PUBLIC HEARING

COMMISSION ON STATE MANDATES

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TIME: 9:36 a.m.

DATE: Thursday, March 25, 2004

PLACE: Commission on State Mandates
State Capitol, Room 126
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By: DANIEL P. FELDHAUS
CSR #6949, RDR, CRR

A P P E A R A N C E S

COMMISSIONERS PRESENT

JAMES TILTON
(Commission Chair)
Representative for DONNA ARDUIN
Director
Department of Finance

WILLIAM SHERWOOD
(Commission Vice Chair)
Representative for PHILIP ANGELIDES
State Treasurer

WALTER BARNES
Representative for STEVE WESTLY
State Controller

JAN BOEL
Acting Director
State Office of Planning and Research

JOHN S. LAZAR
City Council Member
City of Turlock

COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director

PAUL M. STARKEY
Chief Legal Counsel

CAMILLE SHELTON
Senior Commission Counsel

KATHERINE TOKARSKI
Commission Counsel

ERIC FELLER
Commission Counsel

NANCY PATTON
~~Legislative Coordinator~~
Assistant Executive Director

PUBLIC TESTIMONY

Appearing Re Item 2 and Item 3:

For Claimant, County of Los Angeles:

LEONARD KAYE, ESQ.
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles
500 W. Temple Street, Suite 603
Los Angeles, CA 90012

For the Los Angeles Regional Water Quality Control Board:

MICHAEL A. M. LAUFFER
Staff Counsel
State Water Resources Control Board
Office of Chief Counsel
1001 I Street
Sacramento, California

Appearing Re Item 4:

For the ~~Applicants~~ Appellants, the cities of Beverly Hills, Carson, Monrovia, Norwalk, Rancho Palos Verdes, West Lake Village:

EVAN J. McGINLEY
Richards, Watson, Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101

For the State Water Resources Control Board:

MICHAEL A. M. LAUFFER
Staff Counsel
State Water Resources Control Board
Office of Chief Counsel
1001 I Street
Sacramento, California

PUBLIC TESTIMONY

Appearing Re Item 5 and Item 6:

For Claimants/Appellants cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, West Covina

KEN FARFSING
City Manager
City of Signal Hill
2175 Cherry Avenue
Signal Hill, CA 90755-3799

For the State Water Resources Control Board:

MICHAEL A. M. LAUFFER
Staff Counsel
State Water Resources Control Board
Office of Chief Counsel
1001 I Street
Sacramento, California

Appearing Re Item 7:

For Test Claimants Santa Monica and South Lake Tahoe Community College Districts:

KEITH B. PETERSEN, MPA, JD
President
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

For the California Integrated Waste Management Board:

DEBORAH BORZELLERI
Staff Counsel
California Integrated Waste Management Board
Legal Office
1001 I Street
Sacramento, CA 95814

PUBLIC TESTIMONY

Appearing Re Item 7: *continued*

For the California Integrated Waste Management Board:

TREVOR O'SHAUGHNESSY
Section Supervisor
California Integrated Waste Management Board
State and Local Assistance Board
1001 I Street
Sacramento, CA 95814

For the Department of Finance:

MICHAEL WILKENING
Principal Program Budget Analyst
Department of Finance
915 L Street
Sacramento, CA 95814

Appearing Re Item 9:

For Claimant Empire Union School District:

DAVID E. SCRIBNER
Executive Director
Schools Mandate Group
One Capitol Mall, Suite 200
Sacramento, CA 95814

For the Department of Finance:

MICHAEL WILKENING
Principal Program Budget Analyst
Department of Finance
915 L Street
Sacramento, CA 95814

LENIN DEL CASTILLO
Finance Budget Analyst
Department of Finance
915 L Street
Sacramento, CA 95814

A P P E A R A N C E S

Appearing Re Item 11:

For Claimant Trinity Union High School District:

DAVID E. SCRIBNER
Executive Director
Schools Mandate Group
One Capitol Mall, Suite 200
Sacramento, CA 95814

For the Department of Finance:

MICHAEL WILKENING
Principal Program Budget Analyst
Department of Finance
915 L Street
Sacramento, CA 95814

LENIN DEL CASTILLO
Finance Budget Analyst
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915 L Street
Sacramento, CA 95814

For the California Department of Education

JUAN SANCHEZ
California Department of Education.

For the Legislative Analyst's Office:

PAUL WARREN
Legislative Analyst's Office
~~5252 Balboa Avenue, Suite 807~~
~~San Diego, CA 92117~~
925 L STREET
SACRAMENTO, CA 95814

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I N D E X

ERRATA SHEET

Page	Line	Correction
2		CHANGE "LEGISLATIVE COORDINATOR" TO
		"ASSISTANT EXECUTIVE DIRECTOR"
3		CHANGE "APPLICANTS" TO "APPELLANTS"
6		CHANGE PAUL WARREN'S ADDRESS
		TO "925 L STREET
		SACRAMENTO, CA 95814
43	12	CHANGE "NOT" TO "CANNOT"
60	20	CHANGE "DISCRETIONARYL=" TO
		"DISCRETIONARY"
62	15	INSERT "IF"
74	16	REPLACE "CHAIR TILTON" WITH
		"MEMBER BARNES"
92	6	CHANGE "INVOKE" TO "VOTE"
92	6	INSERT "AND"
* 58	18	CHANGE "MIKE" TO "MICROPHONE"

I N D E X
(continued)

Proceedings — Page

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I N D E X
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BE IT REMEMBERED that on Thursday, March 25, 2004, commencing at the hour of 9:36 a.m., thereof, at the State Capitol, Room 126, Sacramento, California, before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the following proceedings were held:

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CHAIR TILTON: The time of 9:30 is upon us. Let me open up and establish today's meeting, March 25th, for the meeting of the Commission on State Mandates.

Paula, could you call the roll, please?

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Here.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Here.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Here.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Here.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Here.

MS. HIGASHI: The first order of business is *Approval of the Minutes*, Item 1.

CHAIR TILTON: Has everyone had a chance to review the minutes?

Do I have a motion?

MEMBER BARNES: Move for approval.

MEMBER LAZAR: Second.

CHAIR TILTON: I have a motion and second.

All those in favor of approving the minutes, signify by saying "aye."

(A chorus of "ayes" was heard.)

CHAIR TILTON: All those opposed?

(No audible response was heard.)

CHAIR TILTON: The motion passes.

MS. HIGASHI: We're now at the consent calendar. The *Proposed Consent Calendar* today is the green sheet, that should be in front of you. It consists of Items 13, 14, Item 15 -- and I just wanted to note for the record, that there's a revised exhibit in that, which all of you should have in your binders -- and Item 16.

MEMBER BARNES: Move approval.

CHAIR TILTON: I have a motion --

VICE CHAIR SHERWOOD: Second.

CHAIR TILTON: -- and a second to approve the consent calendar.

Any discussion?

(No audible response was heard.)

CHAIR TILTON: Any comments from the audience?

(No audible response was heard.)

CHAIR TILTON: All those in favor of approving the

consent calendar, please signify by saying "aye."

(A chorus of "ayes" was heard.)

CHAIR TILTON: Opposed?

(No audible response was heard.)

CHAIR TILTON: The motion carries for approval of the consent calendar.

MS. HIGASHI: We've now reached the hearing portion of our meeting. And as is customary for us, I'd like to ask all of the persons who are here today, who will be participating in the hearing for Items 2 through 12, if they would please stand.

(Several people stood up.)

MS. HIGASHI: Would you please raise your right hand?

Do you solemnly swear or affirm that the testimony which you are about to give today is true and correct, based upon your personal knowledge, information or belief?

(A chorus of "I do's" was heard.)

MS. HIGASHI: Thank you.

The first items that we're calling today are Items 2 and 3, Senior Commission Counsel, Camille Shelton will present these items.

CHAIR TILTON: Camille, do you want to introduce the item for us?

MS. SHELTON: Yes. Thank you.

Items 2 and 3 involve appeals by the County of Los Angeles of the Executive Director's decision to return two test claim filings. The County of Los Angeles filed two test claims in September 2003, on orders issued by the California Regional Water Quality Control Board, Los Angeles Region. In October, the Executive Director returned the filings to the County because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to Article XIII B, section 6, of the California Constitution.

The County argues that the Commission cannot rely on the plain language of Government Code section 17516 since it limits the County's right to reimbursement under Article XIII B, section 6, of the California Constitution.

Staff concludes that the Executive Director correctly returned these filings. Article III, section 3.5, of the Constitution, prohibits the Commission from declaring Government Code section 17516 unenforceable or unconstitutional, as asserted by the County.

Thus, the Commission is required by the law to

enforce the plain language of Government Code 17516 and find that the documents issued by the California Regional Water Quality Control Board are not executive orders subject to Article XIII B, Section 6, of the California Constitution.

Staff recommends that the Commission deny the County's appeals.

Will the parties or representatives please state your names for the record?

MR. KAYE: Leonard Kaye, County of Los Angeles.

MR. LAUFFER: Michael Lauffer with the State Water Resources Control Board's Office of Chief Counsel, counsel for the Los Angeles Regional Water Quality Control Board.

CHAIR TILTON: Mr. Kaye, would you like to start?

MR. KAYE: Oh, thank you.

I am pleased to be here this morning because this is a new area of the law for the Commission. I believe this is a case of first impression. I don't think we previously handled or dealt with an executive order from the California Regional Water Quality Control Board. And I'm very pleased that we have a representative from the Board with us this morning to fill us in on some of the detail, the substantive aspects of the law.

The two matters which I believe are our two test

claims, as I believe, as I understand from Camille, will be voted on separately. But you would prefer a discussion that combines both, rather than to repeat ourselves, and I know that time is of the essence. So I will try and limit my remarks to those test claims. But I would say that the other test claimants before you -- or I guess were not officially test claimants, I guess we're hoping to walk through that door -- have similar arguments. And we would certainly incorporate a lot of what they've said by reference. But we feel it is better said by them; and that the Commission has studied their remarks, and I'm sure they've influenced the staff in coming up with their general recommendations.

So we just have a few brief comments.

First of all, the *Transit Trash Receptacles* was marked as CSM number 03-TC-04. And, again, "TC," I believe, stands for "test claim." But this is sort of a pre-test claim. This is what we're trying to decide here.

And the other test claim is regarding *Inspection of Industrial/Commercial Facilities*, CSM number 03-TC-19.

And the first thing that I would note is, we studied in great detail the February 25th, 2004, analysis by the State Water Resources Control Board, I believe prepared

by Mr. Lauffer and so forth, beside me. And in that very detailed analysis, where he considers whether it's a federal mandate and all these other issues, and whether it's a law of general application applied to all entities up and down the state or whether it applies just to the County, he really goes into some depth. And it's more than just saying, "No, this section of the Government Code prohibits the Commission from even thinking about this. He really thinks about it, which we really appreciate it.

But the one thing we'd like to note is that in his analysis -- I don't know whether perhaps it was an oversight -- but he doesn't include -- or maybe I'm just not reading the heading right -- he doesn't include our analysis -- test claim on *Inspection of Industrial/Commercial Facilities*, 03-TC-19.

MR. LAUFFER: Merely a typographical error.

MR. KAYE: Okay, thank you.

MR. LAUFFER: My regrets.

MR. KAYE: Thank you, okay.

So assuming that that's the case, then I can go ahead and talk a little bit about those.

And just to, again, without going greatly into the merits, we've filed very, very detailed test claims in all these areas, we've detailed our costs and so forth.

But the first claim involves developing and installing and maintaining and servicing transit trash receptacles. There's no other entity in the county that was asked to do this.

This is not a law of general application. We don't get any money for this. It wasn't a bargained-for agreement. We just were told to do it. It is, we believe, among the other things within the permit, we identified this particular mandate because it is clearly, under traditional -- and, again, this is a case of first impression for the Commission -- it is a case whereby it otherwise would be a perfectly reimbursable mandate. There is no defense. There is nothing in federal law that says we need to provide trash receptacles at all the transit stops in L.A. County. I mean, it's kind of clear.

So what we think we have is sort of like a Trojan horse. We have a large body of "it may or may not be unreimbursable"; but within that framework, hiding, lurking within, are specific elements which are, I think, traditionally, based upon the Commission that I've been practicing before this Commission for 12 or 14 years, I think traditionally, you would find that they are reimbursable mandates.

And we ask not merely that you would, you know,

just dismiss it without giving us an opportunity to exhaust this administrative remedy, but go to the merits. At least give us a chance to discuss whether, in fact, this would be reimbursable or not. And so that's what we're asking for today.

Now, I will say a little bit more for the case. I talked a little bit about *Transit Trash Receptacles*. We have to inspect now a large number of industrial types of industrial and commercial facilities in Los Angeles County. Again, that was not required under prior law. It was not and is not -- as inspectors, there's no other entity that has to do this within Los Angeles County. But even more egregious in this case is the fact that the State was performing these inspections and these facilities that we're inspecting, we're sending inspection fee money to the State. And it's my understanding that the State is keeping the fee money and making us do this new work.

And I think that under any type of analysis -- and I know this is not a court of equity, this is a highly specialized area -- but I would strongly urge you to vote to at least consider the merits of specific components within our test claims.

And I appreciate that. Thank you.

CHAIR TILTON: Mr. Lauffer?

MR. LAUFFER: Good morning, Commissioners.

As I stated on the record, my name is Michael Lauffer. I'm an attorney with the State Water Resources Control Board; and I represent the Los Angeles Regional Water Control Board.

Based on the test claims that have been filed with this Commission, you are probably well aware that there is a strong history between the Los Angeles Regional Water Quality Control Board and these test claimants with respect to this permit. There is ongoing litigation that involves whether or not the Regional Board has the authority to even issue the permit and to specify some of the requirements here.

The exercise that the Commission has to go through, I think, has been accurately described, summarized; and the resolution thereof has been stated by your staff.

And in our February 25th, 2004, submittal, I think we go out of our way to make it clear that pursuant to the Constitution, this Commission is obliged to follow the Government Code. And pursuant to Government Code section 17516, the test claim should be returned because the permit represents an executive order. I really do think that's the end of the inquiry.

The February 25th submittal that the State Water Resources Control Board had provided under my signature,

is really designed to help the commissioners understand a Government Code section, so that you don't feel like you're blindly just hiding behind the Government Code section.

In other words, it lays out the rationale by which Government Code section 17516 was adopted by the Legislature and provides a reasoned analysis as to why that Government Code section is constitutional.

And I won't go into that analysis again. It's in the record. I think it's pretty clear. And I welcome and am available to answer any questions on it. But I do want to address a couple of the issues the County has raised.

First of all, as my testimony -- or as the written testimony had indicated, the particular permit at issue here, the Regional Water Quality Control Board is compelled to issue, pursuant to federal law. Now, the Regional Water Quality Control Boards regulate the discharge of waste, generally. This particular permit, a municipal stormwater permit, which is a creature of federal law, can only be issued to municipalities. So to the extent that the County claims that there's a Trojan horse, it's somewhat of a misnomer because it's really federal law that has created that characterization. Only municipal dischargers, municipal

stormwater permitees can have this kind of permit.

So the question then becomes: What are the requirements within that permit? And the regional boards required to develop those on a record that's before it, are supposed to look at sources of pollution, and basically are required to regulate the municipalities here, and Los Angeles County is jointly regulated with 84 other cities under this permit.

And those requirements are designed to protect water quality. And we base those on what is developed over the course of prior permits. This is actually the third such permit that the County has had for its municipal stormwater.

