 requires district STAR coordinators to train test site coordinators to oversee the test administration at each school. This

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[82] California Code of Regulations, title 5, section 857(b)(2), as last amended by Register 2001, No. 19.

[83] California Code of Regulations, title 5, section 857(b)(7), (c), as last amended by Register 2001, No. 19.

is a new requirement. Prior law did not require district STAR coordinators to perform training. Thus, the Commission finds that section 857(b)(12) constitutes a state-mandated new program or higher level of service for district STAR coordinators to train test site coordinators to oversee the test administration at each school.

Accordingly, the Register 2005, No. 34 regulations imposed the following new requirements on the school district STAR coordinator:

- Immediately notify CDE of any security breaches or testing irregularities in the district before, during, or after the test administration. (Cal. Code Regs., tit. 5, § 857(b)(9), as added by Register 2005, No. 34.)
- Ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing. (Cal. Code Regs., tit. 5, § 857(b)(10), as added by Register 2005, No. 34.)
- Train test site coordinators to oversee the test administration at each school. (Cal. Code Regs., tit. 5, § 857(b)(12), as added by Register 2005, No. 34.)

8) Duties of the STAR test site coordinator (Cal. Code Regs., tit. 5, § 858)

Under existing law, a STAR test site coordinator is designated at each school site to be available through August 15 in a calendar year for purposes of resolving discrepancies or inconsistencies in materials or errors in reports. Register 2005, No. 34 regulations that amended section 858 of the regulations added new requirements for the test site coordinator as described below.

The 2005 amendment to section 858(a) authorizes either the superintendent of the school district or the district STAR coordinator to designate a test site coordinator. Under prior law, only the school district superintendent could designate a test site coordinator. This gives the district more flexibility in appointing a STAR test site coordinator, but does not impose any new requirements on school districts.

Section 858(b)(2) was amended as follows:

> Overseeing the acquisition and distribution of tests and test materials at the test site, including but not limited to, distributing test materials to test examiners on each day of testing in accordance with the contractor's directions.

The added language is a clarification of the existing requirement to distribute test materials at the test site, and does not impose a new requirement on the test site coordinator.

Section 858(b)(4) was amended to provide that the test site coordinator maintain security over the CAPA. This amendment is clarifying of existing law and does not impose a new requirement on school districts. Preexisting law required school district administration of the CAPA with "procedures . . . designed to insure . . . the security and integrity of the test content and test items."[84] Thus, the Register 2005, No. 34 regulation specifies who is responsible for the test security, but does not impose new activities on the school district.

[84] California Code of Regulations, title 5, section 853(b) (Register 2004, No. 6, Operative February 3, 2004).

The amendment to section 858(b)(4) also added a requirement for the test site coordinator to submit the security agreement described in section 859 to the district STAR coordinator prior to the receipt of the test materials. Under prior law, the test site coordinator was required to sign the security agreement and certify to the district coordinator that the test site has maintained security and integrity of the tests.[85] However, submitting the security agreement to the STAR district coordinator is a new required activity.

Section 858(b)(5) was amended as follows:

> Arranging for and ~~O~~overseeing the administration of the designated achievement test, and the standards-based achievement tests, and the CAPA to eligible pupils at the test site.

This amendment clarifies the administration of tests, but does not require a new district activity. In addition, administering the CAPA was required under preexisting law.[86] Thus, the 2005 amendment to section 858(b)(5) does not impose a new requirement on school districts.

Section 858(b)(9)) was added as follows: "Ensuring that an answer document is submitted for scoring for each eligible pupil enrolled in the school on the first day of testing." Under prior law, the test site coordinator was required to ensure that one scannable answer document is submitted for each pupil *tested*. The requirement now is to ensure that an answer document is submitted for each pupil *enrolled* on the first day of testing, but do not take one of the STAR tests. As a result, the new requirement imposed on the test site coordinator by section 858(b)(9) is to ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but are excused from testing because the parent or guardian submits a written request,[87] or the pupil who is absent from school when the test (and any makeup test) is administered for a significant medical emergency.

The newly designated section 858(b)(10) was amended by Register 2005, No. 34 as follows:

> Ensuring that for each pupil tested only one scannable answer document is submitted for scoring, except that for each pupil tested at grades ~~4 or grade 7,~~ for which the contractor has designated the use of more than one answer document. ~~a~~An answer document for the STAR writing assessment administered pursuant to Section 855(c) shall be submitted in addition to the answer document for the multiple choice items."

This amendment does not require a new district activity. Both before and after the Register 2005, No. 34 amendment, section 858 required the test site coordinator to ensure that one scannable answer document per pupil was submitted for scoring for multiple choice tests, in addition to ensuring that a writing assessment answer document was submitted for pupils taking the writing test.

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[85] Former California Code of Regulations, title 5, sections 858(b)(4) and 858(c).

[86] California Code of Regulations, title 5, section 853(b) (Register 2004, No. 6, Operative February 3, 2004).

[87] Education Code section 60615; California Code of Regulations, title 5, section 852.

Finally, the Register 2005, No. 34 amendments added subdivision (b)(11) and (12) to section 858 to require the test site coordinator to perform the following activities:

> (11) Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859.
>
> (12) Train all test examiners, proctors, and scribes for administering the tests.[88]

These activities are new and were not required under prior law.

