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COMMISSION ON
STATE MANDATES

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PUBLIC HEARING

COMMISSION ON STATE MANDATES

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TIME: 10:00 a.m.

DATE: Wednesday, April 26, 2006

PLACE: Department of Social Services
744 P Street, First Floor Auditorium
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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ORIGINAL

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A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNE SHEEHAN
(Commission Chair)
Representative for MICHAEL GENEST
Director
Department of Finance

SEAN WALSH
Director
State Office of Planning and Research

FRANCISCO LUJANO
Representative for PHILIP ANGELIDES
State Treasurer

SARAH OLSEN
Public Member

NICHOLAS SMITH
Representative for STEVE WESTLY
State Controller

J. STEVEN WORTHLEY
Supervisor and Chairman of the Board
County of Tulare

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A P P E A R A N C E S

COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director

CAMILLE SHELTON
Chief Legal Counsel
(Items 6 and 7)

DEBORAH BORZELLERI
Senior Commission Counsel
(Items 10 and 11)

CATHY CRUZ
Program Analyst
(Item 15)

ERIC FELLER
Commission Counsel
(Items 8 and 9)

--oOo--

PUBLIC TESTIMONY

Appearing re Item 6:

For City of Sacramento:

PAMELA A. STONE
MAXIMUS
4320 Auburn Boulevard, Suite 2000
Sacramento, California 95841

DEE CONTRERAS
Director of Labor Relations
City of Sacramento
Office of Labor Relations
915 I Street, Room 4133
Sacramento, California 95814

TED TAKACH
Labor Relations Officer
City of Sacramento

A P P E A R A N C E S

PUBLIC TESTIMONY

(continued)

Appearing re Item 6: *continued*

For City of Los Angeles:

DAVID W. MCGILL
Lieutenant II
Los Angeles Police Department
304 S. Broadway, Room 205
Los Angeles, California 90013

For County of Los Angeles:

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles
500 West Temple Street, Suite 603
Los Angeles, California 90012

For Department of Finance:

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

For San Diego Unified School District:

ART PALKOWITZ
Manager, Office of Resource Development
San Diego City Schools Finance Division
4100 Normal Street, Room 3209
San Diego, California 92103-2682

A P P E A R A N C E S

PUBLIC TESTIMONY

(continued)

Appearing re Item 8:

For Western Placer Unified School District and Fenton Avenue Charter School:

DAVID E. SCRIBNER
President/CEO
Scribner Consulting Group, Inc.
3840 Rosin Court, Suite 190
Sacramento, California 95834

ERIC PREMACK
Co-Director
Charter Schools Development Center
Institute for Educational Reform
Cal State University, Sacramento
6000 J Street, Suite 327
Sacramento, California 95819

For California Teachers Association:

ALEXANDRA CONDON
California Teachers Association

For Department of Finance:

DAN TROY
Department of Finance
915 L Street
Sacramento, California 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

(continued)

Appearing re Item 10:

For County of Los Angeles:

LEONARD KAYE
Certified Public Accountant
Office of Auditor-Controller
County of Los Angeles
500 West Temple Street, Suite 603
Los Angeles, California 90012

For Department of Finance:

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

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Commission on State Mandates – April 26, 2006

1 BE IT REMEMBERED that on Wednesday, April 26,
2 2006, commencing at the hour of 10:00 a.m., thereof, at
3 the Department of Social Services, 744 P Street, First
4 Floor Auditorium, Sacramento, California, before me,
5 DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the following
6 proceedings were held:

7 --oOo--

8 CHAIR SHEEHAN: The hour of ten o'clock having
9 arrived, I would like to call to order the April 26th
10 meeting of the Commission on State Mandates.

11 Paula, can you call the roll?

12 MS. HIGASHI: Mr. Glaab is absent today.

13 Mr. Lujano?

14 MEMBER LUJANO: Francisco Lujano for Philip
15 Angelides.

16 MS. HIGASHI: Ms. Olsen?

17 MEMBER OLSEN: Here.

18 MS. HIGASHI: Mr. Smith?

19 MEMBER SMITH: Nick Smith for the State
20 Controller Steve Westly here.

21 MS. HIGASHI: Mr. Walsh?

22 MEMBER WALSH: Here.

23 MS. HIGASHI: Mr. Worthley?

24 MEMBER WORTHLEY: Here.

25 MS. HIGASHI: And Ms. Sheehan?

1 CHAIR SHEEHAN: Here.

2 We have a quorum.

3 Paula, do you want to go ahead?

4 MS. HIGASHI: Sure.

5 CHAIR SHEEHAN: Shall we go over some of the
6 changes to the agenda, so that people are aware?

7 MS. HIGASHI: Certainly.

8 CHAIR SHEEHAN: They may not be aware of some
9 of the last-minute changes to the agenda.

10 MS. HIGASHI: The last-minute changes to the
11 agenda is we have postponed Items 4 and 5 on our agenda
12 today. This is the reconsideration of the *Mandate*
13 *Reimbursement Process*. And this will be scheduled for a
14 future hearing.

15 CHAIR SHEEHAN: Right.

16 MS. HIGASHI: The first action item that we
17 have today is approval of the minutes of March 29th.

18 MEMBER WORTHLEY: Move approval.

19 MEMBER OLSEN: Second.

20 CHAIR SHEEHAN: I assume there were no
21 additions or changes to the minutes.

22 All those in favor, say "aye."

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

24 CHAIR SHEEHAN: Any opposed?

25 *(No audible response)*

Commission on State Mandates – April 26, 2006

1 CHAIR SHEEHAN: The minutes are approved.

2 MS. HIGASHI: The next item is the *Proposed*
3 *Consent Calendar*; and you should have that before you.

4 CHAIR SHEEHAN: Yes.

5 MS. HIGASHI: It is a yellow sheet of paper.
6 And the items on the Consent Calendar are Proposed
7 Parameters and Guidelines, *High School Exit Exam*,
8 Item 12; *Annual Parent Notification*, Item 13; and
9 *Adoption of Commission Order to Initiate Rulemaking*,
10 Item 14.

11 CHAIR SHEEHAN: Great. Hopefully, there are no
12 changes to the Consent Calendar.

13 If not, we'll entertain a motion to approve the
14 Consent Calendar.

15 MEMBER WORTHLEY: So moved.

16 MEMBER LUJANO: Second.

17 CHAIR SHEEHAN: We have a motion and a second.
18 All those in favor, say "aye."

19 (A chorus of "ayes" was heard.)

20 CHAIR SHEEHAN: Any opposed?

21 (No audible response.)

22 CHAIR SHEEHAN: All right.

23 MS. HIGASHI: There are no issues to consider
24 under Item 3.

25 CHAIR SHEEHAN: No appeals? Okay.

1 MS. HIGASHI: This brings us to the hearing
2 portion of our meeting.

3 As is our practice, would all of the parties,
4 witnesses, representatives who intend to come forward on
5 Items 6, 7, 8, 9, 10 or 11 please rise?