Each permit under federal law is required to get more stringent, to the extent that there continue to be stormwater quality problems.

You may not all be familiar with the stormwater quality problems in the Los Angeles region, and it's not before you today. But suffice it to say, it is the number one problem with respect to water quality in the Los Angeles region. And that's why each successive permit has been required to get more and more stringent, to go after those sources of pollution. It's as a result of federal law, however, that the County and its sister cities are required to receive the permit.

The second issue that the County raises that I think merits particular response, is the issue of inspections. Under federal law, the cities and counties are required to have an inspection program for these facilities. There's some concern by the County that the State is somehow shifting its responsibility. And that couldn't be further from the truth. The State continues to carry out its inspection obligations. And, again, this is really not before the Commission today; but I think it's important that you appreciate it, because I know my board members are frustrated sometimes when we say, legally, they can't do something, but they want to know, "Well, what's the basis for why we would do it, in the first instance?"

And so, first, the cities and the counties have inspection requirements under federal law. The State will continue to carry out its own inspection obligations. But what we're looking for the cities and the counties to do is, they are required pursuant to federal law to develop ordinances to regulate municipal stormwater runoff. And that's pursuant to our permit as well.

And we wish to ensure that they actually enforce their ordinances, and their inspection requirements are designed to ensure that their ordinances are being

faithfully followed. Again, those are general descriptions.

I'm available for any questions.

The other test claims you hear concerning this permit today will raise many of the same issues. And I would just request my comments be incorporated on all test claims, though I will be available for questions. And I encourage the Commission to uphold the staff recommendation and the Executive Director's decision to deny the test claims pursuant to Government Code section 17516.

CHAIR TILTON: Thank you.

Does anyone else wish to speak on this item?

(No audible response was heard.)

CHAIR TILTON: I think the issue, Members, before us is whether Government Code 17516 applies, which means that we would reject this as not part of our jurisdiction.

MEMBER LAZAR: Mr. Chairman, I think Mr. Kaye had something else to say.

MR. KAYE: Yes, I'd like to say that in every other case that I've been familiar with, with the Commission -- which I've been at most of the hearings, as I say, over a number of years -- where you have identified or it's very clear from the beginning that a funding disclaimer

applies -- it's my understanding that the practice of the Commission has always been to not cut it off at that point, but to consider the merits of the matter.

We've had cases where it plainly stated a funding disclaimer in the legislation; and yet the courts have ruled that we were correct, ultimately, in our view of the situation.

And I think that regarding the issue of the federal mandate, we recognize it is a very broad federal mandate and the counties are affected. But I think the matter is quite clear that the State and regional boards have a tremendous amount of discretion. And under the Hayes case, if the State voluntarily assigns certain -- whether they be inspection or enforcement duties to the counties and cities, then it becomes a reimbursable state-mandated program. And you've held that consistently, and the courts have held that consistently.

But I think by denying even considering the various aspects of this claim, you foreclose any possible movement to greater understanding as to, you know, what is the Commission's position on this matter.

Thank you.

CHAIR TILTON: Thank you, Mr. Kaye.

Members, any questions?

MEMBER LAZAR: Could I just ask Camille to respond

to that, please?

MS. SHELTON: Sure. Typically, when there are disclaimers in legislation, the Commission will go through an analysis of the merits of the claim. But in the past, we've not ever received a document or a test claim filed on a permit issued by a water quality control board. And here -- so for the first time, we're applying 17516. And the Commission is required to apply that Government Code section which, by the plain language, says that any rules or requirements issued by the State Water Resources Control Board or by any regional water control board are not executive orders.

So we have taken the position that the Commission does not have the jurisdiction over this claim and can't get into the merits of it.

MEMBER LAZAR: Thank you.

CHAIR TILTON: Any other questions?

VICE CHAIR SHERWOOD: Mr. Chair and Mr. Kaye, I just don't see how in good conscience I can get by with that section and really come to any other determination, other than the fact that, frankly, staff's recommendation is correct in this case. I appreciate, you know, what you've said today in your situation. But I think -- I just feel in my particular case, that my hands are tied by 17516.

CHAIR TILTON: Do we have a motion?

MEMBER BARNES: I move the staff recommendation.

VICE CHAIR SHERWOOD: Second.

CHAIR TILTON: We have a motion and a second.

Paula, will you call the roll, please?

MS. HIGASHI: I'd just like to clarify. This is a vote on Item 2?

CHAIR TILTON: Right.

MS. HIGASHI: Okay.

MEMBER BARNES: Is there any reason why it can't be on 3 as well, since, as I understand it, we've heard testimony on that.

MR. KAYE: Yes.

MEMBER BARNES: Did you have anything more to say about that?

MR. KAYE: No. My understanding is that the presentation would cover both Item 2 and Item 3. And I was told that you might want to consider voting separately, but it's at the discretion of the Commission.

CHAIR TILTON: What's your motion?

MEMBER BARNES: I'd like to make it on both Items 2 and 3.

CHAIR TILTON: Okay, the motion is to vote on both, 2 and 3.

MEMBER BOEL: I'd like a point of clarification. Is

the vote -- an "aye" vote supporting the staff recommendation?

MEMBER BARNES: Yes.

CHAIR TILTON: Call the roll, Paula.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MR. KAYE: Thank you.

CHAIR TILTON: Thank you for your testimony.

MS. HIGASHI: This brings us to Item 4, which Ms. Shelton will also present.

MS. SHELTON: Item 4 involves the appeal by several cities of the Executive Director's decision to return their test claim filing, alleging that the *Waste Discharge Requirements* program required by the California Regional Water Quality Control Board, Los Angeles Region, is a reimbursable state-mandated program.

Like the earlier items, the Executive Director

returned the filing to the cities because the plain language of Government Code section 17516 provides that the requirements or rules issued by the Water Quality Control Board are not executive orders subject to Article XIII B, section 6, of the California Constitution.

The cities are arguing that the Commission cannot rely on the plain language of 17516. They contend that 17516 is unconstitutional as applied to this claim, and that the California Regional Water Quality Control Board implemented the new requirements through underground rulemaking in violation of the Administrative Procedures Act.

Staff concludes that the Executive Director correctly returned this filing.

First, the Commission does not have the authority to determine if the requirements issued by the California Regional Water Quality Control Board are underground regulations. Second, Article III, section 3.5, of the California Constitution prohibits the Commission from declaring Government Code section 17516 unconstitutional. Thus, the Commission is required by law to enforce the plain language of 17516, and find that the document issued by the California Regional Water Quality Control Board is not an executive order subject

to Article XIII B, section 6, of the California Constitution.

Staff recommends that the Commission deny the cities' appeal.

Will the parties please state their names for the record?

MR. McGINLEY: Certainly. My name is Evan McGinley. I am here on behalf of the applicants under this test claim, the cities of Beverly Hills, Carson, Monrovia, Norwalk, Rancho Palos Verdes, West Lake Village. And I think that's all.

MR. LAUFFER: And once again, Michael Lauffer with the State Water Resources Control Board.

CHAIR TILTON: Mr. McGinley, would you like to begin?

MR. McGINLEY: Yes, thank you.

Initially, I'd just like to say that we also incorporate the remarks that were made earlier by Mr. Kaye. I think a lot of what Mr. Kaye said, particularly about the constitutionality of the executive order and whether or not the permit is something which is entitled to be treated as an unfunded mandate, and to obtain a subvention of funds is applicable here as well.

As a result, I won't really go into -- I prepared more extensive remarks about the constitutionality. I

won't really go into that, other than to point out one area in which we would disagree with the State Water Resources Control Board.

If you've had a chance to review, as I'm sure you have, the State Water Resources Control Board's comments, you'll note that they make reference to the proposition, Proposition Number 4, in the ballot materials that were prepared at the time that was put before the voters of the state of California.

I think it's interesting and worthwhile to note that nowhere in those materials is there any mention that what is now enshrined as Article XIII B, section 6, was ever intended to specifically exempt orders issued by the Regional Water Control Board or the State Water Resources Control Board, pursuant to either of those agencies' administration of the federal NPDES permitting program in the State of California.

And I think, while I can appreciate I guess the conundrum that's before the Commission this morning about having to deal with the constitutionality of this measure, nevertheless, we think that the plain language of Article XIII B, section 6, really doesn't speak to nor contemplate any kind of exception being carved out. I mean, there are three exceptions that are specifically stated under Article XIII B, section 6. There's nothing

that references orders issued by the regional board.

So I'd ask you to keep that in mind. I'm not sure that it's necessarily going to comfort you in making a decision that's contrary to the one that you just rendered; but nevertheless, I think it's worth mentioning for your consideration.

The second point that I would like to touch on -- and, again, there is tremendous parallels between both our application, as well as the County's applications. So almost necessarily, I have to cover some of the same ground; but I'll keep my remarks brief, nevertheless.

We believe that even if you accept that you are constrained by Government Code 17500 and the provisions that are part of that section of the Government Code, we think that it's still possible for you to find that there is the possibility that an unfunded mandate has been visited upon the cities that we represent. And in that regard, I would point you to two specific, possibly three, specific points for your consideration.

Number one is that, as Mr. Kaye pointed out earlier, although the State board contends that what is taking place here is simply the regional board's implementation of a federally-required permitting program, there is choice. There are various policy considerations and opportunities that the regional board has in implementing

the permitting requirements. They have chosen to implement inspection requirements.

Now, the regulations that Mr. Lauffer called to your attention earlier and has written about in his comments on behalf of the board, mention 40 CFR 122.6. Those regulations actually deal with the requirement for applying for a permit. Those are the application requirements that the cities had to follow when they were applying to be covered under the permit that's at issue here.

But those provisions do not require that the cities have to undertake an inspection of facilities which are regulated under a different permit. And that is the case. And I don't know that that's a point that Mr. Kaye covered before.

We are talking about commercial and industrial facilities as well as construction sites, which are already regulated under two separate permits which have been issued by the State Water Resources Control Board. Those permits, in turn, are within the specific jurisdiction of each regional board, are administered and enforced by those regional boards, and are actually inspected by those regional boards.

Now, Mr. Kaye did point out that the State board receives monies from the permit applicants. We think

that this is the kind of issue that really gets to the heart of why Article XIII B, section 6, was adopted. It was the voters' intent that the State not be allowed to shift the cost of maintaining State programs onto local governments. I mean, this is precisely at the heart of why this provision was adopted. And we think that this is -- I mean, despite the very articulate comments that have been put forth by Mr. Lauffer, nevertheless, the State board, the regional boards have choices as to how they will meet their obligations under the Clean Water Act. And they have chosen to meet their obligations in a way which shifts the burden of certain programmatic responsibilities onto local governments.

Additionally, we would point out -- and this is something that we had addressed in our comments as well -- that the nature of the program and the permit, which is at issue here, this isn't simply one permit. This is one iteration of the same sort of permit which has been issued and adopted by regional boards across the state. Thus, it resembles a rule of general application.

Now, under the State's Administrative Procedures Act, a rule of general applicability is supposed to be formally adopted through the State's rulemaking provisions. That hasn't been done in this case. And so as a result, we would argue that this -- although

17516 says "executive order includes rules, orders, plans, et cetera, which have been adopted by regional boards," in the case where action has been taken by a regional board, which is essentially something that should be put through the formal rulemaking provisions of the APA, what has not gone through those provisions, we don't think that that provision under 17516 is applicable. And through their own actions, the regional boards and the State board have essentially removed themselves from the cover of that exemption under 17516.

The last point that I would make is simply this: 17516 -- I'm sorry, the definition of "executive order" talks about and contemplates an exemption for actions which have been taken by the Regional Water Quality Control Board. And I would offer this for your consideration: It's interesting to note that that provision actually talks also about exemptions for publicly-owned treatment works. And we think that it's at least an ambiguous provision, in that if you look at -- there would be no reason to actually have specific language that talks about publicly-owned treatment works, apart from orders and plants, which is generally where that provision is going.

So our argument would simply being this: That there would be no reason to specifically mention POTWs if, in

fact, that provision doesn't actually go towards POTWs as a whole. And, really, it's not a provision that that's applicable to something such as the situation that we have here: Permits which are issued to dischargers of municipal stormwater systems.

That concludes my remarks. But if the Commission has any questions, I'd be more than happy to answer them.

CHAIR TILTON: Any questions, Members?

(No audible response was heard.)

CHAIR TILTON: Mr. Lauffer, do you want to add more comments from your first testimony?

MR. LAUFFER: I will be mercifully brief again, Mr. Tilton.

First of all, I request that any comments I've previously made be incorporated on this item.

Mr. McGinley has identified three items where he believes that it provides an avenue for this Commission to essentially bypass Government Code section 17516 and to actually proceed to the merits on the test claim.

The first of his suggestions is the true choice analysis, under Hayes. Frankly, I have no doubt that Mr. McGinley and I will end up in a debate ultimately on the merits, either in the permitting proceeding or in the subsequent court proceeding based on what the Commission does. Obviously, we take different approaches on the

true-choice question. But simply put, that doesn't matter in the context of the exemption under Government Code section 17516. So I think the Commission can stop its analysis there and not even look at that issue.

The second two points, the general application point -- in fact, conceivably, there's a rule of general application that somehow the regional board is following that hasn't been adopted pursuant to the APA. I wouldn't even want to speculate whether or not that might open the door for you all. However, clearly, in order to do that, you would have to be passing on the legality of other state agencies, which is simply not within the purview of this Commission. And I don't think that alters the analysis under Government Code section 17516.

One interesting thing is the fact that the exemption for executive orders doesn't apply just to permitting actions; it applies to all actions under Division 7 of the Water Code. So even if the regional board did this as a regulation and the State board did it as a regulation, it would still fall within the Government Code purview.

The final analysis or issue put forward is the fact that Government Code section 17516 is potentially ambiguous because of its reference to POTWs. I really do believe that this also does not provide an avenue for the

Commission to blow past Government Code section 17516. On its language, on its face, it's clear with respect to actions taken pursuant to Division 7 of the Water Code.

The provision of Government Code section 17516 that Mr. McGinley references talks about two things, and they're conjunctive.

It, first of all, is precatory language. And the Commission's legal counsel may be able to provide you additional guidance on this; but it does not say that enforcement orders issued to POTWs are outside of the exemption. It says it's the Legislature's desire -- I don't have the exact language in front of me -- but California courts have consistently held that that kind of language is not directory to the agency. Instead, it's precatory. It's essentially the legislative preference, if you will. But it's not binding on the Commission.

The other thing is, it doesn't talk about just POTWs, it talks about, quote, "enforcement orders," unquote, directed towards POTWs. And that's certainly not the issue before the Commission today, and certainly doesn't do anything, at least in my legal analysis, to take the particular test claims and the particular actions of the regional board out of the purview of

Government Code section 17516.

And with that, I'll conclude my comments.

I once again urge the Commission to adopt the staff recommendation.

CHAIR TILTON: Thank you.

Camille, do you want to make any follow-up comments?

MS. SHELTON: No, I agree with all of those comments.

Just one thing to mention on the second issue of whether or not their permit went through the regulatory process. You know, the definition of an executive order goes way beyond a regulation. It can include any rule or plan or order. So it really doesn't have bearing on whether or not something is an executive order, if it went through the regulatory process.

But the plain language of 17516 does clearly apply to permits issued by the Regional Water Quality Control Board. And that's why we are applying the plain language here.

CHAIR TILTON: No more discussion. Do I have a motion?

VICE CHAIR SHERWOOD: I'd like to move for approval of staff's recommendation.

