Hearing Date: March 25, 2004
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ITEM 12
TEST CLAIM
PROPOSED STATEMENT OF DECISION

Education Code Sections 60850, 60851, 60853, 60855

Statutes 1999x, Chapter 1; Statutes 1999, Chapter 135

California Code of Regulations, Title 5, Sections 1200 – 1225 in effect March 2003

High School Exit Examination (00-TC-06)

Filed by Trinity Union High School District, Claimant

EXECUTIVE SUMMARY

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects any decision made by the Commission at the March 25, 2004 hearing on the above-named test claim.[1]

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page two, which accurately reflects the staff recommendation on the test claim. Minor changes to reflect the hearing testimony and the vote count will be included when issuing the final Statement of Decision.

However, if the Commission's vote on Item 11 modifies the staff analysis, staff recommends that the motion on adopting the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. In the alternative, if the changes are significant, it is recommended that adoption of a Proposed Statement of Decision be continued to the May 2004 Commission hearing.

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[1] California Code of Regulations, title 2, section 1188.1, subdivision (g).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 00-TC-06
Education Code Sections 60850, 60851, 60853, 60855; Statutes 1999x, Chapter 1; Statutes 1999, Chapter 135; California Code of Regulations, Title 5, Sections 1200 – 1225 in effect March 2003. Filed on January 25, 2001, By Trinity Union High School District, Claimant	***High School Exit Examination*** PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Proposed for adoption on March 25, 2004)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on March 25, 2004. [Witness list will be included in the final Statement of Decision.]

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/modified] the staff analysis at the hearing by a vote of [vote count will be included in the final Statement of Decision].

BACKGROUND

A. Test Claim Legislation

The test claim legislation[2] that established the high school exit exam (HSEE) was sponsored by Governor Davis in 1999, and enacted during an extraordinary session of the Legislature dedicated to education reform issues. The purpose of the HSEE is to "significantly improve pupil achievement in public high schools and to ensure that students who graduate from public high schools can demonstrate grade-level competency

[2] Although part of Statutes 1999x, chapter 1, claimant did not plead Education Code section 60852. Therefore, the Commission makes no findings on Education Code section 60852.

in the state content standards for writing, reading and mathematics."[3] The HSEE tests "eligible pupils"[4] on mathematics through Algebra I, and English/Language arts.[5]

The test claim legislation[6] originally required high school students, beginning in the 2003-2004 school year, to pass the HSEE as a condition of receiving a diploma or graduating from high school.[7] Statutes 2001, chapter 716 (Assem. Bill No. 1609) authorizes the State Board of Education (SBE) to delay the date upon which passing the HSEE is required for graduation. The SBE has postponed the HSEE requirement for graduation until the class of 2006, and has shortened the length of the HSEE from three to two days.[8]

The HSEE is administered by the "test administrator," defined as,

> a certificated employee of a school district who has received training in the administration of the [HSEE] from the high school exit examination district or test site coordinator.[9]

The test administrator may be assisted by a test proctor, "an employee of a school district who has received training specifically designed to prepare him or her to assist the test

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[3] <http://www.cde.ca.gov/statetests/cahsee/background/info.html> [as of February 2, 2004].

[4] An eligible pupil is "one who is enrolled in a California public school in any of grades 10, 11, or 12 who has not passed either the English/language arts section or the mathematics section of the [HSEE]." (Cal. Code Regs, tit. 5, § 1200, subd. (e)).

[5] <http://www.cde.ca.gov/statetests/cahsee/background/info.html> [as of February 2, 2004]. More specific content is listed on the website as follows:

> The [English] part [of the HSEE] addresses state content standards through grade 10. In reading, this includes vocabulary, decoding, comprehension, and analysis of information and literary texts. In writing, this covers writing strategies, applications, and the conventions of English (e.g. grammar, spelling, and punctuation). The mathematics part of the [HSEE] addresses state standards in grades 6 and 7 and Algebra I. The exam includes statistics, data analysis and probability, number sense, measurement and geometry, mathematical reasoning, and algebra. Students are also asked to demonstrate a strong foundation in computation and arithmetic, including working with decimals, fractions, and percents.

[6] Statutory references are to the Education Code, unless otherwise indicated.

[7] Education Code section 60851, subdivision (a).

[8] < http://www.cde.ca.gov/statetests/cahsee/background/info.html> [as of February 2, 2004].

[9] California Code of Regulations, title 5, section 1200, subdivision (g). This section was amended in May 2003 to add "…or a person assigned by a nonpublic school to implement a student's Individualized Education Program (IEP)…."

administrator in administration of the [HSEE]."[10] Others with roles in the HSEE are the district coordinator and test site coordinator, whose functions are discussed below.

In addition to the 2001 amendment to the HSEE statutes mentioned above (Stats. 2001, ch. 716), the Legislature also amended the HSEE program in 2002 (Stats. 2002, ch. 808, Sen. Bill No. 1476), and in 2003 (Stats. 2003, ch. 803, Sen. Bill No. 964). These statutes are not before the Commission, which makes no findings on them unless noted herein.

Additionally, the HSEE regulations[11] were amended in May 2003 and are in the process of being amended again. According to the California Department of Education's (CDE) website,[12] the comment period for the latter regulation amendments ended September 30, 2003. The amended regulations, like the statutes, are not before the Commission. Thus, the Commission makes no findings on regulations adopted subsequent to March 2003, when the test claim was amended to add the regulations[13] (the May 2003 amendments to the HSEE regulations are footnoted).

B. Prior Law

The test claim legislation included a finding that "[l]ocal proficiency standards established pursuant to Section 51215 of the Education Code are generally set below a high school level and are not consistent with state adopted academic content standards." (Stats. 1999x, ch. 1, § 1). These proficiency standards were enacted in 1977 and repealed by the test claim legislation. They required school districts with grades 6-12 to establish basic skills proficiency standards and administer proficiency assessments (usually tests) that all pupils must pass to graduate. The locally developed tests and standards were aligned to local curriculum, and at a minimum addressed, "reading comprehension, writing and computational skills, in the English language" (former Ed. Code, § 51215, subd. (c)). Different standards and testing procedures were authorized for special education pupils and other pupils with a diagnosed learning disability (former Ed. Code, § 51215, subd. (d)). Assessment of pupil proficiency in English was required at least once during grades 4 through 6, and 7 through 9, and twice during grades 10 and 11. Districts could defer assessing pupils of limited English proficiency until the pupils had received at least 24 months of instruction, including six months of instruction in English (former Ed. Code, § 51216, subd. (a)).

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[10] California Code of Regulations, title 5, section 1200, subdivision (h).

[11] References to regulations are to California Code of Regulations, title 5, sections 1200-1225, unless otherwise indicated.

[12] <http://www.cde.ca.gov/regulations/cahseeseb15dnot090903.pdf> [as of February 2, 2004].

[13] California Code of Regulations, title 5, section 1218.5 was adopted in May 2003 and requires the school district to administer the HSEE to the pupil with modifications if the pupil's IEP or Section 504 plan indicates that it is appropriate and necessary for a pupil to use modifications. As a regulation adopted after March 2003 the test claim amendment, the Commission makes no finding on Section 1218.5.

C. Federal Law

Some of the HSEE activities arise under federal law, warranting a summary of those statutes.

Individuals with Disabilities Education Act: Administering statewide assessments with accommodations to disabled students, and Individualized Education Programs (IEPs) are provided for under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.), the purposes of which are stated in 20 U.S.C. § 1400 (d):

> (1)(A) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services … (B) to ensure that the rights of children with disabilities and parents … are protected; and (C) to assist States, localities, educational services agencies, and Federal agencies to provide for the education of all children with disabilities;

Other purposes of the IDEA are, "early intervention services for infants and toddlers with disabilities … to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities…and to assess, and ensure the effectiveness of efforts to educate children with disabilities." (*Ibid.)* Assistance is available to states (20 U.S.C. § 1411, 1412) and local educational agencies (20 U.S.C. § 1413) that meet specified criteria (34 C.F.R. § 300.110 (1999)). IDEA requires that disabled children be "included in general State and district-wide assessment programs, with appropriate accommodations, where necessary" (20 U.S.C. § 1412 (a)(17), 34 C.F.R. § 300.138 (1999).) IDEA also provides for the IEP, a document with specified contents that includes (1) measurable annual goals to meet the disabled child's needs regarding the curriculum and other educational needs, and (2) the special education and aids and services to be provided to the child (20 U.S.C. § 1414 (d)). The HSEE statutes and regulations conform to IDEA's statewide assessment, accommodations, and IEP requirements.

The predecessor to IDEA is the federal Education of the Handicapped Act (FEHA), which since its 1975 amendments has

> required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education. (20 U.S.C. § 1412 (a).) The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states [citations omitted]. … The Supreme Court has noted that Congress intended the act to establish "a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children." [citations omitted.][14]

[14] *Hayes v. Commission on State Mandates,* (1992) 11 Cal. App. 4th 1564, 1587.

The *Hayes* court held that FEHA is a federal mandate.[15] *Hayes* also held,

> To the extent the state implemented the act [FEHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[16]

No Child Left Behind Act: The federal government required statewide systems of assessment and accountability (such as HSEE) for schools and districts participating in the Title I program under the Improving America's Schools Act (IASA) of 1994. In 2002, the federal No Child Left Behind (NCLB) Act replaced the IASA. Under NCLB, annual assessments in mathematics, reading and science are required (20 U.S.C. § 6311 (b)(3)(A), 34 C.F.R. § 200.2 (a) (2002)), although the science assessments need not be conducted until the 2007-2008 school year (*Ibid)*. States are also required, by school year 2002-2003, to "provide for an annual assessment of English proficiency …of all students with limited English proficiency…." (20 U.S.C.§ 6311 (b)(7).) One of the requirements of the assessment system is that it "be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency." (34 C.F.R. § 200.2 (b)(2) (2002).) The assessment system, like all the NCLB requirements, is merely a condition on grant funds (20 U.S.C. § 6311 (a)(1)) that is not otherwise mandatory (20 U.S.C. §§ 6575, 7371).

