BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 48985, 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6 Statutes 1977, Chapter 36, Statutes 1978, Chapter 848, Statutes 1980, Chapter 1339, Statutes 1981, Chapter 219, Statutes 1994, Chapter 922 California Code of Regulations, Title 5, Sections 11300, 11301, 11302, 11303, 11304, 11305, 11306, 11307, 11308, 11309, 11310, 11316, 11510, 11511, 11511.5, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, 11517 Register 1998, No. 30 (July 24, 1998) pages 75-76, Register 1998, No. 33 (Aug. 14, 1998) page 75, Register 1999, No. 1 (Jan. 1, 1999) pages 75-76, Register 2001, No. 40 (Oct. 5, 2001) pages 77-78.2, Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1, Register 2003, No. 16 (April 18, 2003) pages 77-78.2 Filed on September 22, 2003 by Castro Valley Unified School District, Claimant	Case No.: 03-TC-06 *California English Language Development Test II* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 25, 2012*) (*Served May 31, 2012*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 25, 2012. Leonard Kaye and Lori A. Harris appeared on behalf of claimant. Susan Geanacou and 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 7-0.

Summary of Findings

The Commission denies this test claim for the following reasons:

- The Chacon-Moscone Bilingual Education Act statutes (Ed. Code §§52164, 52164.1, 52164.2, 52164.3, 52164.5, and 52164.6) sunset and ceased to be operative on June 30, 1987. Thus, the statutes have not constituted a state-mandated program during the period of reimbursement for this claim.
- The regulations adopted to implement Proposition 227 (Cal. Code Regs., tit. 5, §§ 11300, 11301, 11302, 11303 (renumbered to § 11309), 11304 (renumbered to § 11310)), do not mandate a new program or higher level of service. Proposition 227 was adopted by the voters in 1998 to establish an English-immersion program for English-learner pupils. The regulations impose activities expressly required by Proposition 227 and the federal Equal Educational Opportunities Act (EEOA) and additional procedural activities that are part and parcel of the ballot measure mandate.
- The 2003 English language learner regulations (Cal. Code Regs., tit. 5, §§ 11303, 11304, 11305, 11306, 11307, 11308) require the language census and identification of English-learner pupils, initial and annual assessment of English-leaner pupils using the CELDT, reclassification process to transfer the English-leaner pupil from English learner to proficient in English, monitoring the progress of the pupils, documentation requirements, and a parental advisory committee to provide recommendations regarding the instruction of English-leaner pupils. The activities are either expressly required by prior statutes (Ed. Code, § 313, 62002.5), or the federal EEOA. Any additional procedural activities required are part and parcel of the federal mandate.
- The CELDT regulations administer the CELDT process (Cal. Code Regs., tit. 5, §§ 11510, 11511, 11512, 11512.5, 11513, 11513.5, 11514, 11516.5, and 11517). The regulations do not impose a state-mandated new program or higher level of service because they are same requirements as prior law in Education Code section 313 and impose activities that are part and parcel of, and necessary to implement, the federal law requirements imposed by the EEOA.
- Notices in English and primary language of the pupil (Ed. Code, § 48985; Cal. Code Regs., tit. 5, §§ 11316, 11511.5) require that all notices, reports, statements, or records sent by a school district to a parent or guardian who speaks a primary language other than English is to be written in the primary language in addition to English. This requirement applies only when 15% of the pupils enrolled in a public school speaks a language other than English, as determined by the annual language census. This requirement does not impose a new program or higher level of service because the same activity was required by former Education Code section 10926.

COMMISSION FINDINGS

Chronology

09/22/2003	Claimant, Castro Valley Unified School District, filed the test claim with the Commission
03/23/2005	Department of Finance (DOF) filed comments on test claim
01/08/2007	Claimant filed a supplement to test claim to clarify the version of regulations pled

08/18/2011 Commission staff issued letter to California Department of Education (CDE) requesting the final statement of reasons for the 1998 and 2003 regulations

09/28/2011 Commission staff issued second request to CDE for the final statements of reason for the 1998 and 2003 regulations

09/29/2011 CDE submitted the final statements of reason for the regulations

04/05/2012 Commission staff issued the Draft Staff Analysis

I. BACKGROUND

This test claim addresses statutes and regulations governing the public instruction of limited English proficient (LEP) pupils in California. LEP pupils are those who do not speak English or pupils whose native language is not English and who are not currently able to perform ordinary classroom work in English.[1]

The law regarding the education for these pupils has a long history. Many federal and state laws have been enacted and interpreted by the courts to require appropriate action on the part of state and local educational agencies to ensure the equal participation and nondiscrimination in education for LEP pupils. In addition, federal and state laws have been enacted to provide funding for these services. A summary of these laws and the test claim statutes and regulations is provided below.

A. Overview of Federal Law

The 14th Amendment to the United States Constitution declares that no state may deny any person the equal protection of the laws. This amendment protects the privileges of all citizens, provides equal protection under the law, and gives Congress the power to enforce the amendment through legislation.

In 1964, Congress passed Title VI of the Civil Rights Act to prohibit discrimination based on race, color, age, creed, or national origin in any federally funded activity or program. Shortly thereafter, Congress enacted the Elementary and Secondary Education Act of 1965 (ESEA),[2] as a part of President Lyndon B. Johnson's "War on Poverty." Title I of ESEA provides funding and guidelines for educating "educationally disadvantaged" children. ESEA has been amended substantially over the years, adding specific education requirements. The federal Bilingual Education Act of 1968, provided funds in the form of competitive grants directly to school districts. These grants were to be used by the districts for: (1) resources for educational programs, (2) training for teachers and teacher aides, (3) development and dissemination of materials, and (4) parent involvement projects. However, the Bilingual Education Act did not specifically require bilingual education.

In 1968, the federal Department of Health, Education, and Welfare (HEW), which has authority to adopt regulations prohibiting discrimination in federally assisted school systems, issued a guideline interpreting Title VI that “school systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system.” In 1970, HEW made the guidelines more

[1] See Education Code section 306.

[2] Public Law 89-10.

specific, requiring school districts that were federally funded "to rectify the language deficiency in order to open" the instruction to pupils who had "language deficiencies."[3]

In 1974, the United States Supreme Court decided *Lau v. Nichols*, a case brought by non-English speaking Chinese pupils challenging the unequal educational opportunities provided by the San Francisco Unified School District under Title VI of the Civil Rights Act.[4] The case presented uncontested facts that more than 2,800 school children of Chinese ancestry attended school in the district and did not speak, understand, read, or write the English language. For 1,800 of those pupils, the school district had not taken any significant steps to deal with the language deficiency.[5] The Supreme Court held that pupils of limited English proficiency who are not provided with special programs to help them learn English were being denied their rights under Title VI of the Civil Rights Act. The court held that the school district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these pupils, and that it is not enough to merely provide these pupils the same facilities, textbooks, teachers, and curriculum. "[F]or students who do not understand English are effectively foreclosed from any meaningful education."[6] The court did not impose any specific remedy, but agreed with petitioners that teaching English to the pupils of Chinese ancestry who do not speak the language is one option, or giving instructions to this group of pupils in Chinese is another option.[7] Nevertheless, affirmative steps are required to be taken under Title VI to rectify the language deficiencies.

Shortly after *Lau*, Congress passed the Equal Educational Opportunities Act of 1974 (EEOA) as part of the amendments to the Elementary and Secondary Education Act. The EEOA was enacted pursuant to Congress' enforcement authority under the 14th Amendment to United States Constitution.[8] The EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by [¶]…[¶]
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The EEOA defines the term "educational agency" to include both state and local educational agencies.[9] In addition, the Act provides that "an individual denied an equal educational

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[3] See *Lau v. Nichols* (1974) 414 U.S. 563, 566-567 for this history.

[4] *Ibid*.

[5] *Id.* at page 569.

[6] *Id.* at pages 566-568.

[7] *Id*. at page 565.

[8] The EEOA is codified in 20 United States Code, section 1703(f); *Gomez v. Illinois State Board of Education* (1987) 811 F.2d 1030, 1037.

[9] 20 United States Code, section 1720(a) and (b) define state and local educational agencies as those defined in 20 United States Code, section 3381. Under section 3381, a state educational agency includes "the State board of education or other agency or officer primarily responsible for

opportunity … may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate."[10] The EEOA limits court-ordered remedies to those that "are essential to correct particular denials of equal educational opportunity or equal protection of the laws."[11]

Many courts have interpreted cases challenging violations of the EEOA, and have determined that by requiring a state "to take appropriate action to overcome language barriers" without specifying particular actions that a state must take, Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques they would use to meet their obligations under the EEOA.[12] Thus, the appropriateness of a particular school system's language remediation program challenged under the EEOA is determined by the courts on a case-by-case basis. Nevertheless, the courts have interpreted the EEOA to generally require that the remediation programs and practices:

- Be based on sound educational theory or principles;
- Are reasonably calculated to implement effectively the educational theory adopted by the school; and
- Produce results indicating that the language barriers confronting pupils are actually being overcome.[13]

If a program, after being employed for a period of time sufficient to give the plan a legitimate trial, fails to produce results indicating that the language barriers confronting pupils are actually being overcome, the program may no longer constitute appropriate action as far as that school is

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the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law." A local educational agency is defined in section 3381 to include "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school."

[10] 20 United States Code, section 1706.

[11] 20 United States Code, section 1712.

[12] *Castaneda v. Pickard, supra,* 648 F.2d 989, 1009. In 1974, Congress also passed the Bilingual Education Act to establish a competitive grant program of federal financial assistance intended to encourage local educational authorities to develop and implement bilingual education programs. However, the court in *Castaneda* found that Congress, in describing the remedial obligation imposed on the states in the EEOA, did not specify that a state must provide a program of "bilingual education" to all limited English speaking students. Rather, Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques to meet their obligations under the EEOA. (*Ibid*.)

[13] *Id*. at pages1009-1010.

concerned.[14] The cases interpreting the requirements of the EEOA are discussed more fully in the analysis.

Almost thirty years later, in 2002, Congress passed Title III of the No Child Left Behind Act. Title III is entitled the "English Language Acquisition, Language Enhancement, and Academic Achievement Act" and was enacted to provide increased federal grant funding to state and local educational agencies to assist them in helping LEP pupils attain English language proficiency and meet the same academic standards as their English-speaking peers in all content areas.[15] In order to receive funding under Title III, state and local educational agencies are held accountable for the progress of LEP and immigrant pupils through annual measurable achievement outcomes, which measures the number of LEP pupils making sufficient progress in English acquisition, attaining English proficiency, and meeting Adequate Yearly Progress. The amount of funding each state receives is determined by a formula derived from the number of LEP and immigrant pupils in that state.[16] Title III also requires educational agencies, as a condition of receipt of funds, to inform the parents and guardians of LEP pupils how they can assist in their child's progress achieving English proficiency.

In 2009, the United States Supreme Court, in *Horne v. Flores*, held that compliance with the provisions of Title III of No Child Left Behind does not necessarily constitute "appropriate action" required under the EEOA. The court found that the federal government's approval of a No Child Left Behind (NCLB) plan does not entail the substantive review of a state's program for LEP pupils or a determination that the programming results in equal educational opportunity for LEP pupils as required by the EEOA. Moreover, Title III contains a savings clause, which provides that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right."[17] Nevertheless, participation and compliance with Title III's assessment and reporting requirements provides evidence of the state and local educational agencies' progress and achievement of LEP pupils for purposes of the EEOA. [18]

B. Test Claim Statutes and Regulations

California has taken several steps to provide programs for LEP pupils. These programs have evolved from providing bilingual instruction while the pupil also learns English, to the current program adopted by the voters in 1998 requiring the use of English-only instruction. The test claim statutes and regulations that implement these programs are described below.

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[14] *Id.* at page 1010.

[15] 20 United States Code, sections 6801-7013; See also, *Horne v. Flores, supra,* 557 U.S. 433, where the United States Supreme Court stated that Title III significantly increased funding for English language learner programs.

[16] California Department of Education, "Title III FAQs."

[17] *Horne v. Flores, supra,* 557 U.S. 433; 20 United States Code, section 6847.

[18] *Ibid.*

The Chacon-Moscone Bilingual-Bicultural Education Act of 1976 (Ed. Code, § 52160 et seq.; §§ 52164, 52164.1-52164.6 have been pled)[19]

This act provided funding to train bilingual teachers to meet the needs of LEP pupils through bilingual instruction.[20] Bilingual instruction programs are those in which LEP pupils, while learning English, receive instruction in academic subjects such as math, science, and social studies in their "primary" or "home" language.[21] The courts have explained the program as follows:

> [The program] set forth a comprehensive legislative structure designed to provide funding and to train bilingual teachers sufficient to meet the growing student population of LEP [limited English proficient] students (§ 52165) through bilingual instruction in public schools (§ 52161). The avowed primary goal of the programs was to increase fluency in the English language for LEP students. Secondarily, the 'programs shall also provide positive reinforcement of the self-image of participating students, promote crosscultural understanding, and provide equal opportunity for academic achievement, …' (§ 52161.)[22]

The statutes in the Act required school districts to take a language census of LEP pupils each year to determine the number of pupils of limited English proficiency and classify them according to their primary language. The statutes also required reassessment, reporting, and reclassifying the pupils once they become proficient in English.

The Act contained a sunset clause that became effective on June 30, 1987.[23] For eleven years following the Act's sunset, the Legislature was unable to gain the necessary consensus for any subsequent legislation regarding bilingual education. However, the Legislature authorized continued funding for the general purpose of bilingual education until 1998, when Proposition 227 was adopted by the voters.[24]

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[19] Originally enacted by Statutes 1976, chapter 978 (not pled in test claim, so staff makes no findings on it) the Act was amended by Statutes 1977, chapter 36 and Statutes 1978, chapter 848.

[20] Pursuant to Education Code section 52168, school districts were authorized to claim funds appropriated for the program for the costs incurred for the employment of bilingual-crosscultural teachers and aids, teaching materials, in-service training, reasonable expenses of parent advisory groups, health and auxiliary services for the pupil, and reasonable district administrative expenses (which included costs incurred for the census of pupils, assessments, and parent consultation).

[21] *Valeria G. v. Wilson* (1998) 12 F.Supp.2d 1007, 1012.

[22] California Research Bureau, "Educating California's Immigrant Children, An Overview of Bilingual Education," June 1999, page 16; *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 203-204.

[23] Education Code section 62000.2 (c); Statutes 1983, chapter 1270, provided for the bilingual education program to sunset on June 30, 1986. Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987.

[24] *McLaughlin v. State Board of Education, supra,* 75 Cal.App.4th 196, 204.

Regulations Implementing Proposition 227 (Cal.Code Regs.,tit.5, § 11300, 11301, 11302, 11303 (renumbered to 11309), 11304 (renumbered to 11310))

On June 2, 1998, the voters of California passed Proposition 227 establishing the English Language Education for Immigrant Children program. The initiative added several statutes to the Education Code that became operative on August 2, 1998[25], and generally rejected bilingual education programs that were in effect in California public schools. The initiative replaced bilingual education programs with an educational system designed to teach LEP pupils English, and other subjects in English, early in their education.

Proposition 227 was premised on the following findings and declarations:

> The People of California find and declare as follows:
>
> (a) Whereas, The English language is the national public language of the United States of America and of the State of California, is spoken by the vast majority of California residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and
>
> (b) Whereas, Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and
>
> (c) Whereas, The government and the public schools of California have a moral obligation and a constitutional duty to provide all of California's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important; and
>
> (d) Whereas, The public schools of California currently do a poor job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children; and
>
> (e) Whereas, Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.
>
> (f) Therefore, It is resolved that: all children in California public schools shall be taught English as rapidly and effectively as possible.[26]

Proposition 227 requires all public school instruction be conducted in English, and requires English-learner pupils be educated through sheltered immersion during a temporary transition period not intended to exceed one year. "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children, in which nearly all classroom instruction is in English, but with the curriculum and presentation designed for

[25] Education Code sections 300, 305, 306, 310, 311, 315, 316, 320, 325, 335, and 340.

[26] Education Code section 300.

children who are learning the language.[27] The requirement may be waived if parents or guardians show that the child already knows English, or has special needs, or would learn English faster through an alternative instructional technique.[28] Individual schools in which 20 pupils of a given grade level receive a waiver are required to offer a class in which children are taught English and other subjects through bilingual or other alternative educational techniques.[29]

English-learner pupils are required to be transferred to English-language mainstream classrooms once they have acquired "a good working knowledge of English."[30] In addition, the initiative affords parents a right to sue if their child or children are not provided English-only instruction.[31]

Proposition 227 was immediately challenged in federal court as violating the U.S. Constitution and other federal laws. The court rejected the challenges.[32]

On July 9, 1998, the State Board of Education adopted emergency regulations that later became permanent in November 1998 to provide guidance for school districts on the implementation of Proposition 227.[33] The final statement of reasons for the regulations states the following:

> Specifically, the proposed regulations clarify "school term," "informed belief of the school principal and educational staff," "a good working knowledge of English," and "a reasonable fluency in English;" provide guidance on the educational services to be provided to English language learners; describe the requirements for informing parents and guardians on the placement of their children, and outline the procedures for receiving and administering funds for community based English tutoring to English language learners.

In addition to the statutes enacted by Proposition 227, the final statement of reasons lists federal law and case law as references for the regulations,[34] and further states under "Disclosures" that the "proposed regulations do not impose a mandate on local agencies or school districts."[35]

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[27] Education Code sections 305, 306 (d).

[28] Education Code sections 310-311; *McLaughlin v. State Board of Education, supra*, 75 Cal.App.4th 196, 217.

[29] Education Code section 310.

[30] Education Code section 305. "English language mainstream classroom" means a classroom in which the pupils either are native English language speakers or already have acquired reasonable fluency in English." (Ed. Code, § 306 (c).)

[31] Education Code section 320.

[32] *Valeria G. v. Wilson, supra*, 12 F.Supp.2d 1007. Petitioners argued that the initiative violated the Equal Educational Opportunities Act, Title VI of the Civil Rights Act, and the Supremacy and Equal Protection Clauses of the U.S. Constitution.

[33] California Code of Regulations, title 5, subchapter 4, "English Language Learner Education," sections 11300-11305. In 2003, section 11303 was renumbered to section 11309; section 11304 was renumbered to section 11310 and amended; and section 11305 was renumbered to section 11315. The claimant has not pled former section 11305 or 11315.

2003 English Language Learner Regulations (Cal.Code Regs.,tit.5, § 11303, 11304, 11305, 11306, 11307, 11308)

The claimant has also pled clean-up regulations adopted by the Board of Education in 2003 that moved all previously-adopted regulations from the bilingual education program that sunset in 1987 to subchapter 4, "English Language Learner Education," where the original Proposition 227 regulations are located. The Board of Education's final statement of reasons for the 2003 regulations states the intent to provide one coherent system of regulations for English learners.

These regulations address the language census of LEP pupils, assessment of LEP pupils using the California English Development test (CELDT), reclassification of the pupil from English learner to proficient in English, monitoring the progress of the pupils, and documentation requirements.

The final statement of reasons states that "[t]hese regulations do not impose a mandate on local agencies or school districts."[36]

California English Language Development Test Regulations (Cal.Code Regs, tit. 5, §§ 11510-11517)

From 1997 to 1999, California began developing CELDT.[37] According to CDE, federal law (Title III of the No Child Left Behind Act and case law) and state law (Ed. Code, §§ 313 & 60810 - 60812), require a statewide English language proficiency test that school districts are required to administer upon enrollment of new LEP pupils and annually to pupils previously identified as LEP who have not been reclassified as fluent in English.[38] The test is used to comply with Proposition 227 to determine the level of English proficiency of the pupil.[39] In addition, funding is appropriated to school districts for CELDT program to identify pupils who

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[34] California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305. Adopted in Register 1998, No. 30 (July 23, 1998). This final statement of reasons, page 2, lists the following references: U.S. Code, Title 20, Section 1703(f); *Lau v. Nichols* (Supreme Court 1974) 414 U.S. 563; *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009-1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041-1042.

[35] California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305, page 6. Adopted in Register 1998, No. 30 (July 23, 1998).

[36] California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11303-11308, 11316, page 4. Adopted in Register 2003, No. 2 (Jan. 10, 2003).

[37] See Education Code section 60810; Statutes 1997, chapter 936, Statutes 1999, chapter 78.

[38] California Department of Education, "California English Language Development Test – CalEdFacts" (www.cde.ca.gov/ta/tg/el/cefceldt.asp).

[39] Education Code section 313.

are limited English proficient, to determine the level of English language proficiency of LEP pupils, and to assess their progress.[40]

In 2001, a test claim was filed on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test* (00-TC-16)) seeking reimbursement for field testing CELDT, the initial assessment of LEP pupils, the annual assessment of LEP pupils, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program was mandated by federal law through Title VI of the Civil Rights Act and the EEOA, which require states and school districts to conduct English language assessments.

This test claim pleads the regulations that administer CELDT, as added and amended in 2001 and 2003.[41] The regulations govern initial and annual assessments, reporting to parents, reporting test scores, documentation and pupil records, data for analysis of pupil proficiency, the district and test site coordinators' duties, test security, accommodations for pupils with disabilities, alternative assessments for pupils with disabilities, and apportionments to school districts.

Parental Notification (Ed. Code, § 48985; Cal. Code Regs., tit. 5, §§ 11316, 11510): Education Code section 48985 requires that, for any K-12 school in which 15 percent or more pupils enrolled speak a single primary language other than English, "all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district," including those required by the regulations here, are to be written in the primary language of those pupils, in addition to English.[42] Districts determine the number of pupils whose primary language is not English by a language census given through a home language survey.

II. POSITION OF THE PARTIES

Claimant's Position

Claimant asserts that all of the requirements imposed by the test claim statutes and regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6, and Government Code section 17514.

Claimant acknowledges state funding of $100 per pupil that is reclassified to English-fluent status. (Former Ed. Code, § 404 (b).)[43] Claimant states this funding would offset the costs of compliance with the test claim statutes and regulations.[44]

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[40] Education Code section 60810(a)(4) and (d). Funding is appropriated in the State Budget through Item 6110-113-0001, schedule (3), for the CELDT.

[41] These regulations were also amended in 2005. The 2005 amended regulations have not been pled and, thus, are not addressed in this analysis.

[42] Statutes 1977, chapter 36; Statutes 1981, chapter 219.

[43] Section 404 was repealed by Statutes 2010, chapter 724 (AB1610), effective Oct. 19, 2010. According to the legislative analysis of AB 1610, the repeal provisions: "Combine the English Language Assistance Program (ELAP) funding with Economic Impact Aid (EIA) funding and repeals the ELAP statute. Clarifies that local educational agencies (LEAs) may continue using this funding for English language professional development." Assembly Floor, Concurrence in

Claimant did not comment on the draft staff analysis.

State Agency Position

In its March 2005 comments, DOF states that the claim should be denied because of federal requirements, Proposition 227, and the voluntary acceptance of federal NCLB funding by potential claimants. DOF states that the test claim activities are "essential to the ability of the state and school districts to comply with the federal requirements …"[45]

III. 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."[46] Thus, the subvention requirement of section 6 is "directed to state mandated increases in the services provided by [local government] …"[47]

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.[48]
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.[49]
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.[50]

Senate Amendments, Analysis of AB 1610 (2009-2010 Reg. Sess.) as amended Oct. 7, 2010, page 1.

[44] Exhibit A.

[45] Exhibit B.

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

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

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

[49] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.)

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. [51]

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.[52] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[53] 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."[54]

ISSUE: Do the test claim statutes mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?

A. Chacon-Moscone Bilingual Education Act (§§ 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6, Stats. 1978, ch. 848, Stats. 1980, ch. 1339)

The Chacon-Moscone Bilingual Education Act was enacted in 1976 to provide bilingual education to pupils of limited English proficiency and to offer financial support to achieve that purpose.[55] "Bilingual-bicultural education" is defined in the Act as a system of instruction that uses two languages, one of which is English, as a means of instruction. The program consists of daily structured English language development instruction in English (through listening, speaking, reading, and writing), and daily instruction in the primary language of the pupil for the purpose of sustaining achievement in basic subject areas.[56]

1. Requirements Imposed by Chacon-Moscone Bilingual Education Act

Many requirements are imposed by the Act. School districts are required to take an annual language census of LEP pupils within the district and classify them according to their primary language, age, and grade level. The census must be taken by actual count, and not by estimates or samplings, and must include all pupils of limited English proficiency, including migrant and special education pupils. Census results are to be reported to the CDE not later than the 30th day of April of each year. The previous language census shall be updated to include new enrollees

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[50] *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.

[51] *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.

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

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

[54] *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.

[55] Education Code section 52161.

[56] Education Code section 52163.

and to eliminate pupils who are no longer LEP pupils or who no longer attend a school in the district. Census data gathered in one school year shall be used to plan the number of bilingual classrooms to be established in the following school year.[57]

The Superintendent of Public Instruction, with the approval of the State Board of Education, is required to prescribe census-taking methods, to include the following:

- A determination of the primary language of each pupil enrolled in the school district.
- An assessment of the language skills of all pupils whose primary language is other than English as pupils enroll in the district and determine whether such pupils are fluent in English or are of limited English proficiency.
- For those pupils identified as being of limited English proficiency, a further assessment shall be made to determine the pupil's primary language proficiency, including speaking, comprehension, reading, and writing, to the extent assessment instruments are available.[58]

The parent or guardian of the pupil is to be notified of the results of the assessment. The statute also states as follows:

> Any district may elect to follow federal census requirements provided that the language skills described in subdivision (m) of Section 52163 are assessed, and provided that such procedures are consistent with Section 52164, the district shall be exempt from the state census procedures described in subdivisions (a) and (b).[59]

CDE is required to annually review the results of the language census and audit the census if "the information provided … appears to be inaccurate or where parents, teachers, or counselors file a formal written complaint that the census is inaccurate."[60]

School districts are required to reassess pupils whose primary language is other than English when a parent or guardian, teacher, or school site administrator claims that there is reasonable doubt as to the accuracy of the pupil's designation. The school district must notify the parent or guardian of the result of the reassessment.[61]

The school district must retain pertinent information on the assessment of language skills for each pupil whose language is other than English so long as the pupil is enrolled in the district, and must report annually to the CDE on the number of pupils:

- Whose primary language is other than English;
- Who are of limited English proficiency;

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[57] Education Code section 52164.

[58] Education Code section 52164.1.

[59] Education Code section 52164.1 (c).

[60] Education Code section 52164.2.

[61] Education Code section 52164.3

- Whose primary language is other than English who are enrolled in classes defined in subdivisions (a) – (f) of Section 52163;
- Who have become bilingual and literate in English and in their primary language, as appropriate; and
- Who have met the language reclassification criteria for exit criteria pursuant to Section 52164.6.[62]

Reclassification is the process of reclassifying a pupil from limited-English proficient (or English learner) to proficient in English. School districts are required to establish reclassification criteria if there are pupils of limited English proficiency enrolled. The criteria are used to determine when pupils of limited English proficiency have developed the language skills necessary to succeed in an English-only classroom. The reclassification criteria include:

- Teacher evaluation, including a review of the pupil's curriculum mastery.
- Objective assessment of language proficiency and reading and writing skills.
- Parental opinion and consultation.
- An empirically established range of performance in basic skills, based on nonminority English-proficient pupils of the same grade and age, which demonstrates that the pupil is sufficiently proficient in English to succeed in an English-only classroom.[63]

2. The Chacon-Moscone Bilingual Education Act Does Not Constitute a State-Mandated Program During the Period of Reimbursement for This Claim

The activities required by the test claim statutes, however, are not eligible for reimbursement because the statutes have not been operative during the period of reimbursement for this claim.[64] Pursuant to Education Code section 62000.2(c), the Chacon-Moscone Bilingual-Bicultural Act sunset and ceased to be operative on June 30, 1987.[65]

The purpose of the sunset legislation was to provide the Legislature with an opportunity to conduct a comprehensive review of the effectiveness of California's bilingual education programs. (Ed. Code, § 62001, Stats.1986, ch. 211.) As part of the sunset review process, Statutes 1983, chapter 1270 required CDE to review the bilingual education program and report on its appropriateness and effectiveness.[66] This 1983 statute included a June 30, 1985 sunset

[62] Education Code section 52164.5.

[63] Education Code section 52164.6.

[64] Pursuant to Government Code section 17557, the eligible period of reimbursement for this claim would begin July 1, 2002.

[65] Statutes 1983, chapter 1270, provided for the bilingual education program to sunset on June 30, 1986. Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987. Education Code section 62000 further provides that the programs sunset "shall cease to be operative on the date specified, unless the Legislature enacts legislation to continue the program."

[66] Former Education Code section 62006 (Stats. 1983, ch. 1270).

date (former Ed. Code, § 62000), later extended to June 30, 1987,[67] and stated the following legislative intent:

> It is the intent of the Legislature, in enacting this act, to maintain and improve educational program quality while providing greater flexibility at the state and local levels, and to reduce paperwork which does not have direct educational benefit.

Although the state's bilingual education program ceased to be operative under the broad terms of these statutes, section 62002 specified that the state funding for the program continued for the general purposes of the program as follows:

> If the Legislature does not enact legislation to continue a program listed in this part, the funding of that program shall continue for the general purposes of that program as specified in the provisions relating to the establishment and operation of the program. The funds shall be disbursed according to the identification criteria and allocation formulas for the program in effect on the date the program shall cease to be operative pursuant to this part both with regard to state-to-district and district-to-school disbursements. The funds shall be used for the intended purposes of the program, but all relevant statutes and regulations adopted thereto regarding the use of the funds shall not be operative except as specified in Section 62002.5.[68, 69]

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[67] Statutes 1984, chapter 1318 extended the sunset date to June 30, 1987, as did Statutes 1986, chapter 211, the source of current section 62000.2.

[68] See also Bill Honig, California Department of Education, "Program Advisory to County and District Superintendents, regarding Education Programs for which Sunset Provisions Took Effect on June 30, 1987, Pursuant to Education Code Sections 62000 and 62000.2" August 26, 1987. This advisory also discusses the existing federal requirements under the EEOA for states and local educational agencies to take appropriate action to eliminate language barriers impeding the participation of LEP students in a district's regular instructional program and, thus, some of the activities included in the sunset bilingual education program are still required by federal law. (See pages 16-20.)

[69] Pursuant to section 62002, all relevant statutes and regulations adopted under the bilingual education program were no longer operative after the sunset, "except as specified in Section 62002.5." In Education Code section 62002.5, the Legislature continued the statutory requirement for parent advisory committees and school site councils that were in existence as of January 1, 1979, pursuant to the statutes and regulations of the programs that were sunset. The Chacon-Moscone Bilingual Bicultural Act, in Education Code section 52176, required that each school district with more than 50 pupils of limited English proficiency to establish a district-wide advisory committee on bilingual education. Each school site with more than 20 pupils of limited English proficiency was also required to establish a school site committee to advise the principal and staff on bilingual education as specified. Funding is specifically provided for the advisory committees pursuant to Education Code sections 62002 and 52168(b). This test claim does not plead Education Code section 52176, however, and no findings are made on that statute.