Therefore, the Commission finds that the Register 2005, No. 34 amendments to section 858 of the title 5 regulations impose the following new requirements on the school test site coordinator:

- Submit the signed security agreement to the district STAR coordinator prior to the receipt of test materials. (Cal. Code Regs., tit. 5, § 858(b)(4), as added by Register 2005, No. 34.)
- Ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but excused from testing. (Cal. Code Regs., tit. 5, § 858(b)(9), as added by Register 2005, No. 34.)
- Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859. (Cal. Code Regs., tit. 5, § 858(b)(11), as added by Register 2005, No. 34.)
- Train all test examiners, proctors, and scribes for administering the tests. (Cal. Code Regs., tit. 5, § 858(b)(12), as added by Register 2005, No. 34.)

9) STAR test security agreement and test security affidavit (Cal. Code Regs., tit. 5, § 859)

Section 859 contains the STAR test security agreement that must be signed by STAR district and test site coordinators and the STAR test security affidavit, which must be signed by all test examiners, proctors, scribes, and other persons having access to the tests and test materials. The

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[88] California Code of Regulations, title 5, section 850(k) defines "test examiner" to mean "an employee of a school district or an employee of a nonpublic school who has been trained to administer the tests and has signed a STAR Test Security Affidavit. For the CAPA, the test examiner must be a certified or licensed school staff member."

Section 850(l) defines a "test proctor" as "an employee of a school district, or a person assigned by a nonpublic school to implement a pupil's IEP, who has received training designed to prepare him or her to assist the test examiner in the administration of tests within the STAR program."

Section 850(m) defines "scribe" to mean "an employee of a school district, or a person assigned by a nonpublic school to implement a pupil's IEP, and is required to transcribe a pupil's responses to the format required by the test. A student's parent or guardian is not eligible to be a scribe."

Register 2005, No. 34 amendment to section 859 added language in section 859(a) as follows: "All STAR ~~program~~ district and site coordinators (coordinators) shall sign the STAR Test Security Agreement set forth in Subdivision (b) before receiving any STAR Program tests or test materials." The language requiring the signature of the agreement "before receiving any STAR program or tests or test materials" clarifies the timing of the signature, but does not impose any new required activities on school districts.

The remaining amendments to subdivision (b) modify the terms of the STAR test security agreement required to be signed by the district and test site coordinators. Pursuant to section 859(b), the agreement now specifies that the coordinator acknowledges by signature that the CAPA is a secure test. The amendments to the agreement further provide that the coordinator is required to deliver the tests and test materials to only those persons who have executed a STAR test security affidavit, to keep the CAPA materials in a secure locked location when not being used, and to adhere to the contractor's directions for the distribution of the assessment materials to examiners. The agreement further prohibits coordinators from disclosing the contents of the tests or from reviewing any test items with any other person before, during, or after the test administration.

These amendments do not impose any new required activities. Although the form of the agreement has changed, no new activities are required to be performed by school districts. The updated form is readily available for download on the STAR website – a website for district STAR coordinators developed and maintained by Educational Testing Service (ETS) under contract with CDE.[89] In addition, signing the agreement is not new and the new provisions of the agreement are already required by prior law. As discussed above, administering and providing security for the CAPA was required under preexisting law.[90] Moreover, under preexisting law,[91] all STAR tests were required to be treated securely and kept in a secure locked location, including the CAPA.[92] The preexisting STAR test security affidavit also required the STAR test, including the CAPA, to be administered in accordance with the contractor's directions.[93] In addition, the language prohibiting the coordinator from disclosing the contents of the test is not new. It was moved from the provisions of the STAR test security affidavit in section 859(d)(6). Thus, the amendments to sections 859(a) and (b) do impose any new requirements on school districts.

Sections 859(c) and (d) address the provisions of the STAR test security affidavit, which is signed by all persons having access to the tests and test materials. Subdivision (c) was amended

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[89] See, STAR security agreement at: <http://www.startest.org/pdfs/STAR.Security_Coord_Form.2014.pdf.> as of November 15, 2013.

[90] California Code of Regulations, title 5, section 853(b) (Register 2004, No. 6, operative Feb. 3, 2004).

[91] California Code of Regulations, title 5, section 859(b)(3) (Register 2004, No. 6, operative Feb. 3, 2004).

[92] Pupils with exceptional needs have long been required to be included in the testing since the CAPA was first administered in 2003 (Ed. Code, §60640(e), as added by Stats. 2002, ch. 492).

[93] California Code of Regulations, title 5, sections 853(b) and 859(d)(9).

to clarify that "all persons having access" to the tests and test materials "include test examiners, proctors, and scribes" are required to sign the affidavit. This amendment is clarifying of existing law and does not impose new requirements on school districts. All persons having access to the tests and the test materials were required by prior law to sign the security affidavit. In addition, the Register 2005, No. 34 amendment to the affidavit form, which now provides that the person has "been trained to administer the tests," does not impose a new activity or higher level of service. The requirement to provide the training is addressed in sections 851(e) and 858(b)(12), both of which are analyzed above, and the updated affidavit security form is readily available for download on the STAR website.[94] Thus, the amendments do not require school districts to perform any new activities.