Equal Educational Opportunities Act of 1974, Title VI of the Civil Rights Act: The test claim statute states that the HSEE, "regardless of federal financial participation, shall comply with Title VI of the Civil Rights Act (42 U.S.C. § 2000d et seq.), its implementing regulations (34 C.F.R. Part 100), and the Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. 1701)."[17] Title VI of the Civil Rights Act prohibits discrimination on grounds of race, color or national origin on programs or activities receiving federal financial assistance. The EEOA states that all public school children "are entitled to equal educational opportunity without regard to race, color, sex or national origin, [and] the neighborhood is the appropriate basis for determining public school assignments." (20 U.S.C. 1701.)

D. Prior Test Claims

In December 2001, the Commission found that notifying parents about the HSEE (Ed. Code, § 48980, subd. (e), as amended in 2000) is a reimbursable mandate in the *Annual Parent Notification* test claim (99-TC-09 and 00-TC-12). The Trinity Union High School District (current claimant) did not plead section 48980. Although the Commission already made findings on section 48980 and therefore does not have jurisdiction over that statute, the *Annual Parent Notification* test claim impacts findings in this claim on section 60850, subdivisions (e)(1) and (f)(1) regarding parental notification, as discussed below.

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[15] *Id.* at page 1592.

[16] *Id.* at page 1594.

[17] Education Code section 60850, subdivision (e)(2).

California's other statewide student-testing requirement is the Standardized Testing and Reporting (STAR) program. On August 24, 2000, the Commission found the STAR statutes and regulations[18] to be partially reimbursable (97-TC-23).

Claimant's Position

Claimant contends that the test claim legislation constitutes a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant seeks reimbursement for the costs of:

(1) field testing the HSEE by selected school districts before implementation to ensure the HSEE is free from bias and its content is valid and reliable;

(2) administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administration of any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed;

(3) administration of the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction (SPI);

(4) providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for the pupil to retake that portion of the exam at the next administration;

(5) meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE;

(6) providing information as requested by the SPI and independent evaluators;

(7) training school district staff regarding administration of the HSEE;

(8) modifying school district policies and procedures to reflect the requirements outlined in the test claim legislation; and

(9) any additional activities identified as reimbursable during the Parameters and Guidelines phase.

In March 2003, claimant amended the test claim to add California Code of Regulations, title 5, sections 1200 – 1225. These regulations address HSEE-related topics, including definitions of terms, pupil identification, documentation, pupil information, data for analysis, notice, HSEE district coordinator and test site coordinator, test security, test site delivery, timing/scheduling, allowable accommodations for pupils with disabilities or English learners, requests for accommodations, use of modifications, independent work, invalidation of test scores, cheating, and apportionment. As stated above, this analysis only concerns the HSEE regulations that were operative as of March 2003 when claimant amended the test claim.

[18] Education Code sections 60607, subdivision (a), 60609, 60615, 60630, 60640, 60641, and 60643, as amended by Statutes 1997, chapter 828; and California Code of Regulations, title 5, sections 850-874.

Claimant's responses to DOF's comments are in the "discussion" section of this analysis. Claimant submitted comments on the draft staff analysis in February 2004 in which it "agrees with most of the analysis." Claimant disagrees on three issues that are discussed below. Attached to claimant's comments on the draft analysis are six declarations from school districts to show the HSEE costs exceed the HSEE apportionment.

State Agency Position

In its April 2001 comments[19] on the test claim, DOF states that no provisions are reimbursable because they are either voluntary (in the case of the first field test) or already funded in the budget. According to DOF, test administration, data collection and training staff are already budgeted. Test administration would not be reimbursable since districts already receive a per pupil funding rate for up to 180 days (or its equivalent minutes) of instruction and HSEE administration falls within the time allotted for regular instruction. DOF also states that section 60853, subdivision (b) is merely a statement of legislative intent. This section concerns school district restructuring of academic offerings to pupils who have not demonstrated skills necessary to succeed on the HSEE.

DOF's assertions did not include support by "documentary evidence … authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so."[20] DOF's comments are not relied on by the Commission, which reaches its own conclusions based on evidence in the record.

Neither CDE nor any other state agency commented on the test claim.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[21] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[22] "Its purpose 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

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[19] Letter from Department of Finance, April 3, 2001.

[20] California Code of Regulations, title 2, section 1183.02, subdivision (c)(1).

[21] Article XIII B, section 6 provides:

> 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 program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[22] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

articles XIII A and XIII B impose."[23] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[24] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[25] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[26] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[27]

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.[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]

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

[24] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that:

> [A]ctivities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.

The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id*. at p. 754.)

[25] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[26] *Lucia Mar Unified School District, supra*, at page 835.

[27] *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.

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

[29] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th at page 1280.

This test claim presents the following issues:

- Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose a "new program or higher level of service" on school districts within the meaning of article XIII B, section 6 of the California Constitution?
- Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

A. Does the test claim legislation impose state-mandated duties?

The issue is whether any of the following constitute state-mandated activities that are subject to article XIII B, section 6.

Duties of the Superintendent of Public Instruction (Ed. Code, § 60850, subds. (a), (b), (d), (e)(2), (e)(3), (e)(4) & (h).): Subdivision (a) of this section requires the SPI to develop the HSEE in accordance with statewide content standards adopted by the State Board of Education (SBE). Subdivision (b) requires the SPI, with the approval of the SBE, to establish a HSEE Standards Panel to assist in the design and composition of the HSEE and to ensure it is aligned with statewide content standards. Subdivision (d) requires the SPI to submit the HSEE to the Statewide Pupil Assessment Review Panel to review the exam. Subdivision (e)(2) requires that the HSEE comply with federal anti-discrimination statutes as mentioned above in the background. Subdivision (e)(3) concerns the validity for the HSEE, which is the SPI's responsibility. Subdivision (e)(4) requires the HSEE to "be scored as a criterion referenced examination." Scoring appears to be the publisher's function based on section 1210, subdivision (b) of the HSEE regulations that requires returning test materials "in the manner …required by the publisher." DOF also commented that the publisher scores the HSEE. Subdivision (h) states that the chapter does not prohibit a district from requiring pupils to pass additional exit examinations approved by the district. Because these provisions do not mandate a school district to perform an activity, they are not subject to article XIII B, section 6.

Field-testing (Ed. Code, § 60850, subd. (c).): This subdivision states that the SPI "shall require that the examination be field-tested before actual implementation to ensure that the examination is free from bias and that its content is valid and reliable." The statutory language does not mandate that every school district participate in field-testing.

Claimant states that activities associated with field-testing the HSEE represent a new program imposed on school districts.

DOF commented that three field tests were scheduled, the first during fall 2000. DOF states that the CDE randomly selected 200 high schools to participate, but participation was voluntary and schools were given the option to refuse to administer the field test. According to DOF, the second and third field tests were incorporated in the March and May 2001 administrations of the HSEE as part of the actual exam, which is covered by

the funds in the budget. DOF argues that to the extent that schools voluntarily participate in field-testing, doing so is not a mandated cost.

Claimant contends that the $3 appropriation per test administration is insufficient to cover the costs of the March and May 2001 HSEE field tests. According to claimant, the appropriation does not rise to the level required in Government Code section 17556, subdivision (e) to completely offset any claims that the activities associated with field-testing the HSEE are reimbursable. This is discussed under issue 3 below.

There is no evidence in the record that claimant or any school district was required to participate in field-testing. On February 3, 2003, Commission staff sent a letter to claimant's representative requesting documentary evidence regarding claimant's participation in the field-testing for each administration of the HSEE, but received no response.

Therefore, the Commission finds that section 60850, subdivision (c), is not subject to article XIII B, section 6 because (1) there is a lack of evidence in the record regarding claimant's participation in field testing, and (2) the statutory language does not mandate school district participation.

HSEE results (Ed. Code, § 60851, subd. (d).): Section 60851, subdivision (d),[30] states:

> The results of the high school exit examination shall be provided to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. A pupil shall take again only those parts of the examination he or she has not previously passed and may not retake any portion of the exam that he or she has previously passed.

Subdivision (d) requires that HSEE results be provided to pupils within eight weeks, but does not specify who provides them. Prior law did not require notification of HSEE results to pupils.

DOF commented that the publisher is required to score all tests within an appropriate time frame so that pupils receive their results within eight weeks of testing. DOF states that the amount provided in the budget covers the costs associated with reporting of test results, including mailings. Claimant disputes the adequacy of the funding for this activity.

Claimant's February 2004 comments on the draft staff analysis include declarations from six school districts that providing the test results is a district activity. Claimant relies on these declarations for the interpretation of section 60851, subdivision (d) regarding districts' requirement to provide test results.

Interpretation of statutes, however, is a question of law.[31] The Commission cannot rely on claimant's factual assertions in interpreting the test claim statute. Moreover, the "determination whether the statutes…at issue establish a mandate under section 6 is a

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[30] This statute is currently section 60851, subdivision (e).

[31] *Taxara v. Gutierrez* (2003) 114 Cal. App. 4th 945, 950.

question of law."[32] The test claim statutes and regulations are silent on the issue of who provides the HSEE results, as is the legislative history[33] of the test claim statute.

Therefore, the Commission finds that providing HSEE results to all pupils within eight weeks of administering the HSEE and providing results to pupils that failed any portion of the HSEE in time for the pupil to retake that portion of it at the next administration is not a state mandate.

Adult students (title 5 regulations): Many of the title 5 regulations apply expressly to adult students as well as high school pupils.[34] Section 1200, subdivision (f) defines an "Eligible adult student" as:

> …a person who is enrolled in an adult school operated by a school district and who has not passed either the English/language arts section or the mathematics section of the high school exit examination. This term does not include pupils who are concurrently enrolled in high school and adult school.