School districts that continued to seek state funds for the program could apply for categorical funding pursuant to Education Code section 64000, and CDE was required to audit the use of state funds by the districts to ensure that the funds were expended for eligible pupils according to the purposes for which the legislation was originally established.[70]

In *McLaughlin v. State Board of Education*, the court discussed the history of the Chacon-Moscone Bilingual-Bicultural Education Act, noting that although the Act lapsed by operation of law, bilingual education continued through extended funding until Proposition 227 was passed in 1998. The court further noted that even though the Act lapsed with the sunset of the law, school districts "inexplicably" continued to seek waivers to opt out of the bilingual programs. "Equally inexplicably," the State Board of Education continued to grant waivers from the "defunct" law until March 1998, when the practice was rescinded.[71]

By the plain language of Education Code sections 62000 et seq., any state mandate imposed by the statutes pled in this test claim that are part of the Chacon-Moscone Bilingual-Bicultural Act ended on June 30, 1987. Thus, the Commission finds that the following test claim statutes do not constitute a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution: Education Code sections 52164, 52164.1, 52164.2, 52164.3, 52164.5, 52164.6, as enacted or amended by Statutes 1978, chapter 848 and Statutes 1980, chapter 1339.

B. <u>Proposition 227 Regulations</u> (Cal.Code Regs.,tit.5, §§ 11300, 11301, 11302, 11303 (renumbered to § 11309), 11304 (renumbered to § 11310))

1. Statutes Enacted by the Voters in Proposition 227

In 1998, the voters adopted Proposition 227 (which added §§ 300 – 340, not including § 313, to the Education Code). The statutes added by the voters require all public school instruction to be conducted in English, and require English-learner pupils to be educated through sheltered English immersion during a temporary transition period not intended to exceed one year. Proposition 227 also requires English-learner pupils to be transferred to English-language mainstream classrooms once they have acquired a good working knowledge of English (Ed. Code, § 305).

The requirements of Proposition 227 may be waived by the parent under the following circumstances:

- Children who already know English - the child already knows English and possesses good English language skills, as measured by standardized tests of English vocabulary and comprehension, reading, and writing;
- Older children - the child is at least 10 years old and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills; or

[70] Education Code section 62003; *Department of Finance v. Commission on State Mandates* (2004) 30 Cal.4th 727, 746.

[71] *McLaughlin v. State Board of Education, supra,* 75 Cal.App.4th 196, 204.

- Children with special needs - the child has already been placed for a period of not less than 30 days during the school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development.

  A written description of the special needs must be provided and any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local board of education and ultimately the State Board of Education. The existence of special needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.[72]

Waiving the requirements of Proposition 227 requires prior written informed consent from the child's parents or guardians to be provided annually.[73] For the consent to be "informed consent," the parents or guardians are required to be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. If the waiver is granted, the child may be transferred to classes where he or she is taught in English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law.

Individual schools in which 20 pupils or more of a given grade level receive a waiver shall be required to offer bilingual classes, or allow the pupils with waivers to transfer to a public school in which such a class is offered.[74]

Thus, under Proposition 227, school districts are required to:

1. Instruct LEP pupils in English through sheltered immersion classes during a temporary transition period not normally intended to exceed one year, unless a parent exception waiver is granted;
2. Transfer the pupil to mainstream classrooms once they have acquired a good working knowledge of English;
3. Provide a full description of the educational materials to be used in the different educational program choices and make all the child's educational opportunities available to the parents or guardians in order for them to make an informed decision about whether to seek a parental exception waiver;
4. Determine whether a pupil should be granted a parental exception waiver under Education Code section 311.
   a. If the child is 10 years or older, the school principal and educational staff must determine whether an alternate course of educational study would be better suited to the child's rapid acquisition of basic English language skills.

[72] Education Code section 311.

[73] Education Code section 310.

[74] Education Code section 310.

b. For pupils with special needs, determine whether the child has such special physical, emotional, psychological, or educational needs that an alternate course of educational study would be better suited to the child's overall educational development. Any such decision is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local board of education and ultimately the State Board of Education. Provide a written description of the special needs to the parents or guardians. Provide full information to parents or guardians of their right to refuse to agree to a waiver.

5. Offer bilingual education classes when 20 or more pupils have been granted parental exception waivers and are enrolled in a given grade, or allow the pupil to transfer to a public school where bilingual education is provided.

2. Test Claim Regulations Adopted to Implement Proposition 227 Do Not Mandate a New Program or Higher Level of Service

In 1998, CDE adopted regulations to implement Proposition 227. As more fully described below, the Commission finds that the regulations do not mandate a new program or higher level of service. These regulations were adopted to implement Proposition 227, and many activities are either expressly required by or are necessary to implement the ballot measure initiative. Article XIII B, section 6 requires reimbursement for mandates imposed by the Legislature or any state agency, and not by ballot measure initiatives.[75]

Furthermore, the regulations are intended to comply with federal law requirements imposed the Equal Educational Opportunities Act (EEOA), which prohibits states and local educational agencies from denying equal educational opportunity to an individual on account of his or her race, color, sex, or national origin. Under the Act, "failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs," is considered a violation of federal law.[76] Requirements imposed by federal law do not result in a reimbursable state-mandated program.[77]

- Definitions, Knowledge and Fluency in English, and Duration of Services (Cal Code Regs., tit. 5, §§ 11300, 11301, 11302)

These regulations define some of the terms used in Proposition 227. "School term," as used in Education Code section 330, is defined in section 11300 to clarify when the initiative became operative. "A good working knowledge of English" pursuant to Education Code section 305, and "reasonable fluency in English" pursuant to Education section 306, are also defined in these regulations to mean that "an English learner shall be transferred from a structured English immersion classroom to an English language mainstream classroom when the pupil has acquired a reasonable level of English proficiency as measured by any of the state-designated assessments approved by the CDE, or any locally developed assessments." The requirement to transfer LEP

[75] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1207; Government Code section 17556(f).

[76] 20 United State Code, section 1703(f).

[77] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 879-880; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1582; Government Code section 17556(c).

pupils to English mainstream classrooms once they have acquired a good working knowledge of English is expressly provided in Proposition 227 and was previously codified in Education Code section 305, and therefore, is not eligible for reimbursement. The remaining language simply clarifies the circumstances and timing of the transfer and does not mandate a new program or higher level of service.

Sections 11301 and 11302 of the regulations also require school districts to continue to provide additional and appropriate educational services to K-12 English learners for the purposes of overcoming language barriers until the English learners have demonstrated English proficiency and recouped any academic deficits which may have been incurred in other areas of the core curriculum as a result of the language barrier. An English learner may be re-enrolled in a structured English immersion program if the pupil has not achieved a reasonable level of English proficiency, unless the parents or guardians of the pupil object to the extended placement. The requirement to continue additional and appropriate education services to English learners until they have demonstrated English proficiency is mandated by Proposition 227. Proposition 227 requires school districts to instruct the pupil in a structured English immersion program until the pupil has acquired a reasonable level of English proficiency. Thus, this requirement does not mandate a new program or higher level of service.

In addition, the requirement to provide appropriate services to recoup any academic deficits that may have occurred in other areas of the core curriculum because of the language barrier is mandated by federal law and not eligible for reimbursement under article XIII B, section 6. In 1974, Congress enacted the Equal Educational Opportunities Act (EEOA, 20 U.S.C. § 1701 et seq.), which recognizes the state's role in assuring equal opportunity for national origin minority and English-learner pupils. According to the EEOA: "No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by [¶ … ¶] (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

In *Castaneda v. Pickard,*[78] the Fifth Circuit Court of Appeal interpreted section 1703(f) of the EEOA when examining English-learner programs of the Raymondville, Texas Independent School District. The court held that the EEOA imposes an obligation on educational agencies to overcome the direct obstacle to learning which the language barrier itself poses, which includes the additional duty to provide LEP pupils with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. In *Castaneda,* which CDE cites as authority for the section 11302 regulation,[79] the court stated the following:

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[78] *Castaneda v. Pickard, supra*, 648 F. 2d 989.

[79] California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305, page 4. Adopted in Register 1998, No. 30 (July 23, 1998). The Final Statement of Reasons states that section 11302 was adopted to "ensure that LEAs understand the federal requirements for teaching English to English learners" and so they do not "misunderstand the intent of Education Code section 305 and provide no additional services for English learners after one year of structured English language immersion even though the pupil is not English proficient."

> In order to be able ultimately to participate equally with the students who entered school with an English language background, the limited English speaking students will have to acquire both English language proficiency comparable to that of the average native speakers and to recoup any deficits which they may incur in other areas of the curriculum as a result of this extra expenditure of time on English language development. We understand § 1703(f) to impose on educational agencies not only an obligation to overcome the direct obstacle to learning which the language barrier itself poses, but also a duty to provide limited English speaking ability students with assistance in other areas of the curriculum where their equal participation may be impaired because of deficits incurred during participation in an agency's language remediation program. If no remedial action is taken to overcome the academic deficits that limited English speaking students may incur during a period of intensive language training, then the language barrier, although itself remedied, might, nevertheless, pose a lingering and indirect impediment to these students' equal participation in the regular instructional program.[80]

Accordingly, the Commission finds that California Code of Regulations, title 5, sections 11300, 11301, and 11302[81] do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

- Parental Exception Waivers (Former Cal. Code Regs., tit. 5, § 11303, renumbered to § 11309)

Former section 11303 (now codified in § 11309) identifies the process for obtaining a parental exception waiver pursuant to Education Code sections 310 and 311. As bulleted below, that section requires several notices to the parents or guardians, the adoption of parental waiver exception procedures and guidelines that include specific components, a written statement of reasons provided in cases where the waiver is denied, and authority to the parent or guardian to appeal a denied waiver to either the governing body of a school district (if the district has adopted an appeal process) or directly to court. The regulation requires the following activities:

1. Inform all parents and guardians of the placement of their children in a structured English immersion program and of the opportunity to apply for a parental exception waiver. The notice shall also include a description of the locally-adopted guidelines for evaluating a parental waiver request.
2. Establish procedures for granting parental waiver exceptions which includes the following components:
    a. Parents and guardians must be provided with a full written description and, upon request, a spoken description, of the structured English immersion program and any alternative courses of study and all educational opportunities offered by the

[80] *Castaneda v. Pickard, supra,* 648 F.2d 989, 1011.

[81] Register 1998, No. 30 (July 24, 1998) pages 75-76; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76.

school district and available to the pupil. The descriptions of the program choices shall address the educational materials to be used in the different options.

b. Pursuant to Education Code section 311(c), parents and guardians must be informed that the pupil must be placed for a period of not less than 30 calendar days in an English language classroom and that the school district superintendent must approve the waiver pursuant to guidelines established by the local governing board.

c. Pursuant to Education Code section 311(b) and (c), parents and guardians must be informed in writing of any recommendation for an alternative program made by the school principal and educational staff and must be given notice of their right to refuse to accept the recommendation. The notice shall include a full description of the recommended alternative program and the educational materials to be used for the alternative program, as well as a description of all other programs available to the pupil. If the parent or guardian elects to request the alternative program recommended, the parent or guardian must comply with the requirements of Education Code 310 and all procedures for obtaining a parental exception waiver.

d. Parental exception waivers shall be granted unless the school principal and educational staff have determined that an alternative program offered at the school would not be better suited for the overall educational development of the pupil.

3. Schools are required to act upon all parental exception waivers within 20 days of submission to the school principal. However, parental waiver requests under Education Code section 311(c) shall not be acted upon during the 30-day placement in an English language classroom. These waivers must be acted upon either no later than 10 calendar days after the expiration of that 30-day English language classroom placement or within 20 instructional days of submission of the parental waiver to the school principal, whichever is later.

4. In cases where a parental exception waiver is denied, the parents and guardians must be informed in writing of the reasons for denial and advised that they may appeal the decision to the local board of education if such an appeal is authorized by the local board of education, or to the court.

Proposition 227 expressly imposes some of these requirements. For example, Education Code sections 310 and 311 require that the parent or guardian be provided with a description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child in order for them to make an informed decision about whether to seek a parental exception waiver. In addition, Education Code section 311(c) requires that the recommendation to place a special needs pupil in an alternative course of educational study be made pursuant to locally adopted guidelines. Moreover, parents and guardians have an existing right pursuant to Education Code section 320, which was added by Proposition 227, to challenge the decisions of a school district on these issues in court. These

requirements have been mandated by the voters, and are not considered a mandate of the state within the meaning of article XIII B, section 6. [82]

In addition, the option to allow a parent or guardian to appeal a denied waiver to the local governing body of a school district is not required. School districts are not mandated by the state to adopt appeal procedures or conduct appeals.

However, the following regulatory requirements are not expressly required by the statutes adopted by the voters in Proposition 227: providing notices to the parents or guardians; adopting parental waiver exception procedures and guidelines for waivers that go beyond the limited exception provided for pupils with special needs; and providing a written statement of reasons to the parents or guardians in cases where the waiver is denied are not expressly required by Proposition 227. Nevertheless, the Commission finds that these excess procedural requirements are not mandates of the state, but are part and parcel of Proposition 227. Thus, these excess activities are not subject to reimbursement pursuant to article XIII B, section 6.

Government Code section 17556(f) requires the Commission to not find costs mandated by the state when a statute or executive order imposes duties that are necessary to implement a ballot measure approved by the voters in a statewide election. The court in *California School Boards Association v. State of California*, found that duties imposed by a test claim statute or executive order that are not expressly included in a ballot measure are "necessary to implement" the ballot measure pursuant to Government Code section 17556(f), and do not impose costs mandated by the state when the additional requirements imposed by the state are intended to implement the ballot measure mandate, and the costs, when viewed in context of the program adopted by the voters, are de minimis. In such cases, that excess requirements are considered part and parcel of the underlying ballot measure mandate and are not reimbursable.[83]

The court borrowed this analysis from the California Supreme Court's decision in *San Diego Unified School Dist.* which addressed whether state imposed procedural requirements that exceeded federal due process requirements constituted a federal mandate. The issue in *San Diego Unified School Dist.* was whether procedural due process activities imposed by the test claim statute were reimbursable when a school district sought to expel a pupil. The court recognized that federal due process law requires school districts to comply with federal procedural steps, such as notice and a hearing, to safeguard the rights of a pupil when the pupil is subject to an expulsion from school. The Education Code statute pled in the test claim mandated procedures on school districts to implement federal due process requirements. The test claim statute also required school districts to comply with additional procedures that were not expressly required by federal law; i.e. "primarily various notice, right of inspection, and recording rules."[84]

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[82] *CSBA, supra*, 171 Cal.App.4th 1183, 1207; Government Code section 17556(f).

[83] *CSBA, supra*, 171 Cal.App.4th at p. 1217.

[84] *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 873, footnote 11, and 890. As stated in footnote 11 of the court's decision, the excess activities in the *San Diego Unified School Dist.* case included (1) the adoption of rules and regulations, (2) the inclusion of several notices in the notice of expulsion hearing, (3) allowing the pupil or the parent to inspect and obtain copies of documents to be used at the hearing, (4) sending written notice on the rights and

The court held that all procedures set forth in the test claim statute, including those that exceed federal law, are considered to have been adopted to implement a federal due process mandate and, thus, the costs were not reimbursable under article XIII B, section 6 of the California Constitution and Government Code section 17556.[85] The court held that for purposes of ruling upon a request for reimbursement, "challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[86]

In reaching this conclusion, the court relied on the holding in *County of Los Angeles*[87] and applied the reasoning in that case as follows:

> In this regard, we find the decision in *County of Los Angeles II, supra,* … to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections – namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that "even in the absence of section 987.9, … counties would be responsible for providing ancillary services under the constitutional guarantees of due process … and under the Sixth Amendment." (32 Cal.App.4th at p. 815 …) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute – requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request – were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. [Citation omitted.] Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety – that is, *even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds* – constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.
>
> We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II*, …, the initial discretionary decision … in turn triggers a federal constitutional mandate

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obligations of the parents, (5) maintenance of a record of each expulsion, and (6) recording of the expulsion order and the cause thereof in the student's mandatory interim record.

[85] *Id.* at page 888.

[86] *Id.* at page 890.

[87] *County of Los Angeles v. Commission on State Mandate*s (1995) 32 Cal.App.4th 805.

> … In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *Count of Los Angeles II* concluded, that for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added costs, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[88]

The court in *CSBA* directed the Commission to apply the holding and analysis in *San Diego Unified* to activities required by the state that are intended to implement ballot measure initiatives.[89] And, as applied here, the excess regulatory requirements to provide notices to parents or guardians, to adopt procedures and guidelines for parental exception waivers, and to provide a written statement of reasons to the parents or guardians in cases where the waiver is denied, are part and parcel of the underlying ballot measure mandate of Proposition 227.

The Final Statement of Reasons for these regulations clearly states the intent of the regulation is to implement Proposition 227. The authority and reference for section 11309 of the regulations are the Proposition 227 code sections added by the voters; Education Code sections 310, and 311. Absent this regulation, school districts would still be required to comply with the Proposition 227 requirements to approve parental exception waivers when appropriate and provide a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child to the parents or guardians in order for them to make an informed decision about whether to seek a parental exception waiver. The excess activities simply establish notice to parents regarding the decisions made by the school district and the guidelines to implement the requirements imposed by the initiative.

There is no evidence that the excess requirements here are different in scope than the excess requirements in *San Diego Unified School District* case, which also included the adoption of rules and regulations, various notice requirements, the inclusion of several notices in the notice of expulsion hearing, maintaining a record of each expulsion, and recording the expulsion order and the cause thereof in the pupil's mandatory interim record.[90]

Therefore, the Commission finds that the activities required by former section 11303[91] (renumbered 11309) are necessary to implement the ballot measure mandate imposed by

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[88] *Id*. at pages 888-889 (Emphasis in original).

[89] *CSBA, supra*, 171 Cal.App.4th at page 1217.

[90] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 873, footnote 11,

[91] Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1998, No. 33 (Aug. 14, 1998) page 75; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76, Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

Proposition 227 and, thus, do not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

- State Board of Education Review of Guidelines for Parental Exception Waivers (Former Cal. Code Regs., tit. 5, § 11304, renumbered to § 11310)

Proposition 227 enacted Education Code 311(c), allows for a parental exception waiver from English-only instruction for pupils with special needs. Under the statute, the principal or other educational staff can make a determination, based on locally developed guidelines, that an alternative course of educational study would be better suited to a child's overall educational development because of the child's special needs. The determination and written description of the special needs is required to be made pursuant to the guidelines, which are subject to review by the local board of education and the State Board of Education. The parents have the right to be informed of the determination and their right to refuse to agree to a waiver.

Former section 11304 of the regulations (now codified in section 11310) requires school district governing boards to submit the guidelines or procedures adopted pursuant to Education Code section 311 regarding parental exception waivers to the State Board of Education upon request for its review. Any parent or guardian who applies for a waiver pursuant to Education Code section 311 may request a review of the local guidelines and procedures by the State Board of Education to determine if the guidelines comply with the law.

The purpose of the regulation is stated in the final statement of reasons adopted by CDE as follows:

> Education Code section 311(c) provides that LEAs may establish guidelines for not placing pupils with special needs in English language classrooms. Education Code section 311(c) also indicates that the guidelines may be subject to the review of the State Board of Education. This regulation clarifies for LEAs when they may be required to submit their guidelines to the State Board of Education and the purpose of the review.[92]

Former section 11304 does not impose any new requirements beyond those required by Education Code section 311(c), a statute enacted by the voters through Proposition 227. Thus, the Commission finds that former section 11304 (renumbered to section 11310)[93] does not impose a state-mandated new program or higher level of service on school districts.

C. 2003 English Language Learner Regulations (Cal.Code Regs.,tit.5, §§ 11303, 11304, 11305, 11306, 11307, 11308)

Although grouped with the Proposition 227 regulations, these English Language Learner regulations became operative in 2003, five years after Proposition 227 was adopted, and do not cite to statutes enacted by Proposition 227 for their authority. When CDE adopted the regulations, it stated that the English Language learner regulations were found in sections 4304,

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[92] California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11300-11305, page 5. Adopted in Register 1998, No. 30 (July 23, 1998).

[93] Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76, Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

4306, 4311, 4312, and 11300-11305, and that sections 4304, 4306, 4311 and 4312 are the provisions remaining from the Chacon-Moscone bilingual education program that sunset June 30, 1987. Thus, CDE renumbered and added regulations "to provide one coherent system of regulations for English learners."[94]

As discussed below, the Commission finds that these regulations do not impose state-mandated new programs or higher levels of service on school districts. Federal case law interpreting EEOA and California statutes adopted before the regulations impose some of the same requirements as these regulations. While some procedural requirements in these regulations are not expressly set forth in federal law, they are part and parcel and, thus, necessary to implement the federal requirements of EEOA. All regulatory activities are intended to implement the federal law requirement imposed on state and local educational agencies to take appropriate action to overcome language barriers of LEP pupils that impede their equal participation in the regular instructional program. Challenged state rules or procedures that are intended to implement federal law and, whose costs are considered de-minimis when viewed in the context of the law, are not reimbursable under article XIII B, section 6 of the California Constitution.[95]

Each regulation is discussed below.

- Initial and Annual Assessments of LEP Pupils (Cal. Code Regs., tit. 5, §§ 11306, 11307(a))

Section 11307(a) of the regulations requires school districts to assess the English language skills of all pupils whose primary language is other than English upon initial enrollment as follows:

> (a) All pupils whose primary language is other than English who have not been previously assessed or are new enrollees to the school district shall have their English language skills assessed within 30 calendar days from the date of initial enrollment.

Section 11306 then requires school districts that report the presence of English learners to conduct annual assessments of the English language development and academic progress of those pupils.

The Commission finds that the requirement to assess English language learner pupils, both initially and annually, for language development and academic progress does not mandate a new program or higher level of service.

In 1999, before the adoption of these regulations, the Legislature added section 313 to the Education Code to supplement Proposition 227.[96] Education Code section 313 requires school districts that have one or more pupils who are English learners to assess each pupil's English language development to determine the level of proficiency upon initial enrollment of each pupil and annually thereafter. The annual assessments are required to continue until the pupil is re-

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[94] California Department of Education, Final Statement of Reasons, California Code of Regulations, title 5, sections 11303-11308, 11316, page 1. Adopted in Register 2003, No. 2 (Jan. 10, 2003).

[95] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 608.

[96] Statutes 1999, chapter 678, section 3.

designated as English proficient. In addition, the statute requires that the assessment primarily use CELDT.

Education Code section 313 was pled in the *CELDT I* test claim (00-TC-16) and denied by the Commission on the ground that the requirements of the statute were previously mandated by federal law. The Commission's decision in *CELDT I* is a final binding decision[97] and is supported by section 4 of the bill that added section 313, which states the following:

> It is the intent of the Legislature that the assessment and reclassification conducted pursuant to this act be consistent with federal law, and not impose requirements on local educational agencies that exceed requirements already set forth in federal law.[98]

Under federal law, state and local governments are required by EEOA to take appropriate action to overcome language barriers that impede equal participation by its pupils in the regular instructional program. (20 U.S.C. § 1703 (f)). The courts have interpreted EEOA to require proper testing and evaluation to determine the progress of LEP pupils and the program.[99] In *Keyes v. School Dist. No. 1*, the court held a Denver school district violated EEOA, in part because of the district's "…failure to adopt adequate tests to measure the results of what the district is doing. …The lack of an adequate measurement of the effects of such service is a failure to take reasonable action to implement the transitional policy"[100]

Accordingly, the Commission finds that the initial and annual assessment of LEP pupils pursuant to sections 11306 and 11307(a)[101] does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.[102]

- Reclassifying Pupils from LEP to Proficient in English (Cal. Code Regs., tit.5, §§ 11303, 11304)

As indicated above, Education Code section 305, which was added by Proposition 227 in 1998, requires pupils to be transferred to English mainstream classes once it is determined that the pupil has acquired a good working knowledge of English.

Section 11303 of the regulations promulgates the process used to reclassify a pupil from English learner to proficient in English and requires the following procedural components to be used in the determination:

- Assessment of language proficiency using the CELDT, as provided in Education Code section 60810.

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[97] *CSBA, supra*, 171 Cal.App.4th 1183, 1200.

[98] Statutes 1999, chapter 678, section 4.

[99] *Castaneda v. Pickard, supra*, 648 F. 2d 989, 1014.

[100] *Keyes v. School Dist. No. 1* (1983) 576 F. Supp. 1503, 1518.

[101] Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

[102] In addition, the federal NCLB requires an annual assessment of English proficiency of all students with limited English proficiency in order to obtain federal funding under the Act. (20 U.S.C., § 6311(b)(7).)

- Participation of the pupil's classroom teacher and any other certificated staff with direct responsibility for teaching or placement decisions of the pupil.
- Parental involvement through notice to parents or guardians of the reclassification and placement of the pupil, and an opportunity to participate; and by seeking their opinion and consultation during the reclassification process.

Section 11304 requires school districts to monitor the progress of pupils reclassified to ensure correct classification and placement.

The requirements in section 11303 are not new. In 1999, section 313 was added to the Education Code to supplement Proposition 227 and implement federal law. Section 313 directed CDE to establish procedures for the reclassification of a pupil from English learner to proficient in English, and required that the reclassification process consider the same criteria outlined in section 11303 of the regulations. Education Code section 313 states in relevant part the following:

> (d) The reclassification procedures developed by the State Department of Education shall utilize multiple criteria in determining whether to reclassify a pupil as proficient in English include, but not limited to, all of the following:
>
> (1) Assessment of language proficiency using an objective assessment instrument, including, but not limited to, the English language development test pursuant to Section 60810.
>
> (2) Teacher evaluation, including, but not limited to, a review of the pupil's curriculum mastery.
>
> (3) Parental opinion and consultation.
>
> (4) Comparison of the pupil's performance in basic skills against an empirically established range of performance in basic skills based upon the performance of English proficient pupils of the same age, that
>
> demonstrates whether the pupil is sufficiently proficient in English to participate effectively in a curriculum designed for pupils of the same age whose native language is English.

As previously indicated, Education Code section 313 implements the requirements of federal law under the EEOA. The EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by LEP pupils in the regular instructional program. The courts have determined that proper testing and evaluation of an LEP pupil is required to properly comply with the federal act.[103] The courts have also held that other measures, in addition to achievement test scores, should be considered to determine a programs' effectiveness in remedying language barriers. The court in *Castaneda* stated the following:

> We note also, that even in a case where inquiry into the results of a program is timely, achievement test scores of students should not be considered the only

[103] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 1014; *Keyes School Dist. No. 1, supra*, 576 F.Supp 1503, 1518.

> definitive measure of a program's effectiveness in remedying language barriers. Low test scores may reflect many obstacles to learning other than language. We have no doubt that process of delineating the causes of differences in performance among students may well be a complicated one.[104]

Therefore, section 11303 of the title 5 regulations does not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.[105]

Moreover, the requirement imposed by section 11304 of the regulations to monitor the progress of a pupil after reclassification to ensure correct classification and placement is required by federal law and does not mandate a new program or higher level of service. The court in *Castaneda* determined that a program may still fail to comply with the EEOA if the program used to overcome language barriers for LEP pupils fails to produce results indicating that the language barriers are "actually being overcome."[106] Thus, there is a continuing duty under federal law to monitor actual results.[107]

Accordingly, the Commission finds that sections 11303 and 11304 of the title 5 regulations[108] do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

- Documentation of Multiple Criteria Used in Reclassification (Cal. Code Regs., tit. 5, § 11305)

This regulation requires school districts to maintain documentation regarding the assessment and evaluation of LEP pupils as follows:

> School districts shall maintain documentation of multiple criteria information, as specified in Section 11303 (a) and (d), [Assessment of language proficiency using the CELDT, and evaluation of pupil's performance for academic deficits] and participants and decisions of reclassification in the pupil's permanent records as specified in Section 11303 (b) and (c)[Participation by teacher and school personnel and parental involvement.]

The Commission finds that section 11305 does not impose a state-mandated activity on school districts, but rather implements the requirements of federal law.

Documenting the assessment and evaluation of a pupil for purposes of reclassification is not expressly mandated by federal law. However, as determined by the California Supreme Court in the *San Diego Unified School Dist.* case, although an activity may not be expressly mandated by

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[104] *Castaneda v. Pickard, supra*, 648 F.2d at p. 1015, fn. 14.

[105] Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

[106] *Id.* at page 1010.

[107] Title III of NCLB also requires, as a condition of funding, pupil "evaluation" that includes "a description of the progress made by children in meeting challenging State academic content and student achievement standards for each of the 2 years after such children are no longer receiving [English learner] services under this part." (20 U.S.C. § 6841 (a)(4).)

[108] Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

federal law, "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the underlying federal mandate" and are not reimbursable.[109]

The reference and authority listed for section 11305 of the regulations are the federal EEOA and federal case law interpreting that Act: *Castaneda v. Pickard* (5th Cir. 1981) 648 F.2d 989, 1009-1011; and *Gomez v. Illinois State Board of Education* (7th Cir. 1987) 811 F.2d 1030, 1041-1042. Thus, CDE adopted the regulation to comply with federal law.

Moreover, the excess requirement imposed by section 11305 to maintain documents is the same requirement imposed by the state to comply with federal due process law in *San Diego Unified School Dist.*, where reimbursement was denied.[110] There is no evidence that the costs here to perform the same activity, when considered with the requirements of the EEOA as a whole, are anything more than de minimis. Absent the requirement imposed by section 11305 of the regulations to maintain documentation for the assessment and evaluation of a pupil for purposes of reclassification, school districts would still be required by federal law to assess and evaluate the English language proficiency of a pupil, reclassify the pupil once proficiency is achieved, continue to monitor the pupil to ensure that the pupil remains proficient and can equally participate in the instructional program, and still be subject to potential civil litigation for its determination under the EEOA. Thus, the documentation requirement in section 11305 simply records the actions of compliance with federal law.

Therefore, the Commission finds that section 11305 of the title 5 regulations[111] is necessary to implement a federal mandate, and is therefore not a reimbursable state mandate.

- Language Census Requirements (Cal. Code Regs., tit. 5, § 11307(b) & (c))

Section 11307(b) and (c) require school districts to take a language census of LEP pupils each year and report the results by grade level on a school-by-school basis to CDE by April 30 of each year as follows:

(b) The census of English learners, required for each school district, shall be taken in a form and manner prescribed by the State Superintendent of Public Instruction in accord with uniform census taking methods.

(c) The results of the census shall be reported by grade level on a school-by-school basis to CDE not later than April 30 of each year.

According to the 2011 language census instructions issued by CDE, the census is taken and reported for the purpose of collecting background and programmatic data on pupils from non-English-language backgrounds and to collect data on the staff providing services to English learners. The data are collected on the R30-LC form, and are used to produce state and federal reports and to compute funding for Title III of the No Child Left Behind Act, the Community-

[109] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 890.