MEMBER BARNES: I'll second.

CHAIR TILTON: A motion and second. And so that's

on Item Number 4.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

Thank you for your testimony.

MR. McGINLEY: Thank you.

MEMBER LAZAR: I just have to say these issues are really painful for cities. Our city is going through something similar, and I'm very sympathetic, but unfortunately I have to follow the recommendations that I think are appropriate.

Thank you.

CHAIR TILTON: Thank you, Mr. Lazar.

MS. HIGASHI: Ms. Shelton will now introduce Items 5 and 6.

MS. SHELTON: Items 5 and 6 involve the appeal by several cities of the Executive Director's decision to return two test claim filings alleging that the

Stormwater Pollution Control Requirements issued by the California Regional Water Quality Control Board, Los Angeles Region, are reimbursable state-mandated programs.

In October 2003, the Executive Director returned these two filings because the plain language of Government Code 17516 provides that the requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to Article XIII B, section 6, of the California Constitution. The cities again argued that the Commission ~~not~~ cannot rely on the plain language of Government Code 17516. Staff concludes that the Executive Director did correctly return these filings based on the plain language of that section; and furthermore, Article III, Section 3.5, of the California Constitution prohibits the Commission from declaring 17516 unconstitutional.

Staff recommends that the Commission deny the cities' appeal.

Will the parties please state your names, for the record?

MR. FARFSING: Yes, my name is Ken Farfsing. I'm the city manager for the City of Signal Hill. Today I'm here representing the cities of Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera,

Signal Hill, South Pasadena, West Covina, in Test claims 21 and 22.

CHAIR TILTON: Mr. Farfsing, do you want to go ahead and start?

MR. LAUFFER: And once again for the record, Michael Lauffer with the State Water Resources Control Board.

MR. FARFSING: First, let me apologize to the Commission if this is like a scene out of the movie "Groundhog Day." I'm not a lawyer, and I'm not here to address legal issues, but I would like to join the comments that have been made today by the County of Los Angeles and the Artesia cities. And I'm going to incorporate their arguments into my testimony.

I wanted to limit my testimony to giving the Commission a better understanding of the particular mandates, so that you'll be in a position to consider how and whether these mandates were appropriate to be issued as part of the NPDES permit, the stormwater permit, ordered by our regional board.

There are three mandates which we believe are appropriately classified as unfunded, which we believe are subject to reimbursement under the State law and the California Constitution. These three unfunded mandates are the mandate to place trash receptacles at all transit stops in our cities; the mandate to inspect

state-permitted industrial facilities in construction sites, even though the State is compelled to conduct these inspections; and the mandate to do whatever it takes to prevent an accedence of water quality standards are an objective.

I first want to point out that, prior to the adoption of this stormwater permit in December of 2001, none of these three mandates were in existence in the prior stormwater permits. There was no obligation under any executive order or statute for the cities to carry out this work. Each of these mandates was created with the adoption of our new stormwater permit in 2001.

The trash receptacle requirement is on page 49 of the permit. And essentially, what it required is that all the cities place trash receptacles at transit stops that had shelters, by August 1st, 2002. And then you had to place receptacles at all other transit stops in your community no later than February 3rd, 2003. That was regardless of whether one person entered the bus or a hundred persons got on the bus at the transit stop. It also required that the receptacles be maintained as necessary.

So this is really the first time that a state agency has ordered local agencies throughout the County of Los Angeles to install trash receptacles at all transit

stops and to maintain trash receptacles.

We feel this is plainly a new mandate that was imposed upon the cities and did not exist prior to the adoption of this permit. And frankly, it's not a mandate that should be associated with a stormwater permit, let alone a mandate that's appropriately issued by a Regional Water Quality Control Board.

As a case example to comply with the mandates, Signal Hill installed 61 trash receptacles at a cost of 10,000 dollars, with the annual maintenance cost estimated at 18,000 dollars. No funding has come from the State to Signal Hill -- to any of the cities, to either install or maintain the trash receptacles. We do not understand how this mandate could be imposed upon us under state law without there being some type of funding source.

The second mandate was created for the first time also by this new stormwater permit, and it's a requirement that the cities inspect all industrial and construction state-permitted facilities within their jurisdiction, if they're not inspected by the State. I'll use the industrial program as an example for discussion purposes. For industrial facilities covered by the State under the NPDES program, the State already collects an annual inspection fee to inspect

state-permitted industrial facilities. This fee was recently increased by the State Water Board to 830 dollars per facility, and it's required to be paid directly to the State by the facility's operator, regardless of whether or not the State actually conducts their inspection. There are literally hundreds of these state-permitted facilities in Los Angeles County. There's about 50 of these facilities in the City of Signal Hill.

The State in our NPDES permit under section 4.3 starting on page 27, has required that individual cities conduct the inspections of these state facilities. The problem with conducting the inspections is that the facilities are already paying an inspection fee to the State to conduct their inspection, yet the cities are being asked to conduct the inspection of the State-permitted facilities, and are basically forced to collect a second inspection fee, if that's even legal, from these facilities, even though the facilities are only being inspected once. In effect, the State is asking us to conduct their inspections but refuses to remit the inspection fee to the cities. The cities are doing the State's work, as agents of the State's NPDES permit program, but the State is refusing to pay the cities for this work, even though the State is collecting

the fees for the inspections.

Clearly, this is an existing requirement that's to be carried out by the State of California to inspect the industrial and construction facilities that have State NPDES permits, and yet equally clear with the permit, is the mandate that the cities conduct the inspections. It cannot be the responsibility of the cities to inspect state-permitted facilities. That's bad enough. But it's a particular problem in an unfunded mandate when the State collects the inspection fee, and then creates a major impediment to the cities to actually collect a second fee. The cities believe it's illegal for the State to force the cities to conduct these inspections of state-permitted facilities unless the State transfers the inspection fee that is collected from these facilities to the cities to perform the inspections.

The final unfunded mandate that we have identified at this point is the permit contains a mandate to actually prohibit all accedence from our storm drain systems of any water quality objectives or standards. This is a complicated legal issue, but the gist is actually explained fairly well in a report we've included in our documentation prepared by the University of Southern California in November of 2002, entitled, "An Economic Impact Evaluation of Proposed Stormwater

Treatment for Los Angeles County." A review of the report shows that the municipalities are likely to expend billions of dollars to design, construct, implement and maintain treatment facilities throughout the County, as necessary, to remove pollutants from stormwater, in order to comply with this requirement under the permit. This is clearly a mandate that did not exist before the permit, and it's a mandate that we believe is inappropriately included within our permit, as it goes beyond the reasonableness standards and the MEP standards as set forth under State law and the Clean Water Act.

It's not appropriately a part of a stormwater permit, and is a mandate that would literally require cities to collectively expend billions of dollars as reflected in the USC study to comply with its terms. The mandate is not required by federal law, it's not permitted by State law, and it's the most expensive of all the mandates of which the cities must comply.

In conclusion, there's a series of mandates that are identified in our legal papers. And those papers are the county and cities of Artesia, et al. And we ask that you realistically consider whether these mandates are appropriately included as part of a stormwater permit. We believe they are not, and that you should consider the

financial impacts of these mandates on the cities and the counties, particularly during these difficult economic times for all the cities and the counties throughout the state. The cities and counties can ill afford these programs, and we firmly believe that these programs are not appropriately a part of the stormwater permit. Thus if they are to be imposed upon the cities and the counties, the State must fund these new mandates.

Thank you for your time this morning.

CHAIR TILTON: Thank you.

Mr. Lauffer?

MR. LAUFFER: Thank you, Mr. Tilton.

Once again, I'll incorporate my comments previously. However, I think what you heard from Mr. Farfsing is much frustration on the part of the cities. But you've also heard frequently, references to authority, and "we don't believe it's appropriate in a stormwater permit."

And I think, frankly, what you're hearing is a lot of concern about what the permit actually requires. And as I discussed earlier, that's something that really is being ferreted out in another forum before the courts. And while I certainly respect everything Mr. Farfsing has said today, needless to say, I disagree with many of the characterizations of the permit and perhaps some of the fiscal analysis that has gone into certain aspects of

the permit. But all of that, even if you were to accept it as true, I don't think has any -- well, it does not alter the analysis that your staff has conducted under Government Code section 17516. This statute is as it reads right now. And for purposes of this Commission, I would believe that it's most appropriate to just follow the staff recommendation, consistent with the other actions earlier today. And I'll conclude my comments on that.

Of course, I'm available for any comments or questions.

CHAIR TILTON: Any questions or comments from Members?

(No audible response was heard.)

CHAIR TILTON: Camille, do you have more comments?

MS. SHELTON: I have nothing further.

CHAIR TILTON: Okay.

Do I have a motion?

MEMBER BARNES: I move the staff recommendation.

MEMBER BOEL: Second.

CHAIR TILTON: I have a motion and second for staff recommendations.

So, no more comments?

Call the roll.

MS. HIGASHI: Just to clarify, this is for Items 5

and 6?

CHAIR TILTON: 5 and 6, that is correct.

MEMBER BARNES: Yes. Thank you.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Yes.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Yes.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: The motion is carried.

CHAIR TILTON: Thank you for your testimony.

MS. HIGASHI: Does everyone have their second binder?

We're now on Item 7. And our first test claim will be presented by Commission counsel, Eric Feller.

MR. FELLER: Good morning. This is the *Integrated Waste Management* test claim in which claimants seek reimbursement for the costs of community colleges in diverting at least 25 percent of all solid waste generated on campus from landfill or transformation facility disposal by January 2002, and diverting at least

50 percent by January 2004, and other related activities as listed on pages 7 and 8 of the analysis -- the staff analysis.

Staff finds that the claim is a partially-reimbursable state mandate for the following activities listed in the analysis:

Complying with the board's model integrated waste management plan.

Designating a solid waste reduction and recycling coordinator.

Diverting 25 percent of waste from landfills by January 2002, and 50 percent by January 2004.

Requesting a time extension or alternative requirement if necessary, with all the accompanying things that that requires.

Submitting annual reports to the board on the progress in reducing solid waste and submitting recycled material reports to the board.

Staff also finds that some of the claimants' activities do not constitute reimbursable activities as specified in the analysis.

One of the issues in the test claim is whether community colleges have fee authority to fund the waste reduction program. Staff finds that they do not.

Staff recommends the Commission partially approve

the test claim for the activities listed.

Will the parties and witnesses please state their names for the record?

MR. PETERSEN: Keith Petersen, representing the test claimants.

MS. BORZELLERI: Deborah Borzelleri, attorney for the Integrated Waste Management Board.

CHAIR TILTON: Mr. Petersen, do you want to start?

MR. PETERSEN: Thank you very much.

I'm going to stand with the written submissions, but request two clarifications, if I can. I'd like to look at one sentence on page 39 of the staff recommendation. It's the first staff conclusion. After the bold text, it says, "A community college must comply with the board's model integrated waste management plan, which includes," et cetera.

With that, we need to look at page 19. The second paragraph begins -- and it's two long sentences, but I need to highlight this -- the second paragraph begins,

> *"Subdivision (b)(1) of section 42920 states 'On or before July 1st, 2000, each state agency shall develop and adopt, in consultation with the board, an integrated waste management plan, in accordance with requirements of this chapter.'*

"Subdivision (b)(2) states, 'Each state agency shall submit an adopted integrated waste plan to the board for review and approval on or before July 15th, 2000.'

"Read in isolation, the statutes appear to be mandates by using the word 'shall.'"

The staff recommendation has concluded that -- I believe concluded that regardless of whether a college adopts its own plan or not, it has to follow the State plan.

Now, we've heard a great deal this morning about the Commission's hands being tied by the plain meaning of the statute. Looking at that sentence, the plain meaning of that sentence is that "Colleges shall adopt an integrated waste management plan." And why isn't the Commission's hands bound by the plain meaning of that code section? That's my question. That plainly states that colleges have to adopt their own plan; and why aren't you bound by that language?

MEMBER LAZAR: He asked for an answer.

MR. PETERSEN: I'm sorry, I can't ask him directly. I have to ask the Commission.

MR. FELLER: It's because it's of the language directly after that in (b)(3) which says that, if that has not happened, that the model plan governs the

community college. Therefore, the staff's position is that it's not actually a requirement for the community college to develop its own plan, if the model plan governs, if they have not done so.

In fact, in looking at the minutes of the Integrated Waste Management Board, that nearly happened. A plan was nearly adopted for a community college that failed to adopt its own plan. And I believe -- well, it's in the footnotes. But anyway, it's on the board's Web site.

CHAIR TILTON: Thank you.

MR. PETERSEN: I'd like to respond to that.

CHAIR TILTON: Sure, go ahead.

MR. PETERSEN: The automatic adoption of the State plan is only if the college doesn't adopt its own plan. It's a separate part of the code section. The code says, "A college shall adopt its plan." The next section says, "If they don't adopt the plan, the board will force the plan on the college."

The staff conclusion is pertinent to those colleges that don't adopt their own plan. They have the State plan.

The law says, "The college shall adopt the plan; and if it adopts a plan, it should follow its own plan." The staff conclusion does not apply to those colleges which adopt their own plan. It's obviously a local issue

versus a state issue.

The fact that there is no penalty for not adopting your own plan is not significant. Until recently, there was no penalty for not adopting a state budget on time. I mean, it happens in the law every day. So the way this code section is constructed is, they're telling colleges to "Adopt your own plan; and if you don't, the State will give you its plan."

The staff recommendation says, "Even though you adopted your own plan, regardless of whether you adopted your own plan, you have to follow the State plan." And that's not a plain reading of the statute. That's not what that code section says. That's a leap they made. And I don't know why that's -- I don't know where that comes from, as far as laws of statutory construction.

So simply stated again, the law says if you adopt your own plan, you follow it; if you don't adopt your plan, you follow the State plan. The Commission says, "No matter if you adopt your plan, you're going to follow the State plan," or, "You will be reimbursed for the State plan." And I don't think there's any authorization anywhere for that conclusion.

CHAIR TILTON: Let me ask the question because, in listening to your argument, it seems to me that you're arguing that if we choose to have our own plan, that's

what's enforceable; but staff, in its analysis, is saying there is the option to choose, using the State plan, which is presumably a cheaper option or less-expensive option. So is that the issue? Am I understanding you correctly?

MR. FELLER: I believe so.

MR. PETERSEN: Actually, the effect of this Commission staff's position is, if you adopt your own plan, so what? You're following -- you'll be reimbursed for the State plan.

CHAIR TILTON: Right. But, I think, that the issue that I'm trying to put out in front of us -- and Paula, maybe you can help me -- is the issue about whether there is discretion on the community colleges' part to which plan you would use.

MR. PETERSEN: The law says, "You shall adopt the plan." There's just no penalty for not doing it.

MR. STARKEY: I'm not sure if my ~~mike~~ microphone is working, so I'll talk loud. I am confused at this point because Mr. Petersen brought up the conclusion on page 39. And what I'm hearing you say is that you believe that staff is saying that if an agency were to adopt its own plan, it must also adopt the State plan.

MR. PETERSEN: No.

MR. STARKEY: You're not saying that?

MR. PETERSEN: No. I'm saying --

MR. STARKEY: The response would be, staff has concluded, in looking at the law, not looking at each separate provision, but reading those provisions together, to say what has the State required. And the State has only required that, at a minimum, the model plan of the State be adopted.

MR. PETERSEN: That's a misstatement of law.