Therefore, the issue is whether administration of the HSEE and the related regulations are mandates as applied to adult students.

Education Code section 48200 states that each person between the ages of 6 and 18 years not otherwise exempted is subject to compulsory full-time education. Education Code section 52502, regarding adult classes, provides:

> The governing board of a high school district or unified school district **may** establish classes for adults. If such classes result in average daily attendance in any school year of 100 or more, such districts **shall** establish an adult school for the administration of the program. [Emphasis added.]

Section 52502 contains no requirement for districts to establish adult classes. Only if the district first decides, in its discretion, to establish adult classes would it need to establish an adult school if the average daily attendance equals 100 or more. Therefore, the Commission finds that under article XIII B, section 6, the statutes and regulations concerning administration of the HSEE to adult students are not mandates.

Restructuring academic offerings (Ed. Code, § 60853, subds. (b) & (c).): Section 60853, subdivision (b), as added by the test claim statute, provides:

> **It is the intent** of the Legislature that a school district **consider** restructuring its academic offerings reducing the electives available to any pupil who has not demonstrated the skills necessary to succeed on the exit examination, so that the

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[32] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[33] The Legislative Counsel's digest of the test claim legislation suggests that this is a district activity (Sen. Bill No. 2 (1999-2000 1st Ex. Sess.)) but Legislative Counsel's opinion is not determinative on the issue of a mandate. *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[34] The following title 5 regulations apply to both high school pupils and adult students: sections 1205, 1206, 1207, 1211, 1215, 1216, 1217, 1218, 1219, 1219.5, and 1220.

> pupil can be provided supplemental instruction during the regularly scheduled academic year. [Emphasis added.]

Claimant contends that this provision requires meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE. Claimant argues that the Legislature requires, at a minimum, that the school site meet to determine if restructuring is necessary to enable pupils to garner the skills necessary to pass the exit examination. Claimant argues that DOF's position ignores legislative intent for school districts to consider restructuring academic offerings.

Claimant's February 2004 comments reiterate this argument, seeking reimbursement for the initial meeting where a district must consider activities associated with restructuring the pupil's academic offerings. Claimant contends that the Legislature requires the school meet to determine if restructuring academic offerings is necessary to enable students to pass the exit examination. Claimant argues that section 60853's overall intent is for districts to prepare pupils to pass the exit examination, as stated in subdivision (a)'s call for using "regularly available resources and any available supplemental resources" to prepare pupils to pass the HSEE, and as stated in subdivision (c)'s statement that a "school district should prepare pupils to succeed" on the HSEE. Claimant argues these statements of legislative intent evidence the Legislature's overriding concern that school districts help prepare pupils to pass the HSEE.

DOF argues that this section merely states legislative intent. To the extent that schools restructure academic offerings in light of pupil performance on the HSEE, they do so on a voluntary basis. Therefore, DOF asserts there are no mandated costs.

The Commission finds that section 60853, subdivision (b) does not require meetings to discuss restructuring academic offerings to pupils who lack skills to pass the HSEE. The language of the statute is plainly permissive: "It is the intent of the Legislature that a school district ***consider*** restructuring its academic offerings…" (emphasis added). If the Legislature had intended to require restructuring academic offerings, it could have used mandatory language to do so (e.g., school districts shall restructure…).[35] Stating intent that school districts "consider" restructuring academic offerings does not make the restructuring activity mandatory. Therefore, based on the plain language of section 60853, subdivision (b), the Commission finds that restructuring academic offerings, or meeting to restructure academic offerings for pupils who lack the skills to pass the HSEE, is not mandated, and thus not subject to article XIII B, section 6.

Similarly, subdivision (c) states that school districts "***should*** prepare students to succeed on the exit examination," and "…districts ***are encouraged to*** use existing resources to ensure that all pupils succeed." [Emphasis added.] Again, mandatory language was not used. "'Should' generally denotes discretion and should not be construed as 'shall.'"[36] There is no compulsion to spend revenue in subdivisions (b) and (c), which is necessary

[35] Education Code section 75 states that "shall" is mandatory.

[36] Sutherland's Statutes and Statutory Construction (5th ed. 1992) section 57.03, page 7.

for finding a mandate.[37] Rather, these activities are discretionary, and therefore are not state mandates.[38]

Thus, because they do not require a school district activity, the Commission finds that subdivisions (b) and (c) of section 60853 are not subject to article XIII B, section 6.

Test Proctors (Cal. Code Regs., tit. 5, § 1200, subd. (h).): This section defines a test proctor as "an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the [HSEE]." (Cal. Code Regs., tit. 5, § 1200, subd. (h).) However, there is no requirement for school districts to use proctors for administering the HSEE.[39] Therefore, the Commission finds that using proctors is discretionary and therefore not an activity mandated by the state.

Permissive accommodations (Cal. Code Regs., tit. 5, §§ 1217, subd. (d), 1218, 1219 & 1219.5.): Section 1217, subdivision (d) authorizes a school district to request an accommodation from the CDE pursuant to section 1218 if the pupils individualized education program (IEP) team or 504 plan team proposes an accommodation for use on the HSEE not included in subdivision (b) of section 1217. Section 1218 authorizes the school district to request accommodations from CDE not included in section 1217, subdivision (b). Section 1218 also specifies the content for the request. Section 1219 requires the district to ensure that all test responses are the independent work of the pupil, and prohibits assistance to pupils in determining how the pupil will respond to each question, or leading the pupil to a response. Section 1219 prohibits school personnel from assisting pupils rather than mandating an activity.[40] Section 1219.5 provides that the pupil's scores will be invalidated if a district allows a pupil to take the HSEE using one or more accommodations determined by the CDE to fundamentally alter what the test measures.[41] Because these sections authorize but do not require[42] (or in the case of sections 1219 and 1219.5, merely prohibit) school district activities, the Commission finds that they are not subject to article XIII B, section 6.

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[37] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal. App. 4th, 1176, 1189.

[38] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal. 4th 727, 742; *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

[39] The HSEE administration regulations, California Code of Regulations, title 5, subdivisions 1204 – 1212, do not require the use of proctors.

[40] Section 1219 was non-substantively amended in May 2003 to alter the note.

[41] Section 1219.5 was non-substantively amended in May 2003 to alter the note.

[42] *Department of Finance v. Commission on State Mandates, supra,* 30 Cal. 4th 727, 742.

Federally mandated accommodations (Ed. Code, § 60850, subd. (g), Cal. Code Regs., tit. 5, §§ 1216 – 1217.): Section 60850, subdivision (g) of the test claim statute provides:

> The examination shall be offered to individuals with exceptional needs, as defined in Section 56026,[43] in accordance with paragraph (17) of subsection (a) of Section 1412 of Title 20 of the United States Code and Section 794 and following of Title 29 of the United States Code. Individuals with exceptional needs shall be administered the examination with appropriate accommodations, where necessary.

This statute requires the HSEE be offered to pupils with disabilities (as defined in state and federal law), and that appropriate accommodations be provided where necessary. The title 5 regulations list what is appropriate. Neither claimant nor DOF commented on the HSEE administration accommodations.

As stated above, the court in *Hayes* stated that the federal Education of the Handicapped Act is a federal mandate. Section 60850, subdivision (g) merely implements the IDEA (an amendment/successor to the federal Education of the Handicapped Act), and IDEA's regulations[44] in administering the HSEE. Therefore, the Commission finds that section 60850, subdivision (g) is not a state mandate subject to article XIII B, section 6, because it was inserted into the HSEE legislation to implement a federal law or regulation.[45]

Similarly, section 1216 of the HSEE regulations states,

> [A]ccommodations will be allowed that are necessary and appropriate to afford access to the test, consistent with federal law, so long as the accommodations do not fundamentally alter what the examination is designed to measure.

As with section 60850 above, section 1216 merely implements a federal law (IDEA). Therefore, the Commission finds that section 1216 is also not a state mandate subject to Article XIII B, section 6.[46]

Section 1217, subdivision (a) of the regulations states:

> Where necessary to access the test, pupils …with disabilities shall take the [HSEE] with those accommodations that are necessary and appropriate to address

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[43] This section excludes "…pupils whose educational needs are due primarily to limited English proficiency…" from the definition of students with exceptional needs. (Ed. Code, § 56026, subd. (e)). It includes "special needs" students up to age 22.

[44] 34 C.F.R. section 300.138 provides, "The State must have on file with the Secretary [of Education] information to demonstrate that-- (a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary…"

[45] *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816.

[46] Section 1216 was non-substantively amended in May 2003 to change the note.

> the pupil's… identified disability(ies) and that have been approved by their individualized education program [IEP] teams or 504 plan teams,[47] including but not limited to those accommodations that the pupil…has regularly used during instruction and classroom assessments, provided that such accommodations do not fundamentally alter what the test measures. Approved accommodations for the [HSEE] must be reflected in the pupil's …[IEP] or 504 plan.

Subdivision (b) of section 1217 lists accommodations that do not fundamentally alter what the test measures,[48] and subdivision (c) lists accommodations that would fundamentally alter what the test measures.[49]

As with the other accommodations discussed above, those added to a pupil's IEP or 504 plan are required by federal law. Therefore, the Commission finds that section 1217, subdivisions (a) (b) and (c), listing HSEE accommodations into the pupil's IEP or 504 plan, is not a state mandate and is not subject to article XIII B, section 6.

In summary, because the test claim statutes and regulations discussed above are not state mandates, they are not subject to article XIII B, section 6, i.e., Education Code section 60850, subdivisions (a), (b), (c), (d), (e)(2), (e)(3), (e)(4), (g) and (h), Education Code section 60853, subdivisions (b) and (c), and California Code of Regulations, title 5, sections 1200, subd. (h), 1216, 1217, 1218, 1219 and 1219.5.