[110] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 873, footnote 11,

[111] Register 1998, No. 30 (July 23, 1998) pages 75-76; Register 1999, No. 1 (Jan. 1, 1999) pages 75-76; Register 2003, No. 2 (Jan. 10, 2003) pages 75-76.1.

based English Tutoring (CBET) program, Economic Impact Aid (EIA) for English learners, and the English Language Acquisition Program (ELAP). The census data are also used to project future English learner enrollments and teachers that provide instructional services to English learners. Data may also serve local needs, such as class load analyses, program design, and to determine school staffing needs.[112] CDE further states that the language census must be submitted because English learners "have federal protections, including the ruling in several federal court cases, such as *Castaneda v. Pickard* & *Gomez v. Illinois State Board of Education*."[113]

The R30-LC form reports the count of all identified English learners enrolled as of a date certain each year. These pupils are counted and identified based on their initial and annual CELDT scores (which are required to be given pursuant to Education Code section 313 and sections 11306 and 11307(a) of the regulations). In addition, if the reclassification process for annual testers has not been completed by the census date, the pupils continue to be counted as English learners.[114]

The Commission finds that the census requirements imposed by section 11307 do not mandate a new program or higher level of service, but are part and parcel and necessary to implement federal law requirements. Pursuant to the *San Diego Unified* and *County of Los Angeles II* cases, reimbursement is not required when school districts are mandated by federal law to perform a duty. The Legislature or any state agency, to implement the federal law, then passes a law setting forth procedures to comply with the federal law and in the process, requires additional procedural duties that are intended to implement the federal law. Absent the state law, school districts are still required to comply with the underlying federal mandate. Under these circumstances, the excess procedural requirements constitute an implementation of federal law and are not reimbursable as a state mandated program. "[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate."[115]

As indicated above, the federal EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by English learner pupils in the regular instructional program. In *Castaneda*, the court determined that "appropriate action" meant, in part, that the programs used for LEP pupils must be reasonably calculated to effectively implement the educational theory adopted by the state and local educational agency as the "appropriate action" under the EEOA, that adequate resources must be provided, and that the action taken produces results indicating that the language barriers are actually being overcome. The court stated the following:

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[112] California Department of Education, Instructions for the Spring Language Census (Form R30-LC), Reporting Year: 2011, page 1.

[113] *Id*. at p. 23.

[114] *Ibid.*

[115] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 890.

> We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.
>
> Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned. We do not believe Congress intended that under § 1703(f) a school would be free to persist in a policy which, although it may have been "appropriate" when adopted, in the sense that there were sound expectations for success and bona fide efforts to make the program work, has, in practice, proved a failure.[116]

In *Gomez v. Illinois State Board of Education*, the court, using the *Castenada* decision, clarified that state educational agencies, and not just local school districts, have a legal obligation under the EEOA to ensure that LEP pupils are properly identified and that the needs of these pupils are met.[117]

Under the facts in *Gomez*, the Illinois State Board of Education adopted regulations requiring every school district in Illinois to identify LEP pupils by taking a census. When the census identified 20 or more pupils who speak the same primary language, the local school district was required by the regulation to provide a transitional bilingual education program to those pupils. When the census disclosed less than 20 such pupils, the district was not required to conduct any review or supervision of the existence or adequacy of the services for achieving English proficiency. [118] Petitioners alleged that the regulations did not provide consistent guidelines on the identification process. As a result, the local school districts perceived they had unlimited discretion in selecting the methods of identifying such children and avoided the provision of transitional bilingual education requirements by identifying less than 20 LEP pupils of the same primary language. Thus, the petitioners argued that the state violated the EEOA by failing to promulgate uniform and consistent guidelines for the identification, placement, and training of

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[116] *Castaneda v. Pickard, supra*, 648 F.2d 989, 1010; see also, *Horne v. Flores, supra*, 557 U.S.433, where the court stated that "any educational program, including the "appropriate action" mandated by the EEOA, requires funding" as a means to the end goal of overcoming the language barriers of English learners.

[117] *Gomez v. Illinois State Board of Education, supra,* 811 F.2d 1030; see also, *Idaho Migrant Council v. Board of Education* (1981) 647 F.2d 69.

[118] *Gomez v. Illinois State Board of Education, supra,* 811 F.2d 1030, 1033.

LEP pupils.[119] While the court did not reach the merits of the arguments raised by petitioners against the State of Illinois, the court held that the EEOA places the obligation on state educational agencies to take appropriate action by setting general and consistent guidelines for local school districts to identify and provide appropriate educational services to LEP pupils and ensure that the implementation of the state's English proficiency program is effective.[120]

Here, the state's census requirements imposed by section 11307(b) and (c) complies with these federal requirements. The language census required by the test claim regulation provides information to state and local educational agencies regarding the number of English language learners to project the future needs of these pupils; determines appropriate funding for educating English learners; and shows evidence of whether the English only, structured English immersion program mandated by Proposition 227 is effective. The census activities are imposed to implement federal EEOA requirements and any additional procedural requirements imposed to implement existing federal law are considered part and parcel of the underlying federal requirement.

Accordingly, the Commission finds that the census activities required by section 11307(b) and (c) of the title 5 regulations[121] do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

- Parent Advisory Committees (Cal. Code Regs., tit. 5, § 11308)

Section 11308 requires school districts to set up school advisory and school district advisory committees. School district advisory committees "shall be established in each school district with more than 50 English learners in attendance." School advisory committees on programs and services for English learners "shall be established in each school with more than 20 English learners in attendance." School advisory committees consist of parent members elected by the parents or guardians of English learners, and each school advisory committee elects at least one member to the district advisory committee, unless there are more than 30 school advisory committees, in which case the district may use a system of proportional or regional representation.

School district advisory committees are required by section 11308(c) to advise the school district governing board on the following matters:

- Development of a district master plan for education programs and services for English learners;
- Conducting a district wide needs assessment on a school-by-school basis;
- The establishment of district program, goals, and objectives for programs and services for English learners;
- Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements;

[119] *Id.* at pages 1033-1034.

[120] *Id.* at pages 1037, 1042-1043.

[121] Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

- Administration of the annual language census;
- Review and comment on the school district reclassification procedures;
- Review and comment on the written notifications required to be sent to parents and guardians.

In addition, school districts are required by section 11308(d) to provide training materials and training to all school advisory and school district advisory committee members. Funding under the chapter may be used to meet the costs of providing training including the costs associated with the attendance of the members at training sessions.

The Commission finds that section 11308 does not impose a new program or higher level of service.

In 1979, the Legislature added sections 62002 and 62002.5 to the Education Code to sunset programs, including the Chacon-Moscone Bilingual Bicultural Education program. The statutes and regulations that implemented the bilingual education program were deemed inoperative by section 62002, "*except as specified in section 62002.5*." In section 62002.5, the Legislature continued the requirement that the advisory committees and school site councils, which existed as part of the programs that sunset, continue and maintain the same functions and responsibilities as prescribed by the appropriate law or regulation in effect as of January 1, 1979. Education Code section 62002.5 states in relevant part the following:

> Parent advisory committees and school site councils which are in existence pursuant to statutes or regulations as of January 1, 1979, shall continue subsequent to the termination of funding for the programs sunsetted by this chapter. Any school receiving funds from Economic Impact Aid or Bilingual Education Aid subsequent to the sunsetting of these programs as provided in this chapter, shall establish a school site council in conformance with the requirements in Section 52012. The functions and responsibilities of such advisory committees and school site councils shall continue as prescribed by the appropriate law or regulation in effect as of January 1, 1979.[122]

Education Code section 52176 was added in 1977 by the Legislature as part of the Chacon-Moscone Bilingual Bicultural Education Act. That statute requires school districts with more than 50 pupils of limited English proficiency, and schoolsites with more than 20 pupils of limited English proficiency, to establish advisory committees.

Former section 4312 of the Title 5 regulations, as last amended in 1999 to implement Education Code sections 62002, 62002.5, and 52176, imposed the same requirements on the advisory committees as currently required in section 11308 of the regulations. Former section 4312 stated the following:

> (a) District advisory committees on programs and services for English learners will be established in each school district with more than 50 English learners in attendance. School advisory committees on education programs and services for English learners will be established in each school with more than 20 English

[122] Statutes 1979, chapter 282; Statutes 1983, chapter 1270.

learners in attendance. Both district and school advisory committees shall be established in accordance with Sections 52176 and 62002.5 of the Education Code.

(b) The parents or guardians of English learners shall elect the parent members of the school advisory committee (or subcommittee, if appropriate). The parents shall be provided the opportunity to vote in the election. Each school advisory committee shall have the opportunity to elect at least one member to the District Advisory Committee, except that districts with more than 30 school advisory committees may use a system of proportional or regional representation.

(c) District Advisory Committees shall advise the district governing board on at least the following tasks:

(1) Development of a district master plan for education programs and services for English learners. The district master plan will take into consideration the school site master plans.

(2) Conducting of a districtwide needs assessment on a school-by-school basis.

(3) Establishment of district program, goals, and objectives for programs and services for English learners.

(4) Development of a plan to ensure compliance with any applicable teacher and/or teacher aide requirements.

(5) Administration of the annual language census.

(6) Review and comment on the district reclassification procedures established pursuant to Education Code Section 52164.6.

(7) Review and comment on the written notification of initial enrollment required in Section 11303(a).

(d) School districts shall provide all members of district and school advisory committees with appropriate training materials and training which will assist them in carrying out their responsibilities pursuant to subsection (c). Training provided advisory committee members in accordance with this subsection shall be planned in full consultation with the members, and funds provided under this chapter may be used to meet the costs of providing the training to include the costs associated with the attendance of the members at training sessions.

Pursuant to Education Code section 62002.5, Education Code section 52176 and former section 4312 of the regulations remained continuously in effect despite the sunset of the state's bilingual education statutes until section 11308 became effective in 2003.

Therefore, because the parent advisory committees have been continuously required since 1977, and the sunset statutes provided for their continuance, the Commission finds that the

requirements imposed by section 11308 of the title 5 regulations[123] do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

D. California English Development Test Regulations (§§ 11510-11517)[124]

In 1997, Education Code sections 60810 et seq. required the State Board of Education to approve standards for English language development for pupils whose primary language is other than English. The Superintendent of Public Instruction was also required to develop a test or series of tests to:

- Identify pupils who are limited English proficient.
- Determine the level of English proficiency of pupils who are limited English proficient.
- Assess the progress of limited English proficient pupils in acquiring the skills of listening, reading, speaking, and writing in English.

In 1999, Education Code section 313 was enacted to supplement the Proposition 227 initiative on English language instruction. Section 313 requires school districts to assess each pupil's English language development upon initial enrollment and annually thereafter until the pupil is reclassified as English proficient. The statute also states that the assessment shall primarily utilize the test identified in section 60810. Education Code 313 also requires CDE to establish procedures for conducting the assessment for the reclassification of a pupil from English learner to English proficient. The test that was developed is CELDT.

As indicated in the Background, a test claim was filed in 2001 on Education Code sections 313 and 60810 through 60812 (*California English Language Development Test* (*CELDT I*, 00-TC-16)) seeking reimbursement for field testing CELDT, the initial assessment of LEP pupils, the annual assessment of LEP pupils, compliance with the CELDT coordinator's manual, training, and drafting policies and procedures. The Commission denied the test claim on the ground that the program is mandated by federal law. Title VI of the Civil Rights Act (42 U.S.C. § 2000d), which prohibits discrimination under any program or activity receiving federal financial assistance, and EEOA require states and school districts to conduct English language assessments. The Commission's decision in *CELDT I* (00-TC-16) is a final binding decision and, thus, the parties may not re-litigate in the current claim whether the activities required by Education Code sections 313 and 60810 through 60812 impose a reimbursable state-mandated program.[125] The CELDT I test claim, however, did not plead the regulations that were adopted to govern the administration of the test.

In 2001, CDE adopted regulations to implement Education Code sections 313 and 60810 through 60812.[126] These title 5 regulations impose the following requirements on school districts:

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[123] Register 2003, No. 2 (Jan. 8, 2003) pages 75-76.1.

[124] Sections 11516, 11516.6, 11517 and the 2005 amendments to these regulations are not part of the test claim. Staff makes no finding on these regulations.

[125] *CSBA, supra*, 171 Cal.App.4th 1183, 1201-1202.

[126] These statutes are listed as the authority and reference for the CELDT regulations.

- Assess a pupil whose native language is other than English for English language proficiency with CELDT within 30 calendar days of enrollment in the school district and during the annual assessment window. (Cal Code Regs., tit. 5, § 11511 (a) & (b).)
- Administer CELDT "in accordance with the test publisher's directions, except as provided by Section 11516.5." Section 11516.5 governs administering the test to pupils with disabilities. (Cal Code Regs., tit. 5, § 11511 (c).)
- If the school district places an order with the publisher of the test that is excessive, the district is responsible for the cost of materials for the difference between the sum of the number of pupil tests scored and 90 percent of the tests ordered. (Cal Code Regs., tit. 5, § 11511 (d).)
- Notify parents or guardians of the pupil's test results on CELDT within 30 calendar days following receipt of results of testing from the test publisher. The notification is required to comply with Education Code section 48985. (Cal Code Regs., tit. 5, § 11511.5.) Education Code section 48985 requires notifications to be in the parent's primary language.
- Maintain a record of pupils who participated in each administration of CELDT, as specified. (Cal Code Regs., tit. 5, § 11512.)
- Provide the publisher of CELDT with information for each pupil tested, as specified. (Cal Code Regs., tit. 5, § 11512.5.)
- Designate a CEDLT district coordinator, with specified responsibilities. (Cal Code Regs., tit. 5, § 11513.)
- Designate a CELDT test-site coordinator for each test site, including each charter school, with specified responsibilities. (Cal Code Regs., tit. 5, § 11513.5.)
- Comply with test security measures, as specified. (Cal Code Regs., tit. 5, § 11514.)
- Provide accommodations for testing for pupils with disabilities. The accommodations provided are those that the pupil has regularly used during instruction and classroom assessments as delineated in the pupil's individualized education plan (IEP). (Cal Code Regs., tit. 5, § 11516.5.)
- Report to CDE the unduplicated count of the number of pupils to whom CELDT was administered for annual or initial assessment during the 12 month period prior to June 30 of each year, as specified. (Cal Code Regs., tit. 5, § 11517.) This section was repealed operative June 9, 2005, by Register 2005, No. 23.

The Commission finds that these activities do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution, but are part and parcel of, and necessary to implement, the federal EEOA.[127]

The EEOA requires state and local educational agencies to take appropriate action to overcome language barriers that impede equal participation by pupils in the instructional programs offered.

[127] An assessment of English proficiency for limited English proficient pupils (e.g., CELDT) is also a condition of receiving federal funds from Title III of NCLB. (20 U.S.C. § 6823(b)(3)(D).)

As stated by the court in *Castaneda,* proper testing and evaluation is essential under the EEOA to determine the progress of pupils involved in the program and in evaluating the program itself.[128]

The courts have also clarified that the EEOA imposes on state agencies the duty to take appropriate action to ensure that LEP pupils are properly identified, evaluated, and placed, and to establish uniform guidelines for school districts to follow in such areas.[129] In the *Gomez* case, the petitioners alleged that the state violated the EEOA by not providing proper guidelines regarding the identification and testing of pupils as follows:

> In addition, because of the absence of proper guidelines, local districts have been found to use as many as 23 different language proficiency tests, 11 standardized English tests, 7 standardized reading tests, and many formal and informal teacher-developed tests. Some of these tests do not accurately measure language proficiency, so that LEP children are not properly identified. This array of tests has also, to the detriment of plaintiffs, resulted in inconsistent results.[130]

The regulations here comply with these principles and do not mandate a new program or higher level of service.

The requirement imposed by the regulations to provide an initial and annual assessment of limited English proficient pupils is not new, but is expressly mandated by Education Code section 313 and, as described above, by federal law under the EEOA.

Moreover, providing test accommodations to pupils with disabilities that take CELDT (Cal Code Regs., tit. 5, § 11516.5.) is mandated by existing federal law under the Individuals with Disabilities Education Act (IDEA). IDEA requires that state and local education agencies ensure that children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services.[131] These services include special test-taking accommodations, as necessary and determined during the pupil's IEP process. IDEA further requires that disabled children be "included in general State and district-wide assessment programs, with appropriate accommodations, when necessary."[132]

The remaining requirements in the regulations are not expressly mandated by the federal EEOA statutes. However, the activities to coordinate with the test publisher, comply with test security measures, notify parents and guardians of the results, maintain records, designate district and school-site coordinators, and provide a report to the state are necessary to implement the federal requirement in the EEOA for the state to establish, and the state and local educational agencies to implement, uniform guidelines for the proper identification and assessment of limited English proficient pupils. "[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal

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[128] *Castaneda v. Pickard, supra,* 648 F. 2d 989, 1014.

[129] *Gomez v. Illinois State Board of Education, supra,* 811 F.2d 1030, 1042.

[130] *Id.* at page 1033.

[131] 20 United States Code section 1400 et seq.

[132] 20 United States Code section 1412(a).

mandate."[133] The California Supreme Court has determined that these types of activities, which may exceed the express provisions of federal law, are not reimbursable under article XIII B, section 6 of the California Constitution because the activities are considered part and parcel of the underlying federal mandate.[134]

Accordingly, the Commission finds that the CELDT regulations (Cal. Code Regs., tit. 5, §§ 11510-11517)[135] do not impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

E. Notice to Parents Provided in English and the Primary Language of the Parent (Ed. Code, § 48985; Cal.Code Regs., tit. 5, §§ 11316, 11511.5)

The claimant has pled Education Code section 48985, as added in 1977 and amended in 1981.[136] The statute requires that all notices, reports, statements, or records sent by a school district to a parent or guardian who speaks a primary language other than English is to be written in the primary language in addition to English. This requirement applies only when 15% of the pupils enrolled in a public school speaks a language other than English, as determined by the annual census. Education Code section 48985, as amended in 1981, stated the following:

> When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

Education Code section 48985 was amended in 2006 to place the quoted language in subdivision (a), and to add subdivisions (b) through (d). The 2006 statute has not been pled in this test claim and, thus, no analysis is provided for subdivisions (b) through (d).[137]

Regulations under the English Language Learner Education and CELDT regulations have been adopted to comply with Education Code section 48985. Section 11316 of the Title 5 regulations is placed in the English Language Learner Education chapter of the regulations and provides the following:

> All notices and other communications to parents or guardians required or permitted by these regulations must be provided in English and in the parents' or guardians' primary language to the extent required under Education Code section 48985.

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[133] *San Diego School Dist*., *supra*, 33 Cal.4th at page 890.

[134] *Id*. at page 889.

[135] Register 2001, No. 40 (Oct. 5, 2001) pages 77-78.2; Register 2003, No. 16 (April 18, 2003) pages 77-78.2

[136] Statutes 1977, chapter 36; Statutes 1981, chapter 219.

[137] Statutes 2006, chapter 706.

As described earlier in the analysis, the notices referred to in section 11316 of the regulations include the notice required by section 11309 of the regulations regarding the placement of an LEP pupil in a structured English immersion program and the opportunity for parents or guardians to apply for a parental exception waiver. It also includes the notice required by section 11303 of the regulations regarding the language reclassification process and placement of an LEP pupil.

Similarly, section 11511.5 of the CELDT regulations requires CELDT reports to parents or guardians to comply with Education Code section 48985. Section 11511.5 states the following:

> For each pupil assessed using the California English Language Development Test, each school district shall notify parents or guardians of the pupil's results within 30 calendar days following receipt of results of testing from the test publisher. Such notification shall comply with the requirements of Education Code Section 48985.

The requirement to provide notices to parents in their primary language, however, is not new. Former Education Code section 10926, as added in 1976, imposed the same requirements as follows:

> When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 5761.3 by the first day of April in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language
>
> Notwithstanding Section 2231 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because this act merely affirms for the state that which has been declared existing law or regulation through action of the federal government.[138]

Accordingly, the Commission finds that Education Code section 48985 and sections 11316,[139] 11511.5[140] of the Title 5 regulations do not mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution.

IV. CONCLUSION

Based on the above analysis, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[138] Statutes 1976, chapter 361.

[139] Register 2003, No. 2 (Jan. 10, 2003) pages 75-76.1.

[140] Register 2001, No. 40 (Oct. 5, 2001) pages 77-78.2.

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RE: **Adopted Statement of Decision**

California English Language Development Test II, 03-TC-06
Education Code Section 48985, et al.
Castro Valley Unified School District, Claimant

On May 25, 2012, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: May 31, 2012

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 60000, 60002, 60045, 60048, 60119, 60200, 60242, 60242.5, 60248, 60252, 60421, 60422, 60423, 60424, 60501, 60510.5, 60521

Statutes 1976, Chapter 817; Statutes 1977, Chapter 36; Statutes 1979, Chapter 282; Statutes 1982, Chapter 1503; Statutes 1983, Chapter 498; Statutes 1985, Chapter 1440; Statutes 1985, Chapter 1470; Statutes 1985, Chapter 1546; Statutes 1985, Chapter 1597; Statutes 1986, Chapter 211; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 1181; Statutes 1991, Chapter 353; Statutes 1991, Chapter 529; Statutes 1991, Chapter 1028; Statutes 1993, Chapter 56; Statutes 1994, Chapter 927; Statutes 1995, Chapter 325; Statutes 1995, Chapter 413; Statutes 1995, Chapter 534; Statutes 1995, Chapter 764; Statutes 1996, Chapter 124; Statutes 1997, Chapter 251; Statutes 1999, Chapter 276; Statutes 1999, Chapter 646; Statutes 2000, Chapter 461; Statutes 2002, Chapter 802; and Statutes 2003, Chapter 4

California Code of Regulations, Title 5, Sections 9505, 9530, 9531, 9532 and 9535

Register 77, No. 39 (Sept. 23, 1977); Register 83, No 25 (June 17, 1983); Register 95, No. 3, (Dec. 30, 1994); Register 97, No. 31 (July 31, 1997); and Register 2003, No. 3 (Jan. 16, 2003)

Standards for Evaluating Instructional Materials for Social Content (2000 ed.)

Filed on September 22, 2003 by

Castro Valley Unified School District, Claimant.

Case No.: 03-TC-07

Instructional Materials Funding Requirements

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

(*Adopted September 28, 2012*)

(*Served October 4, 2012)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 28, 2012. Claimant did not appear. Donna Ferebee and Christian Osmena 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 staff analysis to deny the test claim at the hearing by a vote of 7-0.

Summary of Findings

This test claim requests reimbursement for activities performed by K-12 school districts to review, select, order, and dispose of textbooks and instructional materials, as well as activities related to the categorical funding programs for purchasing these materials. The test claim statutes, regulations, and alleged executive order were enacted between 1976 and 2003. Some of the statutes pled in this claim were amended after 2003 as a result of the state's settlement agreement with plaintiffs in the *Williams v. State of California* case. These later-enacted statutes have not been pled in this claim and will not be analyzed in this test claim.

For the reasons provided in this decision, the Commission finds that the test claim statutes, regulations, and the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.) do not impose a state-mandated new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. Thus, the Commission denied the test claim.

COMMISSION FINDINGS

Chronology

09/22/2003	Claimant, Castro Valley Unified School District, filed test claim with the Commission[1]
11/03/2003	California Department of Education (CDE) filed comments on the test claim
12/05/2003	Claimant filed rebuttal to CDE comments
02/13/2004	California Department of Finance (DOF) filed comments on the test claim
03/23/2004	Claimant filed rebuttal to Finance's comments
08/08/2012	Commission staff issued the draft staff analysis
08/31/2012	DOF filed comments on the draft staff analysis
09/13/2012	Commission staff issued the final staff analysis and proposed statement of decision

I. Background

The State Board of Education has the constitutional and statutory duty to adopt instructional materials for kindergarten and grades 1 through 8.[2] "Instructional materials" includes the following:

[1] Based on this filing date, the period of reimbursement for this claim begins July 1, 2002. (Gov. Code, § 17557.)

[2] Article IX, section 7.5 of the California Constitution; Education Code section 60200.

> [A]ll materials that are designed for use by pupils and their teachers as a learning resource and help pupils to acquire facts, skills, or opinions or to develop cognitive processes. Instructional materials may be printed or nonprinted, and may include textbooks, technology-based materials, other educational materials, and tests.[3]

The state's adoption process is complex and involves evaluation criteria, various expert panels, curriculum committees, a Curriculum Commission, advocates, and the general public.[4] Generally, however, the SBE adopts at least five sets of basic instructional materials at each grade level (K-8) in reading/language arts, mathematics, history-social science, science, visual/performing arts, foreign language, and health education. There are exceptions, however, if fewer than five sets of materials are submitted or if the SBE finds that fewer than five submittals meet the evaluation criteria. Instructional materials are adopted "not less than two times every six years" for the four core curriculum areas of reading/language arts, mathematics, history–social science, and science and "not less than two times every eight years" in other subjects.[5]

Before adoption, the SBE is generally required to determine if the materials:

- Are consistent with criteria and standards of quality prescribed in the adopted curriculum framework;[6]
- Are factually accurate and incorporate principles of instruction reflective of current and confirmed research;
- Do not contain materials, including illustrations, that provide unnecessary exposure to commercial brand name, product, or corporate or company logo. Instructional materials containing commercial brand names, products, or logos may only be adopted if the SBE determines that the brand names, products, or logos are necessary for an educational purpose, or is incidental to the general nature of an illustration; and
- Meet the content requirements established in Education Code sections 60040 et seq., and the social content requirements outlined in the SBE guidelines (entitled "*Standards for Evaluating Instructional Materials for Social Content, 2000 Edition*").

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[3] Education Code section 60010(h). "Basic instructional materials" is defined as "instructional materials that are designed for use by pupils as a principal learning resource and that meet in organization and content the basic requirements of the intended course." (Ed. Code, § 60010(a).)

[4] See, for example, Office of the Legislative Analyst, "Reforming California's Instructional Material Adoption Process," May 2007.

[5] Education Code section 60200(b)(1). A 2009 statute, however, delays all instructional materials adoptions and developing curriculum frameworks and evaluation criteria until the 2013-2014 school year. (Ed. Code, § 60200.7, eff. July 28, 2009.)

[6] "Curriculum framework" is defined as "an outline of the components of a given course of study designed to provide state direction to school districts in the provision of instructional programs." (Ed. Code, § 60010(c).)

Publishers of instructional materials must also meet cost, format, and delivery requirements in order to be considered for adoption.[7]

After determining the submissions it will adopt, the SBE provides school districts with a menu of instructional programs for each subject area and grade level.[8] Local school districts then use their own criteria to determine which of the approved materials offer features that best meet the needs of their kindergarten through grade 8 (K-8) school population. If a school district establishes to the satisfaction of the SBE that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning in the district, the state board shall authorize the school district to use state funding allowances for materials to purchase other materials in accordance with the standards and procedures established by the state board.[9]

There are no state-adopted instructional materials for high school. The adoption of instructional materials for grades 9-12 is the responsibility of local school districts. Generally, the same content standards and publisher requirements imposed on state-adopted materials are also imposed on locally-adopted instructional materials.[10]

In 1972, the state established the State Instructional Materials Fund (SIMF) as a means of annually funding the acquisition of instructional materials. In 1994, the Legislature enacted the Pupil Textbook and Instructional Materials Incentive program to provide supplemental funds to ensure that every pupil has adequate textbooks and instructional materials. In 2002, the Instructional Materials Funding Realignment program (IMFRP) was enacted to consolidate existing instructional materials programs, including the SIMF, into a single block grant for the costs of standards-aligned textbooks and instructional materials in the four core curriculum areas of English-language arts, mathematics, history-social science, and science. Remaining funds under the IMFRP can be used for other classes, in-service training regarding the adoption and purchase of textbooks and instructional materials, and classroom library materials.

Each fiscal year since 2002, between $175 and $419 million has been appropriated for school districts to purchase standards-aligned instructional materials. Between $416 and $419 million has been appropriated annually since fiscal year 2007-08 to purchase the materials.[11] In addition, for the costs of instructional materials incurred beginning in fiscal year 1998-1999, school districts receive fifty percent of an increase in lottery revenues allocated to the district based on

[7] Education Code sections 60060 et seq.

[8] Education Code section 60200(i).

[9] Education Code section 60200(g).

[10] Education Code section 60400.

[11] Item 6110-189-001 in Statutes 2002, chapter 379; Statutes 2003, chapter 157; Statutes 2004, chapter 208; Statutes 2005, chapters 38 and 39; Statutes 2006, chapters 47 and 48; Statutes 2007, chapters 171 and 172; Statutes 2008, chapters 268 and 269; Statutes 2009, chapter 1 (4th Ex. Sess.); Statutes 2010, chapter 712; Statutes 2011, chapter 33.

an equal amount per unit of average daily attendance (ADA).[12] Additional funds may be received from the school district's sale of obsolete textbooks and instructional materials.[13]

The Test Claim Statutes

This test claim pleads statutes and regulations enacted between 1976 and 2003. Some of the statutes pled in this claim were amended after 2003 as a result of the state's settlement agreement with plaintiffs in the *Williams v. State of California* case. These later-enacted statutes have not been pled in this claim and will not be analyzed in this test claim.[14] The statutes, regulations, and alleged executive order pled in this claim address the following:

- Establish legislative intent for "a need to establish broad minimum standards and general educational guidelines for the selection of instructional materials."[15]
- Include criteria that the SBE and publishers must address when adopting instructional materials for use in grades K-8. For example, the instructional material cannot provide exposure to a commercial brand name, product, or corporate or company logo unless the SBE makes specified findings.[16]
- Authorize the purchase of non-adopted materials if the district establishes to the satisfaction of the SBE that the state-adopted instructional materials do not promote maximum efficiency of pupil learning in the district.[17]
- Require school districts to adopt instructional materials that are accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels. Except for literature and tradebooks, all instructional materials adopted by any governing board must use proper grammar and spelling.[18] School districts are prohibited from adopting instructional materials that provide exposure to a commercial brand name, product, or corporate or company logo in a manner that is inconsistent with SBE guidelines or frameworks, unless the district makes a finding with specified contents.[19] In addition, SBE-adopted instructional materials are encouraged to comply with the *Standards for Evaluating Instructional Materials for Social Content* (2000 Edition).

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[12] Government Code section 8880.4(a)(2)(B), as added by Proposition 20, The Cardenas Textbook Act of 2000 (March 7, 2000 election).

[13] Education Code section 60521.

[14] The *Williams Case Implementation* statutes are the subject of three other test claims (05-TC-04, 07-TC-06 and 08-TC-01) pending before the Commission which are tentatively set for the December 2012 hearing.

[15] Education Code section 60000.

[16] Education Code section 60200(c).

[17] Education Code section 60200(g).

[18] Education Code section 60045.

[19] Education Code section 60048(b).

- Require districts to ensure that the selection of instructional materials complies with various requirements, such as teacher, parental and community involvement.[20]
- Govern the ordering of instructional materials. At the time the test claim was filed, former section 9530 of the title 5 regulations required school districts to buy adopted instructional materials directly from publishers and manufacturers and to comply with specified requirements.
- Authorize school districts to use non-adopted instructional materials for the district's core reading program in kindergarten to grade 3 if the school district believes that none of the core reading materials adopted by the SBE in 1996 promote the maximum efficiency of pupil learning.[21]
- Authorize school districts to review instructional materials to determine when they are obsolete pursuant to previously adopted rules, regulations, and procedures. Districts are authorized to report the results of their reviews and staff recommendations at public meetings of their governing boards,[22] and are also encouraged to take specified steps before disposing of any instructional materials, such as notifying the public no later than 60 days before the disposition, and permitting specified entities and the public to address the governing board regarding the disposition.[23] Districts must use proceeds from selling instructional materials to purchase instructional materials.[24]
- Govern the state's categorical funding programs for textbooks and instructional materials, including the SIMF, the Pupil Textbook and Instructional Materials Incentive Program, and IMFRP. The IMFRP, which was enacted in 2002, consolidates existing block grants within the SIMF account for standards-aligned instructional materials into an ongoing block grant and requires school districts to perform a number of activities in order to receive funding.[25]

II. Positions of the Parties and Interested Parties

A. Claimant's Position

The claimant alleges that the test claim statutes, regulations, and alleged executive order impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 to review, select, order, and dispose instructional materials, as well activities related to funding under the state's categorical funding programs for instructional materials. The specific activities pled by claimant are in the analysis below.