Accordingly, the Commission finds that the Register 2005, No. 34 amendments to section 859 do not impose any new state-mandated requirements on school districts.

10) Reporting data to the contractor for purposes of the reporting required by the API (Cal. Code Regs., tit. 5, § 861)

Section 861 of the title 5 regulations was originally adopted in 1998 to require each school district to report specified information "for each pupil tested" to the test contractor for "purposes of reporting required by the Academic Performance Index of the Public Schools Accountability Act." Register 2005, No. 34 amended section 861(a) to require school districts to provide the contractor with the information for each pupil "enrolled on the first day the tests are administered," instead of "for each pupil tested." As a result, school districts are now required to provide data for pupils excused from testing whose parents or guardians submit a written request,[95] as well as pupils who are absent from school when the test (and any makeup test) is administered for a significant medical emergency. The requirement to provide *all* information specified in section 861(a) for those pupils enrolled on the first day the tests are administered, who do not in fact take a STAR test, is a new requirement imposed on school districts.

The Register 2005, No. 34 regulations also added the following new information to be provided to the contractor, and the requirement to provide this new information for each pupil tested constitutes a new requirement imposed on school districts:

- The pupil's full name
- Date of English proficiency reclassification
- If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient
- California School Information Services (CSIS) Student Number once assigned
- For English learners, length of time in California public schools and in school in the United States
- Participation in the National School Lunch Program

[94] STAR Security Affidavit at: <http://www.startest.org/pdfs/STAR.Security_Admin_Form.2014.pdf> as of November 15, 2013.

[95] Education Code section 60615; California Code of Regulations, title 5, section 852.

- County and district of residence for pupils with IEPs
- Special testing conditions and/or reasons for not being tested[96]

According to the Notice of Proposed Rulemaking for the Register 2005, No. 34 regulations, the purpose of the requirement to collect additional pupil data was "to expand the student demographic data collected to meet the requirements for federal and state reporting."[97]

In addition, the Register 2005, No. 34 regulations added a new subdivision (b) to state the following: "In addition to the demographic data required to be reported in Section 861(a), school districts may report if a pupil in grades 2 through 11 is not tested due to a significant medical emergency." A "significant medical emergency" is defined in section 850 as a significant accident, trauma, or illness (mental or physical) that precludes a pupil in grades 2 through 11 from taking the STAR tests. An accident, trauma, or illness is significant if it is determined by a licensed physician to preclude a pupil from participating in the tests. The reason for this amendment was stated by CDE as follows:

> The grade two through eight California Standards Tests (CSTs) within the STAR Program are used for federal accountability purposes under the No Child Left Behind (NCLB) Act. Beginning in the 2004-05 school year federal guidelines state that "States do not have to include a student with a significant medical emergency in the participation rate calculation." The proposed additional amendments would add the definition for significant medical emergency as Section 850(r) and would include significant medical emergency under Section 861(b) as data that may be provided by each school district to the test contractor for each pupil in grades two through eight who is not tested due to a significant medical emergency.[98]

Because the plain language of the regulation authorizes school districts to report if a pupil is not tested due to a significant medical emergency, the Commission finds that section 861(b) (Register 2005, No. 34) does not impose a new requirement on school districts.[99]

Former section 861(c) was renumbered to subdivision (d) and amended by Register 2005, No. 34 to require school districts to provide the same information identified in subdivision (a) for each pupil placed in a nonpublic school. This amendment is clarifying of existing law, and does not impose a new requirement on school districts. As previously indicated, pupils placed in nonpublic schools are considered enrolled in the public school district. Since 2002, Education Code 60640(e) has required that individuals with exceptional needs be included in the testing requirements of the STAR program.[100] Immediately before the adoption of Register 2005,

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[96] California Code of Regulations, title 5, section 861(a)(1)(6)(7)(10)(13)(14)(17)(18).

[97] CDE, Notice of Proposed Rulemaking, Standardized Testing and Reporting (STAR) Program, July 23, 2004, page 2.

[98] CDE, Last Minute Memorandum, Standardized Testing and Reporting (STAR) Program: Adopt Amendments to Title 5 Regulations, September 8, 2004, page 1.

[99] Education Code section 75: "'Shall' is mandatory and 'may' is permissive."

[100] Statutes 2002, chapter 492.

No. 34, school districts were required to make the "necessary" arrangements to test all eligible pupils in alternative education programs or programs conducted off campus.[101] The prior regulations also specified that no test may be administered in a private home or location unless it was administered by either a certified employee of the school district or an employee of a nonpublic school who holds a credential and signs a security agreement.[102] Section 861 of the regulations required each school district to provide the contractor with the information specified in subdivision (a) for each pupil tested, including those enrolled in "alternative or off campus" programs. Thus, the amendment to section 861(d) does not impose any new required activities on school districts.

Finally, the following language was added by Register 2005, No. 34 to section 861(e):

> If the information required by Section 861(a) is incorrect, the school district may enter into a separate agreement with the contractor to have the district's student data file corrected. The district STAR coordinator shall provide the correct information to the contractor within the contractor's timeline. Any costs for correcting the student data shall be the district's responsibility.