MR. STARKEY: Well, we --

MR. PETERSEN: The law says --

MR. STARKEY: We read those two sections together.

MR. PETERSEN: No, you read each sentence separately. The law says you will adopt the plan. If you do not adopt the plan, the State will force its plan on you.

It doesn't say, "You've got the discretion of not adopting a plan." It says, "You will adopt a plan." There's no penalty for not adopting a plan, except the State plan will be forced on you. The fact that there's no penalty has no implication for reimbursement.

The staff's conclusion is, you've got a choice of not following the law.

Now, as a general statement by attorneys that you don't have to follow law, I don't think that's supposed to be where the staff is going. Colleges were told

three or four years ago, and they didn't attend reimbursement seminars and nobody from the Commission called them up and said, you know, "Ignore that first sentence because you're going to be reimbursed for the State plan, no matter what you do." The law came out several years ago, and the director of maintenance and operations said, "I have to adopt a model plan." I don't know how many districts -- excuse me, "I have to adopt a plan for the district."

I do not know how many districts have adopted a plan, just adopted the State model plan. It might be one and the same. The point I'm making is, there's no legal requirement -- excuse me, there's no reason for the staff to conclude that reimbursement will be circumscribed by the State plan, because the law says each college adopts its own plan. And the fact that they don't, there's a state plan, makes no difference at all. That doesn't make it discretionary.

The law says you shall develop a plan. It's not ~~discretionary~~ discretionary; there's just no penalty. There's a difference from what they're trying to say, that if you don't have to -- if the law has a substitute, it's discretionary. That's not the case.

This is something new for the Commission staff.

MEMBER BOEL: I'd like to hear what Paula has to say

about this.

MS. HIGASHI: As I read this, just my quick understanding of the situation is that there's a difference between what law mandates and what is reimbursable. And what the staff recommendation here concludes is that, if the model plan is adopted for the community college district, that then it would be reimbursable. It's a state-imposed reimbursable state mandate program. And so there are two distinctions.

What Mr. Petersen is arguing is that all of it should be reimbursable. And what staff has done is limited it to what the State has adopted for the local agency -- for the community-college district.

CHAIR TILTON: Mr. Petersen, you have a comment?

MR. PETERSEN: I understand what the staff has done. They just don't have a legal basis for doing it.

The law says you will adopt your own plan; and if you don't, the State plan will be implemented. Reimbursement for the plan should be either your plan or the State plan.

If the issue is cost containment and the State model plan is the scope of reimbursement, that's, you know, one issue, the parameters and guidelines, practices, perhaps. But as a matter of law, they can't do what they did. They decided reimbursement would be the model plan; and

the law says you have to adopt your own plan.

It's true that what the law mandates and what the Commission reimburses are two different things, but there has to be a reason. They don't have a reason.

MR. STARKEY: I respectfully disagree. The reasoning is contained on page 19 of the staff recommendation. And as I said, the staff has read the statutory scheme and has interpreted it to mean that there is no mandate with respect to the agency opting voluntarily to choose its plan, as opposed to just going with the State's model plan.

Clearly in this statute, the State was creating a statute scheme that would encourage the locals to develop a plan and, in fact, was insistent that they do it, to the point that if a plan was not adopted, they would have the State's plan.

But I don't think you read statutes in isolation to understand what they mean. So that's our legal basis.

CHAIR TILTON: Walter?

MEMBER BARNES: Yes. Could I ask -- is it Deborah Borzelli?

MS. BORZELLERI: Borzelleri, yes.

MEMBER BARNES: Borzelleri, I apologize. What's your thoughts about this?

MS. BORZELLERI: I agree with Mr. Starkey. I do not

believe the statute should be read in isolation; they should be read together. And the practical effect is that, if they do not adopt it, the State plan will take over. We agree with the staff's analysis.

MEMBER BARNES: And I guess the question I'm wondering about is that the words they used was that, if they don't adopt a plan that they've developed or if the board rejects a plan, then the model plan is imposed upon them.

MS. BORZELLERI: Correct.

MEMBER BARNES: And so I guess my question is, I agree, you can't take this stuff in isolation; but it seems like we -- or that the staff recommendation is suggesting that we take it in isolation, that sets the consequence of a plan not being submitted or a plan being rejected is the imposition of the model plan. I guess it does seem to me that it's more a consequence than it is, you know, a requirement.

MS. BORZELLERI: Actually, you know, it is a fine point. But our staff has always viewed it as a choice. And I think that the fact that it is discretionary in the end result, is how we looked at it.

MEMBER BARNES: Just to add, I noticed that the wording says, "An integrated waste management plan in accordance with the requirements of this chapter."

Have you published anything with regard to the requirements? Or have you just issued the model plan as to meet these requirements? How did the requirements get into this?

MS. BORZELLERI: I'm going to need to talk to staff.

MR. FELLER: I think the requirements of this chapter are the 25 and 50 percent reductions, if I'm not mistaken.

MS. BORZELLERI: That's correct. But I think there are some more specifics. And we actually -- we published the model plan, but I believe there were some additional documents that went with that.

MR. O'SHAUGHNESSY: Trevor O'Shaughnessy, staff of the Integrated Waste Management Board.

If I may restate your question so I can have a clear understanding, and then attempt to answer your question. Are you asking whether or not staff provided additional information describing what the programs were, what recycling was? Or were you just asking what the overall program was and what we presented when the legislation was passed and what the board did to inform people of the implementation?

MEMBER BARNES: Well, it just says "requirements," "in accordance with the board requirements." So without getting into a listing of those board requirements, did

you publish requirements or did you just publish a model plan and say, "If you meet this, then you've taken care of it"?

MR. O'SHAUGHNESSY: The model plan was essentially outlining what was needed to be submitted. So I guess you could state that those were a type of requirement that was needed to be met or a minimum standard of developing or putting a plan together for submission to the board, outlining what it was you were planning to do for your specific location in recycling and diversion of materials from California landfills.

MEMBER BARNES: So that if they complied with that model plan, that would be the minimum level of compliance with this particular provision?

MR. O'SHAUGHNESSY: Either complying with the model plan or submitting information that covered those issues, yes, that is correct.

MEMBER BARNES: So potentially, anything more than that that came from a separate plan, that would be discretionary, on their part?

MR. O'SHAUGHNESSY: That is absolutely correct. Anything above and beyond that was completely discretionary, which a lot of entities that submitted plans did do, they went above and beyond what the minimum requirements or requested information was.

MEMBER BARNES: Okay, thank you.

CHAIR TILTON: Mr. Petersen?

MR. PETERSEN: I have to object again for the record. There's nothing in the law that says this is discretionary. This is where fine points are decided.

Whether their staff thinks it's discretionary or not is not determinative of anything. The law says the college will do its best to adopt a plan by that date; and if it doesn't, it gets the State plan. The State model plan doesn't say it's discretionary; the State model plan doesn't say that the original requirement to file your own plan was discretionary. That's something Commission staff has made up today. And it's not automatic. If you don't file, you end up with the State plan. It's not automatic that you end up with the State plan; it's a failure to file. It means you get a State plan. You don't go straight to the State plan if you file your own plan.

And, again, this stuff came out four years ago. And maintenance and operations directors don't know these little ins and outs of mandate reimbursement law. They didn't know they could wait and do nothing until the State plan was dropped on their doorstep. This is some sort of convenient way of getting to the State plan that doesn't exist in law.

MEMBER BOEL: I have a question.

CHAIR TILTON: Sure.

MEMBER BOEL: Could you, as a jurisdiction, just file the State plan originally, as your plan?

MR. PETERSEN: I believe if you had the State plan in hand, there's nothing legally to prevent you from slapping a letter on top of it and having your own board adopt it. But there's no requirement to do that.

MEMBER BOEL: No, but that would satisfy the law, according to your interpretation?

MR. PETERSEN: Yes, it would be your plan because you slapped the letter on top of it, yes. And you don't have much reportable costs if all you do is slap a letter on top of it.

CHAIR TILTON: Any more questions or comments?

MEMBER BARNES: About that issue, no; but I did have a couple of others things.

CHAIR TILTON: Okay, go ahead.

MR. PETERSEN: And I also had a second issue also.

CHAIR TILTON: Why don't you go ahead and finish your testimony?

MEMBER BARNES: Then let's get yours out of the way.

MR. PETERSEN: Okay, thanks.

To the conclusions again -- this should be fairly easy to clear up. Page 39, the third conclusion,

"Divert solid waste. A community college must divert at least 25 percent of all of its solid waste from landfill disposal or transformation facilities by 2002."

And it indicates that goes up to 50 percent.

I wish to clarify for the record, if the staff recommendation and statement of decision anticipates potential reimbursement of actually doing the mandate, of actually doing diversion things, or just are they limiting it to planning to do these things? Or is the scope of the staff recommendation also including reimbursement for actually doing these things?

CHAIR TILTON: Clarification?

MR. FELLER: The intent was to actually reimburse doing these things.

MR. PETERSEN: Thank you.

Those are my two clarification issues. Thank you.

VICE CHAIR SHERWOOD: Does that help, by the way, meet your specification?

MR. PETERSEN: That's my understanding of the word of the verb "divert." I just wanted to make sure -- I had some problem on a previous test claim where the word "implementation" did not mean "implementation." So I wanted to make sure that "divert" meant "divert."

CHAIR TILTON: Is anyone here from the Department of

Finance? I just noticed their comments in terms of their question on the jurisdiction of community college.

(No audible response was heard.)

CHAIR TILTON: Walter, do you have some other questions?

MEMBER BARNES: Yes. I have two comments -- or questions, actually. And the first one has to do with the solid waste coordinator. I notice that the staff recommendation is to approve for the designation and activities associated with the solid waste reduction and recycling coordinator.

In looking at the bill -- and keep in mind, that most of the implementation was imposed upon State agencies and community colleges got in by definition -- there was, as I recall, a reference in the bill to using existing resources to cover the duties assigned to the designated solid waste reduction and recycling coordinator. My experience and understanding is that for all the State agencies, this language was used to indicate that there would be no additional staffing associated with this activity, that basically State agencies had to designate an already-existing staff person associated with this. So I guess my feeling is that the community colleges -- their contention that this is a new requirement on them, and that basically --

I agree with that. But it does seem to me that the clear intent of the legislation was to indicate that anyone who had to -- it was required to appoint a solid waste reduction and recycling coordinator, was to also abide by the intent of the legislation that, that existing resources be used to take care of this.

And so since I see that that was applied across the board with all of the State agencies, I don't see any reason why it shouldn't be applied across the board with regard to the community colleges. So it would seem to me that this should not be a reimbursable activity.

CHAIR TILTON: Mr. Feller, since this is your analysis, any comment?

MR. FELLER: That's addressed on pages 31 and 32. And the reason that community colleges are treated differently under this -- as far as mandates and reimbursement goes -- is because they're subject to Article XIII B, section 6. And the courts have held in other situations -- and I've outlined some of those on page 32, in footnote 63 -- that --

MEMBER BARNES: Excuse me, which page was that?

MR. FELLER: It's on page 32, in footnote 63.

The courts have said things like, "Legislative disclaimers or findings and budget control language are no defense to reimbursement."

The Carmel Valley court called such language self-serving and transparent attempts to do indirectly that which cannot lawfully be done directly.

So the courts have, in a couple of past cases, rejected that kind of language that says that the local agency has to absorb the cost within its existing resources.

MEMBER BARNES: I guess my question is that in these cases, wasn't it basically a mandate that was imposed only on local governments, as opposed to this mandate, which basically affects both state government agencies, as well as local government?

MR. FELLER: This legislation is different in that way. And the Legislature may not have foreseen Article XIII B, Section 6, because the primary focus was State agencies; but we believe that that language applies in this case because of the community-college nexus and because of their constitutional right to reimbursement.

MEMBER BARNES: I notice you were --

MR. PETERSEN: Yes. I believe we all know, there is a great deal of the legislation that combines state and local duties in the same statute. So I don't see how that would be too significant to the issue of reimbursement.

And I have to agree with staff here, that the

Commission's hands are tied by the plain meaning of the court's decision, that legislative disclaimers are ineffectual.

MEMBER BARNES: Any thoughts from you?

MR. STARKEY: Staff looked at that, and we believe that the approach that we're taking that that language is not going to be determinative as the way we have to go with that.

I think that if the situation were being audited in terms of reasonable activities and things like that, there might be some issues as to how -- to what extent a community college might be complying, if they're within sort of the spirit of the law, in terms of doing it with existing resources, that they really went far aside, I think there might be some audit issues. But in terms of mandate determination, I don't think we can rely upon that as a limiting language.

MEMBER BARNES: Okay, the other question that I have -- and this is probably less about the decision, than it is -- and perhaps it's a Parameters and Guidelines issue -- but it seems to me that one aspect of the annual report should contain information on savings that can be used to cover the costs of this mandate. There is a reference to savings being used to offset the costs; but it seems to me that the only place

in which we're going to see those savings or see a documentation associated with those savings, is going to be in the annual report.

As I say, this is probably more of a Parameters and Guidelines issue; and I'm more than willing to have it dealt with in the Parameters and Guidelines. But I'd seek sort of agreement, you know, from the Members, that, in fact, that kind of thing should be put into there -- or should be included in the Parameters and Guidelines.

VICE CHAIR SHERWOOD: I would agree with you, Walter. And I think it's an important issue, especially in this case, when we're talking about a lot of different offsetting revenues, fee authorities, it's a complicated issue in this particular matter, especially. And I think it's something that has to be worked out in the P's and G's, and we have to be very thorough on it.

In fact, in the past, I think we have been criticized -- we're always criticized, now that I think about it -- but we have been criticized on this specific issue relative to our certainty of issues of this nature in P's and G's. And I think it's a wonderful comment, and I'm fully supportive of it.

MEMBER BARNES: Okay, I appreciate it.

CHAIR TILTON: I don't need to play my Finance role. I appreciate it.

MR. PETERSEN: I'd like to add to Mr. Barnes' comments. In addition, the type of income you're talking about, I met with several maintenance directors who have the plan in force, is the -- it was a penny and a half per can in the glass recycling and that sort of thing. But the Parameters and Guidelines can also specify -- and they usually do -- that if the college is getting a grant to do the recycling plan, of course, you can't claim the costs that the grant covers. Now, that's fairly standard in the reimbursement business, we all know that. But that mechanism exists. If the college is getting revenues for doing something the State mandates, those revenues offset the State mandate. And the recycling income, as far as the reimbursement business goes, is just another revenue source that must be offset.

MEMBER BARNES ~~CHAIR TILTON~~: The one comment I'd have is just to make sure that -- the overall sense, it seems to me, is reduce landfill. So there's a tipping fee savings that needs to be calculated also, it seems to me, it's an important point.

But I think very clearly, the legislation was there, I think, to reduce landfills, to reduce costs. And so as long as we get the P's and G's, we include all those -- all factors, that there's net costs, and I think we ought to reimburse those, but let's make sure it's a net cost

issue, not just --

CHAIR TILTON: Okay, thank you for the comments.

MEMBER BARNES: Sure.

CHAIR TILTON: Do we have a motion then?

Oh, excuse me. I apologize.

MS. BORZELLERI: That's okay.

I just wanted to make some brief comments.

Thank you, Trevor.

Again, my name is Deborah Borzelleri representing the Integrated Waste Management Board. I appreciate the Commission's comments so far. They do dovetail with some of mine. I have three points to make.