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[20] Education Code section 60002.

[21] California Code of Regulations, title 5, section 9535.

[22] Education Code section 60501.

[23] Education Code section 60510.5.

[24] Education Code section 60521.

[25] Education Code sections 60119, 60242, 60242.5, 60248, 60252, 60421, 60422, 60423,and 60424; California Code of Regulations, title 5, sections 9505, 9531, and 9532.

The claimant disagrees with the comments submitted by DOF and CDE. Claimant argues that the activities in the test claim statutes and regulations are mandatory and not optional, that legal compulsion is not necessary to find a reimbursable state mandate, and that the state's position denies pupils equal protection of the laws.[26]

B. State Agencies' Positions

1. Department of Finance's Position

DOF contends that this test claim should be denied. Its February 2004 comments state that between $184 million and $1.024 billion in annual categorical funding has been appropriated to school districts between 1999-2000 and 2003-2004 for purchasing instructional materials. DOF asserts that this funding "is more than sufficient to offset any marginal administrative costs." The DOF also states that districts are expected to use general purpose funds to supplement categorical funding. According to DOF, categorical programs, such as the SIMF and IMFRP are optional, so conditions on receipt of those funds are downstream requirements resulting from the district's decision to receive those funds. The conditions are not state mandates.

In comments on the draft staff analysis, DOF agrees with the portion of the analysis that denies reimbursement, but disagrees with the portion of the analysis that found that Education Code sections 60045(b) and 60048(b) (Stats. 1999, ch. 276) constitute a reimbursable state-mandated program to determine if the materials use proper grammar and spelling before adoption, and to review all instructional materials for grades 9 to 12, inclusive, to determine if they contain a commercial brand name, product, or corporate or company logo, before the materials are adopted. DOF argues that Education Code sections 60045(b) and 60048(b) do not impose any duties on school districts, but require publishers and manufacturers to demonstrate compliance. Any activity undertaken by a school district in accordance with these code sections is discretionary. Moreover, DOF argues that sufficient revenue has been appropriated to offset any costs incurred by a school district to review instructional materials pursuant to Education Code sections 60045(b) and 60048(b).

2. California Department of Education's Position

CDE, in its November 2003 comments, contends that the requested activities do not constitute state-mandated new programs or higher levels of service. Specifically, CDE states that because the categorical funding program, Instructional Materials Funding Realignment Program, and

[26] In its December 2003 rebuttal to CDE and March 2004 rebuttal to DOF, claimant asserts that these state agency comments are incompetent and should be excluded from the record because they are not signed under penalty of perjury "with the declaration that it is true and complete to the best of the representative's personal knowledge or information or belief." (Cal. Code Regs., tit. 2, § 1183.02 (c)). While the claimant correctly states the Commission's regulation, the Commission disagrees with the request to exclude the comments from the official record. Most of the state agency comments argue an interpretation of the law, rather than make a representation of fact. If the Commission's decision were to be challenged in court, the court would not require sworn testimony for argument on the law. The ultimate determination of a reimbursable state-mandated program is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.)

other test claim statutes are voluntary, any requirements connected to them are ultimately discretionary and not reimbursable under article XIII B, section 6 of the California Constitution.

III. 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."[27] Thus, the subvention requirement of section 6 is "directed to state mandated increases in the services provided by [local government] …"[28]

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.[29]
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.[30]
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.[31]
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. [32]

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[27] *County of San Diego, supra,* 15 Cal.4th 68, 81.

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

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

[30] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[31] *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.

[32] *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.

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.[33] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[34] 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."[35]

Issue 1: Do the test claim statutes, regulations, and alleged executive order impose a state-mandated new program or higher level of service?

A. School district review, selection, ordering and disposal of instructional materials

1. Legislative Intent and Policies and Procedures (Ed. Code, § 60000)[36]

Education Code section 60000 is a statement of legislative intent regarding Part 33 of the Education Code, governing instructional materials and testing. As amended in 1995, section 60000 provides the following:

> (a) It is the intent and purpose of the Legislature in enacting this part to provide for the adoption and selection of quality instructional materials for use in the elementary and secondary schools.
>
> (b) The Legislature hereby recognizes that, because of the common needs and interests of the citizens of this state and the nation, there is a need to establish broad minimum standards and general educational guidelines for the selection of instructional materials for the public schools, but that because of economic, geographic, physical, political, educational, and social diversity, specific choices about instructional materials need to be made at the local level.
>
> (c) The Legislature further recognizes that the governing boards of school district have the responsibility to establish courses of study and that they must have the ability to choose instructional materials that are appropriate to their courses of study.

Claimant alleges that, based on this provision, it must: "establish broad minimum standards and general educational guidelines for the selection of instructional materials for the district's schools."

The Commission finds that section 60000 does not impose a state-mandated new program or higher level of service. This statute provides a statement of what the Legislature recognizes, but it imposes no requirements on school districts.

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

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

[35] *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.

[36] The claimant pled the statute as amended by Statutes 1995, chapter 413.

Moreover, the statements of legislative intent are not new. Since 1972, the Legislature has recognized the same needs in identical language.[37] These provisions were carried forward into the 1976 Education Code,[38] and amended into their current form in 1995.

Thus, Education Code section 60000 (Stats. 1995, ch. 413) does not impose a state-mandated new program or higher level of service.[39]

2. SBE Review of Content and Adoption of Instructional Materials (Ed. Code, § 60200)[40]

The SBE is required to adopt instructional materials for grades K-8. The Education Code establishes criteria that the SBE and publishers must address when adopting instructional materials for use in these grades. Claimant specifically alleges that Education Code section 60200(c)(5) and (g) impose reimbursable state-mandated activities on school districts. These subdivisions state the following:

> The state board shall adopt basic instructional materials for use in kindergarten and grades 1 to 8, inclusive, for governing boards, subject to the following provisions:
>
> [¶] . . . [¶]
>
> (c) In reviewing and adopting or recommending for adoption submitted basic instructional materials, the state board shall use the following criteria, and ensure that, in its judgment, the submitted basic instructional materials meet all of the following criteria:
>
> [¶] . . . [¶]
>
> (5) Do not contain materials, including illustrations, that provide unnecessary exposure to a commercial brand name, product, or corporate or company logo. Materials, including illustrations, that contain a commercial brand name, product, or corporate or company logo may not be used unless the board determines that the use of the commercial brand name, product, or corporate or company logo is appropriate based on one of the following specific findings:
>
> (A) If text, the use of the commercial brand name, product, or corporate or company logo in the instructional materials is necessary for an educational

[37] See former Education Code sections 9200, 9202, and 9203 (Stats. 1972, ch. 929).

[38] See former Education Code sections 60000, 60002, and 60003 (Stats. 1976, ch. 1010).

[39] Claimant also generally alleges that Education Code sections 60000-60521 require school districts to: "Develop, adopt, and implement policies and procedures, and periodically update those policies and procedures, to ensure compliance with laws and regulations governing the selection, acquisition and use of instructional materials in public schools."

The Commission finds that these activities are not mandated by the state because the plain language of the statutes and regulations in this test claim do not require school districts to develop, adopt, or implement policies and procedures.

[40] Claimant has pled the 1979, 1982, 1986, 1989, 1991, 1993, 1995, 1997, and 1999 statutory amendments to this code section.

purpose, as defined in the guidelines or frameworks adopted by the State Board of Education.

(B) If an illustration, the appearance of a commercial brand name, product, or corporate or company logo in an illustration in instructional materials is incidental to the general nature of the illustration.

[¶]. . . . [¶]

(g) If a district board establishes to the satisfaction of the state board that the state-adopted instructional materials do not promote the maximum efficiency of pupil learning in the district, the state board shall authorize that district governing board to use its instructional materials allowances to purchase materials as specified by the state board, in accordance with standards and procedures established by the state board.

Claimant alleges that it must make a determination that the use of a commercial brand name, product, corporate or company logo is appropriate based on the findings in section 60200(c) because school districts submit the materials for review and adoption and, thus, must meet the criteria used by the SBE.[41] Claimant also alleges that when requesting authorization for the district governing board to purchase non-adopted materials pursuant to section 60200(g), it is required to establish to the satisfaction of the SBE that the state-adopted instructional materials do not promote maximum efficiency of pupil learning in the district.

The Commission finds that the requirements in section 60200 are imposed on the SBE and that no requirements are imposed on local school districts. The plain language of the statute begins by stating that the "state board shall adopt basic instructional materials . . . subject to the . . . provisions [in sections (a) through (p)]. Moreover, claimant's interpretation of subdivision (c) is wrong. Although claimant asserts that the basic instructional materials referenced in subdivision (c) are submitted by school districts, these materials are actually submitted by the publishers. Subdivision (m) of section 60200 makes this evident by stating: "The state board shall give publishers the opportunity to modify instructional materials, in a manner provided for in regulations adopted by the state board, if the state board finds that the instructional materials do not comply with paragraph (5) of subdivision (c)."

Therefore, the Commission finds that section 60200 does not impose a state-mandated program on school districts.[42]

3. School Districts' Adoption of Instructional Materials for Grades 9-12 (Ed. Code, §§ 60045 & 60048; *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.).

Education Code section 60400 requires school districts to adopt instructional materials for the high schools under their control. The statute further requires that only those materials that

[41] Claimant comments dated March 19, 2004, Exhibit E.

[42] Statutes 1977, chapter 36; Statutes 1979, chapter 282; Statutes 1982, chapter 1503; Statutes 1986, chapter 211; Statutes 1989, chapter 1181; Statutes 1991, chapter 353; Statutes 1993, chapter 56, Statutes 1995, chapter 413; Statutes 1995, chapter 764; Statutes 1997, chapter 251; Statutes 1999, chapter 276.

comply with article 3, commencing with Education Code sections 60040, may be adopted. Claimant alleges that Education Code sections 60045 and 60048, and the SBE guidelines on adoption entitled *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.) result in a reimbursable state-mandated program to adopt instructional materials that comply with sections 60045, 60048 and the SBE guidelines.

For the reasons below, the Commission finds that Education Code sections 60045 and 60048, as added or amended by Statutes 1999, chapter 276, do not mandate a new program or higher level of service within the meaning of article XIII B, section 6. The Commission also finds that the SBE publication, *Standards for Evaluation of Instructional Materials for Social Content*, does not impose a state-mandated new program or higher level of service.

a. Education Code section 60045 (Stats. 1999, ch. 276)

As amended in 1999, Education Code section 60045 states in relevant part the following:

(a) All instructional materials adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels.

(b) With the exception of literature and tradebooks, all instructional materials adopted by any governing board for use in schools shall use proper grammar and spelling. . . .

Claimant seeks reimbursement to adopt instructional materials that are accurate, objective, current, and suited to the needs and comprehension of pupils at their respective grade levels and that use proper grammar and spelling.

The plain language of the statute, however, does not require school districts to adopt instructional materials. The requirement for school districts to adopt instructional materials is in Education Code section 60400, which originated in 1972 from former Education Code section 9600.[43] Moreover, since 1972, the Education Code has required that instructional materials "adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective and current and suited to the needs and comprehension of pupils at their respective grade levels."[44] Thus, Education Code section 60045(a) does not mandate a new program or higher level of service within the meaning of article XIII B, section 6.

Staff further finds that Education Code section 60045(b) does not impose a state-mandated program on school districts. That section states that all instructional materials adopted by the governing school district board shall use proper grammar and spelling. DOF argues that Education Code section 60045(b) is a requirement imposed on a publisher or manufacturer that produces and submits instructional materials to a school district for adoption, and that the publisher must demonstrate compliance with section 60045(b). Based on the plain language of section 60045(b) and the surrounding statutes, DOF is correct.

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[44] Former Education Code section 9244 (Stats. 1972, ch. 1233). Former Education Code section 60045 (Stats. 1976, ch. 1010).

Education Code section 60400 directs school districts to adopt instructional materials for use in the high schools. That statute states that "only instruction *materials of those publishers who comply with the requirements of Article 3 (commencing with Section 60040*) … may be adopted by the district board." (Emphasis added.) Education Code section 60045 is in Article 3 and, thus, the publisher must comply with the requirements of section 60045(b) to ensure that its materials contain proper grammar and spelling. Moreover, Education Code section 60060 requires that "every publisher or manufacturer of instructional materials offered for adoption or sale in California shall comply with all of the requirements and provisions of this part." Education Code section 60045 is in the same part of the Education Code as section 60060.

Finally, the plain language of section 60045(b) does not direct the school district to review or take on any new duties. It simply states that the "materials adopted by any governing board for use in schools shall use proper grammar and spelling." Education Code section 60046 goes on to authorize any governing board to conduct an investigation of the compliance of any instructional materials which it adopts with the requirements of Article 3.

Accordingly, the Commission finds that Education Code section 60045, as amended in 1999, does not mandate a new program or higher level of service on school districts.

b. Education Code section 60048 (Stats. 1999, ch. 276)

Education Code section 60048 was added in 1999, and generally prohibits school district governing boards from adopting instructional materials, including illustrations, that provide any exposure to a commercial brand name, product, or corporate or company logo in a manner that is inconsistent with guidelines or frameworks adopted by the SBE. If, however, the governing board makes a specific finding pursuant to the criteria in section 60200(c)(5) that the use of the commercial brand name, product, or corporate or company logo in the instructional materials is appropriate, it may adopt the materials. Section 60048 states, in relevant part, the following:

> (a) Basic instructional materials, and other instructional materials required to be legally and socially compliant pursuant to Sections 60040 to 60047, inclusive, including illustrations, that provide any exposure to a commercial brand name, product, or corporate or company logo in a manner that is inconsistent with guidelines or frameworks adopted by the State Board of Education may not be adopted by a school district governing board.
>
> (b) The governing board of a school district may not adopt basic instructional materials, and other instructional materials required to be legally and socially compliant pursuant to Sections 60040 to 60047, inclusive, including illustrations, that contain a commercial brand name, product, or corporate or company logo unless the governing board makes a specific finding pursuant to the criteria set forth in paragraph (5) of subdivision (c) of Section 60200 that the use of the commercial brand name, product, or corporate or company logo in the instructional materials is appropriate.
>
> (c) Nothing in this section shall be construed to prohibit the publisher of instructional materials to include whatever corporate name or logo on the instructional materials that is necessary to provide basic information about the publisher, or protect its copyright, or to identify third party sources of content.

The claimant requests reimbursement to adopt instructional materials that are legally and socially compliant pursuant to sections 60040 to 60047, and to delete illustrations that contain a commercial brand name, product, or corporate or company logo, unless the governing board makes the findings identified in section 60200(c)(5).[45]

DOF argues that Education Code section 60048 does not require reimbursement under article XIII B, section 6. DOF asserts that Education Code section 60048(b) prohibits a school district from adopting instructional materials that contain a commercial brand name, product, or company logo and that it is within the district's discretion to find that the use of the commercial brand name, product, or company logo is appropriate.

The Commission finds that Education Code section 60048 does not impose a state-mandated new program or higher level of service on school districts. As stated above, publishers are required by section 60060 to comply with provisions of section 60048 to ensure that their materials, including illustrations that provide any exposure to a commercial brand name, product, or corporate or company logo, are legally and socially compliant and are consistent with guidelines or frameworks adopted by the SBE. Education Code section 60400 has long required school districts to adopt instructional materials and textbooks, and states that "only instruction materials of those publishers who comply with the requirements of Article 3 (commencing with Section 60040) … may be adopted by the district board." Section 60048 is in Article 3. Moreover, the plain language of section 60048 does not impose any new mandated duties on school districts; it simply prohibits the adoption of materials offered by publishers that do not comply with the guidelines prescribed by SBE. If a school district determines that the use of a commercial brand name, product, or corporate or company logo in the instructional materials it is considering is appropriate, pursuant to the standards identified in Education Code section 60200(c)(5), then the district is authorized to adopt those materials. That decision, however, is a decision left to the school district and is not mandated by the state.

Accordingly, the Commission finds that Education Code section 60048, as added in 1999, does not impose a state-mandated new program or higher level of service on school districts.

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[45] Education Code section 60200(c)(5) is referenced in section 60048(b) and states the following:

> Materials, including illustrations, that contain a commercial brand name, product, or corporate or company logo may not be used unless the board determines that the use of the commercial brand name, product, or corporate or company logo is appropriate based on one of the following specific findings:
>
> (A) If text, the use of the commercial brand name, product, or corporate or company logo in the instructional materials is necessary for an educational purpose, as defined in the guidelines or frameworks adopted by the state board.
>
> (B) If an illustration, the appearance of a commercial brand name, product, corporate or company logo in an illustration in instructional materials is incidental to the general nature of the illustration.

c. SBE publication *Standards for Evaluation of Instructional Materials for Social Content* (2000 Ed.)

Claimant also pleads the SBE publication, "Standards for Evaluation of Instructional Materials for Social Content" (2000 ed.), which provides standards that the SBE must use when evaluating instructional materials for compliance with the social content statutes.[46] Claimant argues that the standards are also required to be used by local school district governing boards in their adoption of instructional materials for grades 9 to 12. Claimant cites passages from the publication that sound mandatory, such as:

> There are standards pertaining to age, disability and nutrition that are not referenced in statute. These standards are based on policies adopted by the State Board of Education. As such, the standards regarding those areas must be considered by those who review for compliance (Page 1.)
>
> Less than full compliance may be allowed under the following special circumstances. (Page 2.)
>
> The standards regarding adverse reflection and equal portrayal [of male and female roles] must be applied in every instance. The other standards require compliance when appropriate. (Page 3.)

Claimant cites similar passages on pages 4, 5, 6, 7, 8, 9, 10, and 12, concluding that "the text of the document is replete with orders, plans requirements, rules and regulations."

Both DOF and CDE argue that the SBE publication is not binding on school districts, and quote parts of it to that effect. CDE points out that on page iv of the forward it states "we encourage local educational agencies to review these standards carefully in their own selection of instructional materials." The DOF points out that on page 2 it states:

> The guidance in 'Standards for Evaluating Instructional Materials for Social Content' is not binding on local educational agencies or other entities. Except for statutes, regulations, and court decision that are references herein, the document is exemplary, and compliance with it is not mandatory. (See Education Code Section 33308.5.)

Education Code section 33308.5, the statute referenced in the SBE publication (and in the paragraph above) states in relevant part the following:

> Program guidelines issued by the State Department of Education shall be designed to serve as a model or example, and shall not be prescriptive. Program guidelines issued by the department shall include written notification that the guidelines are merely exemplary, and that compliance with the guidelines is not mandatory.

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[46] California Code of Regulations, title 5, section 9518 states that "The social content standards in the publication entitled *Standards for Evaluating Instructional Materials for Social Content*, 2000 Edition, approved by the SBE on January 13, 2000, and maintained on the CDE website . . ., are incorporated in this section by reference and *apply to all SBE adoptions of instructional materials in all subjects*." (Emphasis added.)

The Commission finds that the SBE publication does not impose a state-mandated program on school districts. The document itself states that it is "exemplary" and "encourages" districts to comply with its provisions (pages iv & 2.) The mandatory provisions in the document pertain to the SBE's review, but are expressly not binding on school districts. Thus, the Commission finds that the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.) does not impose a state-mandated program on school districts.

4. Teacher and Parent Involvement when Selecting Instructional Materials (Ed. Code, § 60002)[47]

School district governing boards are required by Education Code section 60002 to "provide for substantial teacher involvement in the selection of instructional materials" and are required to "promote the involvement of parents and other members of the community in the selection of instructional materials."

These requirements do not impose a new program or higher level of service. In 1972, former Education Code section 9462 (Stats. 1972, ch. 929) required district boards to "provide for substantial teacher involvement and shall promote the involvement of parents and other members of the community in selecting instructional materials." This was renumbered to section 60262 by Statutes 1976, chapter 1010, and was the law at the time of the 1995 test claim statute, which repealed and replaced it with the current version of section 60002. Thus, the Commission finds that Education Code section 60002 (Stats. 1995, ch. 413) does not impose a new program or higher level of service.

5. Ordering Instructional Materials Directly from the Publisher (Former Cal. Code Regs., tit. 5, § 9530)[48]

Claimant seeks reimbursement for activities based on former section 9530 of the title 5 regulations, subdivisions (d) and (e). Section 9530 was repealed and replaced in 2008.[49] At the time of the 2003 test claim, the relevant provisions of section 9530 read as follows:

> Each school district shall purchase adopted instructional materials directly from publishers and manufacturers. With respect to the purchase of instructional materials by a school district, the publisher or manufacturer shall comply with the following requirements:
>
> [¶] . . . [¶]
>
> (d) A discontinuation of an instructional material before its adoption expiration date, or before eight years, whichever is less, may cause a hardship on the school districts by limiting the reorder availability of components necessary for the use of instructional materials sets or programs. Should the publisher or manufacturer discontinue to supply an instructional material before its adoption expiration date or before eight years, whichever is less, without prior written approval from the

[47] Statutes 1995, chapter 413.

[48] Register 95, No. 3, (Dec. 30, 1994).

[49] Register 2008, No. 10 (April 2, 2008). The Commission makes no findings on this 2008 version of section 9530 that is not part of the test claim.

district, upon receipt of written notice from the district, the publisher or manufacturer shall buy back, from all school districts having received the program, set, or system within the adoption period of the program, set, or system, all components of the instructional materials program, set, or system in which the discontinued item was designed to be used. The publisher shall buy back the instructional materials program, set, or system at the price in effect pursuant to the purchase order or agreement at the time the particular material from the program, set, or system is discontinued.

(e) The failure of the publisher or manufacturer to perform under the term of any purchase order or agreement by late or nondelivery of instructional materials, or the discontinuation to supply materials without prior approval by the Board and the delivery of unauthorized materials will disrupt and delay the intent of the school district's educational process, causing loss and damage to the school, its students, and the public interest. It is difficult to assess and fix the actual damages incurred due to the failure of the publisher or manufacturer to perform. Therefore, the publisher or manufacturer shall comply with any of the following requirements made by the school districts pursuant to this section as compensating or liquidating damages and not as penalties:

(1) For purposes of this subdivision, unauthorized instructional materials are those that do not appear in exact description and terms in the purchase order or agreement or are materials that have not been approved for delivery to California schools in written notice to the publisher or manufacturer from the Board or Department.

Should the publisher or manufacturer deliver unauthorized instructional materials to the school district, on written notice from the district, the publisher or manufacturer shall comply with the following requirements:

(A) Withdraw the delivered unauthorized instructional materials from the school district.

(B) Replace the unauthorized instructional materials with authorized materials that are comparable in subject matter, quality, quantity, and price in the California schools.

(C) Incur all costs of transportation or any other costs involved to complete the transactions of withdrawing and replacing unauthorized materials.

(D) Complete the transactions of withdrawing unauthorized instructional materials and replacing them in the school district with comparable authorized materials within 60 calendar days of the receipt of written notice from the district.

(2) Should the publisher or manufacturer fail to deliver instructional materials within 60 days of the receipt of a purchase order from the school district and the publisher or manufacturer had not received prior written approval from the district for such a delay in delivery, which approval shall not be unreasonably withheld, the school district may assess as damages an amount up to five hundred dollars ($500) for each working day the order is delayed beyond sixty (60) calendar days. If late delivery results from circumstances beyond the control of the publisher or manufacturer, the publisher or manufacturer shall not be held liable. Pursuant to

this section, the maximum dollar amount that shall be assessed to the publisher or manufacturer by the school district from any individual purchase order shall be twenty thousand dollars ($20,000.00). Should the district take such action, the district shall give the publisher or manufacturer written notification of the delivery delay and the date commencing the accrual of dollar amounts to be assessed to the publisher or manufacturer.

Claimant requests reimbursement for the following activities based on this regulation:

- Purchase adopted instructional materials directly from publishers and manufacturers.
- Provide notice to a publisher or manufacturer demanding that it buy back, from the district a program, set, or system within the adoption period of the program, set or system, all components of the instructional materials program, set, or system when the publisher or manufacturer discontinues the supply of instructional material before its adoption expiration date or before eight years, whichever is less.
- Demand that a publisher or manufacturer, who has failed to perform under the term of any purchase order or agreement, has failed to deliver instructional materials, has discontinued to supply materials without prior approval of the district, or has delivered unauthorized materials, comply with the following requirements:
    1) Should the publisher or manufacturer deliver unauthorized instructional materials to the school district, provide written notice to the publisher or manufacturer to comply with the requirements of section 9530(e)(1).
    2) Should the publisher or manufacturer fail to deliver instructional materials within 60 days of the receipt of a purchase order from the school district and the publisher or manufacturer had not received prior written approval from the district for such a delay in delivery, which approval shall not be unreasonably withheld, assess damages as provided in section 9530(e)(2).

CDE comments that districts have always been responsible for preparing their orders for instructional materials, although in the past, orders were sent to the state, which either printed the materials or forwarded the orders to publishers. The regulation simply directs districts to send their orders directly to publishers instead. According to CDE, the other provisions apply if a publisher has shipped incorrect materials, in which case the publisher is responsible for all retrieval and replacement costs. And the regulation provides for district assessments against the publisher if the publisher does not comply with specific shipping deadlines.

The Commission finds that ordering instructional materials is not a state-mandated new program or higher level of service because it is not a new activity. Former Education Code section 9463 (Stats. 1972, ch. 929) stated the following: "District board shall order state-adopted textbooks and instructional materials on forms prescribed by the Department of Education." This provision was moved to section 60263 by Statutes 1976, chapter 1010, and was repealed by Statutes 1995, chapter 413, effective January 1, 1996. The test claim regulation (former § 9530) was adopted in December 1994, before the 1995 repeal of Education Code section 60263. Thus, since 1972 the law has continuously required school districts to order instructional materials. There is nothing in the law to indicate that ordering instructional materials directly from the publisher or manufacturer provides a higher level of service to the public than ordering them through CDE.

Thus, the Commission finds that requiring school districts to order instructional materials in former California Code of Regulations, title 5, section 9530 is not a state-mandated new program or higher level of service.

The remaining activities of notifying and making demands on publishers are not mandated by the state. Subdivision (d) and (e)(1) of former section 9530 imposes requirements on publishers and manufacturers "upon receipt of" and "on written notice from the school district." These provisions do not, however, require school districts to provide the written notice unless the district makes the decision to invoke the remedies in the regulation, e.g., requiring the publisher to buy back instructional materials. Because providing the written notices would be based on a local decision of the school district, providing them is not a state mandate.[50]

Similarly, subdivision (e)(2) states that "the school district *may* assess as damages an amount up to five hundred dollars . . . . . [and] *Should the district take such action,* the district shall give the publisher or manufacturer written notification of the delivery delay and the date commencing the accrual of dollar amounts to be assessed to the publisher or manufacturer." [Emphasis added.] Use of the word "may" in the regulation is permissive,[51] so the activity is not mandated by the state.

Therefore, the Commission finds that former section 9530 of the title 5 regulations does not impose a state-mandated new program or higher level of service on school districts.

6. Requesting Authorization to Use Non-adopted Instructional Reading Materials for Grades K-3 (Cal. Code Regs., tit. 5, § 9535)[52]

Section 9535 of the title 5 regulations authorizes school districts to request authorization from the SBE to purchase non-adopted instructional materials for the district's core reading program in grades K-3 if the school district believes that none of the core reading materials adopted by the SBE in 1996 promotes the maximum efficiency of pupil learning. If the district decides to seek authorization to purchase non-adopted reading materials, the district is required by section 9535 to comply with the following activities:

> If, in the judgment of the governing board of a school district or a county office of education, none of the instructional materials adopted by the California State Board of Education in 1996 promotes the maximum efficiency of pupil learning in that local agency's core reading program, and if that governing board desires to purchase non-adopted materials with the funds apportioned to it pursuant to Education Code section 60351, it shall request authorization to do so from the California State Board of Education. The request shall include all of the following:
>
> (a) An overview of the goals and objectives of the local educational agency's core reading program for kindergarten and grades 1 to 3, inclusive, including a statement about how the goals and objectives were developed and a

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

[51] Education Code section 75.

[52] Register 97, No. 31 (July 31, 1997).

description of their consistency with "Teaching Reading: A Balanced, Comprehensive Approach to Teaching Reading in Prekindergarten through Grade Three" (Reading Program Advisory) jointly approved by the State Superintendent of Public Instruction, California State Board of Education, and the California Commission on Teacher Credentialing, and published by the California Department of Education in 1996.

(b) A list of the core reading program instructional materials proposed to be purchased, including titles of individual curricular units, literature, and technology resources.

(c) An analysis of the proposed materials, describing the strengths and weaknesses of the materials, including the local educational agency's rubrics, criteria, and standards used to evaluate the materials for consistency with the requirements of this section, including, in particular, subdivisions (j) and (k).

(d) A description of the process by which the proposed materials were evaluated and selected by the local educational agency.

(e) A description of the local educational agency's plans for staff development for teachers regarding the use of the proposed materials.

(f) A description of how the proposed materials will be used by the local educational agency's teachers.

(g) A description of the projected timeline for the purchase of the proposed materials.

(h) A description of the process used for public display of the proposed materials by the local educational agency, with a statement of assurance from the local educational agency that the materials have been or will be on public display for at least 30 days prior to their purchase, with all comments received during the display period being made part of the official records of the local educational agency's governing board.

(i) A statement of assurance from the district that the proposed materials are for use in kindergarten or any of grades 1 to 3, inclusive.

(j) A statement of assurance from the district that the proposed materials are based on the fundamental skills required by reading, including, but not limited to, systematic, explicit phonics and spelling, within the meaning of Education Code section 60200.4.

(k) A statement of assurance from the district that the proposed materials include, but are not necessarily limited to, phonemic awareness, systematic explicit phonics, and spelling patterns, accompanied by reading materials that provide practice in the lesson being taught, within the meaning of Education Code section 60352 (d).

(l) Evidence that the local educational agency's governing board:

(1) Formally approved the authorization request at a properly noticed public meeting.

(2) Supports the use of the specified funds for the purpose expressed in the request.

(3) Verified that the local educational agency's considered the California State Board of Education adopted materials for its core reading program and considered the reasons given by the California State Board of Education for not adopting the materials proposed for purchase, if those materials were submitted for adoption in 1996.

(4) Verified that the proposed materials comply with Education Code sections 60040, 60041, 60042, 60044, 60045, and 60046.

(5) Verified that all statements of assurance included within the request for authorization are true and correct.

CDE asserts that this regulation is not a state mandate, but a voluntary option offered to school districts in order to provide some flexibility in their adoption of materials.

Claimant argues that school districts having the "option" and "flexibility" to purchase materials that do not offer the maximum efficiency for pupil learning, is not an option. Districts have the obligation to request the use of non-adopted materials when necessary to educate pupils.