6 *(Several persons stood.)*

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

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

12 MS. HIGASHI: Thank you.

13 Our first hearing item today is reconsideration
14 of the *Peace Officer Procedural Bill of Rights* test claim
15 decision, and it's Item 6. Chief Legal Counsel Camille
16 Shelton will introduce this item.

17 MS. SHELTON: Good morning.

18 CHAIR SHEEHAN: Good morning.

19 MS. SHELTON: In 2005, the Legislature added
20 section 3313 to the Government Code to direct the
21 Commission to review its 1999 Statement of Decision on
22 the *Peace Officer Procedural Bill of Rights* test claim,
23 commonly known as "POBR."

24 POBR provides procedural rights to peace
25 officers employed by local agencies and school districts

1 that are subject to discipline or investigation by the
2 employer. As stated in numerous court decisions,
3 interpreting the POBR legislation, POBR is a
4 labor-relations statute. It does not regulate the
5 qualifications for employment or the causes for which an
6 employee may be investigated, interrogated, disciplined
7 or removed. Those decisions are made by the local
8 government employer.

9 The Commission's jurisdiction in this case to
10 reconsider POBR is narrow. Government Code section 3313
11 requires only that the Commission review the Statement of
12 Decision to clarify whether the test claim legislation
13 imposed a mandate consistent with the Supreme Court
14 decision in San Diego Unified School District and other
15 applicable court decisions.

16 Staff finds that the San Diego Unified School
17 District case supports the Commission's Statement of
18 Decision which found that the POBR legislation
19 constitutes a state-mandated program within the meaning
20 of Article XIII B, section 6, of the California
21 Constitution for counties, cities, school districts, and
22 special districts identified in Government Code
23 section 3301 that employ peace officers.

24 Staff further finds that the San Diego Unified
25 School District case supports the Commission's Statement

1 of Decision that the test claim legislation constitutes a
2 partial reimbursable state-mandated program for all
3 activities previously approved by the Commission, except
4 the following:

5 Number one, the activity of providing the
6 opportunity for an administrative appeal to probationary
7 and at-will peace officers, except when the chief of
8 police is removed, is no longer a reimbursable
9 state-mandated activity. The Legislature amended
10 Government Code section 3304 in 1999 to limit the right
11 of an administrative appeal to only those peace officers
12 who successfully completed the probationary period that
13 may be required by the employing agency, and to
14 situations where the chief of police is removed.

15 And number two, the activities of obtaining the
16 signature of the peace officer on the adverse comment or
17 noting the officer's refusal to sign the adverse comment
18 pursuant to Government Code sections 3305 and 3306 when
19 the adverse comment results in a punitive action
20 protected by the due-process clause of the California and
21 federal Constitutions does not constitute a new program
22 or higher level of service, and does not impose costs
23 mandated by the state pursuant to Government Code section
24 17556, subdivision (c).

25 Staff recommends that the Commission adopt the

1 analysis and revise the Statement of Decision effective
2 July 1st, 2006, to be consistent with the analysis.
3 Will the parties and representatives please come forward
4 and state your names for the record.

5 MS. STONE: Good morning, members of the
6 Commission. My name Pamela Stone, and I'm here on behalf
7 of the City of Sacramento.

8 To begin with, we would like to state that we have found
9 the draft staff analysis, as well as the final staff
10 analysis, very confusing insofar as it appears to track
11 what the legislation does, in fact, require, and then
12 comes to a contrary conclusion.

13 Furthermore, there was a plethora of testimony
14 at the prior hearing held in 1999, talking about the
15 substantial difference and efforts required to do the
16 adverse comment, which has been totally overlooked in
17 this particular matter.

18 We had a long hearing last time, over two
19 sessions, talking in length about the difference between
20 what is required for miscellaneous employees, i.e., those
21 who are not sworn officers, versus those who are, in
22 fact, covered by the Peace Officer Bill of Rights.

23 As a result, I have experts here, the first
24 being Dee Contreras who also was the test claimant and
25 testified at the prior hearing, who is the labor

1 relations officer for the City of Sacramento, and can
2 explain in substantial detail those requirements that are
3 afforded to miscellaneous employees versus those who are
4 afforded to those sworn officers covered by POBR, as well
5 as Lieutenant David McGill from the Los Angeles Police
6 Department, who supervises the Internal Affairs unit, so
7 that you will have some facts to demonstrate why we
8 believe your draft staff analysis and final staff
9 analysis is in error.

10 Dee?

11 MS. CONTRERAS: Good morning. My name is Dee
12 Contreras. I was the Labor Relations officer who was the
13 test claimant with the City of Sacramento when this was
14 originally filed ten years ago. I'm now the Labor
15 Relations director for the City of Sacramento. So I
16 still have responsibilities relative to oversight and
17 implementation in this.

18 I agree with what Pam said in terms of
19 confusion of the staff report. So let me say that we
20 agree obviously that there is a mandate, and we agree
21 that there's a reimbursable issue here; and we do not
22 have a dispute as to the probationary employees since the
23 law was, in fact, changed after we went through the
24 process to exclude those people, and we no longer do or
25 are required to do under POBR administrative processes

1 for probationary employees.

2 The issue regarding adverse comments, however,
3 and the way that the report uses the phrase "due
4 process," as well as the burdens of Skelly, I think,
5 require that we go back and look at what is, in fact, the
6 difference between what POBR does to an organization in
7 terms of what we are required to do in an investigative
8 and administrative review process, and what Skelly or due
9 process actually requires.

10 The Skelly case, as you know, applies to all
11 public employees who have a property interest in their
12 job. Those people who are past probation and they have
13 the ability to -- the employer has to demonstrate
14 affirmatively some reason for removal from their job.

15 Skelly applies to a variety of cases, but it
16 doesn't apply to all discipline of essentially permanent
17 career employees in civil service or non-civil service
18 public employment.

19 It does not apply to disciplines of five days
20 or less. There's a court decision narrowing Skelly to
21 exclude all those. That is, the vast majority of
22 discipline in any organization are suspensions of five
23 days or less.

24 It does not apply to letters of reprimand. So
25 the staff reference to Skelly as a sort of baseline

1 due-process requirement in our investigative process does
2 not apply to the vast majority of cases. In fact, the
3 cases that are six days or more in terms of the
4 suspensions or terminations are less in most
5 organizations than ten or 15 percent of the discipline
6 process.

7 POBR applies to all of those, down to letters
8 of reprimand, and, in fact, includes things that have
9 never been considered in a Skelly context. For example,
10 transfers. Transfers that the employee views as
11 punitive. And from an employer perspective, I can tell
12 you, you would have to be searching to find a way to do
13 a punitive transfer. In fact, if I transfer somebody
14 from detectives back to patrol, we would not view that as
15 a punitive transfer.

16 We've had situations in the City of Sacramento
17 where we were eliminating a unit because of layoffs in
18 the 1990s. We eliminated an entire gang unit, right.
19 That was viewed as a punitive transfer by all those
20 employees, who then grieved the process under POBR,
21 alleging that we could not, in fact, transfer them out.
22 We couldn't disband the unit without going through all of
23 the POBR protections.