The Commission finds that section 861(d) does not impose any required activities on school districts. If a school district mistakenly provides incorrect information to the contractor, the plain language of the regulation authorizes the district to enter into an agreement with the contractor to have a pupil's data file corrected at the district's expense. Thus, it is the district's mistake that triggers any additional costs incurred to correct the mistake.

Accordingly, the Commission finds that section 861 of the title 5 regulations, as amended by Register 2005, No. 34, imposes the following new requirements on school districts to:

- Provide *all* information specified in section 861(a) for those pupils enrolled on the first day the tests are administered and who do not in fact take a STAR test.
- Provide the following new information to the contractor for each pupil tested:
    - The pupil's full name;
    - Date of English proficiency reclassification;
    - If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient;
    - California School Information Services (CSIS) Student Number once assigned;
    - For English learners, length of time in California public schools and in school in the United States;
    - Participation in the National School Lunch Program;
    - County and district of residence for pupils with IEPs;

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[101] Former California Code of Regulations, title 5, section 851(b), renumbered without amendment to section 851(c) by the 2005 regulations.

[102] Former California Code of Regulations, title 5, section 851(d), which was amended and renumbered to section 851(e) by the 2005 regulations.

- Special testing conditions and/or reasons for not being tested.

11) Apportionment Information Report (Cal. Code Regs., tit. 5, § 862)

Since 2003, Education Code section 60640 has provided that the Superintendent shall apportion funds to school districts to meet the requirements of the STAR program. As a condition of receiving the apportionment payment, Education Code section 60640(j) requires school districts to report to the Superintendent the following information: (1) the number of pupils enrolled in the school district in grades 2 to 11; (2) the number of pupils to whom an achievement test was administered in grades 2 to 11; and (3) the number of pupils who were exempted from the test at the request of their parents or guardians. The amount of funding to be apportioned is governed by section 870 and is determined by the certification of the school district superintendent pursuant to section 862.

Before the enactment of the Register 2005, No. 34 regulations, section 862 required each school district to report specified information to CDE in order to receive the apportionment payment. Register 2005, No. 34 amended section 862 to specify that CDE provides the information to the district, thus eliminating the duty of the district to report to the state. The SBE Agenda Report to adopt the Register 2005, No. 34 amendment to the STAR program regulations states the background for this amendment as follows:

> Based on current technology, the Department is now able to produce Apportionment Information Reports for district superintendents to certify. This process results in more accurate reports and a workload reduction for districts.

Therefore receiving this information, instead of reporting the information, constitutes a reduction in the activities required of school districts.

Section 862(c) was then added to state in relevant part the following:

> To be eligible for apportionment payment school districts must meet the following conditions:
>
> (1) The school district has returned all secure test materials, and
>
> (2) The superintendent of each school district has certified the accuracy of the apportionment information report for examinations administered during the calendar year . . . .

Section 862(c) as amended by Register 2005, No. 34 does not impose any new requirements on school districts. The pre-2005 version of section 857(c) required the STAR district coordinator to return test materials to the publisher. In addition, the district superintendent was required by the pre-2005 version of section 862(b)(1) to certify the accuracy of the apportionment information report.

12) Student Reports and Record Labels (Cal. Code Regs, tit. 5, § 863)

Section 863 requires school districts to forward the STAR student report of the pupil test results to each parent or guardian within 20 days of receiving the reports from the test contractor.

Section 863(b) was amended by Register 2005, No. 34 to require school districts to forward the standards-based tests or CAPA results to the pupil's parent or guardian if they are received by the school after the last day of instruction. This provision does not impose any new requirements

on school districts. Under prior law, section 863(a) (Register 99, No. 4) and Education Code section 60641[103] required reporting individual results of each pupil test administered to the pupil's parent or guardian.

Section 863(c) was added by Register 2005, No. 34 to provide the following:

> Schools are responsible for affixing cumulative record labels reporting each pupil's scores to the pupil's permanent school records or for entering the scores into electronic pupil records, and for forwarding the results to schools to which pupils matriculate or transfer. Schools may annotate the scores when the scores may not accurately reflect pupils' achievement due to illness or testing irregularities.

Section 863(c) does not impose any new requirements on school districts. Since 1997, preexisting law has required schools to "include the pupil's test results in his or her pupil records."[104] In addition, since 1997, Education Code section 60607(a) has required each pupil to have an individual record of accomplishment by the end of grade 12 that includes the results of the achievement test required and administered annually as part of the STAR Program.[105] The Notice of Proposed Rulemaking for the amendment to section 863 of the regulations indicates that its purpose is "to clarify requirements related to including test results in pupils' permanent records as required by *Education Code* Section 60607."[106] Preexisting law also requires school districts to forward pupil records, upon request, to schools to which the pupil transfers.[107]

13) Discrepancy resolution (Cal. Code Regs., tit. 5, § 868)

Section 868 was originally adopted in 1998 to require school districts to process discrepancies determined by the publisher or contractor of the tests upon receipt of returned tests and test materials.

The Register 2005, No. 34 amendments to section 868 made non-substantive changes to the language (e.g., changing "designated publisher" to "contractor" and "STAR program district coordinator" to "district STAR coordinator"), which do not impose any new requirements on school districts.