The Commission finds that section 9535 of the title 5 regulations does not impose a state-mandated program on school districts. School districts are not legally compelled by the state to purchase non-adopted instructional reading materials, nor has claimant provided evidence in the record to indicate that school districts are practically compelled to use the option provided by section 9535.[53] Therefore, the Commission finds that section 9535 of the title 5 regulations does not impose a state-mandated new program or higher level of service.

7. Disposing of Instructional Materials (Ed. Code, §§ 60501, 60510.5, 60521)

Education Code section 60500 provides that school districts may dispose of obsolete instructional materials in accordance with the rules, regulations and procedures they were required to have previously adopted for determining when instructional materials are obsolete. The claimant pleads sections 60501, 60510.5 and 60521, which further implement the disposal of instructional materials.

a. Education Code section 60501 (Stats. 2000, ch. 461)

Education Code section 60501 was added by the Legislature in 2000 to provide the following:

> A school district may review instructional materials to determine when those materials are obsolete pursuant to the rules, regulations, and procedures, adopted pursuant to Section 60500 and may report the results of its review and staff recommendations at a public meeting of the school district governing board.

[53] *Kern High School Dist., supra,* 30 Cal.4th 727, 742; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1268.

Both CDE and DOF point out that this provision is not a state mandate because the language is permissive.

Claimant argues that "having been required to adopt rules, regulations and procedures for determining obsolescence [by Ed. Code, § 60500] it is not a valid argument to then say that abiding by rules, regulations and procedures is permissive."

The Commission finds that section 60501 (Stats. 2000, ch. 461) does not impose a state-mandated activity on school districts. The plain language is permissive: "A school district *may* review instructional materials . . . and *may* report the results . . . ." The use of the word "may" in a statute is permissive.[54] Moreover, school districts would be required to comply with their own rules and regulations without the test claim statute.

This conclusion that the statute is permissive is bolstered by the statute's legislative history. As introduced, the language stated that school districts "shall" review instructional materials. It was amended in the Senate on August 25, 2000 to the permissive "may." When it was sent back to the Assembly for concurrence, the analysis stated:

> The Senate amendments eliminate the appropriation from this bill. They also no longer "require" school districts to review instructional materials, but rather "permit" school districts to review the materials. The school districts "may" then report the results of their review and staff recommendations at a public meeting of the school district governing board.[55]

California courts have consistently held that "rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out."[56] The mandatory "shall" in the original version of AB 2236 was rejected by the Legislature in favor of the permissive "may" in the final version, so the statute may not be interpreted as though it still contained a "shall."

Thus, the Commission finds that Education Code section 60501 (Stats. 2000, ch. 461) does not impose a state-mandated program on school districts.

b. Education Code section 60510.5 (Stats. 1991, ch. 1028)

According to preexisting law, Education Code section 60510 gave school districts the discretion to dispose of surplus or undistributed obsolete instructional materials that are usable for educational purposes by either: (a) donation to any governing board, county free library, or other state institution; (b) donation to any public agency or institution of any territory or possession of the United States, or the government of any country that formerly was a territory or possession of the United States; (c) donation to any nonprofit charitable organization; (d) donation to children or adults in the State of California or foreign countries to increase the general literacy of the

[54] Education Code section 75.

[55] Assembly Floor, Analysis of Assembly Bill No. 2236 (1999-2000 Reg. Sess.) as amended August 25, 2000, page 1.

[56] *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107.

people; or (e) sale to any organization that agrees to use the materials solely for educational purposes.[57]

If the school district exercises the discretion to dispose of the materials pursuant to section 60510, the test claim statute, Education Code section 60510.5 (Stats. 1991, ch. 1028) "encourages" the following activities:

> (a) Prior to the disposition by a school district of any instructional materials pursuant to Section 60510, the school district governing board is encouraged to do both of the following:
>
> (1) No later than 60 days prior to that disposition, notify the public of its intention to dispose of those materials through a public service announcement on a television station in the county in which the district is located, a public notice in a newspaper of general circulation published in that county, or any other means that the governing board determines to reach most effectively the entities described in subdivisions (a) to (e), inclusive, of Section 60510.
>
> (2) Permit representatives of the entities described in subdivisions (a) to (e), inclusive, of Section 60510 and members of the public to address the governing board regarding that disposition.
>
> (b) This section does not apply to any school district that, as of January 1, 1992, had in operation a procedure for the disposition of instructional materials pursuant to Section 60510.

Claimant requests reimbursement for the activities of providing notice and permitting the specified representatives to address the governing board as provided in this statute.

Both CDE and DOF argue that this provision is permissive and imposes no state mandate.

The Commission finds that section 60510.5 does not impose a state-mandated program on school districts. According to the statute's plain language, school districts *"are encouraged"* to notify the public or permit the specified representatives and members of the public to address the governing board once the district decides to dispose of the materials, but are not required to do so. Therefore, the Commission finds that section 60510.5 (Stats. 1991, ch. 1028) does not impose a state-mandated new program or higher level of service.

c. Education Code section 60521 (amended by Stats. 1995, ch. 413)

Education Code section 60521 governs how school districts may use proceeds from the sale of instructional materials. The statute was originally derived from former Education Code section 9861, which was added by the Legislature in 1972 to provide the following:

> Any money received by a district board from the sale of obsolete instructional materials pursuant to the provisions of this chapter shall be deposited in any such

[57] Education Code section 60510 was derived from former Education Code section 9820 (Stats. 1972, ch. 929).

fund of the school district as the district board prescribes and shall be used for school district purposes.[58]

Former section 9861 was renumbered to section 60521 in 1976[59] and was substantively amended by the 1995 test claim statute as follows (the amendments are reflected in strikeout and underline):

> Any money received by the governing board of a school district ~~board~~ from the sale of ~~obsolete~~ instructional materials pursuant to ~~the provisions of~~ this ~~chapter~~ code shall be ~~deposited in any such fund of the school district as the district board prescribes and shall be~~ used ~~for school district purposes~~ to purchase instructional materials.

Thus, under prior law, money received from the sale of instructional materials could be used for any school district purpose. The 1995 amendment to the statute restricts the use of the money and now allows it to be used only to purchase instructional materials.

Claimant requests reimbursement to use "any money received by the governing board of a school district from the sale of instructional materials to purchase instructional materials." Claimant further argues that the Legislature's redirection of revenue imposes a state requirement that is fully reimbursable because funds can no longer be used for any school district purpose.

The DOF states that the statute restricts the use of money received from the discretionary sale of instructional materials and therefore the statute does not impose a state-mandated activity.

The Commission finds that Education Code section 60521, as amended in 1995, does not impose a state- mandated new program or higher level of service. As indicated above, the sale of instructional materials is within the discretion of a school district. Section 60521 restricts the school district's use of the money received from the sale, but it does not impose a state-mandated activity. Moreover, the courts have held that reallocating resources or losing flexibility in a program is not a reimbursable state mandate.[60]

Thus, the Commission finds that Education Code section 60521 (Stats. 1995, ch. 413) does not impose a state-mandated new program or higher level of service.

B. Categorical funding programs for the purchase of textbooks and instructional materials

The statutes and regulations at issue in this part of the analysis provide categorical funding for the purchase of textbooks and other instructional materials for K-12 pupils. The claimant has pled the statutes and regulations as they were enacted from 1982 through 2002 that implement the SIMF, the State Instructional Materials Fund Incentive Program that provided supplemental funding under the SIMF account, and the IMFRP.

The SIMF was the first program adopted by the Legislature in 1972 to help fund the purchase of textbooks and instructional materials, and its statutes have been amended many times. In 2002, the Legislature enacted the IMFRP, which, for purposes of funding, took effect at the beginning

[58] Statutes 1972, chapter 929.

[59] Statutes 1976, chapter 1010.

[60] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.

of the 2002-2003 fiscal year.[61] The IMFRP was part of the Governor's proposal to consolidate the categorical funds and the requirements from the SIMF program into one categorical program.

Since the period of reimbursement for this claim begins in fiscal year 2002-2003, the analysis of the activities required by the IMFRP in the period of reimbursement is provided below. In addition, the State Instructional Materials Fund Incentive Account was in effect until it was made inoperative on January 1, 2003 (six months after the start of the period of reimbursement for this claim) and, thus, that program is analyzed below for that limited time period.

1. Instructional Materials Funding Realignment Program[62]

In 2002, the Legislature enacted the IMFRP (Ed. Code, §§ 60420-60424), which, for purposes of funding, took effect at the beginning of the 2002-2003 fiscal year.[63] The program was part of the Governor's proposal to consolidate categorical funds from the SIMF into one categorical program. The main purpose of the IMFRP was to provide a source of funding for the purchase of standards-aligned materials in the core subject areas of English-language arts, mathematics, history-social science, and science.[64]

The IMFRP requires CDE to apportion funds appropriated for purposes of the chapter to school districts on the basis of an equal amount per pupil enrolled in grades K-12 in the prior year. Enrollment is certified by the SPI and is based on the data reported by the California Basic Education Data System (CBEDS) count. Schools in their first year of operation and those that have expanded grade levels are eligible for the funding based on enrollment estimates provided by the school district to CDE. "As a condition of receipt of funding" a school district in its first year of operation or of expanding grade levels at a schoolsite is required to provide enrollment estimates, as approved by the governing board of the school district. These estimates provided by the new school or school that expanded its grades, and the associated funding are then adjusted for actual enrollment as reported by the subsequent CBEDS report.[65]

The Legislature directed the Controller to transfer from the General Fund to the State Instructional Materials Fund for instructional materials for grades K to 8, and for grades 9 to 12, the amount to be allocated under the IMFRP.[66] Education Code section 60248 restricts the use of the funding apportioned for instructional materials for grades 9 to 12 "solely for the purchase of instructional materials for pupils in grades 9 to 12, inclusive."

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[61] Education Code section 60424 (Stats. 2002, ch. 802).

[62] Education Code sections 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424 (Stats. 1982, ch. 1503; Stats. 1983, ch. 498; Stats. 1985, chs. 1440, 1470, 1546; Stats. 1987, ch. 1452; Stats. 1999, ch. 646; Stats. 2002, ch. 802); California Code of Regulations, title 5, sections 9505, 9531, and 9532.

[63] Education Code section 60424 (Stats. 2002, ch. 802).

[64] Office of the Legislative Analyst, "Analysis of the 2003-2004 Budget Bill."

[65] Education Code section 60421; California Code of Regulations, Title 5, section 9532.

[66] Education Code sections 60246.5, 60247.5. (Stats. 2002, ch. 802.) Section 60247 apportions to each school district $14.41 per pupil enrolled in grades 9 to 12 for the purpose of purchasing textbooks and instructional materials.

School districts must meet the IMFRP requirements "in order to continue to receive IMFRP funding."[67] Education Code section 60422(a) and (b) lay out the requirements of the program. School districts must (1) comply with Education Code section 60119, and (2) certify that IMFRP funds have been used by the district to provide standards-aligned instructional materials in the core curriculum areas of reading/language arts, mathematics, science, and history-social sciences for all students. School districts may spend any remaining funds from the program for other approved purposes outlined in Education Code sections 60242 and pursuant to 60242.5.[68]

Pursuant to Education Code section 60119, in order to receive instructional materials funding from any state source, school districts are required to hold an annual public hearing and adopt a resolution stating whether each pupil in the district has sufficient textbooks or instructional materials in years when the SPI determines that the base revenue limit for each school district will increase by at least one percent per unit of ADA from the prior fiscal year.[69] Section 60119 requires the following:

- Hold an annual public hearing or hearings at which the governing board shall encourage participation by parents, teachers, members of the community interested in the affairs of the school district, and bargaining unit leaders, and shall make a determination, through a resolution, as to whether each pupil in each school in the district has, or will have prior to the end of that fiscal year, sufficient textbooks or instructional materials, or both, in each subject that are consistent with the content and cycles of the curriculum framework adopted by the state board.

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[67] CDE, "Instructional Materials FAQ, Instructional Materials Funding Realignment Program (IMFRP) and Williams Case FAQ and Answers," as of July 18, 2012.

[68] Education Code section 60422(a), as added by the 2002 test claim statute, requires school districts to use the funding received under the IMFRP to ensure that each pupil is provided with standards-aligned textbooks or basic instructional materials, as adopted by the State Board of Education, after the adoption of content standards, for grades 1 to 8 or as adopted by the local school district for grades 9 to 12. Pupils shall be provided with standards-aligned textbooks or basic instructional materials by the beginning of the first school term that commences no later than 24 months after the materials were adopted by the State Board of Education.

Education Code section 60422(b) requires that "once a governing board certifies compliance with subdivision (a) [that it used the money to provide each pupil with standards-aligned textbooks or basic instructional materials] in the core curriculum areas of reading/language arts, mathematics, science, and history-social sciences, and if the governing board of a school district has met the eligibility requirements of Section 60119, the remaining funds may only be used consistent with subdivision (a) of Section 60242 and pursuant to Section 60242.5."

[69] The statutory language requiring school districts to hold a hearing only in years when the SPI determines that the base revenue limit for each school district will increase by at least one percent per unit of ADA from the prior fiscal year was removed in 2009. (Stats. 2009, 3d Ex Sess. ch. 12.) School districts are now required to hold a hearing each year. The 2009 statute has not been pled in this test claim and is not analyzed here.

- Notice of the hearing must be provided ten days before the hearing. The notice shall contain the time, place, and purpose of the hearing and shall be posted in three public places in the school district.[70]
- If the governing board determines that there are insufficient textbooks or instructional materials, or both, the governing board shall (1) provide information to classroom teachers and to the public setting forth the reasons that each pupil does not have sufficient textbooks or instructional materials, or both, and (2) take any action, except an action that would require reimbursement by the Commission on State Mandates, to ensure that each pupil has sufficient textbooks or instructional materials, or both, within a two-year period from the date of the determination.[71, 72]

School districts may use any funds available for textbooks and instructional materials from categorical programs appropriated in the budget, funds in excess of the amount needed during the prior fiscal year to purchase textbooks or instructional materials, and any other funds available to the school district for textbooks and instructional materials to ensure that each pupil has sufficient textbooks or instructional materials within a two-year period from the date the governing board determines there are insufficient materials.[73]

Education Code section 60242(a) specifies the priority use of IMFRP funds. The first priority is the purchase of standards-aligned textbook or basic instructional materials in reading/language arts, mathematics, history-social science, and science. If the district can certify that every pupil will be provided with these materials in the four core curriculum areas with the IMFRP funds, as is required by section 60422, then the district may use the remaining funds "for the visual and performing arts, foreign language, health, or other curricular area if those materials are adopted by the state board pursuant to Section 60200 for kindergarten and grades 1 to 8, inclusive, or by the governing board pursuant to Section 60400 for grades 9 to 12, inclusive." If funds still remain, the school district may use the funds as follows:

- To purchase, at the discretion of the district, supplementary instructional materials and technology-based materials;
- To purchase tests;

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[70] Education Code section 60119(b).

[71] Education Code section 60119(a).

[72] Section 9531 of the CDE regulations clarifies some of the statutory terms in Education Code sections 60422 and 60119, but does not, itself, impose any requirements. For example, section 9531(b) states that "for purposes of the hearing requirement specified by Education Code Section 60119, textbooks or instructional materials used in kindergarten and grades 1 to 8 shall be considered 'consistent with the content and cycles of the curriculum framework adopted by the state board' if students are provided textbooks or instructional materials from the most recent SBE adoption by the beginning of the first school term that commences no later than 24 months after those materials are adopted by the SBE pursuant to Education Code section 60422."

[73] Education Code section 60119(a)(2)(B).

- To bind basic textbooks;
- To fund in-service training related to instructional materials; and
- To purchase classroom library materials for kindergarten and grades 1 to 4.

If a school district uses the funds to purchase in-service training related to instructional materials, section 9505 of CDE regulations restricts the use of the money by stating the following: "No cash allotment authorized by Education Code Section 60242(b) for purchase of in-service training shall be expended for salaries or for travel or for per diem expenses of district employees during or attendant to participation in such in-service training."

If a school district uses the funds to purchase classroom library materials, it is required to comply with the following requirements in section 60242(d):

> (d)(1) A school district that purchases classroom library materials, shall, *as a condition of receiving funding under this article*, develop a districtwide classroom library plan for kindergarten and grades 1 to 4, inclusive, and shall receive certification of the plan from the governing board of the school district. A school district shall include in the plan a means of preventing loss, damage, or destruction of the materials.
>
> (2) In developing the plan required by paragraph (1), a school district is encouraged to consult with school library media teachers and primary grade teachers and to consider selections included in the list of recommended books established pursuant to Section 19336. If a school library media teacher is not employed by the school district, the district is encouraged to consult with a school library media teacher employed by the local county office of education in developing the plan. A charter school may apply for funding on its own behalf or through its chartering entity. Notwithstanding Section 47610, a charter school applying on its own behalf is required to develop and certify approval of a classroom library plan.

Education Code section 60242.5 requires school districts to deposit allowances received from the IMFRP in a separate account. The allowances may only be used for the purchase of the instructional materials outlined in section 60242. Section 60242.5 further requires the school district superintendent to provide written assurance that all purchases of instructional materials made with IMFRP funds conforms to law. The SPI may withhold the funding allowance for any district that fails to file a written assurance. Section 60242 states the following:

> All purchases of instructional materials made with funds from this account shall conform to law and the applicable rules and regulations adopted by the state board, *and the district superintendent shall provide written assurance of conformance to the Superintendent of Public Instruction*. The Superintendent of Public Instruction may withhold the allowance established pursuant to Section 60242 for any district which has failed to file a written assurance for the prior fiscal year. The Superintendent of Public Instruction may restore the amount withheld once the district provides the written assurance.

These requirements are subject to the Controller's audit and review, which may be appealed to the Education Audit Appeals panel.[74] Substantial "compliance with all legal requirements is a condition to the state's obligation to make apportionments" of these funds.[75]

The claimant seeks reimbursement for the activities described above. The Commission finds, however, that these activities are not mandated by the state, but are required as a condition of receiving funds.

In 2003, the California Supreme Court decided *Kern High School Dist.* and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[76] In *Kern High School Dist.*, school districts participated in various education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and utilize school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.[77]

When analyzing the term "state mandate," the court reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[78]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have

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[74] Education Code sections 14502.1, 41020, 41344.1; California Code of Regulations, Title 5, sections 19828 et seq. (dealing with instructional materials).

[75] Education Code section 41344.1(c).

[76] *Kern High School Dist., supra,* 30 Cal.4th 727.

[77] *Id.* at page 730.

[78] *Id.* at page 743. (Emphasis in original.)

participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[79]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.[80]

Similarly here, school districts are not legally compelled by the state to comply with the requirements of the IMFRP. Rather, school districts make a local decision to perform the activities in order to receive funding. A local decision requiring a school district to incur costs does not constitute a state mandate.[81] The plain language of Education Code section 60421 states that the requirements are imposed as a condition of receipt of funding. Section 60422 authorizes the use of the funds, which the district "may use" to purchase instructional materials in the core curriculum subjects and, any remaining funds may be used for in-service training on instructional materials and classroom library materials.[82] Education Code section 60119 also states that "in order to be eligible to receive funds," the governing board of a school district must comply with the textbook sufficiency hearing. Audits are performed on a district's use of the funding and compliance with the requirements. Substantial compliance with all legal requirements is "a condition" to the state's obligation to make apportionments of the funds. Moreover, CDE interprets the IMFRP as imposing requirements "in order to continue to receive IMFRP funding."[83] The construction given to a statute by the administrative officials charged with its enforcement or implementation is entitled to great weight.[84]

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[79] *Id.* at page 731. (Emphasis added.)

[80] *Id.* at pages 744-745.

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

[82] As indicated above, Education Code section 60242 requires school districts to develop a library plan before they use IMFRP funding for the purchase of classroom library materials. The development of a library plan pursuant to Education Code section 60242 does not mandate a new program or higher level of service. State law does not require school districts to purchase classroom library materials. Moreover, immediately before the enactment of the 2002 test claim statute, school districts were required by former Education Code section 18201 to develop a classroom library plan in order to apply for and receive state funding under the Classroom Library Materials Act of 1999. The Classroom Library Materials Act of 1999 was repealed by the 2002 test claim statute and its provisions moved to Education Code section 60242. (Senate Rules Committee, Office of Senate Floor Analyses, Analysis of AB 1781 (2001-2002 Reg. Sess.) amended August 27, 2002, page 1.)

[83] CDE, "Instructional Materials FAQ, Instructional Materials Funding Realignment Program (IMFRP) and Williams Case FAQ and Answers," as of July 18, 2012.

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

Moreover, there is no evidence that school districts are practically compelled by the state to comply with these funding requirements. In *Kern High School Dist*., the school districts urged the court to define "state mandate" broadly to include situations where participation in the program is practically compelled; where the absence of a reasonable alternative to participation creates a "de facto" mandate.[85] The court previously applied such a construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the court considered whether state statutes enacted as a result of various federal "incentives" for states to extend unemployment insurance coverage to public employees constituted a reimbursable state-mandated program under article XIII B, section 6. The court in *City of Sacramento* concluded that the costs resulted from a federal mandate because the financial consequences to the state and its residents of failing to participate in the federal plan (full, double unemployment taxation by both state and federal governments) were so onerous and punitive; amounting to "certain and severe federal penalties" including "double taxation" and "other "draconian" measures.[86]

Although the court in *Kern High School Dist*. declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies – the court stated: "In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[87]

However, the court in *Kern High School Dist*. found that the facts before it failed to amount to such a "de facto" mandate since a school district that elects to discontinue participation in one of the educational funding programs at issue did not face "certain and severe" penalties such as "double … taxation" or other "draconian" consequences, but simply must adjust to the loss of program funding. The court concluded that:

> [T]he circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants' phrasing, a "de facto" reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento* … a claimant that elects to discontinue participation in one of the programs here at issue does not face "certain and severe … penalties" such as "double … taxation" or other "draconian" consequences … but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of article XIII B, section 6.[88]

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[85] *Kern High School Dist., supra,* 30 Cal.4th 727, 748.

[86] *City of Sacramento, supra,* 50 Cal.3d 51, 74; *Kern High School Dist., supra,* 30 Cal.4th 727, 750.

[87] *Kern High School Dist., supra,* 30 Cal.4th 727, 752.

[88] *Id*. at page 754.

The court acknowledged that a participant in a funded program may be disappointed when additional requirements are imposed as a condition of continued participation in the program. Such conditions, however, do not make the program mandatory or reimbursable under article XIII B, section 6:

> Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstances that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary.[89]

The court's reasoning applies here. If a school district decides not to participate in the IMFRP, 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 its right to continue to receive funding to assist the school district in paying for textbook and instructional material costs.

The claimant, however, argues that compliance with the IMFRP is required. The claimant notes that a pupil's constitutional right to an equal educational opportunity may be impaired if every pupil does not have access to textbooks or instructional materials in each subject area and that the compliance with the IMFRP is required in order to carry out the preexisting constitutional and statutory requirement to provide students with textbooks or instructional materials at no cost to the student. [90]

There is no evidence in the record, however, to support a finding that a pupil's constitutional right to education is impaired if a school district does not comply with the IMFRP and receive that additional funding. School districts also receive revenue limit apportionments based on the average daily attendance of the students that can be used to purchase textbooks and instructional materials. Lottery funds[91] and revenues from the sale of obsolete materials[92] are also available

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[89] *Id.* at pages 753-754.

[90] Article IX, section 7.5 of the California Constitution provides that "The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute." Education Code section 60411 governs instructional materials for high school students and similarly provides that the books be provided to pupils at no charge. The statute states that:

The district board of each high school district shall purchase textbooks and may purchase supplementary books for the use of pupils enrolled in the high schools of the district. The textbooks and supplementary books shall at all times remain the property of the district, and shall be supplied to pupils for use without charge.

[91] Government Code section 8880.4(a)(2)(B), as added by Proposition 20, The Cardenas Textbook Act of 2000 (March 7, 2000 election).

for the purchase of textbooks and instructional materials. There is no evidence in the record that this existing funding fails to provide sufficient funds to purchase textbooks and instructional materials for students, or that participation in the IMFRP is the *only* reasonable means of carrying out the core mandatory function of providing sufficient textbooks and instructional materials to each pupil.[93]

Accordingly, the Commission finds that Education Code sections 60119, 60242, 60242.5, 60248, 60421, 60422, 60423, 60424[94], and California Code of Regulations, title 5, sections 9505, 9531, and 9532 do not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

2. Pupil Textbook and Instructional Materials Incentive Account[95]

In 1994, the Legislature created the Pupil Textbook and Instructional Materials Incentive Account within the SIMF to provide supplemental funding to school districts for textbooks and instructional materials, by adding Education Code section 60252.[96] That statute was in effect until the 2002 test claim statute, which made section 60252 inoperative on January 1, 2003 (six months after the start of the period of reimbursement for this claim).[97] The money in the account is allocated to K-12 school districts that "satisfy each of the following criteria:"

> (1) A school district shall provide assurance to the Superintendent of Public Instruction that the district has complied with Section 60119 [as described above].
>
> (2) A school district shall ensure that the money will be used to carry out its compliance with Section 60119 and shall supplement any state and local money that is expended on textbooks or instructional materials, or both.

Compliance with section 60119 is required to receive the supplemental funding under this program. School districts are not legally compelled to comply. Moreover, as described in the

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[92] Education Code section 60521.

[93] *Department of Finance v. Commission on State Mandates, supra,* 170 Cal.App.4th 1355, 1368.

[94] Statutes 1982, chapter 1503, Statutes 1983, chapter 498, Statutes 1985, chapters 1440, 1470, and 1546, Statutes 1987, chapter 1452, Statutes 1999, chapter 646, Statutes 2002, chapter 802.

[95] Education Code section 60252 (Stats. 1994, ch. 927; Stats. 2002, ch. 802.)

[96] Statutes 1994, chapter 927.

[97] Statutes 2002, chapter 803 added subdivision (d) to section 60252, which stated: "This section shall become inoperative on January 1, 2003, and, as of January 1, 2007, is repealed, unless a later enacted statute that becomes operative on or before January 1, 2007 deletes or extends the dates on which it becomes inoperative and is repealed." In 2004, the Legislature deleted subdivision (d), making the statute operative again (Stats. 2004, ch. 900, S.B. 550). The 2004 statute, however, is not pled in this test claim and no findings on Education Code section 60252, as amended by the 2004 statute, are made in this analysis. The 2004 statute is included in the *Williams Case Implementation I* test claim (05-TC-04) and will be analyzed there.

analysis above, there is no evidence in the record that school districts are practically compelled by the state to comply with sections 60252 and 60119 and seek supplemental funding to provide sufficient textbooks and instructional materials to their pupils. Accordingly, the Commission finds that Education Code section 60252[98] does not impose a state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

IV. Conclusion

For the reasons discussed above, the Commission concludes that the test claim statutes, regulations, and the *Standards for Evaluation of Instructional Materials for Social Content* (2000 ed.), 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.

[98] Statute 1982, chapter 1503, Statutes 1983, chapter 498, Statutes 1985, chapters 1440, 1470, and 1546, Statutes 1987, chapter 1452, Statutes 1999, chapter 646, Statutes 2002, chapter 802.

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

Instructional Materials Funding Requirements, 03-TC-07
Education Code Sections 60000 et al.
Castro Valley Unified School District, Claimant

On September 28, 2012, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: October 4, 2012

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Penal Code Sections 830.6 and 832.6 As Added and Amended by Statutes 1977, Chapter 987; Statutes 1979, Chapter 987; Statutes 1980, Chapters 1301 and 1340; Statutes 1982, Chapter 79; Statutes 1983, Chapter 446; Statutes 1984, Chapter 761; Statutes 1986, Chapter 160; Statutes 1988, Chapter 1482; Statutes 1989, Chapters 594 and 1165; Statutes 1990, Chapter 1695; Statutes 1991, Chapter 509; Statutes 1993, Chapters 169 and 718; Statutes 1994, Chapters 117 and 676; Statutes 1993-94 Extra Session, Chapter 26; Statutes 1995, Chapter 54; Statutes 1996, Chapter 1142; Statutes 1997, Chapter 127; Statutes 1998, Chapter 190; Statutes 1999, Chapter 111; Statutes 2000, Chapter 287; and Statutes 2001, Chapter 473; Post Administrative Manual, Section B (January 2003 Version); Filed on September 26, 2003, By City of Kingsburg, Claimant.	Case No.: 03-TC-15 *Reserve Peace Officer Training* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 28, 2012*) (*Served October 4, 2012)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 28, 2012. Juliana Gmur appeared on behalf of the claimant, City of Kingsburg. Randy Ward and 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 staff analysis to deny the test claim at the hearing by a vote of 7 to 0.

Summary of the Findings

In order for the test claim statutes and alleged executive order to impose a reimbursable state-mandated program, the statutory language must mandate an activity or task on local government. If the statutory language does not impose a mandate on local government, then article XIII B, section 6 of the California Constitution is not triggered and reimbursement is not required.

In addition, the courts have determined that a reimbursable state-mandated program does not exist when a local entity incurs costs for activities required by the state as part of a program that the local entity "voluntarily" participates, as long as the participation is without legal compulsion and there is no evidence that the entity is practically compelled to participate in the program. Practical compulsion may exist and result in a mandate under article XIII B, section 6, if the state imposes certain and severe penalties (independent of the loss of program funding), such as "double taxation or other draconian consequences" upon a local entity that declines to participate in the program. In such cases, a concrete showing by the claimant of the "certain and severe" penalty or other adverse consequence is required to find that local government may be practically compelled and, thus, mandated under article XIII B, section 6 to incur the increased costs.

In this case, the Commission finds that the test claim statutes and alleged executive order do not impose a state-mandated program on local law enforcement agencies for the following reasons:

1. Local law enforcement agencies, including cities and counties, are not mandated by the state to appoint or designate reserve peace officers or to provide the required training to reserve peace officers.

   - Local law enforcement agencies, including cities and counties, are not required by state law to appoint or designate volunteer reserve peace officers. The volunteer reserve officers appointed and used by the claimant in this case saves the city resources by not having to hire more full-time regularly employed peace officers. Thus, the claimant, and other local law enforcement agencies that have discretion with respect to the use of reserve peace officers, will make the choices that are ultimately the most beneficial for the agency and its community.

   - Even if it were found that a city, county, or other local entity was practically compelled to appoint reserve peace officers, state law does not require local law enforcement agencies to provide or pay for reserve peace officer training. Rather, the obligation to get trained is on the individual seeking reserve peace officer status and on those individuals seeking to continue their designation or appointment as a reserve officer.

2. School districts, community college districts, and special districts are not mandated by the state to maintain a police department and appoint reserve peace officers.

   School districts, community college districts, and special districts do not have the provision of police protection as an essential and basic function and are not legally compelled by the state to comply with new statutory duties imposed with respect to police protection services. Moreover, there is no evidence that the districts, as a practical matter, are required to exercise the authority to maintain a police department and hire peace officers, rather than rely on the general law enforcement resources of a county or city.