First, it's already been stated that this is somewhat a convoluted claim in that we're dealing with community colleges and State agencies within one statute. And I wanted to give you a little brief overview to make my point that I -- well, I'll just make a brief overview of the major statute that established the diversion guidelines in California. It's AB 939, Statutes of 1989. And that established the Integrated Waste Management Board's, as we know it today, task of overseeing the diversion of waste from California's landfills: 25 percent by the year 1995 and 50 percent by the year 2000. And the structure of that program sets forth the local jurisdictions, cities, counties and regional

agencies as the direct implementers of that statute. Local jurisdictions are tasked with working at their level in cooperation with the State, other entities, waste haulers, within their jurisdictions, to establish integrated waste management plans. And those plans set forth the myriad of programs needed to ensure the 25 percent and 50 percent goals.

AB 75 was enacted in 1999, as a result of complaints by some local jurisdictions -- many local jurisdictions -- that the State was not pulling its weight in the diversion efforts. Efforts that local jurisdictions could not, within the hierarchy of government, force on state agencies.

One study estimated state agencies annually generate between 500,000 and 850,000 tons of waste, representing 1 to 2 percent of the waste stream. But that State agency diversion, including community colleges, hovered between 5 and 12 percent. That's well below the current statewide local government average at that time of 33 percent.

So AB 75, this test claim statute, was intended to extend the responsibility to large State facilities that could be impacting a jurisdiction's ability to reach its diversion goals. Then "large state facilities" defined in AB 75 to include community colleges, and presumably,

by specifically including community colleges in the statute, community colleges had not done their part to assist the local jurisdictions, contributing to the low diversion problems; and to some extent, perhaps relying on their quasi, sometimes State status. So there was some sort of difficulties with making this whole thing happen.

So paradoxically, the Government Code for purposes of allowing -- for reimbursable mandate defines "school districts" to include community college districts. Your staff analysis says certain of those mandates are reimbursable. We just wanted to point out for the record, as you're well aware, the contradictory results with community colleges being subject to this law, State facilities, large State facilities due to their impact on local jurisdictions, because they are not covered by the originating statute, AB 939, but perhaps being allowed to claim reimbursement as a local entity under the local mandates law.

So we find that as a problem. We have not been before this Commission before. Understand that this issue is with you. There are particular legal parameters there, but we just had to make this statement for the record.

The second point, board staff respectfully disagrees

with the staff analysis regarding the applicability of Government Code section 17556(d), and the community colleges' fee authority. We went back and forth a few times on this issue.

It's true that AB 75 does not specifically authorize in the test claim statute fee authority; however, we believe community colleges do have optional fee authority to recover costs of implementing the program. And my basis for this is that the governing boards of community college districts have broad authority to act in any manner that is not in conflict with or inconsistent with or preempted by any law, and that is not in conflict with purposes for which community college districts are established.

I'm citing Education Code section 70902. And this is in your staff analysis.

Based on this statutory provision, the Chancellor's office provided a legal opinion that addresses fees that are optional in nature. And I quote them in reading this, "Under the authority of the permissive code" -- and they're section 70902(a) -- "a district may charge a fee, which is optional in nature, provided the fee is not in conflict or inconsistent with existing law and is not inconsistent with the purposes for which community college districts are established."

Our arguments pointed out, there is nothing inconsistent, we believe, with them -- with some sort of fee covering recycling costs or waste costs.

Then Education Code section 70209(b)(9) requires the governing board of a district to establish student fees, as it is required to establish by law, and in its discretion, fees, as it is authorized to establish by law.

So it appears from the Chancellor's legal office opinion, that optional fees are authorized under their interpretation.

The staff analysis disregards that opinion and maintains that permissive code does not provide authority to charge an optional fee to cover the AB 75 program. The board wishes to point out for the record, that according to the staff analysis, it appears that the governing board would not be able to charge any optional-type fees for any purpose; and we do not believe this is the case. It is likely the Chancellor's office or any governing boards would also agree with that assessment.

My third point is -- and this does perhaps go more to the Parameters and Guidelines -- the two community colleges that are making this test claim, had diversion -- we believe had some diversion programs in

place sometime before the test claim statute was enacted. Should the Commission find there are, in fact, reimbursable mandates, we'll be interested to review the Proposed Parameters and Guidelines and provide comments because, as we've noted before in our written comments, not only is it likely that community colleges are saving money through these programs, but we believe that many, if not all, were already in place prior to the enactment of AB 75. And we're all aware that pursuant to Government Code section 17565, reimbursement is allowed only for costs incurred after the operative date of the mandate.

In addition, going back to my previous point regarding fee authority, since many of the colleges had recycling programs in place, they must have had some ability to fund the programs. So we'll be curious to know where the money came from or what -- whether there were fees charged for that.

Thank you.

CHAIR TILTON: Well, I've got a question. I apologize for skipping over you now. I appreciate that we went back to you on these issues.

One of the issues I read in the staff -- that's why I asked if Finance staff was here -- it seems to me it's not clear to me how these kind of efficient operations

of facilities aren't included as part of maintaining the basic program of providing education. And given the significant amount of general funding that goes to community colleges, it seems to me, it would be easy for me to conclude this is the normal cost of doing business. And forgetting the fee issue here, I'm just wondering, do we need to address that issue here, or is it a P and G issue? How do I struggle with that issue in terms of whether this is not an activity that should already be covered under the existing budget; or if not, by the fee structure?

MR. PETERSEN: I certainly have something to say, if you don't.

MS. HIGASHI: What I was going to do is defer to Mr. Feller, to tell us what is in the record currently that addresses that issue specifically, and if we need to augment the record.

CHAIR TILTON: Okay.

MR. FELLER: Well, let me see if I understand your question correctly.

CHAIR TILTON: Two points -- and they may or may not have been direct -- my question is, just in terms of trying to conclude whether these are new activities or activities that normally should be done, anyway, based on the comment here and some already had, and questioning --

there's two issues for me: One is, "Are they the kind of things that are already covered in terms of funding for community colleges as part of their state and local funding, as a normal cost of doing business to provide the educational activities?"; and then the other point is that, even if they're not, some discussion on their abilities to raise fees to cover these things, because I consider basic running a facility efficiently and maintaining proper, you know, facility maintenance and those kinds of issues, which this is part of, is subordinate to providing the educational activity.

MR. FELLER: Okay, there wasn't anything in the record regarding that first point about the amount of funding that they're already getting.

As a new program or higher level of service, we looked at it as a new requirement.

In terms of the fee authority, as Ms. Borzelleri referred to 70902(b)(9), Student Fees, "The community college shall establish student fees as required to establish by law and, in its discretion, fees, as it is authorized to establish by law."

And their argument is that based on a community-college Chancellor's opinion, that there's this thing called "permissive fee authority," where students can opt into a fee and pay for recycling activities.

Even if that exists, if you look on page 435, the copy of the Chancellor's opinion that they're relying on is in your binder; and on page 435, it says -- it looks like paragraph I:

"Fees required for funded services. It is the opinion of the Chancellor's office that community college districts may not charge students a fee for use of a service which the district is required to provide by state law or which the district is already funded to provide."

This is one of those "required to provide by state law" programs. And so even according to the community college Chancellor's office, they would -- I don't think that they would say that fees are allowed for this type of program because State law requires it.

As Ms. Borzelleri pointed out, if a community college was already implementing these programs before the test claim legislation came into effect, Government Code 17565 says that that doesn't preclude the existence of a state-mandated program. That still would be reimbursable, even if they were doing it voluntarily, before the fact.

CHAIR TILTON: I guess my point here is, this jurisdiction does get state resources. So the second

point here, it said "can raise fees unless it's already been funded." So how do I get the issue of whether this is reasonably expected to be covered out of the operating budgets of community college?

MR. FELLER: I'll defer to Mr. Petersen.

MR. PETERSEN: I've had this come up seven or eight times in the 16 years I've been doing this. It's a Department of Finance argument that you shouldn't be reimbursed for the normal cost of doing business, or what you should be doing, anyway.

First of all, unless the Department of Finance is God, who knows what we're supposed to be doing, anyway? That's a personal opinion.

Second -- and this is going to come up next year on something you probably all heard about, clean bathrooms at K-12. That's going to be a big thing next year, where you're supposed to have clean bathrooms. Well -- but every time the Department of Finance has used the "normal cost of doing business" argument in a test claim I've been involved with, the Commission staff has ignored it because it's not statutory. It's merely a policy or personal opinion. Reimbursements governed by 17514, 17556 -- 17514 says any new duty program adopted after 1975, irrespective of what you were doing or what people think you should be doing, it's a statute adopted after

1975.

If the fee issue becomes important, I think we should spend some time briefing it because if the presumption is that a college can charge students for any new law, we're in a real problem here, constitutionally and mandatewise.

The entire body of fee law in public education pertains to providing services directly to students. Community colleges, the example is student health services. You can charge a fee for student health services because it's not educational and it's a service you're providing directly to the student.

And the ASB, which is voluntary fees. The law is quite clear, Mr. Feller quoted it appropriately, that you cannot -- a community college cannot charge on their own authority a fee for something the State requires them to do. If the State wants to give the community colleges the power to charge for recycling, they can do that. They did not do that.

As it stands now, though, recycling doesn't look like education or services directly to a student, so that wouldn't work.

And to clarify, 17565, Mr. Feller is correct; that is, it states clearly that if you were doing something as an option before it became a law, you're not penalized

when it becomes a requirement. I believe the board read that backwards.

I also understand there's some trailer bill language being proposed that would change that the other direction; but that's not the law yet, so that's not an issue.

CHAIR TILTON: Let me ask you a question because I think I'm not -- let's put the fee aside.

MR. PETERSEN: Uh-huh.

CHAIR TILTON: My issue is, the part of the mandates issue -- and this is where you get carrying two hats, whether community colleges are a local or a State entity -- what I'm kind of asking is, it seems to me on this point, that a community college district is already doing something here and, therefore, it's a legitimate question as to how are you paying for that. And if the answer is, I'm paying for that out of State appropriations for that, then my point is, why should we pay twice?

MR. PETERSEN: I understand.

CHAIR TILTON: I understand the Finance logic sometimes, but that's the question.

MR. PETERSEN: The standard reasoning is, if you're doing something locally, voluntarily, you can stop doing it when the Governor cuts your budget 5 percent and spend

money on instructors.

If the law says you have to keep doing it, you can't stop doing it. So it's no longer a local choice. If it's purely a local choice, you can't do anything about -- you know, that's your choice to do it.

But if you're -- and everybody's budget is declining. If you can't stop doing it, it must be a mandate.

CHAIR TILTON: Okay, I appreciate your comment.

Department of Finance?

MR. WILKENING: Michael Wilkening with the Department of Finance.

Unfortunately, I don't have expertise in the community colleges budget, so I can't really shed light on it. But it might be useful, given this discussion, for me to try to get somebody over here that could. Perhaps if you could continue this, move to the next two items maybe, and then bring this up at the end, I might be able to get somebody from Finance that can address your questions.

CHAIR TILTON: I'd appreciate that, because I think I'd like to -- I understand the comments back here; but if there's an argument that this is funded, then I'd like to hear it; if there's not, then we won't put it on the record and move on to the next item. So could you bear

with us and could we put this on hold for a little while?

MR. PETERSEN: I'm sorry, we're going to hold this for what purpose?

CHAIR TILTON: The only issue I'm trying to address is, as part of my responsibility here, is to ask a question: Do we give guidance to staff in terms of addressing whether this is funded or not? I understand your comments and they may be very valid, and it may be the appropriate comments to the question.

MR. PETERSEN: Right.

CHAIR TILTON: But I would appreciate at least trying to get the perspective of whether there's a position that this is, in fact, funded.

MR. PETERSEN: So it's your expectation that someone from Finance could come over and tell you whether recycling is funded by State General Funds?

CHAIR TILTON: I'm just trying to getting the perspective on the issue, right. And then we can put that in the record and then the Commission can respond to it or not. It seems to me, it's a question I'd like to get answered. If you would bear with us for a few minutes, they're going to go get someone to answer the question.

I do appreciate your answer, though. I think there's merit in your answer, and I was trying to put the

issue before the Commission for discussion.

Paula?

MS. HIGASHI: Could I suggest at this point that we take a five-minute break and a few minutes longer, if our court reporter needs a few minutes longer, and then we can come back, and then we can find out when someone will be coming over?

CHAIR TILTON: That would be very good. And if they're not coming right over, then I think we can move on. At least I can have the question answered for the Commission.

MR. PETERSEN: Well, it's a pervasive -- I believe your position is very pervasive in State government. So it's a good point to discuss.

CHAIR TILTON: I understand. I would just like to get it on the record; and then if the Commission can be responding based on that information is all.

Thank you very much.

Let's take a break for five minutes.

(A recess was taken from 11:12 a.m. to 11:23 a.m.)

CHAIR TILTON: Thank you for the break. I've got something to report back from the Department of Finance.

Mr. Petersen, first of all, I want to comment on your response. I think it had merit when you talked

about discretionary and non-discretionary issues. But what I was trying to find out is whether we could cite in the Finance budget whether this was specifically covered or not. Since my intuition says it probably was, but they said they couldn't identify that it was specifically covered in budget. So I was hopeful --

MR. PETERSEN: So it's a non-issue now, huh?

CHAIR TILTON: Well, not that it's a non-issue; but in terms of this body, I couldn't come back and demonstrate for the record that it specifically is. We can all talk about intuition, what we think is the case; but I have a responsibility to put things on the record that we can then cache, and I couldn't cache that one.

But I appreciate your comment about discretionary funds. I understand in these tight budget times, those are issues that are valid. But I think the key issue for me is Walter's point about making sure, as we did the P's and G's, we identify both revenues as well as cost avoidance in terms of tipping fees and if they are, in fact, mandates and that's what we'll address. I appreciate those comments.

Any more comments? Does anyone else have anything else to say?

(No audible response was heard.)

CHAIR TILTON: Or does the Board have questions or comments?

MEMBER BOEL: I'd like to make a motion.

CHAIR TILTON: Motion to accept staff's recommendation entirely.

VICE CHAIR SHERWOOD: I'll second that motion.

CHAIR TILTON: Okay. We have a motion and a second to accept staff's recommendation.

Paula, call the roll.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: The motion is carried.

CHAIR TILTON: Thank you for your testimony.

MR. PETERSEN: Thank you.

MS. HIGASHI: This brings us to Item 8. It's the proposed Statement of Decision.

Mr. Feller?

MR. FELLER: The staff recommends the Commission adopt the proposed statement of decision beginning on page 2, which accurately reflects the decision of the test claim. Staff also requests the Commission allow minor changes be made to the SOD, including those two that reflect the hearing testimony and vote ~~invoke~~ count.

CHAIR TILTON: Mr. Feller, does that mean you include a stronger reference to identifying the savings in them?

MR. FELLER: That would be in the Parameters and Guidelines. We would identify those offsets.

VICE CHAIR SHERWOOD: Could I just clarify the last statement you made, to clarify two issues?

MR. FELLER: I'm sorry?

VICE CHAIR SHERWOOD: In the Statement of Decision, you were going to note testimony and --

MR. FELLER: Yes, and --

MEMBER BOEL: The vote count.

MR. FELLER: -- the vote count. That would be on page 2, where you see the brackets.

VICE CHAIR SHERWOOD: I'm sorry.

MR. FELLER: Yes.

CHAIR TILTON: Mr. Petersen, do you have a comment?

MR. PETERSEN: Yes, in order to get closure on my first issue, is it fair to say that whether or not a

college adopts its own plan, it will be reimbursed according to the State plan? Is that a fair statement of what the Statement of Decision means?