24 In no way is it disciplinary if an employer
25 decides to downsize an organization and remove people, as

1 long as you're removing them consistent with whatever
2 other processes you may have. In this case, it was the
3 entire unit based on seniority, was being moved out.
4 So as a practical matter, POBR raises a threshold burden
5 that does not exist under Skelly or under any other
6 due-process kind of definitional requirement.

7 Yes, you have to have a property interest in
8 the job in order to be covered by Skelly. And in POBR,
9 once you eliminate probationary employees, typically, you
10 have a property interest in the job.

11 Under Skelly, there is no requirement to notify
12 a person before you go into an investigative process what
13 you're going to talk about. You can call a person in,
14 say "Come in. Sit down," and start interrogating them
15 immediately.

16 Under POBR, you have to notify the officer what
17 this investigation is about. That's a disputed area and
18 a source of ongoing litigation in terms of what it really
19 means to notify the employee, how broadly or how
20 narrowly.

21 But if you think about it, notifying somebody
22 what you're going to talk to them about, tomorrow when
23 you bring them in for a hearing, allows an awful lot of
24 opportunity for that person to create a story, get
25 stories in line, talk to other people about what is

1 going to happen; and, in essence, complicates
2 substantially and increases the burden in the
3 investigative process.

4 And Dave will be talking about that when he
5 gets up here to address basically the problems of this.
6 The draft report and final report used the phrase
7 "liberty interest" as if that was a common issue. So
8 even if people don't have a due-process right, they may
9 have a liberty interest in what we're doing.

10 I've been in this business for 26 and a half
11 years, and I've been involved in one liberty-interest
12 hearing. For a liberty interest to arise, you have to
13 have a person who has been accused of some fundamental
14 behavior that constitutes a fundamental impairment of
15 their ability to function in the workplace, like accusing
16 them of theft.

17 Accusing a person of simple incompetence, for
18 example, does not raise a liberty interest. If you say
19 they can't do the job or they're not competent or you
20 don't like them or whatever, I mean, as long as you're
21 not saying they are significantly morally impaired or
22 behaviorally impaired in terms of their ability to do the
23 job. And by that, I don't mean they're incompetent or
24 they're not crazy and they don't come to work, or they
25 have an attendance problem, or they yell at other people

1 on the job, or they have behavior issues. I mean,
2 there's a variety of things. None of those are covered
3 by a liberty interest.

4 You have to say you think they're a thief. You
5 have to say you think they're a terrorist threat to the
6 country before a liberty interest arises. It almost
7 never actually arises as a liberty interest.

8 You look like you want to say something,
9 Ms. Sheehan.

10 CHAIR SHEEHAN: Well, just in terms of --
11 because we've got other people who want to speak, so if
12 you can begin to focus on the point you want to make,
13 because I want to make sure everyone else can testify.

14 MS. CONTRERAS: Okay. Well, this is a critical
15 element because the draft -- and I could be very wrong in
16 terms of how I read it -- but the staff recommendation
17 to review and reduce the reimbursement process uses
18 Skelly and due process as the justification for that
19 reduction. It says basically, fundamentally, POBR isn't
20 a burden because these things apply.

21 And what I'm trying to point out is that, in
22 fact, these other things that they identify are not
23 applicable. Liberty interest is not an applicable
24 defense in terms of what has happened with POBR, nor is
25 Skelly.

1 Over the past 25 years, there have been
2 probably a hundred cases expanding POBR and the burdens
3 that the employer bears under POBR.

4 There have not been five decisions defining,
5 clarifying or expanding Skelly.

6 If they really both dealt with due process, if
7 they were really fundamentally overlapping, you would
8 have the same kind of litigation going on in the other
9 arena. And, in fact, you don't because they're not
10 overlapping or the same. They are substantially
11 different. And to say that Skelly exists is not a
12 defense for the additional burdens that POBR raises. It
13 doesn't arise at that level.

14 I'm very concerned that that distinction
15 which -- and, again, I could be wrong in how I
16 interpreted it because I did find the draft report and
17 the final report to be quite confusing on that issue.
18 It, as a practical matter, indicates that because of
19 Skelly -- and, in many cases liberty interest -- POBR is
20 not an increased mandate. And that's simply incorrect,
21 absolutely incorrect.

22 It's important to note that the kinds of things
23 that we get investigated, one of the things for POBR is
24 because police officers are subject to a constant
25 potential for being investigated. They rarely make

1 people happy when they arrest them. They often offend
2 people when they are in the process of doing their jobs.
3 We understand that, and we look at that very carefully.

4 On the other hand, we have to be in a position
5 where we can do an investigative process that allows us
6 to find out whether the officer did something right or
7 wrong, and whether there are issues or there are not
8 issues.

9 The adverse comments piece, which was
10 identified again as a due-process protection, from our
11 perspective, doesn't arise in that context. I'm not sure
12 even how you define "due process" in terms of having
13 people sign off.

14 I can tell you from an experiential
15 perspective, we've had situations in which people filed,
16 not uncommonly, five-, ten-, and 90-page responses to
17 something they don't agree with.

18 The City of Sacramento has been subjected to
19 litigation by an employee who was never disciplined.
20 There was an investigation. There was an act, a
21 complaint, actually, and an EOD bomb vehicle was left
22 with the keys in it, and was taken by joy-riding kids;
23 okay? It sounds like a serious issue to me, because it
24 had bomb equipment in the back of the vehicle. And that
25 caused an investigation. Some additional charges came

1 out of that investigation.

2 Ultimately, there was no discipline in that
3 case. But the employee wanted to know, because he wanted
4 to go -- essentially get back and talk to everybody who
5 had said anything adverse about him in the investigative
6 process.

7 We refused to give him any information. He had
8 no right to it under Skelly. There was no discipline.
9 He had no right to it from our perspective under any
10 circumstances.

11 There was an investigation. He had his
12 opportunity in the investigative process to talk. That
13 case was litigated and we lost, and he was allowed to
14 obtain the information out of that case under POBR
15 because it was viewed as an adverse incident.

16 Well, of course, it was an investigation; but
17 it was an investigation that caused no adverse impact on
18 him, except what he perceived was there. So to believe
19 that POBR does not create huge burdens in what are for us
20 sometimes theoretical ways, but they apply heavily and
21 they fall on the employer, making it very, very difficult
22 for us in terms of dealing with.

23 In an effort to get it done -- and believe me,
24 I've testified for probably a day and a half on this
25 issue the last time we went through this -- and we would

1 be happy to provide any additional information, and we
2 also -- obviously, you have them, can get the transcripts
3 from the last time we discussed these issues when we went
4 through this process -- it is very important from our
5 perspective, as the test claimant, and from the
6 perspective of every employer in the State of California
7 who is subject to POBR, that the consequences of this act
8 not be minimized; and that the impacts and burdens on our
9 ongoing investigative process be reviewed.

10 If there are problems in terms of the way
11 they're being claimed, if there are issues about how it's
12 done, that needs to be looked at. But just to decide
13 that things are excludable now because somebody does not
14 clearly understand the day-to-day impacts of the
15 due-process pieces, and particularly Skelly which is
16 bandied about freely in the decision -- in the staff
17 report, as well as liberty interests, would be a grave
18 miscarriage of this process.