B. Is the remaining test claim legislation a "program" under article XIII B, section 6?

For the remainder of this analysis, "test claim legislation" refers to the statutes and regulations not already discussed: Education Code sections 60850, subdivisions (e)(1) and (f), 60851, 60853, subdivision (a), and 60855; and California Code of Regulations, title 5, sections 1200-1215, 1217.5, 1220, and 1225 (except § 1200, subd. (h)).

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[47] A 504 plan is a document falling under the provisions of the Rehabilitation Act of 1973. (29 U.S.C. § 794, 34 C.F.R. § 104 et. seq.). It is designed to plan a program of instructional services to assist students with special needs who are in a regular education setting. An Individualized Education Program (IEP) is an IDEA program for special education students. (20 U.S.C. § 1414 (d)).

[48] According to subdivision (b) of section 1217 of the title 5 regulations:

> Accommodations that do not fundamentally alter what the test measures include, but may not be limited to: (1) Presentation accommodations: Large print versions; test items enlarged through mechanical or electronic means; Braille transcriptions provided by the test publisher or a designee; markers, masks, or other means to maintain visual attention to the test or test items; reduced numbers of items per page; audio presentation on the math portion of the test, provided that an audio presentation is the pupil's … only means of accessing written material.

[49] Section 1217, subdivision (c) was non-substantively amended in May 2003 as follows: "The following <u>are modifications</u> ~~accommodations are not allowed~~ because they ~~have been determined to~~ fundamentally alter what the test measures:" The May 2003 amendment also changed the section heading and note.

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." As discussed above, this means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[50] Only one of these findings is necessary to trigger article XIII B, section 6.[51]

The test claim legislation consists of educational testing as a means to measure pupil achievement and school accountability. These activities are within the purview of public education, a program that carries out a governmental function of providing a service to the public.[52] Moreover, the test claim legislation imposes unique requirements on school districts that do not apply generally to all residents and entities of the state.

Therefore, the test claim legislation is a program that carries out the governmental function of educational testing, and a law which, to implement state policy, imposes unique requirements on school districts and does not apply generally to all residents and entities in the state. As such, the Commission finds that the test claim legislation constitutes a program within the meaning of article XIII B, section 6.

Issue 2: Does the test claim legislation impose a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution?

Article XIII B, section 6 of the California Constitution states, "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 determine if the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before the enactment of the test claim legislation.[53]

Adequate notice (Ed. Code, § 60850, subds. (e)(1) & (f)(1).): Subdivision (e)(1) of section 60850 provides that the "examination may not be administered to a pupil who did not receive adequate notice as provided for in paragraph (1) of subdivision (f) regarding the test." Subdivision (f)(1) defines "adequate notice" as follows:

> "Adequate notice" means that the pupil and his or her parent or guardian have received written notice, at the commencement of the pupil's 9th grade, and each year thereafter through the annual notification process established pursuant to Section 48980, **or if a transfer pupil, at the time the pupil transfers**. A pupil who has taken the exit examination in the 10th grade is deemed to have had "adequate notice" ….[Emphasis added.]

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[50] *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56.

[51] *Carmel Valley Fire Protection Dist.* (1987) 190 Cal.App.3d 521, 537.

[52] "Education in our society is …a peculiarly governmental function." *Long Beach Unified School District v. State of California, supra,* 225 Cal.App.3d 155, 172.

[53] *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 835.

This statute prohibits giving the HSEE without providing adequate notice pursuant to section 48980.

In 2001, the Commission determined (in *Annual Parent Notification*, 99-TC-09 and 00-TC-12) that providing HSEE notification to parents, pursuant to section 48980, subdivision (e), was a reimbursable state mandated activity. School districts are eligible for reimbursement under the *Annual Parent Notification* (APN) parameters and guidelines, which state:

> The Commission determined that Education Code section 48980, subdivisions (e)… resulted in costs mandated by the state by requiring school districts to provide to parents the following:
> a. Notice that pupils will be required to pass a high school exit examination as a condition of graduation. (Ed. Code, § 48980, subd. (e).)[54]

Claimant is not eligible for reimbursement under this claim for activities already decided under the APN parameters and guidelines.

In its February 2004 comments, claimant argues that the APN parameters and guidelines require annual notification, but do not apply to transfer students. Claimant points out that section 48981 requires the notice "be sent at the time of registration for the first semester or quarter of the regular school term" but that neither section 48980 nor 48981 require notifications for transfer students.

The Commission agrees. Providing notice to transfer students of the HSEE is required by section 60850, subdivisions (e)(1) and (f)(1), but not by section 48980, upon which the APN parameters and guidelines are based, nor elsewhere in California law. Therefore, the Commission finds that section 60850, subdivisions (e)(1) and (f)(1), is a new program or higher level of service on school districts for the purpose of notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the HSEE. The notification shall include, at a minimum, the date of the HSEE, the requirements for passing the HSEE, and the consequences of not passing the HSEE, and that passing the HSEE is a condition of graduation.

Documentation of notice (Cal. Code. Regs., tit. 5, § 1208.): Section 1208 of the title 5 regulations requires school districts to "maintain documentation that the parent or guardian of each pupil has received written notification as required by Education Code sections 48980 (e) and 60850 (f)(1)."

Prior law did not require maintaining documentation of HSEE notice to parents.[55] Neither claimant nor DOF commented on maintaining documentation of notice.

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[54] Commission on State Mandates, Amended Parameters and Guidelines, *Annual Parent Notification*, 99-TC-09, 00-TC-12, adopted 11/30/95, last amended 5/23/02, page 7.

[55] Education Code section 49062. California Code of Regulations, title 5, section 432 requires retention of various kinds of pupil records, including "Mandatory Permanent Pupil Records," "Mandatory Interim Pupil Records" and "Permitted Records," each of which is defined to include specified data. Section 437 of the title 5 regulations provides

Thus, as a new requirement, the Commission finds (pursuant to Cal. Code Regs., tit. 5, § 1208) that the activity of maintaining documentation that each pupil's parent or guardian has received written notification of the HSEE is a new program or higher level of service.

Determining English language skills (Cal. Code Regs., tit. 5, § 1217.5.): This regulation[56] states: "English learners must read and pass the [HSEE] in English. School districts must evaluate pupils to determine if they possess sufficient English language skills at the time of the [HSEE] to be assessed with the test."[57] If not, districts may provide additional time as an accommodation, in addition to instruction pursuant to Education Code section 60852.

Prior law, enacted in 1978, required that pupils of limited English proficiency be assessed to determine their primary language proficiency.[58] These provisions were sunset in 1987.[59] Education Code section 313 requires annual assessments of English-learner pupils' English skills, but not until the 2000-2001 school year,[60] so it does not predate the HSEE legislation.

Prior law, repealed by the test claim statute, required a "limited-English proficient pupil" to "be assessed for basic skills in the English language upon his or her own request or upon the request of his or her parent or guardian." (former Ed. Code, § 51216, subd. (a).) This statute also provided,

> No individual English-speaking pupil or limited-English-proficient pupil shall receive a high school diploma unless he or she has passed the English language proficiency assessment normally required for graduation. (Former Ed. Code, § 51216, subd. (b).)

Prior law required an English assessment on request, and passage of the English language proficiency assessment to receive a high school diploma. Passage of this assessment for a diploma merely required assigning a pass/fail grade or score. Section 1217.5, on the

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for retention and destruction. However, none of these include the HSEE parental notification. It appears that Mandatory Interim Records (that includes parental prohibitions and authorizations of pupil participation) most closely resembles the HSEE notification. According to section 437, subdivision (c), Mandatory Interim Records, unless forwarded to another district, are "adjudged to be disposable when the student leaves the district or when their usefulness ceases." However, because the length of maintenance for HSEE notification records is specified in neither the statutes nor the regulations, the issue is not addressed in this analysis.

[56] Section 1217.5 was non-substantively amended in May 2003 to change only the note.

[57] The issue of whether this regulation constitutes a federal mandate under NCLB or its predecessor is discussed below under issue 3.

[58] Education Code section 52164.1 (sunset). This statute and related ones are the subject of a pending test claim: *California English Language Development Test 2* (03-TC-06).

[59] Education Code section 62000.2, subdivision (d).

[60] This is the subject of a pending test claim: *California English Language Development Test* (00-TC-16).

other hand, also requires assigning a grade or score, and also expressly requires determining whether the pupil would take the HSEE based on the evaluation.

Therefore, the Commission finds that section 1217.5 constitutes a new program or higher level of service only for the activity of determining whether an English-learner pupil possesses sufficient English language skills at the time of the HSEE to be assessed with it.

HSEE administration (Ed. Code, § 60851, subds. (a), (b) & (c); Cal. Code Regs., tit. 5, §§ 1200, 1215, 1203 – 1206, 1209, 1210 & 1212.): Subdivision (a) of section 60851, as originally enacted reads:

> Commencing with the 2003-04 school year[61] and each school year thereafter, each pupil completing grade 12 shall successfully pass the exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school. Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), (c), and (d). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.

Subdivision (b) originally provided:

> A pupil may take the high school exit examination in grade 9 beginning in the 2000-01 school year.[62] Each pupil shall take the high school exit examination in grade 10 beginning in the 2001-02 school year and may take the examination during each subsequent administration, until each section of the examination has been passed.

Subdivision (c) requires the HSEE to be offered in public schools and state special schools that provide instructions in grades 10 through 12 on the dates designated by the SPI, and prohibits administering the HSEE on any dates other than those designated by the SPI as examination or makeup days.

Claimant pled the activity of administering the HSEE in the 2001-02 school year to all pupils in grade 10, and administering any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed. Claimant also pled the activity of HSEE administration to all pupils in grade 10, 11 or 12 on the dates designated by the SPI.

DOF comments that these requirements would not be reimbursable since districts already receive a per pupil funding rate for up to 180 days (or equivalent minutes) of instruction and HSEE administration falls within the time allotted for regular instruction. DOF's

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[61] As indicated above, the HSEE as a graduation requirement has been postponed until the 2006 graduating class, but HSEE administration is not optional for districts.