In addition, subdivision (c) was amended to specify that the test site coordinator is required to report to the district coordinator any discrepancy in a shipment of CAPA materials received and to require the district coordinator to remedy the discrepancy as follows.

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[103] See former Education Code section 60641 (b) (Stats. 1997, ch. 828).

[104] Education Code section 60641(a)(3) (added by Stats. 1997, ch. 828).

[105] Education Code section 60607(a) (Stats. 1997, ch. 828).

[106] SBE, "Standardized Testing and Reporting (STAR) Program; Approve Commencement of the Rulemaking Process for the Proposed Amendments to Title 5 Code of Regulations" Agenda Item #8, Notice of Proposed Rulemaking, July 2004, Attachment 2, page 2. The regulations were adopted and became operative on September 21, 2005 (Register 2005, No.34).

[107] Education Code section 49068.

> Any discrepancy in a shipment of designated achievement tests or test materials, or standards-based achievement tests or test materials, or CAPA materials received by a test site from the ~~STAR program~~ district STAR coordinator shall be reported to the ~~STAR program~~ district STAR coordinator immediately but no later than two (2) working days of the receipt of the shipment at the testing site. The ~~STAR program~~ district STAR coordinator shall remedy the discrepancy within two (2) working days.

The Commission finds that the Register 2005, No. 34 amendment to subdivision (c) is clarifying of existing law and does not impose any new requirements on school districts. Since 2003, individuals with exceptional needs have been required to be included in the testing requirements of the STAR program.[108] The CAPA, the alternate assessment developed for pupils with exceptional needs, was developed and first administered in 2003.[109] The title 5 regulations in effect immediately before the enactment of the Register 2005, No. 34 amendments required that the CAPA be administered and returned by school districts in accordance with the manuals and other instructions provided by the contractor.[110] The existing regulations also required the district STAR coordinator to serve as the school district representative and the liaison between the school district and the publisher or contractor "for all matters related to the STAR program."[111] In this respect, the district coordinator had the duty to respond to correspondence and inquiries from the publisher or contractor, the duty to oversee the collection and return of all test data and materials to the publisher or contractor, and the duty to assist the publisher and CDE in the resolution of any discrepancies in the test information and materials.[112] In addition, the STAR test site coordinator had the existing duty to be available to the district coordinator for purposes of resolving discrepancies or inconsistencies in materials or errors in reports.[113] The test site coordinator was also responsible for overseeing the collection and return "of all testing materials" to the district coordinator and assisting the district coordinator and the Department in the resolution of any discrepancies in the test information and materials.[114] Therefore, the Register 2005, No. 34 clarification of language to specifically identify the CAPA in section 868 does not impose new requirements on school districts.

e) Summary of new required activities imposed by the test claim statute and regulations

Based on the discussion above, the Commission finds that the following activities are newly required of school districts:

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[108] Education Code section 60640(e), as added by Statutes 2002, chapter 492.

[109] CDE memorandum titled "State Board of Education-Adopted CAPA Performance Level," February 2009.

[110] California Code of Regulations, title 5, section 853(b).

[111] California Code of Regulations, title 5, section 857(a).

[112] California Code of Regulations, title 5, section 857(b).

[113] California Code of Regulations, title 5, section 858(a).

[114] California Code of Regulations, title 5, section 858(b)(6)(7)(8).

- Beginning July 1, 2004, administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11. Beginning October 7, 2005, school districts are required to administer the primary language test to those pupils in nonpublic schools in grades 3 to 11, instead of grades 2 to 11. (Ed. Code, § 60640(g), as amended by Stats. 2004, ch. 233.)
- Effective September 21, 2005, district STAR coordinators are required to
    - Immediately notify CDE of any security breaches or testing irregularities in the district before, during, or after the test administration. (Cal. Code Regs., tit. 5, § 857(b)(9); Register 2005, No. 34.)
    - Ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing. (Cal. Code Regs., tit. 5, § 857(b)(10), as added by Register 2005, No. 34.)
    - Train test site coordinators to oversee the test administration at each school. (Cal. Code Regs., tit. 5, § 857(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, the STAR test site coordinators are required to
    - Submit the signed security agreement to the district STAR coordinator prior to the receipt of test materials. (Cal. Code Regs., tit. 5, § 858(b)(4); Register 2005, No. 34.)
    - Ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but excused from testing. (Cal. Code Regs., tit. 5, § 858(b)(9), as added by Register 2005, No. 34.)
    - Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859. (Cal. Code Regs., tit. 5, § 858(b)(11); Register 2005, No. 34.)
    - Train all test examiners, proctors, and scribes to administer the tests. (Cal. Code Regs., tit. 5, §§ 851(e) and 858(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, provide *all* information specified in section 861(a) to the contractor for those pupils enrolled on the first day the tests are administered and who do not take a STAR test. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, provide the following new information to the contractor for each pupil tested:
    - The pupil's full name;
    - Date of English proficiency reclassification;
    - If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient;
    - California School Information Services (CSIS) Student Number once assigned;

- For English learners, length of time in California public schools and in school in the United States;
- Participation in the National School Lunch Program;
- County and district of residence for pupils with IEPs;
- Special testing conditions and/or reasons for not being tested. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)

- Effective September 21, 2005, establish a periodic delivery schedule, which conforms to section 866(a) and (b), to accommodate test administration periods within the school district. (Cal. Code Regs., tit. 5, § 866(b); Register 2005, No. 34.)