CHAIR TILTON: Yes. But let me restate what I think you're saying, in my view, is we have accepted staff recommendation that you have the State plan, but to accept anything above that is discretionary.

MR. PETERSEN: Okay. I wanted to make sure.

So whether or not they adopt the plan, the State plan will govern?

CHAIR TILTON: No.

MR. PETERSEN: Whether or not they adopt their own plan, the State plan describes reimbursement, not their plan?

CHAIR TILTON: That's correct.

MR. PETERSEN: Thank you.

CHAIR TILTON: That's the recommendation of staff, as I understand it.

VICE CHAIR SHERWOOD: Yes.

CHAIR TILTON: No discussion?

(No audible response was heard.)

CHAIR TILTON: Can I have a motion?

MEMBER LAZAR: So moved.

CHAIR TILTON: I've got a motion to approve the staff recommendation. Do I have a second?

MEMBER BOEL: Second.

CHAIR TILTON: And a second.

Call the roll.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Aye.

MS. HIGASHI: Mr. Sherwood?

MEMBER SHERWOOD: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: The motion carries.

MR. PETERSEN: Thank you.

MS. BORZELLERI: Thank you.

MR. PETERSEN: It was a tough one.

MS. HIGASHI: This brings us to Item 9. This item will be introduced by Commission counsel, Katherine Tokarski.

MS. TOKARSKI: Good morning. In 1988, the California voters approved Proposition 98, which amended the California Constitution, including adding the following language:

"Any school district maintaining the

elementary or secondary school shall develop and cause to be prepared an annual audit accounting for such funds and shall adopt a school accountability report card for each school."

The proposition also added Education Code sections on the school accountability report cards. 97-TC-21 was a previous test claim heard and approved by the Commission covering legislative amendments to the school accountability report card Education Code sections. Before you today our consolidated test claims, *School Accountability Report Cards II and III*. The claims allege new reimbursable activities are required for including new components in the school accountability report card, as well as for training school personnel to either use the optional State template or regarding standard definitions to be used when preparing the school accountability report card.

Claimant Empire Union also alleges new activities from the amendment of Education Code Section 33126 by statutes 1997, Chapter 912. However, that statutory amendment was part of the original *School Accountability Report Card* Statement of Decision, and staff asserts that no further issues on the merits may be raised before the Commission at this time.

As to the remainder of the test claim legislation, staff finds that to the extent that the claimed amendments to the Education Code are a restatement of what was required by the voters in enacting Proposition 98, no program or new program or higher level of service can be found.

The Department of Finance filed late comments yesterday concurring with the staff analysis.

Staff recommends that the Commission adopt the final staff analysis, which denies this consolidated test claim, as described in the conclusion on page 21.

Will the parties and representatives please state your names for the record?

MR. SCRIBNER: Good morning. David Scribner, representing the claimant, Empire Union.

MR. WILKENING: Michael Wilkening with the Department of Finance.

MR. CASTILLO: Lenin Del Castillo with the Department of Finance.

CHAIR TILTON: Mr. Scribner, go ahead.

MR. SCRIBNER: Thank you.

We have several areas of disagreement with the staff analysis, as you can probably surmise, and it's not a big surprise this morning.

By way of background, essentially what we're dealing

with here in this test claim is an opinion, the opinion of how one would apply verbiage that included -- that was added by the electorate in Education Code 33126, that language which is "but is not limited to."

Now, recall under Proposition 98, section 33126 came into play, requiring school accountability report cards, or SARCs, to include 13 specific activities. We, as a people, voted to say: We want to see this information on our schools: 13 activities. But it's not limited to that.

In staff's opinion, the "but is not limited to" language gives the Legislature a credit card, that says, "We can add whatever we want, we can change the original 13 activities, we can add to it, we can amend it forever more. We can make the SARC from an original one- or two-page document, to a ten-page document. And they're not being mandated costs or new activities imposed upon districts because the 'but is not limited to' language was intended to do that."

Fine. Where's the legal support?

As long as I've been doing mandates, and especially over the last few years of mandates law on this Commission, being under the microscope it has been, one of the ultimate mantras that we hear is that a decision must be based on some legal basis in the record.

What you have before you in the record by staff is nothing more than its opinion, its read of what it believes the "but is not limited to" language was meant to do. There's no statement from the electorate that says that "We intended the Legislature to be able to add to the SARC at will, ad infinitum, to make it the very large and complicated document that it is today." That's not there.

Instead, what you have in the record from the claimant, is an analysis no different than what you had in the *SARC I* test claim. You have a review of what we did before the Legislature added this information to the SARC, and a declaration signed under penalty of perjury that says, "We never did that before. This is new. We are incurring additional costs on an annual basis to include additional information on programs, first and foremost, many of them that did not even exist at the time Proposition 98 was adopted; but we're doing this because the Legislature said we had to. Not the electorate, the Legislature."

Now, I have an opinion as to what the "but is not limited to" language is meant to do. I think that we included the "but is not limited to" language in section 33126 so that we would not hog-tie districts and the information that they wished to provide within a

SARC. Think about it. The electorate said, "We want 13 specific activities." They said, "But it's not limited to those 13 specific activities." We did so because we recognize there's over a thousand school districts and thousands of school sites in this state. They all have different programs, they all have different ways to meet accountability, they all have different aspects to the program that they may want to involve their parents and guardians about. So what we did instead was say instead of, "Just give them these 13, but that's all you can do. Prepare a separate document, if you want to supply any other information," we said, "It's not limited to that. If you want to add more things to your accountability document, go ahead. Feel free, because we know that you will make the best judgment to inform your parents and guardians on an annual basis of how you're meeting the State's goals. That's the claimant's position of what that "but is not limited to" language is meant to mean.

Do I have any legal support for that? None. It's opinion, not unlike what staff put forward today. Do they have any legal support for that read? None.

And you would have to admit that my opinion as to what the "but is not limited to" language meant is just as plausible as staff's. It's not far-fetched to mean

that we wanted to give more information. We didn't want to limit districts and their ability to provide information to parents or guardians. Staff has no legal support for its opinion as to what it means.

Staff does respond to a comment that the claimant made on page 15 of the staff analysis -- and I'm not sure if that's the Bates page number -- but it's the middle of page 15, the third paragraph that starts, "In comments dated October 27th, 2003." We asked, "Why would the Legislature go to such lengths to specifically delineate over a dozen new pieces of information that must be in a SARC, if this information was somehow already required to be reported?"

Staff goes on to say: Well, a change in law doesn't necessarily mean it's an addition, that it's a new activity. Claimants agree, there is a maximum statutory construction that states that there are times when the Legislature makes an amendment, and it's doing so to clarify existing law. That's great. But remember where Education Code section 33126 came from. It came from the electorate, not the Legislature.

So what staff is doing is saying that the Legislature has the ability to clarify what the electorate initially intended with Proposition 98. We don't know. There is no statement here from the

electorate. Only a statement of what the Legislature wants to see in the SARC. Not what we voted on to include in the SARC.

Now, here's another problem and it's minor because we had a standard rule here with the Commission, and that is Commission decisions have no precedential value. We understand that. But if you vote up the staff recommendation here today, you have a huge inconsistency that can't be ignored. You have a *SARC II* test claim that has been adopted under the exact same fact pattern, under the exact same set of laws, but now you're reaching a different result.

Now, I have an idea of how we can get to what I was talking about opinion, of my opinion versus staff's opinion, and why really our opinions don't matter. It's really what the law says and what the legal basis of a decision is, and that is, to determine what we were doing before and after the test claim legislation. That's Lucia Mar case law.

Let's look at *SARC I* and *SARC II* and compare them. The facts are the same. The electorate added section 33126 to the Education Code. *SARC I*, the Legislature comes around, does a little tweaking, adds some things. Test claim filed. Mandate.

SARC II, the same thing, the electorate, we're

dealing with the original 13 activities, the Legislature comes along, tweaks, adds some things, here we are today, with a staff rec that says no mandate.

Obviously, something has to have changed; right? I mean, I can't put it any clearer. There has to be a difference between the first test claim and this test claim.

So has there been a change in the Education Code? None cited by staff. None cited by Finance. None cited by the claimant. It's the same.

Has there been a change in the Government Code? Maybe the way that we go about determining these mandates have changed since *SARC I*. No, that hasn't changed, either.

Staff points to new case law later on, as far as trying to knock out costs mandated by the State. We'll address that, but as far as determining whether there's a new program or higher level of services, is there case law that has changed since *SARC I*? No. What's changed? Staff. Staff's opinion. That's what's changed. Everything else is the same. Everything else is the same.

So when you make your determination whether or not there is a higher level of service here, it must be done on something more substantial than an opinion as to what

language was intended to mean. Because in the end, that's all it is.

What the claimant has provided you when you're making your determination whether this is a higher level of service or a new program is what's required under the law. We reviewed what we did before the Legislature added these activities and we reviewed what we did after. We came to the conclusion, supported by declaration, signed under penalty of perjury, that this information was never added to a SARC, never even contemplated to be added to a SARC until the Legislature told us to do so. Not the electorate, the Legislature.

Now, the second issue that I need to address today goes to the cost mandated by the State argument. That was the "new program, higher level of service" issue. I'm a little confused on this one. I admit, I'm easily confused, so that doesn't say much. But I think the best way to go about this is to start at the end. So if we could go to page 19 of the staff analysis, that would be great.

At the top of page 19, staff concludes:

"Claimants have not demonstrated that the State funds received through Article XVI, sections 8 and 8.5, or any other sources beyond property tax revenue, are unavailable for the

claimed additional costs of issuing SARCs.

In the absence of that showing, staff finds the test claim legislation did not impose costs mandated by the State."

This is where I'm confused. Staff is tying the SARC program to Proposition 98, which is a funding guarantee, not an appropriation. It's not something that appears in a budget. And then they're using the Department of Finance case -- the new case -- to support that position. And on page 18, they have some italicized language -- no, it's not the italicized language I would use; but, you know, we disagree.

At the bottom, beginning with,

"The costs necessarily occurred in complying the notices and agenda requirements under that funded program --"

Now, that's what I would italicize.

"-- under that funded program do not entitle claimants to obtain reimbursement under Article XIII B, section 6, because the State, in providing program funds to claimants, already has provided funds that may be used to cover the necessary activities."

There is a fundamental difference between the facts in the Department of Finance case and what you have

before you today. The difference is that the Department of Finance case dealt with a program that had a specific line item in the budget. It receives funding for it. It's identified and funded specifically by the State. And the court said, "When you're looking for such a small bubble of activities to be reimbursed, this notice and agenda portion, you can't show us that the money that's in the budget for that activity doesn't cover that." That's what that case stands for.

There's no line item in the budget for SARC. There's no appropriation already made and identified for SARC, in which we're saying, we can't fund SARC.

Staff is bootstrapping. Staff is saying, "Well, since SARC was part of the funding guarantee" -- even though it's not an appropriation -- "the funding guarantee, the State intended that Prop. 98 money shall go to pay for SARC, first and foremost, and then you fund everything else." That's the only read you can have here. That's essentially what staff is saying: You must use Prop. 98 money first and foremost for SARC. And if that doesn't cover the bill, then come back to us.

But that's not what Prop. 98 says. That's not what was intended. There's no clear link between the SARC requirements and activities and the Prop. 98 guarantee.

In fact, staff admits as much by saying, on page 15,

in footnote 27, it says,

"Empire Union's comments dispute that the Proposition 98 funding guarantee is an available state funding source for providing SARC. On the contrary, there must be a presumed close link between the two due to the Constitutional single-subject rule."

Prop. 98, again, is not a funding source, period. Period. It's a guarantee. The budget is a funding source.

And, again, when we're talking about opinion and what we believe and we'd like to see what's happening and intuition that's been used today, staff uses the term "a presumed close link." But yet there's no legal basis to make the leap between combining them for purposes of funding and it actually being true. There's no legal basis for that decision here in this analysis.

Staff attempts to do so with the Department of Finance case; but as I already pointed out, the fact patterns are completely different. The Department of Finance case here is completely inapplicable. The Department of Finance, again, dealt with a program that was specifically identified in the budget, specifically received funding for it, and people were seeking reimbursement for a subset of activities that were

already funded due to a budget appropriation.

We don't have that here. When you're talking about costs mandated by the State, what do you have? You have an unfunded requirement by the Legislature that says, "We want these additional activities listed in the SARC." What you have is the Legislature adding activities that weren't there immediately before the test claim came into play. The Legislature did that, not the electorate. There's no case law that's going to pull us back out and say, "You have funding." General funding for education is not what's applied here. That's not the test. It wasn't the test in the Department of Finance case, and it shouldn't be the test here.

I respectfully request that this morning you deny the staff analysis and approve the test claim for the activities listed in the original test claim filing.

Thank you.

CHAIR TILTON: First, I'd like to hear from staff, and then I'd like to hear from the Department of Finance.

MS. TOKARSKI: Okay, the claimant representative focused on the "but is not limited to" language that was part of the original initiative language of Education Code section 33126. Although this language is emphasized on page 15 as a part of the analysis, this is not what staff's analysis hinges on. It hinges on for dealing

with the new-program or higher-level-of-service issues.

What the language of 33126 was, as far as the program components of the SARC, the very first item is, "The model school accountability report card shall include, but is not limited to, assessment of the following school conditions," and the first one is, "Student achievement in and progress towards meeting reading, writing, arithmetic and other academic goals."

Many of the so-called new items that the Legislature added, deal specifically with testing results of particular tests that are required now. And it's staff's assertion that those go specifically to providing information on student achievement and progress towards meeting reading, writing, arithmetic and other academic goals. This is just an example of the analysis that you have before you.

In addition, regarding the follow-up issue of costs mandated by the State, which if you did not get to -- if you went beyond new program or higher level of service and said, "Okay, these are new. We agree with the claimant, these are new," then you would get to costs mandated by the state, and staff is relying on current case law, both old and new case law.

On page 18, there are citations to the County of Sonoma and Redevelopment Agency which go into the issue

of -- for example, "No state duty subvention is triggered where the local agency is not required to expend its proceeds and taxes." And that's where the focus on Prop. 98 funding is, versus a budget line item. Staff's assertion is because this particular requirement providing a school accountability report card was part of Proposition 98, and Proposition 98 was a funding guarantee, staff agrees, it's not a particular budget line item which is normally what we've looked at in the past for deciding whether a program was fully funded or not.

But in this case, it's part of Proposition 98 funding guarantee, it's state funds. And staff's position is that claimant has not shown that those state funds are not available to cover any incremental increased costs expended in order to comply with the new language that the Legislature has now added.

So those are the two main issues. I'd be happy to answer any questions that come up, either that you have right now or after Finance has had their chance to respond.

CHAIR TILTON: Questions from Members?

(No audible response was heard.)

CHAIR TILTON: Can we hear from the Department of Finance?

MR. CASTILLO: I just --

CHAIR TILTON: Oh, excuse me.

MR. SCRIBNER: Could I respond, and we could kind of keep this discussion in flow, so there's not a disconnect? Or would you prefer to hear from Finance?

CHAIR TILTON: Let's hear from Finance and then come back and wrap it up.

MR. SCRIBNER: Okay, okay.

MR. CASTILLO: I'd just like to note, as staff mentioned earlier in a letter that we recently submitted, we concur with their staff analysis.

MR. SCRIBNER: Thank you for being brief. We'll keep this together now.