19 Thank you.

20 CHAIR SHEEHAN: Thanks.

21 Did you have a question, Paula?

22 MS. HIGASHI: I just wanted to respond to one
23 point that Ms. Contreras raised.

24 I just wanted to state for the record that the
25 Commission members did receive the entire administrative

1 record for the prior test claim proceeding, including the
2 transcripts that you mentioned.

3 MS. CONTRERAS: Thank you.

4 LT. MCGILL: Good morning, Madam Chair, ladies,
5 and gentlemen. Thank you for the opportunity to respond.
6 I had an hour, I was told --

7 CHAIR SHEEHAN: Can you identify yourself?

8 LT. MCGILL: Lieutenant David McGill.

9 Is this on?

10 CHAIR SHEEHAN: Yes, we can hear you.

11 LT. MCGILL: Lieutenant David McGill, I am with
12 the Los Angeles Police Department. I have been so for
13 the last 20 years. I have over seven years' experience
14 in the Internal Affairs arena; and for the past three and
15 a half years I've been the office in charge of support
16 section at Internal Affairs.

17 In the LAPD, the Internal Affairs group is
18 responsible for all the aspects of the department's
19 disciplinary system, including tracking, analyzing, and
20 investigating personnel complaints of misconduct.
21 My current role, I'm in charge of all aspects of internal
22 affairs other than the actual investigations. This means
23 I'm responsible for the collection, tracking,
24 administration of all records, the classification of all
25 cases, the review and audit of all complaint

1 investigations, a retrieval analysis, et cetera.
2 Anything having to do with the case other than the actual
3 investigation piece falls under my purview.
4 I'm also the vice president of the National Internal
5 Affairs Investigators Association.

6 I'm not an attorney. I don't profess to have
7 any legal background other than my law enforcement
8 background; but I do have extensive experience in the
9 Internal Affairs arena, and I want to share that with you
10 today in relation to how it impacts or is impacted by
11 POBR.

12 My department, just for your information, has
13 over 9,000 sworn personnel, with a total workforce of
14 over 12,000 employees. About 350 of us are actively
15 engaged in the Internal Affairs group. It's a very large
16 group. 150 of those are the individuals that actually
17 investigate personnel complaints, which spread throughout
18 eight sections of the City of Los Angeles' 400-plus
19 square miles of area.

20 To give you some perspective how much work we
21 do, we average between 6,000 and 6,500 complaint
22 investigations a year. We handle about half of those, we
23 in Internal Affairs.

24 Keep in mind 6,000 complaints often involve
25 multiple employees to interview. They involve multiple

1 accused employees, many witnesses. All these cases have
2 to be tracked, administered, and initiated.

3 And, of course, I'm responsible -- part of one
4 of my duties is the training of all Internal Affairs
5 officers. We rotate that assignment. It's an ongoing
6 process to try to keep our employees up to speed in POBR.

7 It's a very difficult task.

8 I guess a great deal of thanks -- or depending
9 on which side of the fence you sit on for POBR involves
10 my department. And it was my league, my union that
11 actually introduced or had the bill -- helped the bill
12 get introduced back in the late seventies. So on behalf
13 of my union, you're welcome.

14 CHAIR SHEEHAN: We appreciate that.

15 LT. MCGILL: Yes, I'm sure.

16 My goal today is to impart real-world
17 experiences for you. The actual application of POBR from
18 the perspective of somebody who is intimately involved in
19 this kind of work.

20 I hope to leave you today with a greater
21 understanding of the practical application of internal
22 affairs investigations as it relates to POBR, and the
23 fact, in my humble opinion, the proposed meager
24 reimbursement considered does not fully comprehend or
25 account for all the requirements or nuances of POBR.

1 POBR is our lifeblood. It's our manual of operations.
2 It's what we do. We must ensure that we don't violate
3 any of those provisions. They're over and above due
4 process, in my opinion; and it has caused us as a
5 department undue stress, time, and precious resources to
6 just keep on top of the whole POBR issue.

7 We understand the issues of POBR and we have no
8 problem ensuring that our people understand and abide by
9 its principles.

10 The reality is that POBR causes us to alter our
11 normal investigative practices of which we are
12 accustomed, and it negatively impacts our operations in
13 terms of extra work, which is extra work and effort
14 necessary to adhere to those mandates.

15 We do not operate in a vacuum. We do not
16 conduct business mired in legalese. I assure you that
17 our procedures and practices are never de minimis, as I
18 read in the staff analysis. We have real-world issues
19 that need to be addressed in relation to POBR above and
20 beyond the normal due process.

21 Due process, in my mind, and in my
22 investigative mind, implies and demands fairness and
23 reasonableness. It does not refer to a specific
24 procedure but, rather, to a minimum procedure that is due
25 as a result of the value of the loss of the individual

1 affected by government action.

2 Due process carries with it minimal procedures
3 to ensure fairness. It entails a fact-finding mission
4 only.

5 POBR goes beyond this. As a police officer, I
6 love POBR. As a manager in charge of investigating
7 allegations of misconduct, POBR requires maximum effort,
8 and is unreasonable in terms of many requirements that
9 people have to abide by.

10 I commend your staff for attempting to wade
11 through its complicated processes to come up with some
12 recommendations; but in my view, the state holds too
13 narrow a view of reality and, quite frankly, it is a slap
14 in the face to my employees and the other hard-working
15 law enforcement colleagues throughout the state when
16 their efforts are termed "de minimis" or run concurrent
17 with or at the same level as due process, so I'm told.

18 In other law enforcement departments, the
19 formal discipline of an employee merely involves a basic
20 investigation of facts under due process. There is no
21 requirement that we advise the employee of the nature of
22 the investigation as in POBR. There is no requirement
23 that we provide the subject employee a copy of any tape
24 recording and notes of any previous interview.

25 Of course, these are all issues that we have to

1 deal with.

2 In my department we handle thousands of cases.

3 In the past several years, in some of these cases you
4 may be familiar with, based on some media reports. We're
5 always in the news, in one way or another.

6 However, every case, whether extremely serious
7 misconduct is alleged or the issues are fairly
8 straightforward, every case must be handled according to
9 POBR. This requirement demands attention to duty and
10 diligence in the area of law, labor relations,
11 investigations, and administration of discipline. My
12 employees are trained to adhere to those requirements.
13 As an example of the difference between Skelly issues and
14 POBR, we believe that written reprimands are not part of
15 Skelly but are covered under POBR. In fact, it is our
16 belief that suspensions of five days or less do not
17 automatically call for a Skelly process.

18 Reprimands are, by far, the most common form of
19 discipline in any police department. In my department,
20 we have two types of reprimands: There are admonishments
21 and official reprimands. Each of these is considered
22 punitive actions, must be handled with extreme diligence,
23 and each requires time, effort, and cost.