The Department of Finance argues that these requirements do not impose state-mandated costs within the meaning of article XIII B, section 6, because the activities were enacted to implement the testing requirements of federal law, through the No Child Left Behind Act. The Commission does not need to reach the federal law issue, however. As described below, the Commission finds that the state has appropriated state and federal funds sufficient to pay for the costs of the new required activities and, thus, there are no costs mandated by the state.

2. The State Has Appropriated State and Federal Funds For the STAR Program That are Sufficient to Pay for the Costs of the New Required Activities and, Thus, Pursuant to Government Code Section 17556(e), There are no Costs Mandated by the State.

Government code section 17514 defines "costs mandated by the state" as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. All claimants allege increased costs to comply with the STAR program based on the statutes and regulations pled in their claims, and have also acknowledged the receipt of state and federal funds appropriated for the program.[115] These declarations do not provide any specific information regarding the new required activities described above, or acknowledge the state and federal funding actually received during the potential period of reimbursement beginning July 1, 2004 (based on the filing dates of the 2005 test claims and the first required activity effective on July 1, 2004).

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if:

> The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue

[115] SDUSD's test claim states it incurred costs of $550,000 to implement the test claim statutes during 2004-2005 and estimates costs of $550,000 in 2005-2006 and beyond. (Test claim 05-TC-02, p. 15.) GJUHSD's test claim alleges that the test claim statutes and regulations cost approximately $110,000 to initially implement and $125,000 in fiscal year 2005-2006 and beyond. (Test claim 05-TC-03, p. 18.) TRUSD claims it will incur approximately $300,000 in all costs claimed in fiscal year 2008-2009 and $325,000 thereafter. (Test claim 08-TC-06, p. 21.)

that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

For the reasons below, the Commission finds that school districts have received state and federal funds specifically intended to pay for the cost of the required activities in an amount sufficient to fund the cost of the activities for all years within the eligible period of reimbursement for this consolidated claim, beginning July 1, 2004 (the effective date of the first required activity). Therefore, Government Code section 17556(e) applies to deny these test claims. Education Code section 60640(h) requires the SPI to apportion funds to school districts to administer the STAR program for each test administered to pupils.[116] Since 2004, significant amounts of state and federal funding have been appropriated to school districts as reflected in the chart below. The plain language of the Budget Acts appropriating the funds require that the appropriation "shall first be used" to offset costs that may be claimed through the state mandates reimbursement process for the STAR program. In addition, federal funds appropriated for the STAR program in Line Item 6110-113-0890 shall be fully expended before the funding provided by the state in Line Item 6110-113-0001 is expended for the same purposes.[117]

Fiscal Year	**State Funding Appropriation for Local Assistance for STAR (Item 6110-113-0001)**	**Federal Funding Appropriation for Local Assistance for STAR (Item 6110-113-0890)**
2012-2013	$58,903,000	$6,381,000[118]
2011-2012	$51,279,000	$12,458,000[119]
2010-2011	$49,042,000	$11,365,000[120]

[116] See Education Code section 60640 (Stats. 1997, ch. 828).

[117] Items 6110-113-0001 and 6110-113-0890 in Statutes 2012, chapters 21 and 29; Statutes 2011, chapter 33; Statutes 2010, chapter 712; Statutes 2009, chapter 1 (4th Ex. Sess.); Statutes 2008, chapters 268 and 269; Statutes 2007, chapters 171 and 172; Statutes 2006, chapters 47 and 48; Statutes 2007, chapters 171 and 172; Statutes 2006, chapters 47 and 48; Statutes 2005, chapters 38 and 39; Statutes 2004, chapter 208. All Budget Acts contain language that says "funds provided in Schedules …[appropriating the STAR funds] shall first be used to offset any state-mandated reimbursable costs that otherwise may be claimed through the state mandates reimbursement process for the Standardized Testing and Reporting Program …"

[118] Federal funds appropriated "are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2012, chs. 21 and 29, Item 6110-113-0890, Provision 1.)

[119] Federal funds appropriated "are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2011, ch. 33, Item 6110-113-0890, Provision 1.)

2009-2010	$50,059,000	$5,433,000[121]
2008-2009	$62,127,000	$6,065,000[122]
2007-2008	$62,124,000	$8,715,000[123]
2006-2007	$65,433,000	$8,565,000[124]
2005-2006	$63,946,000	$2,180,000[125]
2004-2005	$53,836,000	$8,549,000[126]

[120] Federal funds appropriated "are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2010, ch. 712, Item 6110-113-0890, Provision 2.)

[121] Federal funds appropriated "are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2009, ch. 1, 4th Ex. Sess., Item 6110-113-0890, Provision 2.)

[122] Federal funds appropriated "are provided for approved contract and district apportionment costs for the development and administration of the California Standards Tests, the national Norm-Referenced Test, the Standards-Based Test in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA), and the Designated Primary Language Test, as part of the STAR program. District apportionments for the CAPA shall be $5 per pupil." (Stats. 2008, chs.268 and 269, Item 6110-113-0890, Provision 2.)