COMMISSION FINDINGS

Chronology

09/26/2003 Claimant, City of Kingsburg, filed the test claim with the Commission on State Mandates (Commission) [1]

11/07/2003 Commission staff issued a completeness review letter for the test claim and requested comments from state agencies

10/28/2003 The Commission on Peace Officer Standards and Training (POST) filed comments on the test claim[2]

12/16/2003 Department of Finance (DOF) filed comments on the test claim[3]

05/08/2012 Draft staff analysis issued[4]

05/29/2012 DOF files comments agreeing with draft staff analysis[5]

09/11/2012 Final staff analysis and proposed statement of decision issued

I. Background

This test claim addresses the basic and continuing professional training requirements for reserve peace officers appointed by local law enforcement agencies of cities, counties, special districts, and school districts. According to the Commission on Peace Officer Standards and Training (POST), reserve peace officers are members of society that choose to dedicate a portion of their time to community service by working part-time or as volunteers with law enforcement agencies. These officers perform a number of general and specialized law enforcement assignments and work with full-time regular officers to provide law enforcement services. There are approximately 6200 reserve peace officers in the state. [6]

Since 1977, the Legislature has adopted standards for selection and training of reserve peace officers. The test claim statute, Penal Code section 830.6, provides that a person appointed or designated as a reserve officer is qualified and has the power of a peace officer only when the person meets the qualifications imposed by Penal Code section 832.6. Section 832.6 establishes three levels of reserve peace officers and identifies the training requirements and responsibilities for each level. All training requirements are prescribed and approved by POST. The claimant

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[1] Exhibit A. Based on the filing date of September 26, 2003, the potential period of reimbursement for this test claim begins on July 1, 2002.

[2] Exhibit B.

[3] Exhibit C.

[4] Exhibit D.

[5] Exhibit E.

[6] Exhibit F, POST Website, Summary of *Reserve Peace Officer Program*: <http://www.post.ca.gov/reserve-peace-officer-program-rpop.aspx>.

has also pled Section B of POST's Administrative Manual (PAM) in this test claim.[7] Section 1007(b) of the POST regulations that are contained in Section B of PAM details the training requirements for reserve peace officers.[8] The requirements and responsibilities of reserve peace officers are described below:

- Level I officers assigned to the general enforcement of the laws of the state must complete the basic training course for deputy sheriffs and police officers and the continuing professional training requirements prescribed by POST in order to exercise the powers of a peace officer. The Level I reserve officer may work alone if the officer completes a POST-approved field training program prior to working alone in a general law enforcement assignment.

  The duties of a Level I reserve officer includes such duties as investigation of crime, patrol of a geographic area, responding to requests for police services, and performing enforcement actions on a full range of law violations. Generally, the authority of a Level I reserve officer extends only for the duration of the person's specific assignment while on-duty.[9] However, if authorized by a local resolution or ordinance, the power and duties of a "designated" Level I reserve peace officer may be the same as a regular peace officer and extend to any place in the state when making an arrest for any public offense that presents immediate danger to person or property, or involves the escape of the perpetrator.[10]

- Level II officers must complete the basic training course for deputy sheriffs and police officers prescribed by POST, the continuing professional training requirements prescribed by POST, and any other training prescribed by POST.

  Level II officers may perform general law enforcement assignments while under the immediate supervision of a peace officer who has completed the Regular Basic Course. These officers may also work assignments authorized for Level III reserve officers without immediate supervision. The authority of a Level II reserve officer extends only for the duration of the person's specific assignment while on-duty.[11]

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[7] The POST Administrative Manual (PAM) is a document containing POST regulations and procedures, guidelines, laws, and forms relating to POST programs (Cal. Code Regs., tit. 11, § 1001(z) (PAM, p. B-4).)

[8] California Code of Regulations, title 11, section 1007 (PAM, pp. B-12 through B-15.)

[9] Penal Code sections 830.6(a)(1) and 832.6(a)(1).

[10] Penal Code sections 830.6(a)(2), 832.6(a)(1), and 830.1. A "regular officer" is defined in POST regulations as "a sheriff, undersheriff, deputy sheriff, regularly employed and paid as such, of a county, a police officer of a city, police officer of a district authorized by statute to maintain a police department, a police officer of a department or district enumerated in Penal Code Section 13507, or a peace officer member of the California Highway Patrol." (Cal. Code Regs., tit. 11, § 1001(ff); PAM, p. B-5.)

[11] Penal Code sections 830.6(a)(1) and 832.6(a)(2).

- Level III officers must complete training required by POST. A Level III reserve officer must be supervised by a Level I reserve officer or a full-time regular officer employed by a law enforcement agency authorized to have reserves.

  Level III reserve officers have limited duties that include traffic control, security at parades and sporting events, report taking, evidence transportation, parking enforcement, and other duties that are not likely to result in physical arrests. Level III reserve officers may transport prisoners without immediate supervision.[12]

The number of training hours required by POST for the basic training, field training, and continuing professional training of reserve peace officers is as follows:[13]

Level I Reserve Officers	Basic Training – 340 hours from 7/1/99 to 1/18/07; 394 hours beginning 7/1/08 Field Training - 400 hours Continuing Professional Training – at least 24 hours every two years
Level II Reserve Officers	Basic Training – 228 hours from 7/1/99 to 1/8/07; 189 hours beginning 7/1/08 Continuing Professional Training – at least 24 hours every two years
Level III Reserve Officers	Minimum Training – 162 hours from 7/1/99 to 1/18/07; 144 hours beginning 7/1/08

In addition, every school police reserve officer appointed by a K-12 school district on or after July 1, 2000, must complete a 32-hour POST-certified Campus Law Enforcement Course within two years of the date of first appointment.[14]

II. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant, the City of Kingsburg, is a small city located in the far southern reaches of Fresno County, surrounded by farm lands. Although the need for reserve police officers varies from agency to agency, the claimant has relied heavily for years on the services of "these volunteer employees" in order to provide adequate services to the citizens.[15]

[12] Penal Code sections 830.6(a)(1) and 832.6(a)(3).

[13] Exhibit F, PAM H-3, 4.

[14] California Code of Regulations, title 11, section 1007(c), section 1081(a)(20) (PAM B-46).

[15] Exhibit A, Test claim, page 6.

Claimant alleges that training requirements for reserve peace officers imposed by Penal Code sections 830.6 and 832.6, as amended by the test claim statutes, and section B of PAM constitute a reimbursable state-mandated program on local agencies. Specifically, claimant alleges the following:

- Penal Code section 830.6 requires that in order to be a properly qualified reserve peace officer, the conditions set forth in Penal Code section 832.6 must be met,[16] and
- Claimant is practically compelled to hire reserve police officers because it is small and has relied heavily for years upon these volunteer officers to provide adequate police services.[17]

Claimant is seeking reimbursement for the cost of instructors providing continual professional training and the cost of materials and supplies. Claimant estimates that the cost to provide continuing professional training over a two year period for 20 reserve officers is a minimum of $1,852.00.[18]

B. Department of Finance's Position

DOF argues that this claim should be denied because local agency participation in POST training programs is optional. Specifically, DOF states that local entities agree to participate in POST programs and comply with POST regulations by adopting a local ordinance or resolution pursuant to Penal Code sections 13522 and 13510. The rules that establish minimum standards of fitness and training apply only to local entities that receive state aid. Costs associated with participation in an optional program are not reimbursable state-mandated local costs.[19]

C. Commission on Peace Officer Standards and Training's Position

POST states that claimant voluntarily opted to become a participating agency in POST in 1970, when its city council adopted an ordinance agreeing to abide by POST Regulation 1010. However, Penal Code section 13523 limits reimbursement of POST training expenses to full-time employees, therefore training for reserve officers is not refundable under the POST program. POST also notes that several legislative attempts have been made to provide funding for reserve officer training, but no bill that would do this has ever made it out of policy

[16] Exhibit A, Test claim, page 4.

[17] Exhibit A, Test claim, pages 6-7.

[18] Exhibit A, Test claim, page 8. The claimant is not seeking reimbursement for costs incurred for the reserve officer to receive training. The reserve officers appointed by the claimant are not paid a salary. They do receive compensation for purchasing the first uniform, and an annual uniform allowance of $125. (Exhibit F, California Reserve Peace Officers Association (CRPOA), Member Agency Spotlight, Kingsburg Police Department.)

[19] Exhibit C.

committee. Finally, POST acknowledges that the claimant's reserve officers save the agency thousands of dollars annually.[20]

III. 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."[21] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[22]

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.[23]
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.[24]
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.[25]
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.[26]

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[20] Exhibit B.

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

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

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

[24] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.)

[25] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

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.[27] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[28] 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."[29]

A. The test claim statutes and POST Administrative Manual do not impose a state-mandated program on local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution.

In order for the test claim statutes and alleged executive order to impose a reimbursable state-mandated program, the statutory language must mandate an activity or task on local government. If the statutory language does not impose a mandate on local government, then article XIII B, section 6 of the California Constitution is not triggered and reimbursement is not required.

In addition, the courts have determined that a reimbursable state-mandate does not exist when a local entity incurs costs for activities required by the state as part of a program that the local entity "voluntarily" participates, if the participation is without legal compulsion and there is no evidence that the entity is practically compelled to participate in the program.[30] Practical compulsion may exist and result in a mandate under article XIII B, section 6, if the state were to impose certain and severe penalties (independent of the loss of program funding), such as "double taxation or other draconian consequences" upon a local entity that declines to participate in the program.[31] In such cases, a concrete showing by the claimant of the "certain and severe" penalty or other adverse consequence is required to find that local government may be practically compelled and, thus, mandated under article XIII B, section 6 to incur the increased costs.[32]

In this case, the Commission finds that the test claim statutes and alleged executive order do not impose a state-mandated program on local law enforcement agencies.

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[26] *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.

[27] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code section 17551 and 17552.

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

[29] *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.

[30] *Kern High School Dist., supra,* 30 Cal.4th 727, 742; see also, *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 884-887 and *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1362-1366.

[31] *Department of Finance, supra,* 170 Cal.App.4th 1355, 1366.

[32] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367.

1. Local law enforcement agencies, including cities and counties, are not mandated by the state to appoint or designate reserve peace officers or to provide the required training to reserve peace officers.

a) Local law enforcement agencies, including cities and counties, are not required to appoint or designate reserve peace officers.

Local law enforcement agencies are not required by state law to appoint or designate volunteer or part-time reserve peace officers. The decision to appoint or designate a reserve peace officer is a local discretionary decision that is not mandated by the state. The plain language of Penal Code section 830.6(a)(2) states that a reserve peace officer may be designated and assigned to the prevention and detection of crime and the general enforcement of the laws "*if authorized"* by a local ordinance or resolution. In this case, the volunteer reserve officers appointed and used by the claimant to provide police protection services saves the city resources by not having to hire full-time regularly employed peace officers. The claimant states the following:

> Kingsburg, in needing to afford public safety for three shifts daily for 7 days a week, does not have adequate resources to staff with regular employees, and thus is totally dependent upon reserve officers to meet the public safety requirements of its citizens.[33]

Thus, the claimant, and other local law enforcement agencies that have discretion with respect to the use of reserve peace officers, will make the choices that are ultimately the most beneficial for the agency and its community.

Although the state does not mandate the use of reserve peace officers, the courts have suggested that when a city or county is mandated by state law to provide police protection services, any new costs required to be incurred by the state that are triggered by the agency's local decision regarding the number of personnel it hires, may, "as a practical matter," be eligible for reimbursement. In *Department of Finance v. Commission on State Mandates,* the court addressed the Commission's decision on the *Peace Officer's Procedural Bill of Rights* test claim. The legislation at issue in the case required local law enforcement agencies to provide the opportunity for an administrative appeal and other due process procedures for peace officers subject to discipline or adverse action. The court stated the following:

> Thus, as to cities, counties, and such [police protection] districts [that have police protection as their essential and basic function], new statutory duties that increase the costs of such services are prima facie reimbursable. This is true, notwithstanding a potential argument that such a local government's decision is voluntary in part, as to the number of personnel it hires. [Citation omitted.] A school district, for example, has an analogous basic and mandatory duty to educate students. In the course of carrying out that duty, some "discretionary" expulsions will necessarily occur. [Citation omitted.] Accordingly, [the California Supreme Court in] *San Diego Unified School Dist.* suggests additional

[33] Exhibit A, Test claim, page 10.

> costs of "discretionary" expulsions should not be considered voluntary. Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs attendant to those actions cannot fairly and reasonably be characterized as voluntary . . . .[34]

Evidence must be filed, however, to support a finding that a city or county, as a practical matter, is required to appoint reserve peace officers. Although the claimant makes the assertion that a lack of resources has resulted in its dependence on volunteer reserve officers, there has been no evidence to support that argument or a showing that "certain and severe penalties or other draconian consequences" will occur if it fails to appoint reserve officers.[35]

Accordingly, local law enforcement agencies, including cities and counties, are not mandated by the state to incur any costs resulting from the training requirements imposed by the test claim statutes and PAM, and are not eligible for reimbursement.

b) Local law enforcement agencies, including cities and counties, are not required to provide or pay for reserve peace officer training.

Even if it were found that a local law enforcement agency was practically compelled to appoint reserve peace officers, state law does not require local law enforcement agencies to provide or pay for reserve peace officer training. Rather, the obligation to get trained is on the individual seeking reserve peace officer status and on those individuals seeking to continue their designation or appointment as a reserve officer.

Penal Code section 830.6(a)(1) specifies in pertinent part the following:

> Whenever any *qualified person* is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city police officer, . . . and is assigned specific police functions by that authority, the person is a peace officer, *if the person qualifies as set forth in Section 832.6*. . . . (Emphasis added.)

Penal Code section 832.6 further requires that reserve peace officers complete the basic and continuing professional training prescribed by POST that is also required for regular officers, and any other training prescribed by POST. Since 1959, POST has been required to adopt rules establishing minimum standards relating to the physical, mental and moral fitness governing the recruitment of local law enforcement officers.[36] In establishing the standards for training, the Legislature instructed POST to permit the required training to be conducted at *any* institution

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[34] *Department of Finance, supra,* 170 Cal.App.4th at page 1367-1368.

[35] There is no evidence in the record that claimant or any other local agency could not allocate more resources to hiring regular full-time police officer employees without draconian consequences. Nor is there evidence in the record concerning levels of crime that would occur but for the recruitment of reserve officers.

[36] Penal Code sections 13510, et seq. These standards can be found in Title 11 of the California Code of Regulations.

approved and certified by POST.[37] These institutions include colleges, and the requirements for a course certification for basic and continuing professional training provided by these colleges and other institutions are in sections 1052 through 1055 of the POST regulations.[38] It is true that some local agencies may choose to offer training or payment for training as a recruitment tool. However, other agencies do not and, instead, require proof of the individual's section 832.6 qualification be submitted with applications for reserve peace officer positions. [39]

Moreover, the continuing professional training required for reserve peace officers in this case is *not* like other cases involving new training requirements imposed on regularly employed peace officers, where the Commission has approved reimbursement for local law enforcement agencies under article XIII B, section 6.[40] For *regularly employed officers*, the Federal Labor Standards Act (FLSA) requires the local agency employer to compensate the regular employee for mandatory training if the training occurs during the employee's working hours and, thus, the state's new required training resulted in mandated increased costs to the agency. Reserve officers, however, do not receive regular compensation for the hours worked, are not regularly employed, and do not receive the benefits that the FLSA provides.[41] Reserve officers appointed by the claimant are volunteers.

Thus, local law enforcement agencies, including cities and counties, are not mandated by the state to incur any costs resulting from the training requirements imposed by the test claim statutes and PAM. Rather, under state law, local agencies have the following choices: (1) the agency may hire only regularly employed peace officers whose training is reimbursable under the POST program, or (2) require reserve officers to possess the requisite training certifications as a condition of appointment or designation.

2. School districts, community college districts, and special districts are not mandated by the state to maintain a police department and appoint reserve peace officers.

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[37] Penal Code section 13511.

[38] PAM, B-31, B-32, where the regulations refer to "college" academies.

[39] See, e.g. San Francisco's and National City's reserve peace officer position announcement flyers, which require applicants to submit proof of completion of the required section 832.6 training with their application for a reserve peace officer position; see also, the SFPD Reserve Peace Officer job announcement flyer, which requires applicants to submit proof of completion of the required training with their applications for a reserve peace officer position. (Exhibit F.)

[40] See for example, *Sexual Harassment Training in the Law Enforcement Workplace* (97-TC-07).

[41] Section 1001(p) of the POST regulations defines "full-time employment" for those employees who are tenured, or have a right to due process in personnel matters, and are entitled to workers compensation and the retirement provisions that other full-time employees of the same personnel classification in the department receive. Section 1001(ff) of the POST regulations defines "regular officer" as "a sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such …."

Penal Code section 830.6 identifies the reserve peace officers that are subject to the minimum and continuing professional training requirements. They include reserve officers appointed or designated by cities, counties, school districts, community college districts, and special districts.

Counties and cities are required by the California Constitution to provide police protection and maintain police departments.[42] The other local law enforcement agencies identified in Penal Code section 830.6 include school districts, community college districts, and special districts that have the statutory authority to maintain police departments, but are not legally required or compelled by state law to do so. For example, Education Code section 38000 provides the statutory authority for school districts to establish a police department as follows:

> (a) The governing board of any school district may establish a … police department under the supervision of a chief of police, as designated by, and under the direction of, the superintendent of the school district. In accordance with Chapter 5 (commencing with Section 45100) of Part 25, the governing board may employ personnel to ensure the safety of school district personnel and pupils and the security of the real and personal property of the school district. … It is the intention of the Legislature in enacting this section that a school district police … department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

The courts have made it clear that the provision of police protection is a mandatory, essential and basic function of counties and cities. However, school districts, community college districts, and special districts do not have the provision of police protection as an essential and basic function and, thus are not legally compelled by the state to comply with new statutory duties imposed with respect to police protection services. [43]

In order for a school district or special district to be eligible for reimbursement when the state imposes requirements on local law enforcement, the districts must first show that as a practical matter exercising the authority to maintain a police department and hiring peace officers, rather than relying on the general law enforcement resources of a county or city, is the "only reasonable means" to carry out the district's core mandatory function.[44] Concrete evidence in the record is required to support this assertion.[45]

In this case, there is no evidence in the record to support a finding that school districts, community college districts, and special districts have been practically compelled by the state to

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[42] Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

[43] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367.

[44] *Id.* at page 1368.

[45] *Id.* at page 1367.

maintain a police department and appoint or designate reserve peace officers. By law, these districts may rely on the general law enforcement resources that the county and city provide.

Accordingly, school districts, community college districts, and the special districts identified in Penal Code section 830.6 are not mandated by the state to incur any costs resulting from the training requirements imposed by the test claim statutes and PAM, and are not eligible for reimbursement.

IV. Conclusion

The Commission finds that Penal Code sections 830.6 and 832.6, as added and amended by the test claim statutes, and the alleged executive order in PAM do not constitute a state-mandated program on local law enforcement agencies and, thus, reimbursement is not required pursuant to article XIII B, section 6 of the California Constitution.

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RE: **Adopted Statement of Decision**

Reserve Peace Officer Training, 03-TC-15
Penal Code Sections 830.6, and 832.6
Statutes 1977, Chapter 987 et al.
City of Kingsburg, Claimant

On September 28, 2012, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: October 4, 2012

Heather Halsey, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Welfare and Institutions Code Sections 779, 1731.8, 1719, 1720 Statutes 2003, Chapter 4 Filed on December 22, 2004 by County of Los Angeles, Claimant	Case No.: 04-TC-02 *Juvenile Offender Treatment Program Court Proceedings* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 25, 2012*) (*Served May 31, 2012)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 25, 2012. Art Palkowitz appeared on behalf of claimant. Donna Ferebee 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 staff analysis to deny the test claim at the hearing by a vote of 7-0.

Summary of Findings

The Commission denied this test claim for the following reasons:

Court Orders to Modify or Set Aside Order of Commitment - Welfare and Institutions Code section 779: The amendment adds a sentence stating that the statute does not limit the authority of the court to change, modify or set aside an order of commitment after a noticed hearing and upon a showing of good cause that the California Youth Authority (CYA)[1] is not providing treatment consistent with section 734. This statute is merely a clarification of existing law. The test claim statute does not mandate a new program or higher level of service subject to article XIII B, section 6.

[1] CYA was renamed the Division of Juvenile Justice (DJJ) in a 2005 reorganization, so all references to the Youth Authority or CYA in this analysis now apply to the DJJ.

Parole Consideration Dates and Parole Procedures – Welfare and Institutions Code sections 1719 & 1731.8: These code sections address a juvenile's parole consideration date (PCD), and transfer the duty to set or modify the PCD from the Youthful Offender Parole Board (YOPB)[2] to CYA. The amendments to sections 1731.8 and 1719 simply transfer the duties imposed on YOPB to CYA relating to the ward's PCD, and direct CYA to comply with the existing regulations when modifying or deviating from the PCD. Nothing on the face of these statutes imposes a new duty on local government. Thus, the test claim statute does not mandate a new program or higher level of service subject to article XIII B, section 6.

Ward Reviews - Welfare and Institutions Code section 1720: The amendment to section 1720 changed the process for reviewing the progress of the wards following their commitment to CYA. The wards' reviews were transferred from YOPB to CYA. This section also requires CYA to provide the reviews in writing, include specified treatment information in the report, and send the report to the court and the probation department of the committing county. The amendment to section 1720 (Stats. 2003, ch. 4) does not mandate a new program or higher level of service on county public defenders. The plain language of this code section imposes duties on CYA, but does not impose any requirements on local government. In addition, under prior law, CYA was required to prepare treatment reports and reviews and provide copies of those reports to the ward. The ward could provide those reports to his or her attorney. Moreover, before the test claim statute, a ward had an existing due process right under the Constitution to receive copies of the reviews, have counsel review and evaluate the material in the review, and represent the ward as necessary in a petition for modification of the prior order of commitment to CYA pursuant to Welfare and Institutions Code sections 778 and 779.

COMMISSION FINDINGS

Chronology

12/22/2004	Claimant, County of Los Angeles, filed the test claim 04-TC-02 with the Commission[3]
01/11/2005	Commission staff issued a letter deeming the test claim filing complete and requested comments from state agencies
02/01/2012	Commission staff issued the draft staff analysis
02/15/2012	Department of Finance submitted comments on the draft staff analysis
02/16/2012	Claimant filed a request for extension of time to file comments and to postpone the hearing

[2] The Youthful Offender Parole Board (YOPB) became the Youth Authority Board under the 2003 test claim statute, and in 2005 became the Board of Parole Hearings (Welf. & Inst. Code, § 1716). Thus, references in this analysis to the Youth Authority Board also include the Board of Parole Hearings.

[3] Based on the filing date of December 22, 2004, the potential period of reimbursement for this test claim begins on July 1, 2003.

02/21/2012 Commission staff requested additional information on the reason for the extension and postponement request

03/02/2012 Claimant provided response to additional request for information

03/05/2012 Commission staff granted an extension of time to file comments and postponement of the hearing to May, 25, 2012

04/20/2012 Claimant submitted comments on the draft staff analysis

I. Background

Claimant seeks reimbursement for costs incurred by county public defenders as a result of the test claim statute which realigned the duties of the former Youthful Offender Parole Board (YOPB)[4] and the California Youth Authority (CYA).[5] Before discussing the test claim statutes, some background on the juvenile justice system is provided.

The Juvenile Justice System

In the juvenile justice system, the emphasis is on offender treatment and rehabilitation rather than punishment.[6] Juvenile court proceedings are not considered to be criminal proceedings, and orders making minors wards of the juvenile court are not deemed to be criminal convictions.[7] Although, since the 1960s, the courts have accorded juvenile offenders some of the constitutional protections afforded criminal defendants.[8]

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[4] The Youthful Offender Parole Board (YOPB) became the Youth Authority Board under the 2003 test claim statute, and in 2005 became the Board of Parole Hearings (Welf. & Inst. Code, § 1716). Thus, references in this analysis to the Youth Authority Board also include the Board of Parole Hearings.

[5] CYA was renamed the Division of Juvenile Justice (DJJ) in a 2005 reorganization, so all references to the Youth Authority or CYA in this analysis now apply to the DJJ.

[6] *In re Aline D.* (1975) 14 Cal.3d 557, 567.

[7] Welfare and Institutions Code section 203. This civil/criminal distinction, however, is not always clear. The U.S. Supreme Court has said:

> [I]t is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the 'civil' label-of-convenience which has been attached to juvenile proceedings,' [Citation omitted.] and that 'the juvenile process . . . be candidly appraised.' (*Breed v. Jones* (1975) 421 U.S. 519, 529.) … [I]n terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. (*Id.* at p. 530.)

[8] For example, the right to counsel in juvenile judicial proceedings (*Application of Gault* (1967) 387 U.S. 1) and the protection against double jeopardy (*Breed v. Jones* (1975) 421 U.S. 519).

The Office of the Legislative Analyst (LAO) described the process of juvenile justice as follows:

> Following the arrest of a juvenile offender, a law enforcement officer has the discretion to release the juvenile to his or her parents, or take the offender to juvenile hall. The county probation department, the agency responsible for the juvenile hall, has the discretion to accept and "book" the offender or not, in which case, the disposition of the juvenile is left to the police. Because most of the state's juvenile halls are overcrowded, mainly with juveniles being held for violent offenses, juvenile halls may accept only the most violent arrestees, turning away most other arrestees.
>
> If the offender is placed in juvenile hall, the probation department and/or the district attorney can choose to file a "petition" with the juvenile court, which is similar to filing charges in adult court. Or, the district attorney may request that the juvenile be "remanded" to adult court because the juvenile is "unfit" to be adjudicated as a juvenile due to the nature of his or her offense. For a juvenile who is adjudicated and whose petition is sustained (tried and convicted) in juvenile court, the offender can be placed on probation in the community, placed in a foster care or group home, incarcerated in the county's juvenile ranch or camp, or sent to the Youth Authority[9] as a ward of the state. For a juvenile tried and convicted in adult court, the offender can be sentenced to the Department of Corrections, but can be placed in the Youth Authority through age 24.[10]

Juvenile court proceedings to declare a minor a ward of the court are commenced after the district attorney or probation officer files a petition,[11] which is tantamount to filing charges. The petition triggers a detention hearing,[12] after which the juvenile may be detained under specified circumstances.[13] The court may appoint counsel for the minor and his or her parents if they desire it at this hearing, and is required to appoint counsel for certain minors who are habitual or serious offenders unless the minor makes an "intelligent waiver" of the right to counsel.[14] Whether indigent or not, since 1961 the court has been required, at a detention hearing, to notify the juvenile and his or her parents of the right to counsel "at every stage of the proceedings."[15]

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[9] The California Youth Authority (CYA) was renamed the Division of Juvenile Justice (DJJ) in a 2005 reorganization, so all references to the Youth Authority or CYA in this analysis now apply to the DJJ.

[10] Office of the Legislative Analyst, "Juvenile Crime – Outlook for California." May 1995, p. 1.

[11] Welfare and Institutions Code section 650.

[12] Welfare and Institutions Code sections 632-633.

[13] Welfare and Institutions Code section 636.

[14] Welfare and Institutions Code section 634.

[15] Welfare and Institutions Code section 633.

Depending on the minor's age and seriousness of the crime, the court may hold a fitness hearing after the detention hearing if the district attorney decides that the minor should be tried as an adult.[16]

After the detention hearing, a jurisdictional hearing is held to decide whether the minor is detained or released to home supervision.[17] During the jurisdictional hearing, the judge decides the merits of the petition. If the judge finds that the allegations in the petition are true, then a dispositional or sentencing hearing is held[18] to determine the minor's care, treatment and guidance, including punishment. Before the hearing, the probation officer writes a "social study" of the minor for the court to help determine what should happen to the minor.

The judge in the disposition hearing may set aside the findings in the jurisdictional hearing, or may put the minor on informal probation. Otherwise, the judge may make the minor a ward of the court, meaning the court makes decisions for the minor instead of his or her parents. Wardship may mean the minor is put on probation, placed in foster care, a group home or private institution,[19] placed in local juvenile detention,[20] or placed in the California Youth Authority.[21] The judge may also impose other conditions, such as fines, restitution, or work programs. If the judge sentences the minor to the youth authority, it means that the judge believes that it would be best for the minor to learn from the discipline or programs at CYA.[22]

Less than two percent of juvenile offenders are committed to CYA and become a state responsibility.[23] County probation departments supervise the remaining 98 percent.

For a graphic depiction of the juvenile justice process, see Appendix 1 attached.

California Youth Authority

CYA is the state agency responsible for protecting society from the criminal and delinquent behavior of juveniles.[24] CYA operates training and treatment programs that seek to educate,

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[16] Welfare and Institutions Code section 707.

[17] Welfare and Institutions Code section 700.

[18] Welfare and Institutions Code section 706.

[19] Welfare and Institutions Code section 727.

[20] Welfare and Institutions Code section 730.

[21] Welfare and Institutions Code section 731.

[22] Welfare and Institutions Code section 734.

[23] Office of the Legislative Analyst. "California's Criminal Justice System: A Primer." January 2007, page 50. The Legislative Analyst's 1995 report stated that three percent were state wards, as did the (2003) legislative history of the test claim statute.

[24] Welfare and Institutions Code section 1700; according to the Legislative Analyst's Office, juveniles committed to CYA are generally between the ages of 12 and 24, and the average age is 19. Legislative Analyst's Office, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 4.

correct, and rehabilitate youthful offenders rather than punish them.[25] It is charged with operating 11 institutions and supervising parolees through 16 offices located throughout the state.[26] Individuals can be committed to CYA by the juvenile court or on remand by the criminal court,[27] or returned to CYA by the Youth Authority Board (YAB).[28]

Juveniles committed to CYA are assigned a category number, ranging from 1 to 7, based on the seriousness of the offense committed; 1 being the most serious and 7 being the least serious.[29] Counties pay the state a monthly fee for persons who have been committed to CYA.[30] In 1996, a new fee structure was imposed to provide incentives for counties to treat less serious offenders at the county level. Counties are required to pay 100 percent of the average cost for "category 7" wards committed to CYA, 75 percent for "category 6" wards and 50 percent for "category 5" wards. At the time of the test claim statute (2003) counties paid over $50 million annually for their commitments to CYA.[31]

Youthful Offender Parole Board/Youth Authority Board/Board of Parole Hearings

Before the test claim legislation, YOPB was the paroling authority for young persons committed to CYA.[32] Although wards are committed to CYA by local courts, decisions relating to length of stay and parole were made by YOPB, which performed the following duties:

- Return persons to the court of commitment for redisposition by the court;
- Discharge of commitment;
- Orders to parole and conditions thereof;
- Revocation or suspension of parole;
- Recommendation for treatment program;
- Determination of the date of next appearance;
- Return nonresident persons to the jurisdiction of the state of legal residence.[33]

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[25] Welfare and Institutions Code section 1700.

[26] Legislative Analyst's Office, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 4.

[27] Welfare and Institutions Code section 707.2, subdivision (a).

[28] Office of the Legislative Analyst, Analysis of the 1999-2000 Budget Bill, Criminal Justice Departmental Issues, page 5 (referring to YOPB, the predecessor agency of the Youth Authority Board which is currently known as the Board of Parole Hearings).

[29] California Code of Regulations, title 15, sections 4951-4957.

[30] Welfare and Institutions Code sections 912 and 912.5.

[31] In May 2007, the Commission determined that the 1996 statutes raising CYA fees for counties (Welf. & Inst. Code, §§ 912, 912.1, 912.5) were not a reimbursable mandate in the *California Youth Authority: Sliding Scale for Charges* (02-TC-01) test claim.

[32] YOPB is a part of CYA. (Welf. & Inst. Code, § 1716.)