24 In my department, only 21 to 23 percent of the
25 total cases that we deal with result in a sustained

1 allegation. This is consistent, in my experience,
2 throughout the United States in law enforcement.
3 Of those few cases sustained, over 80 percent of them
4 contain penalties of over five days or less.

5 So if my math is correct, we're talking about
6 less than 4 percent in my department of our cases involve
7 a penalty greater than five days.

8 So what's going on with the other cases? I
9 assure you, this is not work that is de minimis, but work
10 that requires time, money, and personnel effort to deal
11 with.

12 In every one of our cases, the investigation
13 involves at least one police officer, one accused -- or a
14 police officer witness. All officers must be treated as
15 accused, and that officer must be afforded the rights and
16 protections mandated by POBR. This is not subject to
17 debate or decided on a case-by-case basis but it is
18 reality.

19 This is because, according to POBR, it is what
20 is in the mind of the employee, not the employer, that
21 dictates our actions. POBR states, in part, that when
22 any public safety officer is under investigation and
23 subject to an interrogation that could result in
24 discipline or punitive action, excuse me -- the
25 investigation shall be conducted under certain

1 conditions.

2 I assure you, without exception, all of our
3 officers consider themselves accused officers, no matter
4 what their official status is at the time of their
5 interview.

6 POBR companies go above and beyond the normal
7 due process and require us to expend our resources and
8 should be appropriately reimbursed.

9 Another example, in 3303(c), where our
10 investigators inform -- which was mentioned earlier --
11 inform the officers of the nature of the investigation
12 prior. In the first place, the public safety officer
13 under investigation can actually be the subject
14 officer -- or any witness officer because again, it's in
15 their mind of what could lead to punitive action.
16 Practically speaking, this means that every police
17 officer is considered, at least in their mind, as an
18 accused. This is because we severely discipline our
19 employees for misleading statements or, you know,
20 something that they didn't bring up in the investigation,
21 that we find out later.

22 Although this may be considered by state
23 auditors to be a broad interpretation of POBR; in fact,
24 the fact remains that this is the true nature of events
25 as they occur in the field.

1 In the second place, and most importantly,
2 informing the employee about the nature of the
3 investigation prior to questioning happens in no other
4 venue, that I can think of.

5 I cannot express to you the degree to which
6 this mandate negatively affects the course of our
7 investigation, the nature of our investigatory practices.
8 We have overcome this through training and practical
9 experience, but it still impacts our department, and it's
10 still required that we do this.

11 In order to effectively prepare for such
12 encounters, our investigators must ensure that they have
13 diligently interviewed and recorded every other witness
14 prior to the officer's interview. In other non-law
15 enforcement investigation, the investigator does not have
16 to prepare, in my mind, so thoroughly. They do have to
17 prepare, but not so thoroughly.

18 In fact, the investigators in other cases, as
19 was mentioned before, can go right to the accused and
20 start asking questions without advice -- or advising them
21 what the nature of the case is.

22 We do a lot of prework as a result of POBR that
23 is not normally required.

24 In fact, in terms of paperwork, tracking and
25 the pure weight of a case, I can assure you, a vast

1 majority of our investigations far exceed that of a
2 regular criminal investigation.

3 Reasonable breaks, another issue. We were
4 required to allow reasonable breaks. This is where we
5 get into having debates when we sit across the table
6 from our employees about what is reasonable, what is not,
7 how much do we tell them ahead of time. That causes us
8 stress, it causes us work, it causes us money.

9 Breaks are often used, in my estimation, to
10 consult with the representative attorneys to manipulate
11 the manner in which the officers respond and question the
12 substance of that response. We deal with this regularly.

13 In 1998 POBR was amended to include a
14 statute-of-limitations clause. This requires us to get
15 those cases done in a year. That seems like a long time,
16 but it's not. It severely impacts our operations, no
17 doubt.

18 POBR -- and I will wrap this up now, thank you
19 for your attention -- POBR is absolutely a matter of
20 statewide concern; and my professional colleagues in all
21 departments throughout the state take this responsibility
22 of ensuring the mandates are followed very seriously.
23 There is no doubt in my experience that many of the most
24 critical mandates under POBR go beyond due process and
25 should, therefore, seriously be considered for

1 reimbursement.

2 I respectfully request this Commission to fully
3 examine not only the letter of the law in terms of
4 requirements of all aspects of POBR, but also the spirit
5 of the law and the practical implications thereof, the
6 real-life expenditure of resources to fully comply with
7 many of the requirements of POBR.

8 Certainly there are matters of interpretation.

9 And, obviously, we, the practitioners, have a slightly
10 different interpretation of what is required of us as the
11 state does. However, the view presented to us thus far
12 should be reconsidered and should be balanced with
13 reasonableness, and all considerations must be given its
14 proper weight when the final decisions are made.

15 I believe your rules allow this commission to include as
16 a reimbursable activity any activity that is reasonably
17 necessary to comply with the mandate. We ask that you be
18 fair and realistic in your examination of all the
19 evidence before you.

20 And I really thank you for your time this
21 morning.

22 CHAIR SHEEHAN: Thank you.

23 Any questions, comments?

24 *(No audible response)*

25 CHAIR SHEEHAN: Thank you, Mr. McGill.

1 All right, the next -- go ahead.

2 MR. KAYE: Good morning. Leonard Kaye, County
3 of Los Angeles County.

4 And I'd like to briefly echo some of the
5 thoughts. But to move beyond that and to make a few
6 additional points, and I appreciate this opportunity to
7 address the commissioners on this exceptionally important
8 program. Because we believe that the test claim before
9 you this morning, the POBR's legislation is not some type
10 of surplusage. It's not just window dressing, but it
11 imposes really significant major duties upon local
12 government, including, for example, the duty to
13 investigate in order to interrogate.

14 And I'd like to go back to Commission's
15 original decision. And on page 13 of the decision, their
16 conclusion -- and I'll briefly read it to you, it's just
17 a small passage -- on page 13, this conclusion remains
18 undisturbed in the Commission's present finding.

19 And it reads, "Conducting the investigation.
20 When a peace officer is on duty and compensating the
21 peace officer for off-duty time in accordance with
22 regular department procedures are new requirements not
23 previously imposed on local agencies and school
24 districts, accordingly, the Commission found that
25 Government Code section 3303(a) constitutes a new program

1 or higher level of service under Article XIII B,
2 section 6, of the California Constitution, and imposes
3 costs mandated by the state under Government Code section
4 17514."

5 So I think that it's very clear that, at least
6 in that Statement of Decision, that investigation costs
7 are imposed upon local government through the *POBR's* test
8 claim legislation. That is a very plain reading of that
9 statement; and Commission staff haven't controverted that
10 statement in any way, shape, or form in their present
11 analysis before you today. And we believe that that
12 statement should stand.

13 The second point I would like to make has to do
14 with the specific mandate to the Commission to reconsider
15 the *POBR's* test claim legislation in light of the
16 San Diego court decision. And we believe that the -- in
17 light of the San Diego decision, we believe that full
18 reimbursement of all of the costs of mandatory procedural
19 duties, we believe that they're not triggered by federal
20 law.