[123] Federal funds appropriated "are provided for approved contract and district apportionment costs for the development and administration of the California Standards Tests, the national Norm-Referenced Test, the Standards-Based Test in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA), and the Designated Primary Language Test, as part of the STAR program. District apportionments for the CAPA shall be $5 per pupil." (Stats. 2007, chs. 171 and 172, Item 6110-113-0890, Provision 2.)

[124] Federal funds appropriated "are provided for approved contract and district apportionment costs for the development and administration of the California Standards Test, the national Norm-Referenced Test, the Standards-Based Test in Spanish, the California Modified Assessment, the California Alternate Performance Assessment, and the Designated Primary Language test, as part of the STAR program. District apportionments for the California Alternate Performance Assessment shall be $5 per pupil." (Stats. 2006, chs. 47 and 48, Item 6110-113-0890, Provision 2.)

[125] Federal funds appropriated "are provided for approved contract and district apportionment costs related to the Standardized Testing and Reporting Program. Of this amount, $1.334 million is for the planning and development of science tests." (Stats. 2005, chs. 38 and 39, Item 6110-113-0890, Provision 2.)

[126] Federal funds appropriated "are provided for approved contract and district apportionment costs related to the Standardized Testing and Reporting program. Of this amount, 1.4 million is for the planning and development of science tests and $650,000 is for reporting Adequate Yearly

Pursuant to section 870(a) of the title 5 regulations, the amount of funding to be apportioned to the school district is established by SBE based on the number of tests administered to eligible pupils in grades 2 to 11 and the number of answer documents returned with only demographic information for pupils enrolled on the first day of testing who were not tested in the school district. The number of tests administered and the number of demographic answer documents is determined by the certification of the school district superintendent pursuant to section 862 of the title 5 regulations. In 2004, CDE issued an Information Memorandum to the SBE, which describes the apportionments to school districts that year as follows:

> The apportionment amounts presented for 2004 are unchanged from last year for the Content Standards Test (CST) and California Achievement Test, Sixth Edition (CAT/6) Survey. The Spanish Assessment of Basic Edition, Second Edition (SABE/2) apportionment for grades 2 and 3 is being decreased by $0.24 to reflect changes in the pre-ID costs for SABE/2. Including a California Alternative Performance Assessment (CAPA) apportionment in the STAR Program is new and reflects the addition of this assessment to the Program. The current budget includes funds to pay these apportionments.
>
> The amounts recommended for the 2004 STAR district apportionments are:
>
> - $0.32 for completing demographic information for students not tested with the California Standards Tests and the CAT/6 Survey
> - $2.52 [per test for completing demographic information and administering the California Standards Tests and CAT/6 Survey
> - $2.44 for administering the SABE/2
> - $5.00 for administering the CAPA[127]

In a May 6, 2011 letter to school districts, SBE increased apportionments to districts for each test as follows:

> The State Board of Education (SBE) has approved the 2011 STAR apportionment amounts as follows:
>
> - $0.38 for the completion of demographic information for each student not tested with the CSTs, the CMA, the STS, or the CAPA.
> - $2.52 per student for the completion of demographic information and administration of the CSTs, the CMA, or a combination thereof.
> - $2.52 per student for the completion of demographic information and administration of the STS to Spanish-speaking English learners.
> - $5.00 per student for the completion of demographic information and administration of the CAPA.

Program pursuant to the No Child Left Behind Act of 2001 (P.L. 107-110.)" (Stats. 2004, ch. 208, Item 6110-113-0890, Provision 2.)

[127] CDE Information Memorandum to the SBE, dated January 29, 2004.

> The STAR apportionment funds are unrestricted funds to reimburse school districts and charter schools for costs associated with the STAR Program that are above and beyond the CDE contract with its test contractor. The CDE contract covers the costs of all required STAR Program testing materials, the scoring of answer documents, and the production of reports. Costs associated with optional materials or services (such as the purchase of additional score reports, etc.) are the responsibility of the school district or charter school.[128]

The allocation formula is the same for fiscal year 2012-2013, which CDE lists on its website as:

> STAR: $2.52 per student tested in grades two through eleven with the California Standards Tests (CSTs), California Modified Assessment (CMA), or a combination thereof; $5.00 per student tested with the California Alternate Performance Assessment (CAPA); $2.52 per student tested in grades two through eleven with the Standards-based Tests in Spanish (STS); $0.38 per student not tested with the CST, CMA, STS, or CAPA for whom only demographic data were submitted.[129]

For purposes of the apportionment, the activities and costs covered by the state's funding are defined in section 870 of the regulations to include the following:

- All staffing costs, including the costs incurred by the district coordinator and the test site coordinator, staff training, and other staff expenses related to testing.
- All expenses incurred at the school district and test site level related to testing.
- All transportation costs of delivering and retrieving tests and test materials within the school district.
- All costs association with mailing the parent reports.
- All costs associated with pre-identification of answer sheets and consumable test booklets, and other activities intended to provide the complete and accurate data required by section 861 of the regulations.

The Commission finds that the itemization of activities and costs identified in section 870 of the regulations and covered by the appropriation includes the costs incurred to comply with the new requirements imposed by the test claim statute and regulations. Thus, the funding is specifically intended to cover the cost of the new required activities within the meaning of Government Code section 17556(e).