[62] Statutes 2001, chapter 716, (Assem. Bill No. 1609) amended this sentence to read, "A pupil may take the [HSEE] in grade 9 in the 2000-01 school year only."

comments and claimant's rebuttal regarding adequacy of funding is discussed below under issue 3.

Prior law did not require administration of the HSEE. Since a certificated employee (acting as a test administrator,[63] or potentially as test site coordinator,[64] or district coordinator[65] or in another capacity) administers the HSEE during normal classroom hours, the question arises as to whether a teacher's time in doing so is reimbursable.

Teacher time: For reasons indicated below, class time minutes used by teachers administering the HSEE constitute instructional minutes that satisfy the school district's minimum minutes per school day required under the Education Code. Accordingly, a teacher's time for HSEE administration is not a new program or higher level of service because the state has not mandated an increased level of service for teachers to administer it that results in increased costs.

Preexisting law states that pupils are not to be enrolled for less than the minimum school day required by law.[66] Minimum school day statutes begin in section 46100, which requires school districts to fix the length of the school day subject to state law. Since before 1959, the state has required public schools to provide education for a minimum of 175 days in a fiscal year.[67] The state has also mandated a minimum number of instructional minutes each school day, which is 240 for grades 4 through 12, exclusive of recesses and lunch.[68] The minimum school days per year and the minimum number of instructional minutes per day did not change as a result of the HSEE statutes or regulations.

During the instructional minutes, school districts are required to teach certain courses, and are required to conform the educational program to state standards.[69] Education Code section 51220 describes the required courses for grades 7 through 12 to include English and Math, among others.

Instructional preparation time is counted as part of the teacher full-time equivalent.[70] A "full-time" teaching position is defined as a position for not less than the minimum

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[63] As stated above, the "'Test administrator' means a ***certificated employee*** of a school district who has received training in the administration of the [HSEE] from the [HSEE] district or test site coordinator." [Emphasis added.] (Former Cal. Code Regs., tit. 5, § 1200, subd. (g).)

[64] Duties are listed in California Code of Regulations, title 5, section 1210, and discussed below.

[65] Duties are listed in California Code of Regulations, title 5, section 1209, and discussed below.

[66] Education Code section 48200.

[67] Education Code section 41420.

[68] Education Code sections 46113, 46115, and 46141.

[69] Education Code section 51041.

[70] Section 41401, subdivision (d).

school day.[71] School districts may, but are not required to have teachers work longer per school day than the minimum number of minutes.[72] In addition, if a school district compensates a teacher for work that is not part of the teacher's contracted instructional day duties, the same compensation is required to be paid to all teachers that perform like work with comparable responsibilities.[73] Education Code section 45023.5 states that "[n]othing in this section shall be construed as requiring a district to compensate certificated employees for work assignments which are not part of the contracted instructional day duties simply because other employees of the district receive compensation for work assignments which involve different types of service."[74]

State law requires teachers to provide instruction to pupils during the minimum number of minutes per school day, and does not mandate school districts to require teachers to work beyond the minimum school day. That decision is at the district's discretion.

In a case about adding a domestic violence training course for public safety officers, the court held that it is not a mandate when the test claim legislation directs "local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[75] Similarly, the HSEE legislation merely reallocates instructional time to include administration of the HSEE.

Therefore, based on the plain language of the Education Code, administration of the HSEE is a new activity only if performed by a non-teacher certificated employee, such as an employee holding a service credential.[76] Thus, the Commission finds that HSEE administration on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, constitutes a new program or higher level of service. The Commission also finds that administration of the HSEE on SPI-designated dates to pupils in grade 9 in only the 2000-2001 school year who wish to take the HSEE is also a new program or higher level of service.[77] "Administration" does not include

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[71] Education Code section 45024, which was derived from section 13503 of the 1959 Education Code.

[72] Education Code section 45024.

[73] Education Code section 45023.5.

[74] Education Code section 45023.5 derives from section 13501.5 of the 1959 Education Code.

[75] *County of Los Angeles v. Commission on State Mandates, supra,* 110 Cal. App. 4th, 1176, 1194.

[76] Service credential employees include those with a specialization in pupil personnel services (Ed. Code, § 44266), specialization in health (Ed. Code, § 44267 & 44267.5), specialization in clinical rehabilitative services (Ed. Code, § 44268), library media teachers (Ed. Code, § 44269), specialization in administrative services (Ed. Code, § 44270), and limited services credentials (Ed. Code, § 44272).

[77] The test claim legislation was amended by Statutes 2001, chapter 716 (Assem. Bill No. 1609) to limit 9th grade participation in the HSEE to the 2000-2001 school year.

teacher time, and is limited to the activities specified in the title 5 regulations outlined below.

Training: According to section 1200, subdivision (g), test administrators are to be trained in administration of the HSEE, and test site coordinators train the test administrators "as provided in the test publisher's manual."[78] Training is not listed in the regulations as a district coordinator duty, but section 1200 states that administrators are to be trained by either the test site or district coordinators. Therefore, section 1200 gives district coordinators the flexibility to train.

As to HSEE training generally, where a statute referring to one subject contains a provision, omitting the provision from a similar statute concerning a related subject is significant to show that a different intention existed.[79] Applying this rule, the test claim legislation provisions that do not mention training are significant to show that no training requirement was intended to apply.

Therefore, the Commission finds that training a test administrator either by a test site or (based on § 1200, subd. (g)) district coordinator as provided in the test publisher's manual[80] is a new program or higher level of service, except that a teacher's time is not reimbursed.

Additional time accommodation: Section 1215 allows pupils to have additional time to complete the HSEE within the test security limits provided in section 1211 (discussed below).[81] This accommodation applies to all pupils, not only those with special needs. Prior law did not allocate additional time for taking the HSEE.

The Commission finds that a teacher's additional time to administer the HSEE during normal classroom hours is not a new program or higher level of service. As discussed above under Teacher time, the state has not mandated an increased level of service to administer the HSEE outside the normal school day, which consists of 240 instructional minutes for grades 4 through 12, excluding recess and lunch.[82] State law does not mandate school districts to require teachers to work beyond the minimum school day.

However, if a pupil's IEP requires an additional time accommodation, the extra time would not be a new program or higher level of service because IEP accommodations are required pursuant to federal law, as discussed above.

Therefore, as discussed above, the Commission finds that section 1215 is a new program or higher level of service only if additional time is not specified in the pupil's IEP, and

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[78] California Code of Regulations, title 5, section 1210, subdivision (b)(3).

[79] *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 26.

[80] <http://www.ets.org/cahsee/admin.html> [as of February 2, 2004].

[81] Section 1215 was non-substantively amended in May 2003 to change only the article heading and note.

[82] Education Code sections 46113, 46115, and 46141.

only if the test is administered by a non-teacher certificated employee, such as an employee holding a service credential.[83]

Identification: Section 1203 of the regulations states that school personnel at the test site are responsible for accurate identification of eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. Claimant states that this section provides additional support concerning the numerous activities that will be claimed in the parameters and guidelines phase under "test administration" if the Commission approves this test claim.

Prior law did not require accurate identification of eligible pupils who take the HSEE. Therefore, the Commission finds that section 1203 constitutes a new program or higher level of service.

Grade 10 administration: Section 1204[84] requires districts to offer the exam in grade 10 only at the spring administration. This regulation merely specifies the timing of the HSEE for 10th graders, so the Commission finds that section 1204 does not constitute a new program or higher level of service.

Record of pupils: Section 1205 requires school districts to maintain a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the names of each pupil who took each section, the grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. Claimant states that the section 1205 activities were not required before the CDE adopted these regulations, creating a new program on school districts.

Section 1206 requires school districts to maintain in each pupil's permanent record the section 1205 information (except grade level). Claimant states that the section 1205 and 1206 activities were not required before the CDE adopted these regulations, creating a new program on school districts.

Preexisting law classifies schools records into three categories: Mandatory Permanent Public Records, Mandatory Interim Pupil Records, and Permitted Records. Under Mandatory Interim Pupil Records, schools are required to keep "results of standardized tests administered within the preceding three years."[85] Under Permitted Records, schools are authorized to keep "standardized test results older than three years."[86]

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[83] Service credential employees include those with a specialization in pupil personnel services (Ed. Code, § 44266), specialization in health (Ed. Code, § 44267 & 44267.5), specialization in clinical rehabilitative services (Ed. Code, § 44268), library media teachers (Ed. Code, § 44269), specialization in administrative services (Ed. Code, § 44270), and limited services credentials (Ed. Code, § 44272).

[84] Prior to its May 2003 amendment, section 1204 read "Each pupil in grade 10 shall take the high school exit exam only at the spring administration." Section 1204 also currently requires districts to offer a make-up test for absent pupils at the next test date designated by the SPI or the next test date designated by the school district.

[85] California Code of Regulations, title 5, section 432, subdivision (b)(2)(I).

[86] California Code of Regulations, title 5, section 432, subdivision (b)(3)(B).

The HSEE appears to be a standardized test, which would require it to be kept only for three years as a Mandatory Interim Pupil Record. Section 1206, however, requires that school districts keep HSEE information "in each pupil's permanent record." [Emphasis added.] These conflicting regulations are reconciled when the following rule applies:

> A specific statutory provision relating to a particular subject, rather than a general statutory provision, will govern in respect to that subject, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.[87]

Section 1206 is the provision that governs the HSEE as the more specific subject, rather than the pupil record regulations that govern the more general "standardized tests." Thus, section 1206's requirement to keep HSEE information "in each pupil's permanent record" is the controlling regulation as to the HSEE.

Because prior law did not require districts to maintain a record of all pupils who participate in each test cycle of the HSEE, and keep HSEE information in the student's permanent record, the Commission finds that sections 1205 and 1206 constitute a new program or higher level of service.