21 And this was important because in the San Diego
22 decision, what they held was, if the duty is not
23 triggered by federal law, then all the due-process
24 procedures -- not merely the minor activities and
25 notification and so forth, but all of the due-process

1 activities for specified classes of actions are then
2 reimbursable.

3 And we cite, basically, in our filings: The
4 judgment of the Court of Appeal is affirmed insofar as it
5 provides for full reimbursement of all costs related to
6 hearings, triggered by the mandatory expulsion procedure
7 provision of Education Code, in this case, 48915.

8 The San Diego decision, we believe, is
9 applicable here as the new POBR's duties are not
10 triggered by federal law but, rather, triggered by
11 state-mandated events, when such events occur. And, of
12 course, we refer to Penal Code section 832.5(a)(1), which
13 states, "Each department or agency in this state that
14 employs peace officers shall establish a procedure to
15 investigate complaints by members of the public against
16 the personnel of these departments or agencies, and shall
17 make a written description of the procedure available to
18 the public."

19 Furthermore, with all due respect to staff,
20 they respond that this section of the Penal Code wasn't
21 included in the original test claim legislation. We
22 think that this is not a fatal omission simply because we
23 believe -- and it's been the past practice of the
24 Commission -- to include statutory provisions which are
25 reasonably related to the San Diego case and as

1 triggering state-mandated events, and also are reasonably
2 related to POBR. In this case, it's directly related to
3 POBR. So we feel that this should stand as submitted.
4 And that investigation costs and due-process costs are
5 clearly reimbursable, in our view.

6 Thank you.

7 CHAIR SHEEHAN: Questions for Mr. Kaye?

8 *(No audible response)*

9 CHAIR SHEEHAN: All right.

10 You'll have a chance, because we have lots of
11 questions also.

12 MR. TAKACH: I'm going to be very brief. My
13 name is Ted Takach, T-A-K-A-C-H. I'm a labor relations
14 officer with the City of Sacramento.

15 Much like Dave from L.A., my background is also
16 in law enforcement. I spent the last ten years as a
17 management representative, mainly here with the City of
18 Sacramento.

19 For 11 years prior to that, my background was
20 in law enforcement and representation of police officers
21 in internal affairs complaints, in discipline as well as
22 contract negotiations. And I am not an attorney.
23 In the process, peace officers -- or every one of them
24 are notified of their rights under POBR. It's a much
25 more involved process than dealing with miscellaneous

1 employees that we deal with from time to time. We don't
2 tell them what their rights are. We tell them we expect
3 them to tell the truth and go on with the questioning.
4 With POBR, you have to outline the rights and what is
5 available to them, as well as give them advanced notice
6 of what we're going to talk with them about. This gives
7 them the opportunity to prepare for that.

8 And I've been on the other side in preparing
9 people for those interviews, and that does occur. We
10 expect people to go in and tell the truth, and that's
11 what we expect out of them, specially police officers.
12 The adverse comments do, as Dee testified earlier, take a
13 great deal of time and effort to process. Sometimes
14 they're lengthy. And, again, I've had experience on both
15 sides of the table with this issue.

16 All of this in a statute that applies to an
17 occupation where we expect the truth and need the truth,
18 and shouldn't have to go to these lengths. But the
19 statute is there, and it provides this level of benefits
20 and these protections, and it is, we believe,
21 reimbursable as further stated.

22 Thanks.

23 CHAIR SHEEHAN: Thanks.

24 Any questions?

25 *(No audible response)*

1 CHAIR SHEEHAN: Okay.

2 Susan, did you want to testify on this?

3 MS. GEANACOU: I do.

4 Susan Geanacou, Department of Finance.

5 The majority of our comments deal with
6 reimbursement for school districts. So if you would
7 prefer to hear feedback from your counsel first.

8 CHAIR SHEEHAN: Yes, is there anyone else who
9 wants to address the issue on the -- not the school
10 district issue, that Finance has -- that is a separate
11 one.

12 Anyone else who wants to testify?

13 *(No audible response)*

14 CHAIR SHEEHAN: All right, let's hear so that
15 when it's fresh in our mind, and then we'll address the
16 issue that your office raised in your letter.

17 MS. GEANACOU: Sure. Okay, great. Thank you.

18 CHAIR SHEEHAN: Why don't you go ahead?

19 Because I know some of us have questions. But you may
20 address -- you know, you may answer our questions through
21 your response, anyway.

22 MS. SHELTON: Well, this is confusing, and I'm
23 hoping to clarify some of these issues now.

24 The reason why it's confusing is because the
25 Commission's jurisdiction in this case is just limited to

1 applying the San Diego Unified case.

2 CHAIR SHEEHAN: Right.

3 MS. SHELTON: That case is hard to read, it is
4 hard to understand, and to apply it is very difficult.
5 But the factual situation in POBR is very much like the
6 factual situation in the *Expulsions* arena as well.
7 But just to clear up any confusion, if you just turn to
8 page 1273, which is Volume 2 of your blue binder, those
9 are the parameters and guidelines that the Commission
10 adopted.

11 Oh, you didn't bring them?

12 There is an extra set, right there.

13 CHAIR SHEEHAN: 1273?

14 MS. SHELTON: Yes.

15 CHAIR SHEEHAN: Okay.

16 MS. SHELTON: The reason I wanted to point this
17 out was because this staff analysis and recommendation
18 does very little to the P's and G's that were adopted by
19 the Commission.

20 CHAIR SHEEHAN: The original ones?

21 MS. SHELTON: Yes. Very, very little.

22 All that it does, when you go to the
23 reimbursable activities under the administrative appeal,
24 here, what we would have to do would be to take out all
25 the at-will and probationary employee rights because of

1 that 1998 amendment, which --

2 CHAIR SHEEHAN: The last bullet on it; right?

3 MS. SHELTON: It would be under (b), and you
4 would have to change the language under "1" to get rid of
5 the at-will employees and the probationary employees. So
6 the first bullet, yes.

7 CHAIR SHEEHAN: Okay.

8 MS. SHELTON: Under (b)(2), would be just to
9 clarify that those administrative appeal activities are
10 only limited to when the chief of police is removed. So
11 language would have to be inserted there to delete the
12 transfer denial of promotion and other actions. And it
13 really is only when the chief of police is removed.

14 CHAIR SHEEHAN: All right, so we'd have to
15 rewrite that section?

16 MS. SHELTON: Right.

17 CHAIR SHEEHAN: So just for the chief of
18 police?

19 MS. SHELTON: Right. And the claimants don't
20 dispute that.

21 Nothing has been changed with the
22 interrogations whatsoever.

23 Going to the adverse comment on page 1278, all
24 that would be recommended to be taken out, would be
25 under -- you see the header "school districts, counties,

1 cities, and special districts"? Just "A." And all it
2 is, is the activity of obtaining the signature of the
3 peace officer or noting when the peace officer refuses to
4 sign. And that's it. Everything else stays.

5 And the reason why those two activities need to
6 be removed is because that would be consistent with the
7 Supreme Court's decision.