[33] Former Welfare and Institutions Code section 1719.

The history and duties of YOPB were provided in the test claim statute's legislative history as follows.

> YOPB was established originally in 1941 by the Legislature as the "Youth Authority Board." When the Department of the Youth Authority was created in 1942, the Director also served as the Chairman of the Board. The Board separated from CYA in 1980 and was renamed the Youthful Offender Parole Board.
>
> YOPB members and hearing officers conduct about 20,000 hearings a year at the 11 CYA institutions, 4 camps, and regional parole offices for the approximately 6,400 wards at CYA and 4,000 on parole. Hearing officers include YOPB staff or retired annuitants who are authorized to conduct hearings. YOPB hearings fall into the following general categories:
>
> Within approximately 45-60 days, YOPB used to conduct an Initial Hearing where the initial parole consideration date (PCD) is set and treatment is ordered; however, the Legislature has been advised by the administration that since November of 2002, this function has been shifted to the CYA, with CYA staff recommendations subject to YOPB approval.
>
> Once a year YOPB conducts an Annual Review to assess the progress of the ward and if they deem appropriate, modify the parole consideration date (PCD). YOPB can also hold Progress Reviews more frequently to review progress or modify the PCD.
>
> At the request of CYA, YOPB holds disciplinary hearings to determine whether a time-add should be given (extending the parole consideration date) as a disciplinary action.
>
> At the ward's parole consideration hearing, YOPB determines whether to grant parole or extend the institution stay. If parole is granted, YOPB sets conditions of parole.
>
> YOPB also conducts Parole Revocation Hearings for parole violators to determine whether parole should be revoked and the ward returned to the institution.[34]

The former YOPB had authority over wards committed to CYA, such as permitting the ward "his liberty under supervision and upon such conditions as it believes best designed for the protection of the public" or ordering confinement "as it believes best designed for protection of the public" with specified limitations. The former YOPB could also order reconfinement or renewed release under supervision "as often as conditions indicate to be desirable" or revoke or modify any order "except an order of discharge" or modify an order of discharge, or discharge him or her from its control "when it is satisfied that such discharge is consistent with the protection of the public."[35]

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[34] Senate Committee on Public Safety, Analysis of SB 459 (2003-2004 Reg. Sess.) as amended March 12, 2003, pages G-H.

[35] Former Welfare and Institutions Code section 1766.

The Test Claim Legislation

The purpose of the test claim legislation was to "consolidate the operations of the Youthful Offender Parole Board under the Department of the Youth Authority and make related changes to the juvenile law."[36] The test claim statute abolished YOPB and created the YAB[37] within the Department of the Youth Authority. YOPB's duties relating to releases (discharge and parole), parole revocations, and disciplinary appeals were allocated to the YAB and YOPB's remaining duties were shifted to CYA.[38]

The powers and duties shifted to CYA include: returning persons to the court of commitment for redisposition by the court, determining the offense category, setting PCDs using existing guidelines, conducting annual reviews, treatment program orders, making institutional placements, making furlough placements, returning nonresident persons to the jurisdiction of the state of legal residence, disciplinary decision making (with appeals to the board), and referring dangerous persons to prosecutors for extended detention.[39]

Additionally, CYA is now required to provide county probation departments and juvenile courts with specified information concerning ward treatment and progress, and must compile specified data concerning CYA's population and effectiveness of treatment.

According to the legislative history of the test claim statute, it "contains important checks and balances that will enhance the relationship between CYA and the counties, which will improve CYA correctional services."[40] The legislative history also cites the following December 2002 findings by the Office of the Inspector General on YOPB:

- YOPB "lacks treatment expertise";
- YOPB appears to order more programs than wards can reasonably complete by the parole consideration date;
- YOPB hearing staff routinely checks off programs to be provided without documentation linking the programs to the ward's history and treatment needs as identified by the (CYA); and
- YOPB hearing staff members who recommend the treatment programs are not necessarily trained in fields related to the programs at issue and in some cases appear to lack basic understanding of the programs available.[41]

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[36] Senate Committee on Public Safety, Analysis of SB 459 (2003-2004 Reg. Sess.) as amended March 12, 2003, page B.

[37] The board was renamed the Board of Parole Hearings in 2005 (Stats. 2005, ch. 10) and the Juvenile Parole Board in 2010 (Stats. 2010, ch. 729).

[38] Senate Committee on Public Safety, Analysis of SB 459 (2003-2004 Reg. Sess.) as amended March 12, 2003, page I.

[39] Welfare and Institutions Code section 1719 (c).

[40] Senate Committee on Public Safety, Analysis of SB 459 (2003-2004 Reg. Sess.) as amended March 12, 2003, page F.

[41] *Id.* at page J.

Although the test claim statute added, repealed or amended 48 statutes, claimant pled only the following four: Welfare and Institutions Code sections 779, 1719, 1720 and 1731.8. As amended, these code sections clarified the authority of the juvenile court to change, modify, or set aside a prior order of commitment to CYA; shifted from YOPB to CYA the duty to set parole consideration dates; transferred the duties regarding the annual review of CYA ward from YOPB to CYA and specified that CYA shall provide copies of the reviews to the court and the county probation department.

II. Positions of the Parties and Interested Parties

A. Claimant Position

Claimant alleges that the test claim statute imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514 for public defenders to perform the following duties that are "reasonably necessary in implementing" the test claim statutes:

1. Review case and court files, mental health, school, medical, psychological and psychiatric records and familiarize themselves with treatment and service needs of the youth;
2. Review court documents to assure court has followed the mandates of SB 459;
3. Prepare and argue motions in cases where the court has not followed the mandates of SB 459 in its dispositional orders;
4. Contact, visit and interview public defender clients sentenced to the California Youth Authority (CYA);
5. Monitor the setting of parole consideration dates to assure they comply with statutory mandates;
6. Assess CYA treatment plans to assure they comply with statutory mandates, needs of the client and orders of the court;
7. Review CYA files, including education, special education, mental health, behavioral, gang and any other specialized files (all kept in separate locations);
8. Monitor the provision of treatment and other services;
9. Advocate for the provision of needed treatment and services within the CYA system, including advocacy at individual education plan [IEP], treatment plan, and similar meetings;
10. File motions in the sentencing court pursuant to Welfare and Institutions Code section 779 where the client's needs are not being adequately addressed by CYA.
11. Coordinate with the Youth Authority in order to assist our clients in preparing for parole hearings, and represent our clients at parole hearings in appropriate cases.[42]

[42] Exhibit A, page 6.

In its comments on the draft staff analysis, claimant asserts that the analysis is wrong and generally argues that:

- The amendment to section 779 creates a mandate for the courts to begin overseeing the treatment of wards while in CYA facilities, and to intervene when those treatment needs are not being met, resulting in a new remedy and due process rights for public defender clients.
- The juvenile court has a responsibility to review and intervene when CYA treatment orders and programming are deficient and county public defenders clients have a new remedy to ensure the test claim statute's treatment standards are applied in their case. This requires coordination of public defenders and CYA and participation in their meetings to the extent allowed.
- Section 1720(e) and (f) mandate a new program or higher level of service by imposing higher treatment standards and reporting requirements on CYA.[43]

B. State Agencies and Interested Parties

The Department of Finance, in comments filed February 15, 2012, concurs with the draft staff analysis recommending that the Commission deny the test claim on the ground that the test claim statute does not mandate a new program or higher level of service on the county public defender.

III. 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."[44] Thus, the subvention requirement of section 6 is "directed to state mandated increases in the services provided by [local government] …"[45]

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.[46]

[43] Exhibit D. Claimant, comments on the Draft Staff Analysis.

[44] *County of San Diego, supra,* 15 Cal.4th 68, 81.

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

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

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.[47]

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.[48]

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. [49]

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.[50] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[51] 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."[52]

A. DO THE TEST CLAIM STATUTES MANDATE A NEW PROGRAM OR HIGHER LEVEL OF SERVICE SUBJECT TO ARTICLE XIII B, SECTION 6 OF THE CALIFORNIA CONSTITUTION?

1. Court Orders to Modify or Set Aside the Order of Commitment to CYA (§ 779)

As indicated in the background, any person who is under the age of 18 when he or she commits a criminal offense is within the jurisdiction of the juvenile court. Once the individual is adjudged a ward of the juvenile court, the court may retain jurisdiction over the ward until the ward attains the age of 21 or 25 depending on the nature of the offense.[53] The court may make any and all

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[47] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[48] *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.

[49] *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.

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

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

[52] *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.

[53] Welfare and Institutions Code sections 602 and 607.

reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor in its care of the ward.[54]

Under this existing authority, the court may commit a ward to CYA if the court determines, pursuant to Welfare and Institutions Code section 734,[55] that the mental and physical condition and qualifications of the ward are such as to render it probable that the ward will be benefited by the reformatory educational discipline or other treatment provided by CYA. CYA, in turn, is required to accept the ward if it believes that the person can be materially benefitted by its reformatory and educational discipline, and if it has adequate facilities to provide care.[56]

Once a ward is committed to CYA, the ward is kept under the control and supervision of CYA as long as is necessary for the protection of the public.[57] "[C]ommitment to the [CYA] in particular, brings about a drastic change in the status of the ward which not only has penal overtones, including institutional confinement with adult offenders, but also removes the ward from the *direct supervision* of the juvenile court."[58] CYA is responsible for providing necessary medical and dental treatments, mental health services, and educational programs to the ward.[59] CYA also has the authority to correct the "socially harmful tendencies" of a person committed to CYA by requiring a ward's participation in vocational, physical, educational, corrective training and activities, and other methods of treatment conducive to the correction of the ward and to the prevention of future public offenses by the ward.[60]

Although the court is not responsible for the direct supervision of a ward committed to CYA, the court retains jurisdiction of the ward's case, and, since 1961, has had the power to change,

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[54] Welfare and Institutions Code section 727.

[55] Welfare and Institutions Code section 734 states: "No ward of the juvenile court shall be committed to the Youth Authority unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the Youth Authority."

[56] Welfare and Institutions Code section 1731.5. After commitment, CYA may order the return of the ward to the juvenile court pursuant to Welfare and Institutions Code section 780 if the ward appears to be an improper person to be received by or retained by CYA or to be so incorrigible or incapable of reformation under the discipline of CYA as to render his or her retention detrimental to the interests of the department. However, section 780 states that the return of the ward to the committing court does not relieve CYA of any of its duties or responsibilities under the original commitment, and that commitment continues in full force and effect until the order of commitment is vacated, modified, or set aside by order of the court.

[57] Welfare and Institutions Code section 1765.

[58] *In re Allen N.* (2000) 84 Cal.App.4th 513, 515, emphasis in original quote.

[59] Welfare and Institutions Code section 1712; California Code of Regulations, title 15, sections 4730 et seq.

[60] Welfare and Institutions Code section 1768.

modify, or set aside any prior order with respect to the disposition of the ward pursuant to Welfare and Institutions Code sections 775 et seq.[61]

Welfare and Institutions Code section 779 specifically extends the court's power to change, modify, or set aside orders committing a juvenile to CYA. As originally enacted in 1961, section 779 did not identify the circumstances under which the court could change, modify, or set aside a prior order of commitment to CYA.[62] When the test claim statute was enacted in 2003, the Legislature amended section 779 by adding the last sentence to the statute to provide that the court may change, modify, or set aside an order of commitment to CYA upon a showing of good cause that CYA is unable to, or is failing to, provide treatment consistent with educational discipline and treatment requirements of section 734. The amendments made by the 2003 test claim statute are reflected below in underline and strikeout:

> The court committing a ward to the Youth Authority may thereafter change, modify, or set aside the order of commitment. Ten days' notice of the hearing of the application therefor shall be served by United States mail upon the Director of the Youth Authority. In changing, modifying, or setting aside the order of commitment, the court shall give due consideration to the effect thereof upon the discipline and parole system of the Youth Authority or of the correctional school in which the ward may have been placed by the Youth Authority. Except as in this section provided, nothing in this chapter shall be deemed to interfere with the system of parole and discharge now or hereafter established by law, or by rule of the Youth Authority, for the parole and discharge of wards of the juvenile court committed to the Youth Authority, or with the management of any school, institution, or facility under the jurisdiction of the Youth Authority. Except as provided in this section ~~provided~~, ~~nothing in~~ this chapter ~~shall be deemed to~~ does not interfere with the system of transfer between institutions and facilities under the jurisdiction of the Youth Authority. This section does not limit the authority of the court to change, modify, or set aside an order of commitment after a noticed hearing and upon a showing of good cause that the Youth Authority is unable to, or failing to, provide treatment consistent with Section 734.

The legislative history of the test claim statute refers to the amendment of section 779 as a clarification of prior law.[63]

Claimant, however, alleges that the last sentence of section 779, added by the test claim statute, results in a reimbursable new program as follows:

> Under prior law, the court had no authority to change, modify, or set aside an order of commitment after a noticed hearing and upon a showing of good cause

[61] Statutes 1961, chapter 1616.

[62].Statutes 1961, chapter 1616.

[63] Senate Committee on Public Safety, Analysis of SB 459 (2003-2004 Reg. Sess.) as amended March 12, 2003, page E. See also, the unpublished decision in *In re Michael M.* 2007 WL 4555337 (Cal.App.5 Dist.).

> that the Youth Authority was unable to, or failed to, provide treatment consistent with Section 734. Further, under prior law, including the holding in Owen E. (1979) 23 Cal.3d 398, Section 779 does not constitute authority for a juvenile court to set aside an order committing a ward to the California Youth Authority merely because the court's view of rehabilitative progress and continuing treatment needs of the ward differ from CYA determination of such matters.[64]

In comments on the draft staff analysis, claimant argues the amendment to section 779 creates a mandate for the courts to begin overseeing the treatment of wards while in CYA facilities, and to intervene when those treatment needs are not being met, resulting in a new remedy and due process right for public defender clients. Before being amended, section 779 did not include language regarding "treatment" or showing "good cause." And although section 779 contained a reference to section 734 which did mention treatment, the "other treatment provided by the Youth Authority" in section 734 is general and not specific, and it is not possible to evaluate deficient treatment without monitoring compliance with treatment standards and intervening when treatment is deficient. Thus, claimant argues that the test claim statute now requires juvenile courts to continuously supervise and regulate the treatment of wards, along with CYA.[65]

Thus, claimant argues that the test claim amendment, for the first time, requires public defenders to:

- File motions in the sentencing court pursuant to Welfare and Institutions Code section 779 where the client's needs are not being adequately addressed by CYA.
- Prepare and argue motions in cases where the court has not followed the mandates of SB 459 in its dispositional orders.
- Assess CYA treatment plans to assure they comply with statutory mandates, needs of the client and orders of the court.
- Review CYA files, including education, special education, mental health, behavioral, gang and other specialized files (all kept in separate locations).
- Monitor the provision of treatment and other services;
- Advocate for the provision of needed treatment and services within the CYA system, including advocacy at individual education plan (IEP), treatment plan, and similar meetings.

For the reasons below, the Commission finds that section 779, as amended by Statutes 2003, chapter 4, does not impose any new state-mandated duties on county public defenders. Contrary to claimant's assertion, the 2003 amendment to section 779 simply clarifies the existing jurisdiction of the juvenile court to change, modify, or set aside an order of commitment to CYA under section 779, and does not mandate any new duties on local government.

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[64] Exhibit A. County of Los Angeles, test claim, page 4, emphasis in original.

[65] Exhibit D. Claimant, comments on the draft staff analysis, April 20, 2012, pp. 7-13.

In 1979, before the enactment of the 2003 amendment, the California Supreme Court in *In re Owen E.*, interpreted the interplay between the authority of CYA and the jurisdiction of the juvenile court to set aside a prior court order of commitment to CYA under section 779.[66] In the *Owen* case, the ward applied for parole two years after commitment to CYA and was denied parole. The ward's mother petitioned the juvenile court to vacate the commitment. The juvenile court agreed with the mother and concluded that the ward's rehabilitative needs would best be satisfied if he were released from custody. The juvenile court set aside its original commitment order and placed the minor on probation.[67]

On appeal by the Director of CYA, the California Supreme Court reversed the order of the juvenile court, finding that the juvenile court's statutory authority to change, modify, or set aside an order of commitment does not apply when the court simply disagrees with the rehabilitation plan because CYA has the exclusive jurisdiction to determine questions of rehabilitation. In its analysis, the California Supreme Court recognized that the Legislature enacted different code sections to regulate the division of responsibility between CYA and the court. Pursuant to these statutes, CYA has been delegated the discretionary authority to determine whether its program will be or of benefit to the ward; that commitment to CYA removes the ward from the direct supervision of the juvenile court; and that it is the function of CYA to determine the proper length of its jurisdiction over a ward.[68] The court then compared the proceedings in juvenile court to those of adult court to find that it is unreasonable to assume the Legislature intended that both the juvenile court and CYA are required to regulate juvenile rehabilitation. The court reasoned as follows:

> In the related field of jurisdiction to determine the rehabilitative needs of persons convicted of crimes, we have concluded the Adult Authority had the exclusive power to determine questions of rehabilitation. "If …the court were empowered … to recall the sentence and grant probation if the court found that the defendant had become rehabilitated after his incarceration, there manifestly would be two bodies (one judicial and one administrative) determining the matter of rehabilitation, and it is unreasonable to believe that the Legislature intended such a result." [Citations omitted.] While different statutes – even different codes – regulate the division of responsibility between the concerned administrative agency and court, it appears to be as unreasonable to assume the Legislature intended that both the juvenile court and CYA are to regulate juvenile rehabilitation as it is to assume that both the superior court and Adult Authority are to regulate criminal rehabilitation.[69]

Based on this analysis, the court held that Welfare and Institutions Code section 779 does not constitute authority for a juvenile court to set aside an order committing a ward to CYA merely

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[66] *In re Owen E.* (1979) 23 Cal.3d 398.

[67] *Id*. at pages 400-401.

[68] *Id*. at page 404.

[69] *Id*. at pages 404-405.

because the court's view of the rehabilitative progress and continuing treatment needs of the ward differ from CYA determinations. Rather, "[t]he critical question is thus whether the Youth Authority acted within the discretion conferred upon it."[70] A juvenile court's authority to change, modify, or set aside a prior order of commitment under section 779 is limited to situations where it is shown that "CYA has failed to comply with law or has abused its discretion in dealing with a ward in its custody."[71] If CYA acts within its discretion, there is no basis for judicial intervention under section 779.[72]

Owen was decided before section 779 was amended to add the last sentence to the statute stating that the juvenile court has the authority to change, modify, or set aside an order of commitment "upon a showing of good cause" that the CYA is "unable to, or is failing to, provide treatment as required by law." Thus, this sentence authorizes the court to modify a prior commitment order when there is evidence that services required by law are not being provided. While this sentence does not use the "abuse of discretion" language identified in *Owen*, the standard articulated in the last sentence of section 779 has the same meaning. If CYA is failing to provide treatment required by law, it has abused its discretion. The courts have found that the failure of an agency to abide by the law is an abuse of discretion.[73]

Moreover, there is nothing in the plain language of the statute or the legislative history to suggest a legislative intent to change or limit the existing authority of CYA to determine how to meet a ward's treatment and training needs and to determine whether the ward has been rehabilitated. The plain language of section 779 still requires the court to give due consideration to CYA's authority as follows:

> In changing, modifying, or setting aside the order of commitment, the court shall give due consideration to the effect thereof upon the discipline and parole system of the Youth Authority or of the correctional school in which the ward may have been placed by the Youth Authority. Except as in this section provided, nothing in this chapter shall be deemed to interfere with the system of parole and discharge now or hereafter established by law, or by rule of the Youth Authority, for the parole and discharge of wards of the juvenile court committed to the Youth Authority, or with the management of any school, institution, or facility under the jurisdiction of the Youth Authority.

Nor does the legislative history of the 2003 statute show intent to grant the court additional authority to supervise the treatment of a ward, as suggested by claimant, or to nullify the court's analysis and interpretation of the statutes in *Owen*. The Legislature's division of responsibility between CYA and the juvenile court with respect to a section 779 motion has remained the same. After the 2003 amendment to section 779, CYA still has the discretion to regulate and supervise

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[70] *Id.* at page 405.

[71] *Id*. at page 406.

[72] *Id.* at page 405; *In re Allen, supra*, 84 Cal.App.4th at page 515.

[73] *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 622; Code of Civil Procedure section 1094.5.

the ward's rehabilitation, and pursuant to section 779, the court retains jurisdiction only to review petitions alleging the failure of CYA to act according to the law. The form and quality of treatment provided by CYA, however, is a matter outside of the juvenile court's jurisdiction under section 779. Rulings by the court after the enactment of the test claim statute concur with this interpretation of the statutes, and show that the *Owens* decision remains good law.[74]

While a petition under section 779 is available to a ward only when CYA fails to comply with the law, a petition under section 778 may be used by the ward to give the court jurisdiction to change, modify, or set aside a prior order of commitment to CYA when there is a *change of circumstances or new evidence* that makes a change in disposition or commitment to CYA "desirable or necessary for the continued welfare of the child."[75] If there is a change of circumstance or new evidence, the court may address the continuing treatment needs of the ward, as alleged by claimant. Claimant has not identified section 778 in its claim. Section 778 was enacted in 1961 and was not affected by the test claim statute.

Thus, both before and after the enactment of the test claim statute, the only way for the court to review the educational program or treatment provided by CYA to a ward is if:

- There is an allegation that CYA has failed to provide the treatment or education required by law (§ 779); or

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[74] See, *In re Antoine D*. (2006) 137 Cal.App.4th 1314, 1322 and 1324-1325, where the court stated that the authority to set aside or modify an order committing the ward to CYA where it appears CYA has failed to comply with the law or abused its discretion in dealing with the ward stems from section 779 <u>*and*</u> the *Owen* case.

[75] *In re Corey* (1964) 230 Cal.App.2d 813, 822; *In re Joaquin S.* (1979) 88 Cal.App.3d 80. Welfare and Institutions Code section 778 states in relevant part the following:

> Any parent or other person having an interest in a child who is a ward of the juvenile court or the child himself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a ward of the juvenile court for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change in circumstance or new evidence which are alleged to require such change of order or termination of jurisdiction.
>
> If it appears that the best interests of the child may be promoted by the proposed change of order or termination of jurisdiction, the court shall order that a hearing be held and shall be give prior notice, or cause prior notice to be given, to such persons and by means as prescribed by Section 776 and 779, and, in such instances as the means of giving notice is not prescribed by such sections, then by such means as the court prescribes.

- There has been a substantial change of circumstances or new evidence that warrants the court's review of the services provided to the ward at CYA and, based on the new circumstance or evidence, make any changes necessary for the continued welfare of the ward (§ 778).

Neither the jurisdiction of the court, nor the rights provided to a ward, have been changed by the amendment to Welfare and Institutions Code section 779.

Accordingly, the standard for juvenile court intervention under the test claim amendment to Welfare and Institutions Code section 779 requiring a "showing of good cause that the Youth Authority is unable to, or failing to, provide treatment" is not new program or a higher level of service over that expressed by the California Supreme Court in the *Owen* case.

For these reasons, the Commission finds that section 779, as amended by Statutes 2003, chapter 4, does not mandate a new program or higher level of service subject to article XIII B, section 6 on county public defenders.

2. Parole Consideration Date(s) (§ 1731.8) and Parole Procedures (§ 1719)

Welfare and Institutions Code sections 1719 and 1731.8 address a juvenile's PCD. The regulation that defines a PCD states: "A parole consideration date represents, from its date of establishment, an interval of time in which a ward may reasonably and realistically be expected to achieve readiness for parole. It is not a fixed term or sentence, nor is it a fixed parole release date."[76] One court described the PCD as follows:

> The parole consideration date is neither a parole release date, a term, or a sentence. It is a date for further review, subject to change by the Youth Authority depending upon the rehabilitation process of the ward. Moreover, pursuant to Welfare and Institutions Code section 1762, wards must be considered for parole at least annually. The parole consideration date is merely an additional review of parole readiness based upon the ward's projected rehabilitation progress. It is not an inflexible time but may, within the principles of the rehabilitation program of the Youth Authority, be modified to reflect the needs of the ward.[77]

Under preexisting law, a PCD is required to be established for each ward at an initial YOBP hearing.[78] The initial PCD is established "from the date of acceptance by the Youth Authority of a ward committed by a court of competent jurisdiction or from the date of the disposition hearing in which parole is revoked."[79]

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[76] California Code of Regulations, title 15, section 4945 (a).

[77] *In re Davis* (1978) 87 Cal.App.3d 919, 923-924.

[78] California Code of Regulations, title 15, section 4945 (b).

[79] California Code of Regulations, title 15, section 4945 (c).

The test claim statute made CYA responsible for setting PCDs[80] and added the following:

> Notwithstanding any other provision of law, within 60 days of the commitment of a ward to the Department of the Youth Authority, the department shall set an initial parole consideration date for the ward and shall notify the probation department and the committing juvenile court of that date. The department shall use the category offense guidelines contained in Sections 4951 to 4957, inclusive, of, and the deviation guidelines contained in subdivision (i) of Section 4945 of, title 15 of the California Code of Regulations, that were in effect on January 1, 2003, in setting an initial parole consideration date.[81]

The test claim statute also amended section 1719 to specify the duties for the YAB (former YOPB) and CYA, and granted to CYA some of YOPB's former duties, and added the following language authorizing modification of PCDs:

> The department [CYA] may extend a ward's parole consideration date, subject to appeal pursuant to subdivision (b) [authorizing a ward's appeal of adjustment to the parole consideration date to "at least two board members"] from one to not more than 12 months, inclusive, for a sustained serious misconduct violation if all other sanctioning options have been considered and determined to be unsuitable in light of the ward's previous case history and the circumstances of the misconduct. In any case in which a parole consideration date has been extended, the disposition report shall clearly state the reasons for the extension. The length of any parole consideration date extension shall be based on the seriousness of the misconduct, the ward's prior disciplinary history, the ward's progress toward treatment objectives, the ward's earned program credits, and any extenuating or mitigating circumstances. … The department may also promulgate regulations to establish a process for granting wards who have successfully responded to disciplinary sanctions a reduction of up to 50 percent of any time acquired for disciplinary matters. (§ 1719 (d).)

Claimant argues that the amendments to sections 1731.8 and 1719 mandate a new program or higher level of service for public defenders to monitor the parole procedures described in these sections in order to further assist the ward in a possible section 779 motion asking the court to change, amend, or modify a commitment order granting parole for the ward. Claimant reasserts its argument that pursuant to the test claim statute, the court may now substitute its judgment on rehabilitation for that of CYA. According to claimant:

> Since the Youth Authority's Administrative Committee, (YAAC), order the youth's treatment and programming, it is inextricably bound with his or her success or failure at CYA. Since failure would be addressed by a § 779 motion, public defenders are under an obligation to coordinate with the YAAC and participate in their meetings to the extent allowed. Under the law prior to [the test

[80] Welfare and Institutions Code section 1719(c).

[81] Welfare and Institutions Code section 1731.8.

> claim statute], the court was powerless to challenge CYA's parole denials and the court was precluded from "substituting its judgment for that of CYA." (See In re Owen E., supra, 23 Cal.3d 398 at 405 …)
>
> Accordingly, [the test claim statute] now mandates a statutory scheme in which the court does substitute its judgment for that of the CYA, tantamount to the granting of parole; thus, the Public Defender has a new duty to monitor parole procedures and assist its clients in their attempts to gain parole.[82]

In comments on the draft staff analysis, claimant repeats the arguments above and states:

> (1) YAAC's treatment orders and programming are not excluded from treatment standards and procedures required under SB 459 [the test claim statute], so the juvenile court has a responsibility to review them and intervene when they are deficient and (2) the County Public Defender's clients have a new remedy to ensure that SB 459 treatment standards and procedures are applied in their case --- and this, of course, requires coordination with YAAC and participation in their meetings to the extent allowed.

Claimant's interpretation of these statutes is wrong. First, as described above, the court's jurisdiction to change, modify, or amend a commitment order under Welfare and Institutions Code section 779 has not changed. The court does not have jurisdiction when a section 779 motion is filed to "substitute its judgment for that of the CYA," as suggested by claimant.

Second, the plain language of sections 1731.8 and 1719 does not impose any new duties on local government. Under prior law, parole consideration dates could be modified by YOPB. For category 1 through 3 offenses, a board panel or referee could "approve a deviation or modification of six months earlier or later than the prescribed or previously established parole consideration date, except that a referee may modify a parole consideration date up to 12 months for DDMS [Disciplinary Decision Making System] behavior."[83] Any deviation in excess of this modification must be submitted to the full Board panel for decision.[84]

For category 4 (serious) offenses, a referee could approve a six-month deviation from the prescribed parole consideration date and may recommend further deviation by submitting the matter to a full Board panel for decision.[85] For category 5 offenses, a board panel or referee could in any annual review year modify an established parole consideration date by six months with certain exceptions.[86] For category 6 offenses, a referee can in any annual review year

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[82] Exhibit A. Test claim, page 6. Emphasis in original.

[83] California Code of Regulations, title 15, sections 4951(b)(2), 4952 (b)(2), 4953 (b)(2). DDMS is a process to ensure a ward the right to due process in disciplinary matters. California Code of Regulations, title 15, sections 4630.

[84] California Code of Regulations, title 15, sections 4951(b)(3), 4952 (b)(3), 4953 (b)(3).

[85] California Code of Regulations, title 15, section 4954(b)(2).

[86] California Code of Regulations, title 15, section 4955(b)(2).

modify an established parole consideration date by six months with certain exceptions.[87] For category 7 offenses, a parole consideration date of one year or less is established subject to a six-month modification by a referee in any annual review year, with certain exceptions.[88]

Preexisting regulations also contain 20 factors to consider when modifying a parole consideration date, including:

1. Extent of involvement in commitment of offense(s);
2. Prior history of delinquency or criminal behavior including sustained petitions and/or convictions;
3. Involvement with dangerous or deadly weapons, their possession or use;
4. Violence, actual or potential. Injury to victims;
5. Behavior or adjustment while in custody prior to acceptance of commitment;
6. Attitude toward commitment offense(s) and victims of offense(s);
7. Alcohol/drug abuse;
8. Facts in mitigation or aggravation as established by court findings;
9. Psychiatric/psychological needs;
10. Staff evaluation;
11. Available confinement time;
12. Maturity and level of sophistication;
13. Motivation of the ward and prognosis for success or failure;
14. Multiplicity of counts of the same, related, or different offense;
15. Factors evaluated in the Community Assessment Report;
16. Availability of community-based programs and the ability to function in the same under parole supervision without danger to the public;
17. Mental or emotional injury to victim;
18. Vulnerable victim: aged or handicapped;
19. Presence of victim during commission of burglary, first degree;
20. Extent the committing offense was youth gang related.[89]

The regulations also include deviation guidelines for modifying an established parole consideration date to assist in determining readiness for parole.[90]

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[87] California Code of Regulations, title 15, section 4956(b)(2).

[88] California Code of Regulations, title 15, section 4957(b)(2).

[89] California Code of Regulations, title 15, section 4945(i).

The test claim statute amendments to sections 1731.8 and 1719 simply transferred the duties imposed on YOPB to CYA relating to the ward's PCD, and directed CYA to comply with the existing regulations that are described above when modifying or deviating from the PCD. The statutes do not require local government to perform any new duties.