<u>HSEE district coordination:</u> Section 1209, subdivision (a), requires the superintendent of the district, on or before July 1 of each year, to designate a district employee as the HSEE district coordinator, and requires notifying the publisher of the HSEE of the identity and contact information of that individual. Subdivision (b) specifies the duties of the HSEE district coordinator as follows:

(1) responding to inquiries of the publisher;
(2) determining district and school HSEE test material needs;
(3) overseeing acquisition and distribution of the HSEE;
(4) maintaining security over the HSEE using the procedures in section 1211 (discussed below);
(5) overseeing administration of the HSEE;[88]
(6) overseeing collection and return of test material and test data to the publisher;
(7) assisting the publisher in resolving discrepancies in the test information and materials;
(8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE;
(9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests;

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[87] *Praiser v. Biggs Unified School Dist.* (2001) 87 Cal.App.4th 398, 405.

[88] This was amended in May 2003 to add "in accordance with the manuals or other instructions provided by the test publisher for administering and returning the test."

(10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district; and

(11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites.

Subdivision (c) of section 1209 requires the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher.

Prior law did not require designating a district employee as the HSEE district coordinator, or notifying the HSEE publisher of the identity and contact information of that individual. Nor did prior law specify the HSEE district coordinator's duties. Therefore, the Commission finds that section 1209 constitutes a new program or higher level of service, except that a teacher's time in administering the HSEE is not a new program or higher level of service, even if acting as the HSEE district coordinator.

<u>HSEE test site coordination:</u> Section 1210 requires the superintendent to annually designate a HSEE test site coordinator for each test site from among the employees of the school district. This individual is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE.

Subdivision (b) of section 1210 enumerates the duties of the HSEE test site coordinator, as follows:

(1) determining site examination and test material needs;

(2) arranging for test administration at the site;

(3) training the test administrator(s) and test proctors as provided in the test publisher's manual (but training proctors would not be reimbursable as discussed above);

(4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials;

(5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing;

(6) maintaining security over the examination and test data as required by section 1211 (see below);

(7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s);

(8) overseeing the administration of the HSEE to eligible pupils at the test site;

(9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination;

(10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator;

(11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations;

(12) Subdivision (b)(12) provides: Within three working days of completion of site testing, the principal[89] and the [HSEE] test site coordinator shall certify to the [HSEE] district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the [HSEE] in the manner and as otherwise required by the publisher.

Prior law did not require the superintendent to annually designate an HSEE test site coordinator for each test site, nor did prior law specify the coordinator's duties. Therefore, the Commission finds that section 1210 (including subdivision (b)(12)) constitutes a new program or higher level of service except that a teacher's time in administering the HSEE is not a new program or higher level of service, even if acting as the HSEE test site coordinator.

Test delivery: Section 1212 requires school districts to deliver the booklets for the HSEE to the school test site no more than two working days before the test is to be administered.[90] Prior law did not require HSEE booklet delivery, nor specify its timing, so the Commission finds that section 1212 constitutes a new program or higher level of service.

In summary, the Commission finds the following title 5 HSEE administration regulations constitute new programs or higher levels of service:

- training a test administrator either by a test site or district coordinator (§§ 1200, 1210);

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[89] The principal's activities may or may not be reimbursable, depending on whether the principal is acting as an HSEE district or test-site coordinator or test administrator.

[90] Section 1212 was non-substantively amended in May 2003 as follows:

> School districts shall deliver the booklets ~~containing the English/language arts sections of~~ for the high school exit examination to the school test site no more than two working days before ~~that section~~ the test is to be administered. ~~and shall deliver the booklets containing the mathematics section of the examination to the school test site no more than two working days before that section is to be administered~~.

- accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
- maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the names of each pupil who took each section, the grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);
- maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);
- designating by the district superintendent, on or before July 1 of each year, a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- designating annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210);
- delivering HSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212).

The Commission also finds the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 are new programs or higher levels of service. Although as discussed above, a teacher's time to perform these functions during the school day is not a new program or higher level of service.

Test security/cheating (Cal. Code Regs., tit. 5, §§ 1211 & 1220.): Section 1211 requires the HSEE test site coordinators to ensure that strict supervision is maintained over each pupil taking the HSEE while in the testing room and during breaks. Subdivision (b) of section 1211 states that access to the HSEE materials is limited to pupils taking the exam and employees responsible for administration of the exam.[91]

Subdivision (c) requires all HSEE district and test site coordinators to sign the HSEE Test Security Agreement set forth in subdivision (d). The Agreement set forth in subdivision (d) requires the coordinator to take necessary precautions to safeguard all tests and test materials by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who will be required to sign the HSEE Test Security Affidavit (this is set forth in subd. (g), and is separate from the Agreement). The Agreement further requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. Subdivision (e) requires HSEE test site coordinators to deliver the exams and test materials only to those actually administering

[91] The May 2003 amendment to section 1211, subdivision (b) added, "and person's assigned by a nonpublic school to implement a pupil's IEPs."

the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. Subdivision (f) requires persons with access to the exam (including test site coordinators, test administrators, and test proctors)[92] to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit. Subdivision (g) lists the content of the HSEE Test Security Affidavit,[93] which prohibits the following: divulging the test contents, copying any part of the test, permitting pupils to remove test materials from the test room, interfering with the independent work of any pupil taking the exam, and compromising the security of the test by any means, including those listed. The Affidavit requires keeping the test secure until it is distributed to pupils, and limiting examinee access to the test materials to the actual testing periods.

Subdivision (h) states that all HSEE district and test site coordinators are responsible for inventory control and requires use of appropriate inventory control forms to monitor and track test inventory. Subdivision (i) states that the security of the test materials delivered to the district is the sole responsibility of the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. Subdivision (j) states that once materials have been delivered to the district, secure transportation within the district is the responsibility of the district.[94,95]

Subdivision (a) of section 1220[96] of the title 5 regulations requires having the HSEE marked "invalid" and not scoring it for any pupil who is found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE. Subdivision (b) requires that the district notify each eligible pupil before administration of the HSEE of the consequences of cheating in subdivision (a).

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[92] The May 2003 amendment to section 1211, subdivision (f) also added, "and persons assigned by a nonpublic school to implement the pupils' IEPs."

[93] Prior to the May 2003 amendment to section 1211, subdivision (g), this section required the affidavit to be "completed by each test administrator and test proctor." However, the more expansive list in subdivision (f), which included the test site coordinator, was in place in May 2003 and more specifically governs who is required to sign the affidavit.

[94] The May 2003 amendment merely clarified section 1211, subdivision (j), and added after the phrase "within a school district" the following: "including to non-public schools, (for students placed through the IEP process), court and community schools, and home and hospital care."

[95] The May 2003 amendment also added a subdivision (k), which prohibits administration of the HSEE to a pupil in a private home except by a test administrator who signs a security affidavit. Subdivision (k) allows classroom aides to assist in the administration of the test "under the supervision of a credentialed school district employee" provided that the aide signs a security affidavit and does not assist his or her own child. The Commission makes no finding on California Code of Regulations, title 5, section 1211, subdivision (k).

[96] Section 1220 was non-substantively amended in May 2003 to change the note.

Prior law did not require security measures, including Security Agreements and Affidavits, for the HSEE. Therefore, because they are new requirements, the Commission finds the following test security regulations are new programs or higher levels of service within the meaning of article XIII B, section 6:

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

Supplemental instruction (Ed. Code, §§ 60851, subd. (e) & 60853, subd. (a).): These sections,[97] as added by the test claim legislation, provide in pertinent part:

> Supplemental instruction shall be provided to any pupil who does not demonstrate sufficient progress toward passing the high school exit examination. To the extent that school districts have aligned their curriculum with the state academic content standards adopted by the State Board of Education, the curriculum for supplemental instruction shall reflect those standards and shall be designed to assist the pupils to succeed on the high school exit examination. ***Nothing in this chapter shall be construed to require the provision of supplemental services using resources that are not regularly available to a school or school district***, including summer school instruction provided pursuant to Section 37252. In no event shall any action taken as a result of this subdivision cause or require reimbursement by the Commission on State Mandates. [Emphasis added.]

This statute requires school districts to provide supplemental instruction to pupils not making progress in passing the HSEE, but directs that it be within resources normally available to a school district.

Regularly available and supplemental remedial resources are identified in section 60853, subdivision (a), of the test claim statute as follows:

> In order to prepare pupils to succeed on the exit examination, a school district shall use ***regularly available resources and any available supplemental remedial resources***, including, but not limited to, funds available for programs established by Chapter 320 of the Statutes of 1998,[98] Chapter 811 of the Statutes of 1997,[99] Chapter 743 of the Statutes of 1998,[100] and funds available for other similar supplemental remedial programs. [Emphasis added.]

Claimant and DOF did not comment on supplemental instruction. Prior law did not require it for pupils not making progress toward passing the HSEE.

These statutes only require providing supplemental services using resources that are regularly available to a school or school district, including summer school instruction provided pursuant to section 37252.

In *County of Los Angeles v. Commission on State Mandates*,[101] a case about adding a training course for public safety officers, the court held that the test claim statute had

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[97] Section 60851, subdivision (e) is now section 60851, subdivision (f).

[98] After School Learning and Safe Neighborhoods Partnerships Program, Education Code section 8482 et. seq.

[99] Student Academic Partnership Program, Education Code section 99300 et. seq.

[100] This is mandatory summer school, Education Code section 37252.5, which the Commission found to be a reimbursable mandate in the *Pupil Promotion and Retention* test claim (98-TC-19). This provision sunset on January 1, 2003.

[101] *County of Los Angeles v. Commission on State Mandates, supra*, 110 Cal.App.4th 1176, 1194.

"directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[102] Similarly, here the Legislature has required districts to reallocate existing, identified, supplemental or remedial instruction resources to prepare pupils to succeed on the HSEE.