8 Those activities occur when the adverse comment
9 leads to a punitive action that's already protected by
10 the due-process clause. When they do receive protection,
11 they have a right to notice. And these activities are
12 part and parcel of the notice requirement.

13 And the activity of simply getting the
14 signature or signature to refuse to sign is just part and
15 parcel of that, and really is equivalent to de minimis
16 costs. It would take a minute to sign and a minute to
17 initial, and that's it. Everything else remains.

18 CHAIR SHEEHAN: The P's and G's --

19 MS. SHELTON: Right, everything stays the same.

20 CHAIR SHEEHAN: And linkage is back there again
21 in terms of the San Diego decision? That's reminding --

22 MS. SHELTON: Right, let me explain --

23 CHAIR SHEEHAN: Yes, because that's
24 reminding -- you know, bringing us back to the nexus
25 between the issue in San Diego and these two.

1 MS. SHELTON: It's probably easier to address
2 it with Mr. Kaye's comments as well.

3 CHAIR SHEEHAN: Okay.

4 MS. SHELTON: *Expulsions* dealt with two types
5 of expulsions: One was an expulsion where the principal
6 had the discretion to recommend an expulsion for certain
7 types of offenses. The other occurred when, for example,
8 a student had a firearm or another serious offense, the
9 principal did not have discretion but was mandated by
10 state law to suspend the pupil and recommend that the
11 pupil be expelled. And then the due-process hearing
12 requirements would flow from either the discretionary
13 recommendation or the mandatory recommendation to expel.

14 The Court held, with respect to the mandatory
15 discretion to expel, that everything was reimbursable
16 because the federal government, although they did
17 establish a due-process procedure, did not trigger that
18 procedure. It was the state, through the mandated
19 expulsion recommendation, triggered those procedures.
20 When the Court discussed what a mandate was, it said,
21 "Well, who is causing this to occur? Does the principal
22 really have any discretion to decide whether or not to
23 suspend and expel, or is it really required by the
24 state?" And there, based on the plain language of the
25 statute, it was decided by the state. The state said,

1 "You need to expel under this situation" -- or "You have
2 to expel under this situation."

3 The other type of expulsion, the discretionary
4 expulsion -- I'll get into some of the discretionary
5 issues when we deal with the Department of Finance's
6 issues -- but the Court did not decide that and moved on,
7 and found that, there, it was the principal's or the
8 local school district's discretionary decision that
9 triggered the downstream procedural requirements, and
10 most of those requirements exactly mirrored what was
11 already in existing law in federal due-process
12 procedures.

13 They acknowledge that there were a couple of
14 minor activities that were not articulated in case law
15 that interpreted the due-process clause, but said that
16 those minor activities are part and parcel and de minimis
17 and should not require reimbursement when the intent is
18 just to satisfy the due-process clause.

19 And here, the Commission's 1999 Statement of
20 Decision found that certainly under certain situations,
21 when a peace officer receives an adverse comment, it
22 could lead to a punitive action -- you know, any number
23 of punitive actions. And when those punitive actions are
24 already protected by the due-process clause, they already
25 have the right to notice.

1 And the two activities, although they're not
2 specifically identified in case law under due process to
3 receive the officer's signature and to note when he
4 refuses to sign, are simply -- the intent is simply to
5 put the officer on notice that, "Hey, there is an adverse
6 comment out there. You need to see it. And here's my
7 proof that you did see it, by your signature." Those are
8 simply part and parcel of the federal due-process
9 requirements. Without that state law, they would have to
10 do that, anyway.

11 And so that's the basis for the recommendation
12 of denying those two minor activities. Everything else
13 stays the same.

14 CHAIR SHEEHAN: Did you have a question, Paula?

15 MS. HIGASHI: Yes.

16 CHAIR SHEEHAN: Go ahead.

17 MS. HIGASHI: I just wanted to make a comment.

18 When Mr. Kaye was speaking earlier, he
19 referenced education Code 48915, which was the section
20 that required the recommendations for expulsion.

21 CHAIR SHEEHAN: Right, the mandated one.

22 MS. HIGASHI: Yes. And I just wanted to
23 clarify for the members, that was included in the
24 original *Expulsions* test claim.

25 And then he contrasted that with this other

1 code section, which he said was the code section which is
2 on investigation of citizen complaints.

3 CHAIR SHEEHAN: What code section?

4 MS. HIGASHI: Which was 832.5(a)(1), I believe.

5 CHAIR SHEEHAN: Penal Code.

6 MS. HIGASHI: And he did acknowledge that that
7 was not included in the POBR test claim.

8 CHAIR SHEEHAN: Correct, correct.

9 MS. HIGASHI: That's what I just wanted to be
10 sure.

11 MS. SHELTON: I was going to get to that. That
12 section is first debatable, whether that really does
13 impose a mandate to investigate. As I read it, it says
14 you just have to establish a procedure. So there's, you
15 know, a dispute over the merits of what that section
16 really means.

17 But most importantly, the Commission does not
18 have jurisdiction. If a statute is not pled in any test
19 claim, there is no jurisdiction to make any decisions on
20 that statute.

21 The courts have been clear. There are numerous
22 court decisions on the POBR legislation, and they all say
23 that this does not mandate the employer to interrogate or
24 investigate or discipline. It doesn't tell them when to
25 do it or why to do it. It is simply a labor relations

1 statute that does provide, you know, extended due-process
2 procedures.

3 And the claimants are absolutely right, they do
4 go way beyond existing state and federal due-process
5 procedures; and this decision does not change any of
6 those prior findings that the Commission has made.

7 CHAIR SHEEHAN: Do you have a question?

8 MEMBER SMITH: Yes. Thanks, Madam Chair.

9 So the POBR provides for an appeal; right?

10 MS. SHELTON: Right.

11 MEMBER SMITH: And when they get there, though,
12 everyone is sitting around the table. What do they talk
13 about?

14 MS. SHELTON: The appeal that you're talking
15 about, there's apparently no dispute over the appeal
16 activity that hasn't been presented here today --

17 MEMBER SMITH: What I'm struggling with is, the
18 work that goes into having something to say at the appeal
19 hearing or the interrogation, that's currently not
20 covered; correct?

21 MS. SHELTON: No.

22 MEMBER SMITH: The investigation?

23 MS. SHELTON: That's not correct. If you look
24 at the P's and G's, under "A" -- or, excuse me, under
25 "B," under the "Reimbursable Activities, Administrative

1 Appeal," "Included in the foregoing are the preparation
2 and review of the various documents to commence and
3 proceed with the administrative hearing, legal review,
4 and assistance with the conduct of the administrative
5 hearing, preparation and service of subpoenas, witness
6 fees and salaries of the employee witnesses, including
7 overtime, the time and labor of the administrative body
8 and its attendant clerical services, and the preparation
9 of the service -- of any rulings or orders of the
10 administrative body." That is all reimbursable. And the
11 Commission does not have jurisdiction to change those
12 findings.