Accordingly, sections 1731.8 and 1719, as amended by the test claim statute, do not mandate a new program or higher level of service on local government subject to article XIII B, section 6 of the California Constitution.

3. Ward Reviews (§ 1720(e) & (f))

Under prior law, Welfare and Institutions Code section 1720 required the YOPB to hear the case of each ward "immediately after the case study of the ward has been completed and at such other times as is necessary to exercise the powers and duties of the board."[91] YOPB was also required to "periodically review the case of each ward for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force."[92] The reviews were required as frequently as the YOPB considered desirable, and at a minimum annually after the initial review. If the review was delayed beyond the year, the ward was entitled to notice that contained the reason for the delay and the date the review hearing was to be held.[93] Failure of the YOPB to review the case of the ward within 15 months of a previous review entitled the ward to petition the superior court for an order of discharge, and the court was required to discharge the ward unless the court was satisfied that the ward needed further control.[94]

The test claim statute amended section 1720 to transfer YOPB's review duties to CYA. Now, CYA is required to review each ward's case within 45 days of arrival at CYA and at other times as is necessary to meet the requirements of law.[95] The duty to "periodically review the case of each ward for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force" is transferred to CYA. Like the review by YOPB, the CYA reviews are required as frequently as CYA considers desirable, and at least annually after the initial review.[96]

In addition, the test claim statute added subdivision (e) to section 1720 to specify that the annual reviews of the ward shall be written and include the following content:

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[90] California Code of Regulations, title 15, section 4945(j).

[91] Former Welfare and Institutions Code section 1720 (a). Section 1720 was initially enacted in 1979 (Stats. 1979, ch. 860) and last amended in 1984 (Stats. 1984, ch. 680).

[92] Former Welfare and Institutions Code section 1720(b).

[93] Former Welfare and Institutions Code section 1720(b) and (c).

[94] Former Welfare and Institutions Code section 1720 d).

[95] Welfare and Institutions Code section 1720(a).

[96] Welfare and Institutions Code section 1720(c).

- Verification of the treatment or program goals and orders for the ward to ensure the ward is receiving treatment and programming that is narrowly tailored to address the correctional treatment needs of the ward and is being provided in a timely manner that is designed to meet the parole consideration date set for the ward;
- An assessment of the ward's adjustment and responsiveness to treatment, programming, and custody;
- A review of the ward's disciplinary history and response to disciplinary sanctions;
- An updated individualized treatment plan for the ward that makes adjustments based on the review required by this subdivision;
- An estimated timeframe for the ward's commencement and completion of the treatment programs or services; and
- A review of any additional information relevant to the ward's progress.

Finally, subdivision (f) was added to the statute to require CYA to "provide copies of the reviews prepared pursuant to this section to the court and the probation department of the committing county."

Claimant alleges that the amendment to section 1720 (f), requiring that copies of the reviews be provided to the court and probation department of the committing county, requires the public defender to review, evaluate, monitor, and change treatment plans as necessary to assure compliance with the order of the court, the needs of the client, and the possible filing of a section 779 motion. As indicated above, the section 779 motion is used to request the court to change, modify, or set aside an order of commitment to CYA when CYA has failed to comply with law or has allegedly abused its discretion in dealing with a ward in its custody.

Claimant, in comments to the draft staff analysis, further alleges that section 1720(e) and (f) mandate a new program or higher level of service by setting higher treatment standards and reporting requirements. Claimant alleges that:

1. The test claim statute, for the first time in section 1720(e), requires the periodic review of cases be in writing and address the specific treatment goals, needs, and progress of the ward.
2. Prior to the 2003 amendment to section 1720, CYA was not required to provide written copies of its review of cases of the ward to the court and probation department.
3. The words "treatment" and "report" are not found in the statute before the test claim statute amended the code section.
4. Before the amendment, CYA was not required to report on the progress of the rehabilitative treatment of the ward to the juvenile court, and county public defenders were not aware of the "serious treatment deficiencies" noted by the California Inspector General in the provision of treatment.
5. The county public defender is now required to provide new services designed to ensure that its clients receive the treatment called for in the statute. As a result of the

test claim statute, the county created a CYA Unit in the public defender's office to advocate on behalf of the wards.

For the reasons below, the Commission finds that section 1720, as amended by Statutes 2003, chapter 4, does not mandate a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

State mandates under the Constitution that require reimbursement "are requirements imposed on local government by legislation or executive orders."[97] Here, the requirements in section 1720 are imposed solely on CYA. The plain language of the statute does not impose any duties on local government.

Moreover, the requirement to have treatment goals for the ward and put progress reports in writing is not new. Under prior law, a ward received complete medical diagnostic services upon commitment to CYA and was referred to appropriate specialists as needed.[98] An initial case conference was conducted within five weeks after the ward's assignment, whereby the treatment team at CYA was required to establish treatment goals for the ward.[99] It was required that the ward be present throughout each case conference in order to participate in the process unless information being discussed was too psychologically damaging to the ward, the ward decided not to attend, or the ward was hospitalized.[100] Moreover, for purposes of the annual review of the ward, prior law required the treatment team at CYA to:

- Advise the ward that an annual review was to be conducted;
- Prepare a comprehensive progress report reviewing the ward's adjustment for the year;
- Schedule the ward for the annual review by the YOPB;
- Inform the ward of the content and recommendation of the case report prior to preparation in final form; and
- Provide the ward with a copy of the final case report no later than five days before the scheduled hearing date.[101]

Under prior law, the ward could not be denied or obstructed in his or her efforts to present a petition or legal document to the courts after receiving a written case report. Although CYA was not responsible for obtaining an attorney for the ward, the ward was not prohibited from contacting his or her attorney or other member of the public for assistance in the preparation of a petition.[102]

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[97] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189.

[98] California Code of Regulations, title 15, section 4611 (last amended in 1985).

[99] California Code of Regulations, title 15, section 4618 (last amended in 1985).

[100] California Code of Regulations, title 15, section 4617 (last amended in 1985).

[101] California Code of Regulations, title 15, section 4622 (last amended in 2001).

[102] California Code of Regulations, title 15, section 4131 (last amended in 1985).

Moreover, under prior law, the ward had a constitutional due process right to have his or her attorney receive a copy of the progress report, to review and evaluate the information, and to represent the ward as necessary. The amendments to section 1720 did not change that right.

In 1998, before the enactment of the test claim statute, the court in *In re Michael I.* interpreted the requirements of section 1720 regarding the ward's right to have his or her attorney review the ward's file and consult with the ward before an annual review.[103] Under the facts of the case, CYA did not permit the ward's counsel to meet with the ward until the afternoon before the review hearing and did not make the ward's file available until a month after the hearing. Thus, the court determined that CYA violated the ward's constitutional due process rights.[104]

The *Michael I.* court explained that a decision to deny parole is not part of the criminal prosecution and, thus, there is no absolute constitutional right to counsel at a parole revocation hearing. However, the loss of liberty entailed is a serious deprivation requiring that the ward be accorded due process. In this respect, the state's decision regarding the ward's need for counsel at the review hearing must be made on a case-by-case basis. If the ward denies that he committed any violations outlined in the reviews of the ward, or when the ward asserts complex matters in mitigation, the ward has a right to counsel. The right to counsel should also be seriously considered when an admission is coerced.[105]

In the *In re Michael I.* case, however, the ward was not requesting that his counsel be present at the review hearing, or that the state provide him with appointed counsel from the public defender's office. Rather, the ward asserted he had a due process right to meet with counsel before the review hearing and to have the state provide his counsel with access to the ward's review file before the hearing. In agreeing, the court stated:

> However, if due process is to mean anything, CYA cannot deliberately structure procedures which prevent counsel retained at the ward's expense from reviewing the ward's file and consulting with the ward before such a hearing. Here, CYA frustrated all of McDonald's [the attorney's] reasonable and timely attempts to review Michael's file and arrange for a prehearing meeting so he and Michael could review its contents, discuss challenges thereto, if any, explore possible mitigating evidence, and arrange to present such challenges and evidence to the board. A "brief meeting less than 24 hours before the hearing, without access to the file that outlined the recommendation and its factual support, renders Michael's retention of counsel worthless. . . . Moreover, one of the factors discussed above in determining whether counsel should be permitted to be present at the review is whether Michael planned to contest the allegations, present complex mitigating evidence, or claim any admissions were coerced. Without the ability to review his file and discuss its contents and any response with his lawyer,

[103] *In re Michael I.* (1998) 63 Cal.App.4th 462.

[104] *Id* at page 469.

[105] *Id.* at pages 467-468.

> Michael and CYA could not know whether he would be entitled to McDonald's presence.[106]

Thus, claimant's assertion that the test claim statute, for the first time, requires the public defender's office to review and evaluate the information in the wards' reviews, is wrong. This right and duty existed in prior law under the ward's constitutional due process rights.

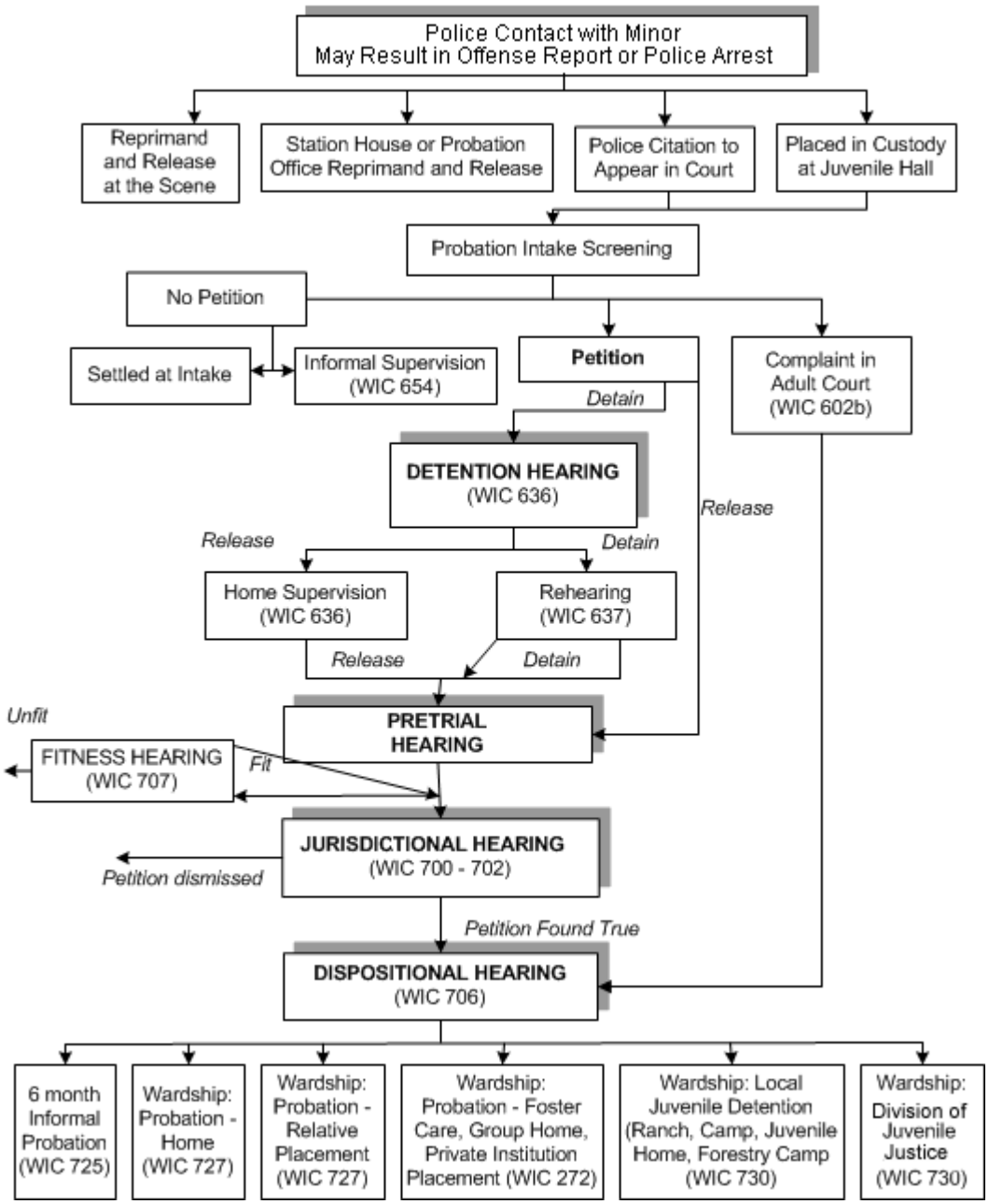
Furthermore, although the statute now requires CYA to provide copies of the reports to the court and the probation department, the court cannot take action on the report for any alleged deficiencies in treatment, as suggested by claimant, unless a petition is filed by the ward or on behalf of the ward pursuant to Welfare and Institutions Code sections 778 and 779. Under prior law, both the ward and the ward's attorney could obtain copies of the reports to assess whether or not to file a petition for modification or set aside of the prior order of commitment under these statutes. The test claim statute did not change those rights.

Accordingly, the Commission finds that section 1720 as amended by Statutes 2003, chapter 4, does not mandate a new program or higher level of service on county public defenders.

IV. Conclusion

The Commission finds that the test claim statutes pled by claimant (Welf. & Inst. Code, §§ 779, 1731.8, 1719 & 1720, as amended by Stats. 2003, ch. 4) do not constitute a reimbursable state-mandated program subject to article XIII B, section 6 of the California Constitution.

[106] *In re Michael I., supra,* 63 Cal.App.4th at p. 468.


Police Contact with Minor
May Result in Offense Report or Police Arrest
Reprimand and Release at the Scene
Station House or Probation Office Reprimand and Release
Police Citation to Appear in Court
Placed in Custody at Juvenile Hall
Probation Intake Screening
No Petition
Settled at Intake
Informal Supervision (WIC 654)
Petition
Detain
Complaint in Adult Court (WIC 602b)
DETENTION HEARING (WIC 636)
Release
Release
Detain
Home Supervision (WIC 636)
Rehearing (WIC 637)
Release
Detain
Unfit
PRETRIAL HEARING
FITNESS HEARING (WIC 707)
Fit
JURISDICTIONAL HEARING (WIC 700 - 702)
Petition dismissed
Petition Found True
DISPOSITIONAL HEARING (WIC 706)
6 month Informal Probation (WIC 725)
Wardship: Probation - Home (WIC 727)
Wardship: Probation - Relative Placement (WIC 727)
Wardship: Probation - Foster Care, Group Home, Private Institution Placement (WIC 272)
Wardship: Local Juvenile Detention (Ranch, Camp, Juvenile Home, Forestry Camp (WIC 730)
Wardship: Division of Juvenile Justice (WIC 730)

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RE: **Adopted Statement of Decision**

Juvenile Offender Treatment Program Court Proceedings, 04-TC-02
Welfare and Institutions Code Sections 779, 1731.8, 1719, and 1720
Statutes 2003, Chapter 4 (SB 459)
County of Los Angeles, Claimant

On May 25, 2012, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: May 31, 2012

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Section 49452.8 Statutes 2006, Chapter 413 (AB 1433) Filed on September 25, 2007, By San Diego Unified School District, Claimant.	Case No.: 07-TC-03 *Pupil Health: Oral Health Assessment* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 28, 2012*) (*Served October 4, 2012*)

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on September 28, 2012. Arthur Palkowitz appeared on behalf of the claimant, San Diego Unified School District. Donna Ferebee and Lauren Carney 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 staff analysis to deny the test claim at the hearing by a vote of 7 to 0.

Summary of the Findings

In order for the test claim statute to impose a reimbursable state-mandated program, the statutory language must mandate school districts to perform a new program or higher level of service, resulting in districts incurring increased costs mandated by the state. Here, the test claim statute does impose mandated activities, but those activities are funded by a specific appropriation, in an amount sufficient to cover the costs of the mandated activities, pursuant to Government Code section 17556(e). There is no evidence of increased costs mandated by the state and, thus, reimbursement is not required. The Commission denied this test claim.

COMMISSION FINDINGS

Chronology

09/25/2007	Claimant filed the test claim with the Commission on State Mandates (Commission)
10/12/2007	Commission staff deemed the filing complete
11/09/2007	The Department of Finance (DOF) submitted written comments
07/20/2012	Commission staff issued the draft staff analysis for comment
09/12/2012	Commission staff issued the final staff analysis and proposed statement of decision

I. Background

This test claim seeks reimbursement for costs incurred by school districts and county offices of education resulting from a 2006 test claim statute that added section 49452.8 to the Education Code to address the oral health assessment of first-year public school children.

In enacting the test claim statute, the Legislature declared that its purpose was to promote oral health in young children, by requiring an assessment to be conducted by a dental professional upon a child's first entry into public school.[1] The statute requires that children enrolling in kindergarten, or in first grade if not previously enrolled in kindergarten, shall present proof of having received an oral health assessment by a licensed dentist or other health professional, not more than 12 months before enrollment. Children whose parents or legal guardians indicate financial hardship, lack of access to a licensed dentist, or non-consent to the assessment are exempt from this requirement and may be granted a waiver. Either the assessment, or a waiver form, must be provided to the school district by May 31 of the year of enrollment. The statute requires public schools to notify the parents or legal guardians of the requirement, collect the completed assessments and waiver forms, and submit an annual report to the county office of education, as specified.[2]

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[1] The Legislature made the following findings: "(a) Oral health is integral to overall health; (b)Tooth decay is the most common chronic childhood disease, experienced by more than two-thirds of California's children and five times more common than asthma; (c) California's schoolchildren, ages 6 to 8, inclusive, experience oral disease at twice the rate of schoolchildren in other states; (d) Oral diseases are infectious, are not self-limiting, contribute to many lost school hours, negatively impact learning, interfere with eating, contribute to poor self-esteem, and can cause considerable pain; (e) Tooth decay is preventable." (Stats. 2006, ch. 413 (AB 1433), § 1.)

[2] Education Code section 49452.8, as added by Statutes 2006, chapter 413 (AB 1433), section 2.

Section 3 of Statutes 2006, chapter 413 provides that funds allocated to local educational agencies pursuant to Item 6110-268-0001 of the 2006 Budget Act shall first be used to offset any reimbursement for costs mandated by the state.

II. Positions of the Parties and Interested Parties

A. Claimant's Position

The claimant alleges that the test claim statute constitutes a reimbursable state-mandated program. The claimant requests reimbursement for the following new activities under the statute:

(1) To train district staff in order to implement the mandated activities.

(2) To review the requirements [of the statute] and any regulations relating to the *Pupil Health: Oral Health Assessment* mandate.

(3) To prepare [and issue a letter], or other reasonable method of communication. The notification must consist, at a minimum, of a letter that includes all of the following:

  (a) An explanation of the administrative requirements of Education Code section 49452.8.

  (b) Information on the importance of primary teeth.

  (c) Information on the importance of oral health to overall health and to learning.

  (d) A toll-free telephone number to request application for Healthy Families, Medi-Cal, or other government-subsidized health insurance programs.

  (e) Contact information for county public health departments.

  (f) A statement of privacy applicable under state and federal laws and regulations.

(4) To notify parents or legal guardians of pupils, enrolled in kindergarten or while enrolled in first grade if not previously enrolled in kindergarten, concerning the oral health assessment requirement.

(5) To collect completed letters from the parents or legal guardians of kindergarten or first-grade pupils to ensure compliance with the oral health assessment requirements no later than May 31st of the school year.

(6) To excuse parents or legal guardians who indicate on the letter that the oral health assessment could not be completed because one or more of the [reasons enumerated in subdivision (d), paragraph (2) is applicable].

(7) To prepare and submit a report, by December 31 of each year, to the county office of education upon receipt of completed assessments. School districts must include in that report:

(a) The total number of pupils in the district, by school, who are subject to the oral health assessment requirement (i.e., the number of kindergarten students plus the number of first grade students who did not attend public school kindergarten).

(b) The total number of pupils who present proof of an assessment.

(c) The total number of pupils who could not complete an assessment due to financial burden.

(d) The total number of pupils who could not complete an assessment due to lack of access to a licensed dentist or other licensed or registered dental health professional.

(e) The total number of pupils who could not complete an assessment because their parents or legal guardians did not consent to their child receiving the assessment.

(f) The total number of pupils who are assessed and found to have untreated decay.

(g) The total number of pupils who did not return either the assessment or the waiver request to the school.[3]

The claimant states that it distributed 9,872 Oral Health Assessment/Waiver forms to parents or legal guardians of children subject to the requirement in 2006/2007. The claimant states that 3,458 assessments were returned, and 397 waivers were collected.[4]

The claimant alleges that it incurred $67,488 in increased costs between January 1, 2007 and December 30, 2007, pursuant to the new activities. That total cost estimate includes (1) $1,442 to train district staff; (2) $13,266 to implement the *Oral Health Assessment* program, distribute information and forms, answer questions, collect and input data, and prepare forms for the county office of education; (3) $1,307 to prepare the letters to be sent to notify parents or guardians of the requirement (4) $46,901 to distribute and collect assessment/waiver forms; and (5) $4,571 to report compliance results and statistics to the county office of education.[5]

The claimant notes that the 2006-2007 Budget Act (the most recent budget act available at the time of filing this test claim) contained an appropriation for the program. The amount allocated for that budget year matched claimant's estimate of statewide costs. However, the claimant expresses concern that continuing funding for the program is at the discretion of the Legislature,

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

[4] Exhibit A. Test Claim, p. 6.

[5] Exhibit A. Test Claim, pp. 6; 16.

and that the claimant should not be forced to resort to its Title I funding to cover any future shortfall should a budget appropriation not be made.[6]

B. Department of Finance's Position

DOF argues that because the activities mandated by the test claim statute were fully funded as of the date of filing, the Commission should not, and may not, find that the statute creates a reimbursable mandate. DOF states that Government Code section 17556(e) specifically prohibits the Commission from finding "costs mandated by the state," as defined in section 17514, where the costs incurred are provided for with offsetting savings or additional revenue in an amount sufficient to fund the mandate.[7]

III. 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."[8] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[9]

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.[10]
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.[11]

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[6] Exhibit A. Test Claim, pp. 7; 18.

[7] Exhibit B. Department of Finance Comments, p. 1.

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

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

[10] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 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.[12]

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.[13]

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.[14] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[15] 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."[16]

A. The test claim statute does not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution because the program has been funded and there is no evidence of school districts incurring increased costs mandated by the state.

Education Code section 49452.8 requires school districts and county offices of education to perform the following activities:

- [N]otify the parent or legal guardian of a pupil described in subdivision (a) concerning the assessment requirement.[17]
- The notification shall include all of the following information:

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[11] *Id*. at 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.)

[12] *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.

[13] *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.

[14] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487; Government Code section 17551 and 17552.

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

[16] *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.

[17] Education Code section 49452.8 (c), as added by Statutes 2006, chapter 413 (AB 1433), section 2.

- An explanation of the administrative requirements of this section.
- Information on the importance of primary teeth.
- Information on the importance of oral health to overall health and to learning.
- A toll free telephone number to request an application for Healthy Families, Medi-Cal, or other government-subsidized health insurance programs.
- Contact information for county public health departments.
- A statement of privacy applicable under state and federal laws and regulations.[18]

- Upon receiving completed assessments, all school districts shall, by December 31 of each year, submit a report to the county office of education of the county in which the school district is located.[19]
- The report shall include the following information:
  - The total number of pupils in the district, by school, who are subject to the requirement to present proof of having received an oral health assessment pursuant to subdivision (a).
  - The total number of pupils described in paragraph (1) who present proof of an assessment.
  - The total number of pupils described in paragraph (1) who could not complete an assessment due to financial burden.
  - The total number of pupils described in paragraph (1) who could not complete an assessment due to lack of access to a licensed dentist or other licensed or registered dental health professional.
  - The total number of pupils described in paragraph (1) who could not complete an assessment because their parents or legal guardians did not consent to their child receiving the assessment.
  - The total number of pupils described in paragraph (1) who are assessed and found to have untreated decay.
  - The total number of pupils described in paragraph (1) who did not return either the assessment form or the waiver request to the school.[20]

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[18] Education Code section 49452.8 (c) (1-6), as added by Statutes 2006, chapter 413 (AB 1433), section 2.

[19] Education Code section 49452.8 (e), as added by Statutes 2006, chapter 413 (AB 1433), section 2.

[20] Education Code section 49452.8 (e) (1-7), as added by Statutes 2006, chapter 413 (AB 1433), section 2.

- Each county office of education shall maintain the data described in subdivision (e) in a manner that allows the county office to release it upon request.[21]

These activities are new requirements, effective in the 2006-2007 school year, and were intended to provide a service to the public. As previously noted, the Legislature declared its findings in section 1 of the statute, including a finding that oral health is integral to overall health and well-being, that oral disease contributes to lost school hours and negatively impacts learning, and that tooth decay is preventable. The Legislature thereby signified its purpose, in enacting the Oral Health Assessment requirement, as it affects both parents and schools, to promote oral health in school children by ensuring that first-year public school children are screened for tooth decay.[22]

However, school districts and county offices of education have received funding for these activities in all fiscal years since 2006, and there is no evidence in the record that the claimant, or any other school district, has incurred increased costs mandated by the state beyond those budget appropriations.

Government Code section 17514 defines "costs mandated by the state" as any increased cost that a local agency is required to incur as a result of a statute that mandates a new program or higher level of service." Government Code section 17556(e) provides that the Commission "shall not find costs mandated by the state," if the Commission finds that:

> (e) 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 that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

Here, DOF asserts, and the claimant acknowledges, that the program imposed by the test claim statute has been fully funded in the budget.[23] Section 3 of Statutes 2006, chapter 413 (AB 1433), provides that "[f]unds allocated to local educational agencies pursuant to Item 6110-268-0001 of Section 2.0 of the Budget Act of 2006…shall be used to offset any reimbursement to local educational agencies provided pursuant to [Government Code §17500 et seq]." Budget line item 6110-268-0001 provides for $4,400,000 for the Oral Health Assessment program.[24]

The claimant's estimate of statewide costs to local educational agencies exactly matches the funding appropriated.[25] And beginning in 2007, the Budget Act contained language specifically

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[21] Education Code section 49452.8 (f), as added by Statutes 2006, chapter 413 (AB 1433), section 2.

[22] Statutes 2006, chapter 413 (AB 1433), section 1.

[23] Exhibit B. Department of Finance Comments, p. 1.

[24] Statutes 2006, chapter 48 (AB 1811), section 43.

[25] See Exhibit A, Test Claim p. 18 ["In fiscal year 2007/08, the CDE expects eligible local educational agencies to receive approximately $8.40/student enrolled in 1st grade. $4,048,000

naming the Oral Health Assessment program in the appropriate line item. The language of the appropriation provides as follows:

> The funds appropriated in this item shall be considered *offsetting revenues within the meaning of subdivision (e) of section 17556 of the government code* for any reimbursable mandated cost claim for child oral health assessments. Local educational agencies accepting funding from this item shall reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them from this item.[26]

Government Code section 17556(e) applies to limit the Commission's findings where there are offsetting revenues specifically intended to fund the mandate. Those offsetting revenues may be authorized in the statute, or in a Budget Act or other bill, and must result in no net costs to the claimant. If available funding does not result in zero net costs, the test claim may still succeed, and the funding would be treated only as an offset. But here, the monies allocated are specifically intended to fund the mandate, and the claimant's own statewide cost estimate exactly matches the appropriation made. Therefore the exception in section 17556(e) applies, and there is no evidence of "costs mandated by the state," within the meaning of section 17514.

Claimant argues that the Commission should still find that the statute imposes a reimbursable state-mandated program, due to fears that someday the Legislature might not fund the program.[27] Specifically, the test claim and the declaration of Jennifer Gorman, Nursing and Wellness Program Manager at San Diego Unified School District, suggest that future appropriations are "not guaranteed."[28] However, the claimant's concern over the possibility of lost funding in the future, resulting in unspecified potential costs, is not sufficient to allege reimbursable costs mandated by the state. Government Code section 17564 states that no claim shall be made unless the claim results in costs exceeding $1,000. If the Legislature were to discontinue funding the program, resulting in districts incurring costs of at least $1,000, then a test claim could be filed pursuant to Government Code section 17551(c) within one year of first incurring costs alleging an unfunded mandate. Until that time, however, there is no evidence of school districts incurring costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

A review of recent Budget Acts from 2006-2007 through 2012-2013 reveals that the funding of the mandate, at line item 6110-268-0001, has continued, despite the claimant's fears. The line

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will be allocated to local educational agencies based on 2006 CBEDS enrollment for first grade. $352,000 will be allocated to County Offices of Education for data storage and retrieval."]; p. 2 ["The statewide cost estimate of increased costs incurred by this legislation would be $4,048,000."].

[26] Statutes 2007, chapter 171 (SB 77), Budget Line Item 6110-268-0001 [emphasis added].

[27] Exhibit A. Test Claim, p. 18.

[28] *Id*.

item appearing in the 2006-2007 and 2007-2008 budgets, which specifically referred to the Oral Health Assessment program, reappears in subsequent enactments for 2008-2009, 2009-2010, 2010-2011and 2011-2012. Each of those budgets contains the same $4,400,000 appropriation at line item 6110-268-0001, and each states that "[t]he funds appropriated in this item shall be considered offsetting revenues within the meaning of subdivision (e) of Section 17556 of the Government Code." It is telling that the Budget Acts specifically refer to the offsetting revenue exception of section 17556(e), presumably with the intent to undermine a test claim such as the one filed here. Thus the mandate is specifically funded within the meaning of section 17556(e), up to the 2012-2013 budget year.[29]

In the 2012-2013 budget year, the line item reappears, but the funding has been reduced by approximately 21%.[30] Whatever the significance of this reduction, claimant has not shown any independent basis for the original 2007 statewide cost estimate of $4,048,000, nor issued any comments providing an updated statewide cost estimate or any evidence or accounting of increased costs mandated by the state in the intervening years. Without more, there is no evidence in the record that the reduced budget allocation is not sufficient to fund the costs of the mandated program for the 2012-2013 fiscal year and beyond.

Thus, the Commission finds that Budget Act appropriations have provided additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the costs of the state mandate within the meaning of Government Code section 17556(e), and that there is no evidence of increased costs mandated by the state.

IV. Conclusion

Based on the foregoing, the Commission finds that Education Code section 49452.8, as added by Statutes 2006, chapter 413, does not impose a reimbursable state-mandated program upon school districts or county offices of education within the meaning of article XIII B, section 6 of the California Constitution.

[29] Statutes 2008, chapter 268 (AB 1781): Item 6110-268-0001; Statutes 2009, Fourth Extraordinary Session, chapter 1 (ABX4 1), section 458: Item 6110-268-0001; Statutes 2010, chapter 712 (SB 870), section 2.00: Item 6110-268-0001; Statutes 2011, chapter 33 (SB 87): Item 6110-268-0001.

[30] Statutes 2012, chapter 21 (AB 1464); Statutes 2012, chapter 29 (AB 1497, filed June 27, 2012).

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RE: **Adopted Statement of Decision**

Pupil Health: Oral Health Assessment, 07-TC-03
Education Code Section 49452.8
Statutes 2006, Chapter 413 (AB 1433)
San Diego Unified School District, Claimant

On September 28, 2012, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

Dated: October 4, 2012

Heather Halsey, Executive Director