Therefore, the Commission finds that supplemental instruction, as set forth in Education Code, sections 60851, subdivision (e), and 60853, subdivision (a), as added by the test claim statute, is not a new program or higher level of service.[103]

Reporting data to the SPI/CDE (Ed. Code, § 60855, Cal. Code Regs., tit. 5, §§ 1207 & 1225.): Section 60855 of the test claim legislation requires the SPI to contract for a multiyear independent evaluation of the HSEE based on information gathered in field testing and annual administrations. Subdivision (a) specifies the information gathered will include:

> (1) analysis of pupil performance, broken down by grade level, gender, race or ethnicity, and subject matter of the examination, including trends that become apparent over time;
> (2) analysis of the exit examination's effects, if any, on college attendance, pupil retention, graduation, and dropout rates, including analysis of these effects on the population subgroups described in subdivision (b);
> (3) Analysis of whether the exit examination has or is likely to have differential effects, whether beneficial or detrimental, on population subgroups described in subdivision (b).

Subdivisions (b) through (d) of section 60855 specify other requirements of the assessment. For example, subdivision (d) requires the independent evaluator to report to the Governor, Office of the Legislative Analyst, the SPI, the SBE, the Secretary for Education, and the chairs of the education policy committees in the Legislature in 2000, 2002, and biennial reports by February 1 of even-numbered years following 2002.

Section 1207 of the title 5 regulations requires school districts to provide the publisher of the HSEE with the following information for each pupil tested "for purposes of the analyses required pursuant to Education Code Section 60855:"

> (1) date of birth, (2) grade level, (3) gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, (13) post-high school plans.

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[102] *Ibid.*

[103] Alternatively, if no new resources are required, the test claim statute should not result in higher costs. It merely redirects effort. In *Department of Finance v. Commission on State* Mandates, *supra*, 30 Cal.4th 727, 747, the court found that costs incurred in complying with the test claim legislation did not entitle claimants to reimbursement because the state already provided funds to cover the expenses. Therefore, the test claim statutes also do not impose costs mandated by the state.

Claimant contends that providing information, as requested by the SPI and independent evaluators, is a new program or higher level of service.

DOF commented that the information will be provided and collected as part of the testing process for the HSEE or is already provided through previously required data collections, and that costs associated with the data collections unique to the HSEE will be covered by the amount provided in the budget. Claimant disputed the adequacy of funding, which is analyzed below under issue 3.

Section 60855 does not expressly require school districts to do anything. It imposes evaluation requirements on the SPI and the entity conducting the HSEE evaluation, so the Commission finds it is not a new program or higher level of service.

However, section 1207 of the title 5 regulations does impose reporting requirements on school districts. Therefore, the Commission finds that providing HSEE data to the SPI or independent evaluators or the publisher is a new program or higher level of service. Specifically, the Commission finds that providing the following information on each pupil tested to a publisher or the SPI or an independent evaluator constitutes a new program or higher level of service:

(1) date of birth;
(2) grade level;
(3) gender;
(4) language fluency and home language;
(5) special program participation;
(6) participation in free or reduced priced meals;
(7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994;
(8) testing accommodations;
(9) handicapping condition or disability;
(10) ethnicity;
(11) district mobility;
(12) parent education; and
(13) post-high school plans.

Section 1225, subdivision (a) requires each school district to report to the CDE the number of examinations for each test cycle.[104] Subdivision (b) requires the district superintendent to certify the accuracy of the information submitted to CDE, and specifies that the report be filed with the SPI within 10 working days of completion of each test cycle in the school district. Prior law did not require districts to report the number of examinations or to certify the accuracy of information submitted to CDE. Therefore, the Commission finds that section 1225 constitutes a new program or higher level of service.

Specifically, the Commission finds that reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and the district superintendent certifying the accuracy of this information submitted to CDE is a new program or higher level of service (§ 1225).

[104] Section 1225 was non-substantively amended in May 2003 to change the note.

Issue 2 Summary

In summary, the Commission finds the following activities are new programs or higher levels of service within the meaning of article XIII B, section 6:

- **Adequate notice:** notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-2004 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the HSEE. The notification shall include, at a minimum, the date of the HSEE, the requirements for passing the HSEE, and the consequences of not passing the HSEE, and that passing the HSEE is a condition of graduation (Ed. Code, § 60850, subds. (e)(1) & (f)(1));
- **Documentation of adequate notice:** maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.);
- **Determining English language skills:** determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE (§ 1217.5);
- **HSEE administration:** administration of the HSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on SPI-designated dates to pupils in grade 9 only in the 2000-2001 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:
    - training a test administrator either by a test site or district coordinator as provided in the test publisher's manual. (§§ 1200, subd. (g) & 1210, subd. (b)(3));
    - allowing pupils to have additional time to complete the HSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's IEP, and only if this activity is performed by a non-teacher certificated employee, such as a service credentialed staff. (§ 1215);
    - accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
    - maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);
    - maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of

the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);

- designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher (§ 1209); and
- designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210).
- Also, the HSEE district coordinator's duties[105] listed in section 1209 and the HSEE test site coordinator's duties[106] listed in section 1210 (except for a teacher's time in administering the HSEE during the school day); and

[105] These duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher..

[106] These duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and

- delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212) are new programs or higher levels of service.

- **Test security/cheating:** Doing the following to maintain test security:
  - for HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks (§ 1211, subd. (a));
  - limiting access to the HSEE to pupils taking it and employees responsible for its administration (§ 1211, subd. (b));
  - having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations (§ 1211, subd. (c));
  - abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211, subd. (d));
  - HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit ((§ 1211, subd. (e));

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

- for persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g) (§ 1211, subd. (f));
- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory (§ 1211, subd. (h));
- being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher (§ 1211, subd. (i));
- providing secure transportation within the district for test materials once they have been delivered to the district (§ 1211, subd. (j)); and
- marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating (§ 1220).

- **Reporting data to the SPI:** providing HSEE data to the SPI or independent evaluators or the publisher is a new program or higher level of service. Specifically, providing the following information on each pupil tested: (1) date of birth, (2) grade level, (3) gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, (13) post-high school plans. (§ 1207); and reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and for the district superintendent to certify the accuracy of this information submitted to CDE (§ 1225) are new programs or higher levels of service.

The Commission also finds that all other test claim legislation is either not subject to article XIII B, section 6, or not a new program or higher level of service.

Issue 3: Does the test claim legislation impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556?

In order for the activities listed above to impose a reimbursable, state mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[107] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

[107] *Lucia Mar Unified School Dist.*, *supra*, 44 Cal.3d 830, 835; Government Code section 17514.

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

Claimant submitted a declaration in support of the contention that the test claim legislation results in increased costs for school districts. The Superintendent of the Trinity Union High School District declared on January 24, 2001, that the Superintendent is informed and believes that prior to enactment of the test claim legislation, the Trinity Union High School District was not required to engage in the test claim activities. The claimant estimated it has incurred, or will incur, costs significantly in excess of $200.[108]

Costs mandated by the federal government: Government Code section 17556, subdivision (c), precludes reimbursement for a local agency or school district if the test claim statute "implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate…." Government Code section 17513 defines "costs mandated by the federal government" as:

> [A]ny increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. "Costs mandated by the federal government" includes costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. "Costs mandated by the federal government" does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district.

As mentioned in the background, NCLB is a federal statute that, among other things, requires statewide annual assessments. As to NCLB and its predecessor, the Improving America's Schools Act of 1994, ("IASA") (Pub. Law 103-82), the Commission finds that Government Code section 17556, subdivision (c) does not apply to this test claim. There is no evidence in the test claim statute, legislative history or record that the test claim statute was enacted to implement NCLB. In fact, the NCLB was enacted in 2001, *after* the HSEE enactment in 2000.

Even though NCLB requires annual assessments in math, reading, and by 2007-08, science (20 U.S.C. § 6311 (b)(3))(A)), and assessments of English proficiency (20 U.S.C.

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[108] Declaration of Bob Lowden, Superintendent, Trinity Union High School District, January 24, 2001. The current statutory standard is $1000 (Gov. Code, §17564). Claimant estimated it would incur costs of more than $1000 in its March 13, 2003 declaration submitted with the test claim amendment.

§ 6311 (b)(7)), they are not costs mandated by the federal government because the HSEE statute required those activities first and not to implement NCLB.

IASA, which predated the HSEE, also required assessments in math and reading (former 20 U.S.C. § 6311 (b)(3)) and also required assessments of English proficiency (former 20 U.S.C. § 6311 (b)(3)(F)(iii) & (b)(5)). As with NCLB, there is no evidence in the test claim statute, legislative history or record that the test claim statute was enacted to implement IASA.

Furthermore, neither NCLB nor IASA constitute costs mandated by the federal government because their applicable requirements are merely conditions on federal funding that neither states nor school districts are required to accept. California is not required to participate in the federal grant programs of NCLB (summarized above under background) or IASA (former 20 U.S.C. § 6311 (a)(1)). Therefore, even though an administration of the HSEE is used to comply with NCLB's assessment programs, such as calculating the Academic Performance Index for state accountability purposes and Adequate Yearly Progress,[109] NCLB is not a federal mandate.

And finally, both NCLB (20 U.S.C. §§ 6575, 7371) and IASA (former 20 U.S.C. § 6311 (f)) state they are not federal mandates "to direct, or control a State…or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction." (20 U.S.C. § 6575.)

Therefore, the Commission finds that Government Code section 17556, subdivision (c) does not apply to this test claim because the test claim legislation does not impose costs mandated by the federal government.

Adequacy of funding: Government Code section 17556, subdivision (e), precludes reimbursement for a local agency or school district if:

> [t]he statute or executive order provides for offsetting savings to local agencies or school districts which 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. [Emphasis added.]

The issue is whether there is adequate additional revenue sufficient to fund the mandate. The test claim legislation includes the following:

> Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), and (c). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.[110]

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[109] <http://www.cde.ca.gov/statetests/cahsee/background/info.html> [as of February 2, 2004].