The Commission further finds, based on the record, that the appropriations have been sufficient to pay the costs of the new required activities. As indicated above, all claimants allege increased costs and acknowledge state and federal funding for the program. However, their filings do not address the new required activities and do not contain evidence to support their allegation of

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[128] CDE, 2011 Standardized Testing and Reporting Program Apportionment Information, May 6, 2011. Emphasis added.

[129] CDE, "Assessment Apportionments for STAR, CELDT and CAHSEE" last modified August 13, 2012.

actual increased costs mandated by the state to perform these activities. As indicated by the court in *County of Sonoma v. Commission on State Mandates*, a showing of actual increased costs is required.

> Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in *increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with "costs" incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas. "*No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes*." [Citation omitted]. (Emphasis added.)[130]

In this case, the narrative of the test claims filed on behalf of TRUSD and GJUHSD provide more detail on the allegation of costs. These test claims contain a chart alleging that the annual cost per pupil to administer the STAR program is $12.08, a dollar figure above the amounts approved by SBE and apportioned to the districts on a per-test (between $2.52 and $5.00 per test) and per-pupil basis (between $0.32 and $0.38 per pupil enrolled who did not take the test, but provided demographic answer documents).[131] The claimants do not identify where the data comes from, and the allegation is not supported by evidence. Pursuant to Government Code section 17559 and sections 1183.03 and 1187.5 of the Commission's regulations, substantial evidence in the record is required to support a finding of costs mandated by the state. If assertions or representations of fact are made in a test claim, they must be supported by documentary evidence, authenticated by declarations signed under penalty of perjury or through testimony under oath or affirmation. Hearsay evidence may supplement or explain other evidence, but shall not be sufficient itself to support a finding. Thus, the narrative in the chart is simply an allegation and does not constitute evidence of costs. Moreover, even if the chart were supported by evidence, the chart is based on data for fiscal years 1997-1998 through 2003-2004, fiscal years *outside* the potential period of reimbursement for this consolidated claim. The effective date of the first required activity begins July 1, 2004, and the effective date for the remaining activities is September 21, 2005. Thus, there is no evidence showing that school districts incurred increased costs to comply with the new required activities beyond the state and federal funds received, which by law must first be applied to "any state-mandated reimbursable costs that otherwise may be claimed through the state mandates reimbursement process for the Standardized Testing and Reporting Program."

The cost issue in this case is similar to what occurred in the *Kern High School District* case,[132] which addressed a statutory requirement for school site councils to comply with modified open meeting act requirements, including posting a notice and an agenda of their meetings. School

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[130] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284.

[131] Test Claim 08-TC-06, page 22; Test Claim 05-TC-03, page 19.

[132] *Kern High School Dist., supra*, 30 Cal.4th 727, 746-747.

site councils were created by several state and federal programs that included funding for "reasonable district administrative expenses."[133] Based on the statutory schemes that created the school site councils, the court noted that the program funding available for the programs was often substantial – "for example, on a statewide basis, funding provided by the state for school improvement programs [citations omitted] for the 1998-1999 fiscal year totaled approximately $394 million. (Cal. Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)"[134] In addition, the statutes allowed school districts to use the program funding for "administrative expenses," but did not establish a priority use of the funds. Despite the allegations by the claimant of increased costs mandated by the state, the court still denied the claim as follows:

> Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, we nevertheless conclude that under the circumstances here presented, the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda related expenses.
>
> We note that, based upon the evaluations made by the Commission, the costs associated with the notice and agenda requirements at issue in this case appear rather modest.
>
> > FN 16 Costs of compliance with the notice and agenda requirements have been estimated as amounting to approximately $90 per meeting for the 1994-1995 fiscal year, and incrementally larger amounts in subsequent years, up to $106 per meeting for the 2000-2001 fiscal year, for each committee or advisory council. . . . Under these formulae, a district that has 10 schools, each with one council or advisory committee that meets 10 times a year, would be forced to incur approximately $9,000 to $10,000 in costs to comply with statutory notice and agenda requirements. Presumably, such costs are minimal relative to the funds allocated by the state to the school districts under these programs. . . .
>
> And, even more significantly, we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of the underlying funded program to pay the associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. (See Ed. Code, § 52168, subd. (b) ["School districts may claim funds appropriated for purposes of this article for expenditures in, but not limited to, the following categories: [¶ … [¶ (6) Reasonable district administrative expenses. …"].) We believe it is plain that the

[133] *Id.* at page 747.

[134] *Id.* at page 732.

costs of complying with program-related notice and agenda requirements qualify as "[r]easonable district administrative expenses."[135]

Accordingly, the Commission finds that school districts have not incurred increased costs mandated by the state pursuant to Government Code section 17556(e).

V. CONCLUSION

For the foregoing reasons, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514. The Commission therefore denies these consolidated test claims.

[135] *Id.* at pages 746-747.

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RE: **Adopted Statement of Decision**

Standardized Testing and Reporting (STAR) II and III, 05-TC-02, 05-TC-03, and 08-TC-06
Education Code Sections 60601 et al.
San Diego Unified School District, Grant Joint Union High School District, and Twin Rivers Unified School District, Claimants

On December 6, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: December 12, 2013

Heather Halsey, Executive Director