When staff talks about the focus on the program components, this goes back to actually what you discussed a little bit earlier on the previous test claim. Mr. Petersen talked about this when we were talking about mandates, and that's loss of discretion. The 13 original program activities have a very broad statement. We all agree. But that means that schools could then do or put in what they chose to, to meet that broad statement; because the model SARC in Education Code section 35256 provides that variances among SARCs are permitted to meet local needs, so that the broad nature of the language was meant to meet the fact that we have a thousand-plus

school districts and thousands of school sites.

What the Legislature has done, in *SARC I* and in *SARC II*, has taken away that discretion. When we're talking about assessment, when we're talking about pupil achievement, rather than allowing districts to decide how they want to transmit that information to parents, the Legislature has made the decision for them. The Legislature has said, "When we're talking about these specific 13 activities, this is what you must include, period. You have no choice but to include that information."

Had the Legislature not acted, schools could have chose to put in API scores, high school exit exam passage rates, governor's performance award rates, dropout prevention rates. They could have chose to do that.

Does that mean they would have? Who knows?

The Legislature, by its actions, has taken away the discretion to determine whether or not we want to put that information into the SARC. We've expanded an original item from 13 activities to well over two dozen. And staff says, "That's not a higher level of service." We disagree.

CHAIR TILTON: Any questions from board members?

(No audible response was heard.)

CHAIR TILTON: Do we have a motion?

VICE CHAIR SHERWOOD: I'd like to move --

MEMBER BARNES: I move the staff analysis.

VICE CHAIR SHERWOOD: I'll second that.

CHAIR TILTON: Any more discussion?

I have a motion and a second. Call the roll.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: No.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Yes.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Yes.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Yes.

MS. HIGASHI: And Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: The motion carries.

Item 10.

MS. TOKARSKI: The next item for you is the Statement of Decision on the *School Accountability Report Cards II and III*. The sole issue before the Commission is whether the proposed Statement of Decision accurately reflects the decision you just made. Staff recommends that the Commission adopt the proposed Statement of Decision beginning on page 2, 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.

CHAIR TILTON: Do we have any further testimony?

(No audible response was heard.)

CHAIR TILTON: Do we have a motion?

VICE CHAIR SHERWOOD: Move for approval of staff's recommendation.

MEMBER LAZAR: Second.

CHAIR TILTON: We have a move and second to approve staff's recommendation.

Call the roll.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Yes.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: This brings us --

Did you want to say anything --

MR. FELLER: Oh, no. I'm ready to go.

MS. HIGASHI: Okay. This brings us next to Item 11.

This item will be presented by Commission counsel Eric Feller.

MR. FELLER: Good morning, again. This is the *High School Exit Examination* test claim in which claimants seek reimbursement for costs of school districts performing various activities in administering the high school exit examination.

Staff finds that the claim is a partially-reimbursable state mandate for the following activities listed in the analysis. Those are providing and documenting notice of the exam; determining whether English-learning pupils have sufficient skills to be assessed with the exam; administering the exam, including the activities required by the regulations in doing so; maintaining test security, again, including activities required by the regulations; and reporting data to either the Superintendent of Public Instruction or whoever is designated by the superintendent.

Staff also finds that some of the claimant's activities do not constitute reimbursable activities as specified in the analysis. And one of the issues in this test claim is whether the three-dollar administration apportioned to districts is sufficient to meet the costs of the program.

The State was afforded a presumption that this

amount is sufficient to cover the district's costs; but the claimant has successfully rebutted the presumption by submitting sworn declarations. Therefore, staff found that three-dollars-per-exam administration is not sufficient to cover the costs of the program. Staff recommends the Commission partially approve the test claim for the activities listed.

Will the parties and witnesses their names for the record.

MR. SCRIBNER: David Scribner representing the claimant.

MR. WILKENING: Mike Wilkening, Department of Finance.

MR. CASTILLO: Lenin del Castillo, Department of Finance.

CHAIR TILTON: Mr. Scribner, go ahead.

MR. SCRIBNER: We have an easier time this time. At least as far as I'm concerned, we end on a positive note this morning.

We concur with staff's recommendation and appreciate the change in tactic after we had submitted the declarations showing that the three-dollar preparation was not sufficient to cover the costs.

However, there is one issue outstanding that we are currently still trying to support; and at this point in

time, I cannot provide legal support, so I'm not going to raise the issue. The issue does surround who is required to actually submit the results to the parents or guardian.

The law just simply says "that shall be provided." It doesn't specifically say who it is. We have been desperately seeking some sort of management advisory directing the schools to do it because the schools are, in fact, submitting that information. But at this time, I cannot provide any legal support for that position. It would just be opinion. So we are not going to -- we won't fight over that issue this morning.

So having said that, we concur.

And if I do receive something within the time for reconsideration of this issue, we will put that forward and request reconsideration on that matter.

Thank you.

CHAIR TILTON: I appreciate that.

Department of Finance?

MR. WILKENING: Mike Wilkening of Finance.

We have three points regarding the staff's analysis.

The first is there's an assertion in the staff analysis that the No Child Left Behind is not a federal mandate. And we disagree with this. We would note that there's in excess of two billion dollars in funds that

are provided pursuant to that statute, and that in reality, there is no real choice there. The State has to take that money and then comply with the mandates that the feds have imposed through that statute.

The second piece which kind of derives from the first, is that there's an assertion that the *High School Exit Exam* is not a federal mandate, because No Child Left Behind is not a federal mandate. And we disagree with this as well. We think that the *High School Exit Exam* is a federal mandate for tenth graders. It's required by No Child Left Behind that the State have a cumulative assessment in the tenth grade and the high school exit exam is the State's test that we use to comply with that federal requirement.

And then the last point being that I believe that the standard for determining whether or not a mandate claim reaches a thousand-dollar threshold should be more stringent than just an assertion. We think that there should be data that's submitted at the time that the assertion is made, so that there can be an analysis of whether or not that does, indeed, meet the thousand-dollar threshold. So we would disagree with the contention that the three dollars is not adequate because there's no data to support that contention.

CHAIR TILTON: Mr. Scribner?

MR. SCRIBNER: Sure, I'd like to respond to those three comments, and we'll do it backwards.

As far as the thousand-dollar minimum claim amount and the declarations that are submitted, they are submitted under penalty of perjury. They are developed based on data the districts have.

What the Department of Finance is recommending is actually a mandate. So if you want to go that route, we can; but it's a new mandated program for us to submit data with the claim, to support the thousand-dollar minimum claim amount. We don't have to do that now. The penalty of perjury document has often been sufficient, and it has been for a long time.

And then the NCLB issues -- and I'll combine them as a funding source and the *High School Exit Exam* being a federal mandate -- this is very complicated, and actually NCLB in my opinion is going to end up just like the *Special Education* test claim in the Hayes. Staff is correct, NCLB is not a requirement. It is an incentive program that if districts wants to continue to receive Title 1 funding, they were required to submit a state plan. The State did so, along with -- all 50 states, I believe, submitted a state plan, to continue to receive funding at their choice.

To make a determination whether NCLB actually

requires the same level of service as we have here with the *High School Exit Exam*, NCLB would actually have to delineate the *High School Exit Exam*. If it just says, as it does, that there must be an assessment made, when the State comes in and says "That assessment is going to be made in this way," that's a mandate. It's the same thing we have with *Special Education*.

If the feds and the State allow there to be just any kind of assessment and districts had discretion as to how that assessment was going to be made, there would be no mandate there.

So what we have in the State plan is a series of assessments, accountability measures and things that the State has in place and has chosen to impose upon districts that aren't required by NCLB. And NCLB is very broad. It says, "States, you do it as you choose to do it. States, go ahead, do the assessments."

And our state has said, "*High School Exit Exam*, that's how it's going to be."

That's why staff didn't raise NCLB because, really, in this test claim, it's a non-issue. It may be an issue in others; but this one, it's not.

MR. WILKENING: And to follow up with that, we think that NCLB is coercive. There is no discretion on the part of the State, really, whether to participate in

that. To not participate would be to forgo a large amount of funding for schools. It's a false choice.

As to the discretion that the districts could have to do their own assessments, No Child Left Behind does not allow that. There has to be a single statewide standard that's applied to all the schools for comparability across those schools. So it's correct that the State has chosen an assessment, but it is required under NCLB to choose an assessment.

MR. SCRIBNER: Sorry, I didn't want this to be back and forth. I was waiting.

CHAIR TILTON: Why don't you go ahead then?

MR. SCRIBNER: Okay. Just very briefly.

This all goes back to the Hayes case, the analysis of the carrot and the stick and the City of Sacramento cases and all the special ed morass that we went through years ago. The bottom line is, NCLB is a choice. It's not a good choice; it's not a fair choice. There is a carrot and stick there, obviously; but it's still a choice. And for this test claim, it is a non-issue, because there is no clear delineation in NCLB as far as a *High School Exit Exam* is concerned. None. There are very broad statements as far as assessments, very broad statements about accountability. And when the State chooses to impose a certain assessment under a program

that it chooses to continue to be a member of, it's a mandate. This Commission held that for many programs under the *Special Education* test claim. The Hayes court says that. I didn't bring the Hayes case, or I could cite to you the specific paragraph that says, essentially, we need to look at how the mandate became imposed upon the locals. Did it come from the feds or did it come from the State? And that's a gross, loose interpretation of what that says, but that's essentially what the Hayes court wanted to know.

And in many of the special education programs, this Commission found that it came from the State, not the feds. And that same decision applies here. *High School Exit Exam* came from the State. It came before NCLB. If you wanted to even talk about the point in time argument, it was before NCLB was brought into play, and the State chose to continue to add that to its State plan when it sought additional funding from the feds.

CHAIR TILTON: Eric, can you respond for me, from the Finance point of view, that in order to get the federal funds, we have to have a statewide decision about what criteria is used?

MR. FELLER: It's staff's position that No Child Left Behind and the predecessor statute, Improving America's Schools Act of 1994, are funding statutes, that

the State is not required to participate in.

The statute itself actually says that, and I quote that part of it on page 43 of the final staff analysis, in 23 USC 6311(f), it says that,

"The provisions do not direct or control a state...or school's specific instructional content, academic achievement standards and assessments, curriculum or program of instruction."

The statute itself says it, and it's staff's position that NCLB and its predecessor statute were funding statutes and not federal mandates.

CHAIR TILTON: Any questions from Members?

MEMBER BARNES: I had a question about the three-dollar-per-student funding source. Am I correct in assuming that this will be considered an offset to the costs?

MR. FELLER: Correct.

MEMBER BARNES: And so I assume that will also be included within the Parameters and Guidelines.

I'm a little unclear about the funding for NCLB, and maybe you could help me with that. The State applies for it, but does it pass through and go down to the school districts?

MR. WILKENING: The vast majority of it does.

There's several titles that are set up under NCLB, and they're for varied purposes, from general funding for education, to teacher training, to funding for assessments, to funding for English language learners. So there's -- the federal set up that structure where there's several different titles that will flow through to the locals, so that they can pay for these programs.

MEMBER BARNES: And I guess with regard to this particular mandate, is there federal funding to -- is that in addition to what they previously had to operate these things?

MR. WILKENING: No Child Left Behind did increase the amount of money that the federal government was giving to the schools for education.

MEMBER BARNES: And how does that increase relate to this specific mandate? Or is there a direct relationship?

MR. SANCHEZ: Juan Sanchez with the California Department of Education.

MEMBER BARNES: Sure.

MR. SANCHEZ: Just to clarify a little bit on how NCLB works is that, as it was correctly stated, there's a number of titles in NCLB having to do with Migrant Ed. and things like that. What happens is, when the law was passed, the States submit a plan to the federal

government, and that plan includes various provisions that the State must agree to in order to get the funding, get the federal funding. So the mechanics are such that the State will submit a plan for the various titles -- those that they want to participate, if you will. And then what will happen is, the funding is provided to the States and then, you know, funding must be approved to be spent for the various programs.

MEMBER BARNES: And I guess the question I'm trying to get to is: Is there a tie between the funding that passes through to the school districts and this particular mandate?

MR. SANCHEZ: In the *High School Exit Exam*? There's not necessarily a specific tie. What happens is that when the State submitted its plan for NCLB, you know, it had some assessment and some performance characteristics for students. So what the State did in this particular case is incorporated a high school exit to meet that requirement. So that's where the tie is in the plan, if that makes any sense. It's kind of a convoluted issue.

MEMBER BARNES: I guess I'm going around it, so I'll try and be as direct as I can. Is there a rationale for saying that that money is, in fact, intended to pay for these activities?

MR. SANCHEZ: There wouldn't -- where that exists or

where that language exists -- and, again, I hate to kind of do the same thing and go around in circles -- but where that exists or where that link is, is in the State plan that's submitted to the federal government.

So, for example, if the federal government, as part of receipt of these funds, of "X" funds, says "There will be an assessment component in your plan, tell us how you're going to meet this assessment component." Then what the State would do is say, "To meet that requirement, what we're going to do is -- and in this particular case, high school exit meets that requirement." So that's in the State plan.

MR. WILKENING: So that's in order to receive an increased funding --

MR. SANCHEZ: Correct.

MR. WILKENING: -- you need to have cumulative assessment in the tenth grade.

And so the State has said, "Okay, we have a High school exit exam, that's a cumulative assessment, so we will use that to fulfill this requirement that we have a cumulative assessment in order for the schools then to receive additional funding."

CHAIR TILTON: Mike, was that specific then in that plan, would the feds say if you did not do what's described by the State, you would not be in compliance

with the requirements of getting the money?

MR. WILKENING: It is specifically in the State plan. And so, yes, if we didn't comply with that, then we would be in violation of our state plan and jeopardize the federal funding.

MR. SANCHEZ: Correct.

CHAIR TILTON: So then the next argument, that if we don't do exactly as described in the plan by the State, then the federal money would not be coming, so there is a linkage to that funding?

MR. WILKENING: Yes.

MR. SANCHEZ: I mean, unless there's an exception that's made. If there's certain parts of -- if you've been reading, like, in popular media right now, they're talking about NCLB and some of the requirements that they had; and that some states are saying, you know, "We can't meet some of the requirements."

So, now, there's an exception, you know; but that has to occur at the federal level.

CHAIR TILTON: Okay. So you don't know then, necessarily, if not following exactly every component of the specific plan we submitted would require the feds to pull back money? First, I thought we were saying we had a specific plan, comply with that specific plan is required for the funding, now you're saying it may not

be that --

MR. SANCHEZ: You know, I'm talking in general terms. If there was a situation where a state, for example, were to submit a plan to the federal government and part of that plan were "X" number of activities, and the State was fearing that it couldn't complete that activities, they know it could petition, you know, the federal government to say, "We haven't been able to. Now, what's the remedy here?"

MEMBER BARNES: What's the relationship between this federal funding and this three dollars? Is the three dollars just state money, or is that --

MR. WARREN: If I could?

MEMBER BARNES: Yes.

MR. WARREN: Paul Warren with the Legislative Analyst's Office.

MEMBER BARNES: Sure.

MR. WARREN: I do believe that when NCLB was passing, there was a large increase for the funding to schools, to help schools address the different requirements that were in state law. And some of them were procedural, like, assessments; and some of them are more global, like we expect student performance to increase significantly, and if you were to keep up with the papers, that's what the discussion is about, a lot.

When the law passed, it was prior to No Child Left Behind, and so there was a state appropriation of funds for the local administrative costs of three dollars a kid. So that money is still, for the most part, there, out of state funds; and then, of course, districts also receive the No Child Left Behind funds.