[110] Education Code section 60851, as added by Statutes 1999x, chapter 1.

Section 1225, subdivision (c) of the title 5 regulations states that the amount of funding to be apportioned to the district for the HSEE as follows:

> The amount of funding … shall be equal to the product of the amount per administration established by the State Board of Education to enable school districts to meet the requirements of subdivisions (a), (b) and (c) of Education Code section 60851 times the number of tests administered to pupils … in the school district as determined by the certification of the school district superintendent pursuant to subdivision (b).

The 2003-04 state budget (Stats. 2003, ch. 157) appropriates $18,267,000 local assistance for the HSEE (Item 6110-113-0001, Schedule (5)), and from the federal trust fund, $1.1 million (Item 6110-113-0890, Schedule (3)), and another $1.8 million for exam workbooks (Item 6110-113-0890, Schedule (7)). The 2002-2003 budget (Stats. 2002, ch. 379) appropriated $18,267,000 local assistance for the HSEE (Item 6110-113-0001, Schedule (6)). The 2001-2002 budget (Stats. 2001, ch. 106) appropriated $14,474,000 local assistance for the HSEE (Item 6110-113-0001, Schedule (6)). The 2000-2001 budget (Stats. 2000, ch. 52) appropriated $15.4 million for local administration of the HSEE (Item 6110-113-0001, Schedule (f)).

The state budgets for the past three years also state that the SBE shall annually establish the amount of funding apportioned to districts, and that the amount per test shall not be valid without the approval of DOF.[111]

DOF argues that the activities in the test claim are fully funded in the budget. DOF's assertions, as stated above, are not supported by "documentary evidence … authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so."[112] The Commission relies on the law and the record as presented.

Claimant refutes DOF's assertion. The CDE issued the California High School Exit Examination Apportionment Forms[113] to district and county superintendents, stating that each school district will receive $3 per pupil tested (not per subject tested) regardless of whether the pupil took one or both portions of the HSEE. Claimant argues that this amount is insufficient to cover the costs of test administration.

Supporting claimant's position is a report analyzing the 1999-2000 state budget in which the Legislative Analyst's Office stated that other states that have implemented high school exit exams incur costs ranging from $5 to $20 per student each time the exam is

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[111] This is in the 2003-2004 state budget (in Item 6110-113-0001, Schedule (5), Provision 7), the 2002-2003 state budget (in (Item 6110-113-0001, Schedule (6), Provision 9) and the 2001-2002 state budget (in Item 6110-113-0001, Schedule (6), Provision 10).

[112] California Code of Regulations, title 2, section 1183.02, subdivision (c)(1).

[113] The 2002-2003 Apportionment Form is on the California Department of Education's website: <http://www.cde.ca.gov/statetests/cahsee/admin/apportionment /appinfo.pdf> [as of February 2, 2004].

administered.[114] The record, however, is silent as to how the HSEE otherwise compares with other states' high school exit examinations, and other states' eligible costs.

The SBE apportions $3 per test administration, which is approved by DOF.[115] There is a rebuttable presumption that in doing so, both the SBE and DOF officially perform their duties,[116] and do so correctly.[117] Therefore, the claimant must rebut both presumptions by showing the nonexistence of the presumed fact:[118] the sufficiency of HSEE funding apportioned to school districts.

Originally, claimant submitted three declarations in support of its claim, none of which could successfully rebut the presumption that $3 per administration is sufficient to fund the HSEE. In its February 2004 comments, however, claimant submits six declarations in support of its claim. All the declarations list the activities determined to be a new program or higher level of service in the draft staff analysis, and declare costs of $1,000 or more in excess of appropriations for performing those activities.

The first declaration, from the Calistoga Joint Unified School District, states it will incur $1,735 performing the activities in Fiscal Year (FY) 2003-2004, but its total "appropriation" will be $135.[119] Denair Unified School District's declaration states $2,954 costs for FY 2003-2004, and a total appropriation of $351 during the same period.[120] Similarly, the Grant Joint Union High School District declared $18,511.27 costs for FY 2002-2003, but $8,028 in appropriations.[121] The Ripon Unified School District declared $3,286 in costs for FY 2003-2004, and $648 in appropriations.[122] The Riverdale Joint Unified School District declared $2,997 in costs for FY 2002-2003,

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[114] Legislative Analyst's Office, Report to Joint Legislative Budget Committee, analysis of the 1999-2000 Budget Bill. <http://lao.ca.gov/analysis_1999/education/ education_depts2_anl99.html#_1_29> [as of February 2, 2004].

[115] As required by the 2003-2004 state budget (in Item 6110-113-0001, Schedule (5), Provision 7), the 2002-2003 state budget (in (Item 6110-113-0001, Schedule (6), Provision 9) and the 2001-2002 state budget (in Item 6110-113-0001, Schedule (6), Provision 10).

[116] Evidence Code section 664.

[117] *Taxara v. Gutierrez, supra,* 114 Cal. App. 4th 945, 949.

[118] Evidence Code section 606.

[119] Declaration of Sylvia Jiminez-Martinez, Counselor and District Test Coordinator, Calistoga Joint Unified School District, February 19, 2004. Claimants' declarations use the term "appropriation" rather than "apportionment."

[120] Declaration of Edward E. Parraz, Superintendent, Denair Unified School District, February 19, 2004.

[121] Declaration of Uve Dahmen, Coordinator of Testing and Assessment, Grant Joint Union High School District, February 18, 2004.

[122] Declaration of Lisa M. Boje, Director of Curriculum and Instruction, Ripon Unified School District, February 12, 2004.

versus $930 in appropriations.[123] And the Sierra Unified School District declared $ 3,390 in costs, in contrast to $648 in appropriations.[124]

The Commission must base its findings on substantial evidence in the record.[125]

> …[S]ubstantial evidence has been defined in two ways: first, as evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[126]

The Commission's finding must be supported by

> …all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence."[127]

Given that the claimant's six declarations show that school districts incur more than $1,000 in costs in excess of their apportionments, the Commission finds that claimant has presented substantial evidence to successfully rebut the presumption of the sufficiency of the $3 appropriation. No state agency has presented evidence to demonstrate the sufficiency of the appropriation or to rebut claimant's evidence.

Based on the administrative record, the Commission finds that the HSEE funding apportioned to school districts is not sufficient to cover the costs of HSEE administration. Any HSEE apportionments to school districts would be considered as offsets should the Commission approve this analysis.

Therefore, the Commission finds that Government Code section 17556, subdivision (e) does not apply to the HSEE statutes because the statutes do not provide for offsetting savings to school districts that result in no net costs, nor do they include additional revenue specifically intended to fund the costs of the mandate in a sufficient amount.

In summary, the Commission finds that the test claim legislation imposes costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

CONCLUSION

The Commission finds that the test claim legislation imposes a reimbursable state-mandated program on school districts within the meaning of article

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[123] Declaration of Brooke Campbell, Assistant Principal, Riverdale Joint Unified School District, February 19, 2004.

[124] Declaration of A.J. Rempel, Director of Educational Services/Special Projects, Sierra Unified School District, February 13, 2004.

[125] *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515; Government Code section 17559, subdivision (b).

[126] *Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 335.

[127] *Ibid.*

XIII B, section 6 of the California Constitution and Government Code section 17514 for school districts to perform the following activities:

- **Adequate notice:** notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the HSEE. The notification shall include, at a minimum, the date of the HSEE, the requirements for passing the HSEE, and the consequences of not passing the HSEE, and that passing the HSEE is a condition of graduation (Ed. Code, § 60850, subds. (e)(1) & (f)(1).);
- **Documentation of adequate notice:** maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE (Cal. Code Regs., tit. 5, § 1208.);
- **Determining English language skills:** determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE (§ 1217.5);
- **HSEE administration:** administration of the HSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on SPI-designated dates to pupils in grade 9 only in the 2000-2001 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a mandate. Administration is limited to the following activities specified in the regulations:
    - training a test administrator either by a test site or district coordinator as provided in the test publisher's manual. (§§ 1200, subd. (g) & 1210, subd. (b)(3));
    - allowing pupils to have additional time to complete the HSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's IEP, and only if this activity is performed by a non-teacher certificated employee, such as an employee holding a service credential. (§ 1215);
    - accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
    - maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);
    - maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);

- designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher (§ 1209); and
- designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210).
- Also, the HSEE district coordinator's duties[128] listed in section 1209 and the HSEE test site coordinator's duties[129] listed in section 1210 (except for a teacher's time in administering the HSEE during the school day); and

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[128] These duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher.

[129] These duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the

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

- **Test security/cheating:** Doing the following to maintain test security:
  - for HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks (§ 1211, subd. (a));
  - limiting access to the HSEE to pupils taking it and employees responsible for its administration (§ 1211, subd. (b));
  - having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations (§ 1211, subd. (c));
  - abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211, subd. (d));
  - HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit ((§ 1211, subd. (e));
  - for persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to

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test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils… at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil …data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher.

the test by signing the HSEE Test Security Affidavit set forth in subdivision (g) (§ 1211, subd. (f));

- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory (§ 1211, subd. (h));
- being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher (§ 1211, subd. (i));
- providing secure transportation within the district for test materials once they have been delivered to the district (§ 1211, subd. (j)); and
- marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating (§ 1220).

- **Reporting data to the SPI:** providing HSEE data to the SPI or independent evaluators or the publisher is a state mandate. Specifically, providing the following information on each pupil tested: (1) date of birth, (2) grade level, (3) gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, (13) post-high school plans. (§ 1207); and reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and for the district superintendent to certify the accuracy of this information submitted to CDE (§ 1225).

The Commission finds that all other statutes and regulations in the test claim not expressly mentioned above are not reimbursable state-mandated programs within the meaning of article XIII B, section 6, and Government Code section 17514.