And, you know, the increase that California experienced from No Child Left Behind was significant, it was in the hundreds of millions of dollars increase. So certainly in the aggregate, there was certainly enough money to pay for the assessment mandates that are contained in the act.

MEMBER BARNES: Sure. Mr. Scribner?

MR. SCRIBNER: I've been dying over here to speak.

MEMBER BARNES: I'm sure you are. I'm dying to hear you. I really am.

MR. SCRIBNER: I think, Member Barnes, what you're talking aboutis: Is there a clear line between NCLB funding --

MEMBER BARNES: Sure.

MR. SCRIBNER: -- state plan activity?

No, there's not. As far as if you can trace dollars that you're going to get a certain amount of money for assessment and a certain amount of money for accountability, a certain amount of money for this, it's

a pool. It's a pot of money. The federal government does not say that, "Okay, we're going to provide you with accountability and funds, but you've got to spend XYZ amount of money on your high school exit exam." That does not exist.

A pot of money flows based on what the State determines to be the requirements that it chooses to impose upon its locals, not what the feds require. This is getting kind of twisted here with the feds are throwing all this money out. They are. But the State chose to say, "This is what we're going to do to meet it." So the federal government then says, "Here's your pot for that portion of your state plan," like was mentioned by the representative from CDE. That portion of the State plan receives a certain amount of money. It is not delineated how that money should be spent or how it's to be allocated.

So if that was your question, if you can, you know, follow the dead bodies all the way down, you can't.

MEMBER BARNES: Well, here's my question, is that, you know, I -- oh, I'm sorry, somebody else wants to speak. Go ahead.

MR. SANCHEZ: I'm sorry. I don't know if this might help, but as an example, each state plan is an individual document. So what you're going to find is that when you

go from state to state, what one state does to meet that accountability requirement, for example, or whichever it may be, will be different -- and may be the same -- and some may be more complete than others. Some may be more involved than others. So in that sense, it's not -- the plans necessarily, when the federal government requests a plan, they don't tie you to specific language. They say, you know, "Here's the general language," as Paul was saying. They tie you -- "Now, tell us how you're going to meet these requirements to get the funding."

MR. WILKENING: But they'll say, generally, that you have to do a cumulative assessment. That's not an option for a state to say, "We don't want to have a cumulative assessment of in the tenth grade."

MR. SANCHEZ: That's correct.

MR. WILKENING: That's a federal requirement.

MR. SCRIBNER: Of the State. Let's clarify, "of the State." Not of the locals, of the State. This is the *Special Education* test claim all over again. Of the State. When they say that, whether it be cumulative assessment or accountability or anything like that, NCLB talks about, for the most part, "of the State."

MEMBER BARNES: Let me kind of -- first off, I buy into the staff recommendations with regard to what's eligible as a mandate under here. So that's not an issue

for me; and whether -- I mean, I'll buy into the argument about how those mandates are imposed and why, you know, reimbursement should take place.

My only issue is with the issue of, is there funding to cover this mandate? And I think it's a fairly clear indication that the three dollars per student is a specific amount of money that is intended to deal with these particular mandates. So that definitely gets offset.

MR. SANCHEZ: That's correct.

MEMBER BARNES: The issue that I think is unclear in all of this is this pot of NCLB money is there to take care of a variety of things, which potentially could include those activities that are covered by this state mandate. And that money is being provided to the school district.

So I'm really more interested in how, you know, schools and/or the State is supposed to determine how much of that, in fact, does accrue to this particular mandate. And maybe this is not -- maybe this is not an issue that we can decide with regard to the activity; it may be an issue that we have to decide in connection with the P's and G's. But I guess I didn't want to leave on the table -- unless, of course, you're prepared to say that that pot of money, that no piece of it should be

available, you know, as an offset for this particular mandate. And I guess that's maybe the question I have.

MR. SCRIBNER: Right.

MEMBER BARNES: Is there such a disconnect between those funds, you know, and this particular activity, that no part of that extra funds -- and I mean, I think we would all agree, it's extra money that we didn't have before -- should apply here.

MR. WILKENING: First, we think that the three dollars per pupil is adequate. That's our initial opinion.

MEMBER BARNES: That's where the claim and that kind of stuff would take place.

MR. WILKENING: But we think to the extent that there are costs beyond three dollars that stand up to an audit by the Controller's office, that the funding that's provided under No Child Left Behind would be available to pay those costs.

MEMBER BARNES: But how much?

MR. SCRIBNER: Well, and again, there's nothing in the record, like you're suffering with -- there's nothing in the record from State agencies that would prove that up. So the Department of Finance has failed to provide any information -- CDE -- to provide any information, that would support that decision.

I agree with Member Barnes, I think that it is an issue that needs to be addressed; but I think it's one for P's and G's, when we're talking about the offset area, not whether or not these are actually mandated activities at this point in time.

And it may be worthwhile to request additional information from the claimants and State agencies to determine at what level does NCLB provide funding to us that could be applied to the *High School Exit Exam.*

MR. SANCHEZ: You know, that's one thing I also -- we're getting really kind of into the mechanics of NCLB. But, you know, each individual title has specific requirements. So, you know, just to clarify; when you receive the NCLB funds, there is some flexibility, but there's also clear lines of demarcation between what's Title 1 money, what's Title 2 money, what's Title 3, 4, you know, and so on.

So what winds up happening is how it feeds -- correct me if I'm wrong -- but how it feeds into the budget is that when one goes to the budget, the approved budget, and one looks at the budget act item number, then that money will be tied, in fact, to the NCLB funds. So that's where the connection happens. So you can, in fact, trace the NCLB funds to what's approved in the budget.

Now, if it's a situation where one is suggesting that money can be taken -- first of all, it has to be within the title, to allow movement between programs. And then there's the other issue that is, if one is suggesting that money can be taken from one program within that title to another program, that would basically happen, you know, via the budget process.

MEMBER BARNES: Well, let me just kind of -- I think -- and I'm sort of prepared to approve the staff recommendation, unless everybody else has other comments -- but I think this is another area that I'd like to ask the staff and everybody else who is going to be involved in developing the Parameters and Guidelines, to specifically, in your analysis back to us, address this particular issue of the federal funding; and whether any or all or none of it should be directly linked as an offset; okay. And I'll be interested to see what the results are.

VICE CHAIR SHERWOOD: Chair?

CHAIR TILTON: Go ahead.

VICE CHAIR SHERWOOD: My only question would be based on the current staff recommendation, if we were to pass it as such, would it be proper to address these issues in the P's and G's?

MS. HIGASHI: Yes, it would be. We have a specific

section in which we can make -- we can add specific language, as to what amounts, if any, need to be identified as offsets.

CHAIR TILTON: My only comment is that it seems to me, the issue for me is when you do that, if you'd give us some specifics and the details of what is submitted to the feds in order to get the fund, it seems to be an issue for me. So that's a very specific list if you have to do the following things, then I think it bears on the decision.

MEMBER BARNES: And I would specifically ask the Department of Education to really actively participate in this role here, because I think this is really a critical issue for you.

MR. SANCHEZ: Oh, yes, we'd be happy to.

MEMBER BARNES: So I really appreciate that.

MR. WARREN: I did have one other issue that maybe would be appropriate to look into as part of the P's and G's, and that is offsetting savings. There was a previous mandate, a pre-1975 mandate that required districts to do proficiency testing of students before they graduated. That means, they had to write or purchase a test, they had to administer it, they had to score it.

If I understand the mandates process correctly,

those should be considered to be offsetting savings that would reduce claims, and potentially, you know, with the three dollars and potentially the federal funds, all these pieces could be put together, from our perspective, to reduce the State's exposure on this mandate.

CHAIR TILTON: Good point. Thank you.

MEMBER BARNES: And by that, I hope you would participate in the development of those, as well; okay?

MR. WARREN: I'd be very happy to.

CHAIR TILTON: Eric, you had a comment?

MR. FELLER: I just want to say, I did try to outline some of the offsetting savings -- or the money already appropriated in the budget on page 44 of the analysis, when I talked about the amount appropriated for the last three years, 18.2 million in 2003-04, and the same amount in 2002-03 and 14.47 million in 2001-02. So I did try to outline some of those offsets for you.

VICE CHAIR SHERWOOD: Can I just make one more comment, kind of in general here?

It's really good to see the Legislative Analyst involved and get their input and Education and Finance. And I noticed -- and I'm not quite sure why this happened -- there was a comment in the write-up concerning a lack of documentary evidence. And I don't think that's common, is it, when Finance usually comes

before us? I think most of the evidence they present has either been attested to in some form.

Am I wrong about that?

MS. HIGASHI: Let me defer to Eric on it. There's a specific declaration in the record that he can point to.

VICE CHAIR SHERWOOD: Okay. My point is, if we can get evidence that has met the needs of the process, it would be better in the future. And I think Finance has done that in the past. And I think Finance, over the years, has participated in these proceedings to a great extent. They've always put their best foot forward and tried to do a good job. So I don't take this as a criticism of your overall effort.

But I think it's really important based on what we've heard from outside entities as to the importance of hearing from the various players that are involved in these issues, like Education. And we've had many education issues that come before us over the last ten years, that I've seen. And, quite frankly, in many cases, we didn't have participation from prior administrations, possibly.

So this was good to see today, and it's something that I think is so important to the process, so that we can get to the bottom line, and try to, you know, resolve

these issues and come up with a fair and equitable finding for everybody, because everybody puts a lot of work and effort into this. And I appreciate that fact and I appreciate what staff does also.

CHAIR TILTON: Walter, a motion?

MEMBER BARNES: I'm ready to move on it, if you are.

CHAIR TILTON: I'm ready.

MEMBER BARNES: Then I'll move the staff recommendation.

VICE CHAIR SHERWOOD: Second.

CHAIR TILTON: We have a motion and second to approve the staff recommendation.

Roll call?

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Yes.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Yes.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Yes.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Yes.

MS. HIGASHI: Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: The motion is carried.

Item 12.

MR. FELLER: Staff recommends that the Commission adopt the proposed Statement of Decision beginning on page 2, which accurately reflects the staff recommendation on the test claim, with allowance for minor changes, including those to reflect the hearing testimony and the vote count that will be included in the final Statement of Decision.

CHAIR TILTON: Any testimony or comments?

Do I have a motion?

MEMBER LAZAR: I'll move.

CHAIR TILTON: Is that a motion?

MEMBER LAZAR: Yes.

MEMBER BARNES: Second.

CHAIR TILTON: And a second?

Roll call.

MS. HIGASHI: Mr. Sherwood?

VICE CHAIR SHERWOOD: Aye.

MS. HIGASHI: Mr. Barnes?

MEMBER BARNES: Aye.

MS. HIGASHI: Ms. Boel?

MEMBER BOEL: Aye.

MS. HIGASHI: Mr. Lazar?

MEMBER LAZAR: Yes.

MS. HIGASHI: And Mr. Tilton?

CHAIR TILTON: Aye.

MS. HIGASHI: Thank you.

MS. HIGASHI: This concludes the test claim portion of our hearing.

We're now at Item 17, which is Mr. Starkey's report.

MR. STARKEY: This is an update for the public. The only addition is that there is a new filing. The County of Los Angeles filed an appeal, filed a writ to the Commission's decision on *Animal Adoption*. There's currently a pending -- and a writ was filed by the Department of Finance which is pending in Sacramento Superior Court. This case is currently pending in Los Angeles Superior Court. It's the same case, *Animal Adoption*. And it was filed on January 23rd. However, we were only served on March 19th.

MS. HIGASHI: Item 18, this is my report.

We've had some hearings scheduled on our budget. And the first one will be the Senate Budget Committee hearing; and then the second will be the Assembly Budget Subcommittee hearing.

We've also had a number of updates on the legislative report. And Nancy Patton is our legislative coordinator for the Commission. And she has prepared an update on the legislation, and distributed it to you.

So if you have any specific questions you'd like to ask her at this time about the legislation, please feel

free to do so. But it's a white sheet.

CHAIR TILTON: Any questions from board Members?

(No audible response was heard.)

MS. HIGASHI: There's an unprecedented number of bills addressing mandate issues. We expect there to be more; much more dialogue, every time you turn on your television set, to watch what's happening in the Capitol, you will find a discussion on mandates. I think some of you may have noticed also, almost every Monday, the Assembly Special Committee on State Mandates has been meeting, and is in the midst of getting through review of many of the education mandates.

Commission staff continues to attend all of the hearings and provide staff assistance to committee staff, as well as to members during hearings.

We expect the discussions at that committee to start focusing on the mandates process itself. And that will be happening sometime in April. We're not quite sure. We expect it to be after the Easter break.

CHAIR TILTON: Paula, has anybody shared with you my director's comments about mandates at her confirmation?

MS. HIGASHI: No, I have not seen that.

CHAIR TILTON: Okay, let me a copy of those and I'll send it to you.

MS. HIGASHI: We've also -- there's also interest

from the Governor's office, the Education Secretary's office on the mandate issues. And generally, all of the Education committee staff and consultants are starting to coalesce within the structure of the Assembly Special Committee. So we expect that there will be meaningful discussion on the mandate process and the definitions for costs mandated by the State there. And so unless we receive further direction from the Commission, we will continue to assist there, as needed.

CHAIR TILTON: Maybe what I'll do then is just share with all the Members then, there was some discussion in my front office as part of the confirmation issue for the director, about mandates. And for information, I'll just share with you, as food for thought.

MS. HIGASHI: Okay, that will be great.

We've also included in your handouts, excerpts from the Leg. Analyst's Office report and various recommendations that are made regarding the mandates issues. And they're included in your exhibits. And if you have any questions about that, we can forward them over to the Leg. Analyst's Office. We expect that all of those issues will be brought up in the context of the Laird committee hearings.

CHAIR TILTON: Okay?

Any questions?

(No audible response was heard.)

CHAIR TILTON: Any more comments from the public?

(No audible response was heard.)

CHAIR TILTON: Okay, we'll now move into closed session today; do we?

MS. HIGASHI: Just briefly on the next agenda. There will be four test claim items set for hearing. The ones listed: 2, 3, 4 and 5.

CHAIR TILTON: The Commission will now meet in closed executive session pursuant to Government Code section 11126 subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon pending litigation listed on the public notice and agenda to confer with and receive advice from legal counsel regarding potential litigation and pursuant to Government Code section 11261(a) and 17526. The Commission will also confer on personnel matters listed on the published notice of agenda.

We will reconvene in approximately ten minutes, fifteen minutes.

MR. STARKEY: Ten minutes.

(The Commission met in Closed Executive Session from 12:30 to 12:50 p.m.)

CHAIR TILTON: Okay, we're back in session.

The Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the public notice and agenda, and potential litigation, and Government Code section 11126(a) and 17526 to confer on personal matters listed on the published notice and agenda. All required reports from the closed session having been made, and with no further business to business, I'll make a motion to adjourn.

All in favor say "aye".

(A chorus of "ayes" was heard.)

CHAIR TILTON: The meeting is adjourned.

MS. HIGASHI: Thank you very much.

(The proceedings concluded at 12:51 p.m.)

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REPORTER'S CERTIFICATE

I hereby certify that the foregoing proceedings were reported by me at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer.

I further certify that I am not of counsel or attorney for any of the parties to said proceedings, nor in any way interested in the outcome of the cause named in said matter.

In witness whereof, I have hereunto set my hand this 15th day of April 2004.

Daniel P. Feldhaus

DANIEL P. FELDHAUS
CSR #6949, RDR, CRR