13 And I did want to address that as well.
14 There's been a lot of testimony with respect to adding
15 activities that are reasonably necessary to comply with
16 the program, and adding more activities into the
17 Parameters and Guidelines. This statute that directed
18 the reconsideration is very narrow and different from the
19 other statutes that we've seen in the last year. Other
20 statutes have directed the reconsideration of the
21 Statement of Decision and a revision of the Parameters
22 and Guidelines. And this statute does not do that.
23 So the Commission does not have jurisdiction at all to
24 change any of those findings that it previously made over
25 activities it found to be reasonably necessary to comply

1 with the mandated activities.

2 The analysis here today is limited to a strict
3 application of the San Diego case to the plain language
4 of the POBR legislation, and that's it.

5 CHAIR SHEEHAN: And it would not cover those
6 other -- well, they are concerned about those costs, the
7 feeling -- your belief, from the legal interpretation is,
8 that issue was not triggered by this reconsideration
9 legislation?

10 MS. SHELTON: Right, exactly. And, you know,
11 they certainly have the right to file a request to amend,
12 and nobody has done that yet. But the Commission cannot
13 do that on its own and does not have jurisdiction with
14 the statute.

15 CHAIR SHEEHAN: Right. But there may be issues
16 outside of this that may be legitimate, and people
17 disagree -- reasonable people -- but the concern is that
18 the statute that directed this gave us a fairly narrow
19 constraint by which to look at this.

20 MS. SHELTON: Right.

21 CHAIR SHEEHAN: The POBR.

22 MS. SHELTON: Exactly.

23 CHAIR SHEEHAN: Other questions?

24 MEMBER OLSEN: Yes.

25 CHAIR SHEEHAN: Sarah, go ahead.

1 MEMBER OLSEN: I need extra clarification on
2 this point that we've just done. I listed, I think, five
3 things that came up when people testified about what is
4 not covered. And I just want to make sure that the
5 San Diego case doesn't apply to any of them. So I'm just
6 going to list them, and you can say, "No, no, no," or
7 "yes, no," or whatever it is.

8 First was punitive transfers.

9 MS. SHELTON: That was not changed. The
10 Commission found that to be reimbursable before, and that
11 has not been changed.

12 MEMBER OLSEN: Okay, suspensions of up to five
13 days?

14 MS. SHELTON: The Commission made the original
15 decision that due process did apply there, not because
16 of Skelly, but because there's a case called the
17 Civil Service Association v. The City and County of
18 San Francisco. It's in the record and in the Staff
19 Analysis.

20 Skelly only required a prehearing process.
21 Before the person was suspended, you had to have the
22 administrative appeal or a hearing. It only set the
23 timing of the hearing.

24 With short-term suspensions, that San Francisco
25 case said due process does apply. It still applies. You

1 don't have to have a hearing before the person is
2 suspended, but it could happen during the suspension or
3 after the suspension. So, still, due process does apply.
4 And under POBR, POBR does not set the timing for the
5 administrative appeal. It depends on the situation. So
6 under, you know, the former Statement of Decision and the
7 current analysis, that finding has not changed that
8 a short-term suspension is still covered by the
9 due-process clause, and POBR does not exceed that with
10 respect to the administrative appeal.

11 MEMBER OLSEN: Okay. Notification prior to
12 investigation?

13 MS. SHELTON: That's still reimbursable under
14 the interrogation section.

15 MEMBER OLSEN: Okay. Reprimands?

16 MS. SHELTON: The written reprimands, again,
17 very similar to the short-term suspension, it still is
18 covered with due-process rights. And POBR does not
19 exceed those rights.

20 MEMBER OLSEN: Okay, and I didn't understand
21 the terminology here, but I think the terminology that
22 was used by -- who was it -- well, by one of the
23 testifiers was "investigate to interrogate."

24 MS. SHELTON: This has been apparently a big
25 issue. But the Commission already made findings when

1 they adopted the Parameters and Guidelines. And it's
2 true, based on the plain reading of these statutes. But
3 claimants are trying to get reimbursed to investigate any
4 complaints that come in.

5 The narrow scope of the POBR legislation is
6 just a procedural labor relations set of statutes. It
7 does not in any way require an agency to investigate.
8 And the case law is very clear that that has always been
9 within the decision-making of the local governmental
10 body, when to investigate, how to investigate. It's
11 always been their decision.

12 When Mr. Kaye was talking about a finding in
13 the prior Statement of Decision, that language was taken
14 out of context. Because when you look at that statute,
15 all the Government Code section 3303 does is establish
16 the timing of the interrogation and the compensation to
17 those officers that are being interrogated during their
18 off-duty times, which often happens. And there's been a
19 lot of testimony in the prior test-claim proceeding that
20 it happens a majority of the time because they don't want
21 to take the officer off the street. So they are getting
22 reimbursed to pay that person for that off-duty time.
23 But other than those limited activities, there is no
24 reimbursement to investigate to perform the
25 interrogation.

1 MEMBER OLSEN: Thank you.

2 CHAIR SHEEHAN: And clarifying on that issue,
3 because I think it is an issue that was brought up by a
4 couple; that is not an issue that was in any way covered
5 by the San Diego --

6 MS. SHELTON: Yes -- no, not at all.

7 CHAIR SHEEHAN: So it's a legitimate -- it may
8 be a very legitimate issue. But the concern that I have
9 is, we have the narrow constraints of the San Diego
10 findings, and your application of those to the case
11 before us.

12 MS. SHELTON: Exactly.

13 CHAIR SHEEHAN: And that may be another avenue
14 or remedy to address some of those, if they feel those
15 are legitimate issues.

16 MS. SHELTON: Right.

17 CHAIR SHEEHAN: That is the concern that I
18 have.

19 MS. SHELTON: In both cases, the *Expulsions*
20 case and the POBR legislation dealt strictly with
21 due-process procedures. And in some situations, they
22 exceed what's already an established law.

23 EMBER WORTHLEY: Madam Chair, just for
24 clarification.

25 Can you distinguish between what the folks who

1 testified have said today in terms of our limited
2 jurisdiction today? It sounds like what they're asking
3 for is beyond their jurisdiction today; is that correct?

4 MS. SHELTON: Yes.

5 MEMBER WORTHLEY: And explain how that is
6 again, real quickly.

7 MS. SHELTON: Let me read the Government Code
8 section that directed the reconsideration.

9 The Commission is an administrative body, and
10 it's limited just to the authority and statute.

11 3313 of the Government Code just says,

12 "In the 2005-2006 fiscal year, the Commission
13 on State Mandates shall review its Statement of Decision
14 regarding the *Peace Officer Procedural Bill of Rights*
15 test claim, and make any modifications necessary to this
16 decision to clarify whether the subject legislation
17 imposed a mandate consistent with a California Supreme
18 Court decision in San Diego Unified School District v.
19 Commission on State Mandates and other applicable court
20 decisions.

21 "If the Commission on State Mandates revises
22 its Statement of Decision regarding the *Peace Officer*
23 *Procedural Bill of Rights* test claim, the revised
24 decision shall apply to local government *Peace Officer*
25 *Procedural Bill of Rights* activities occurring after the

1 date the revised decision is adopted."

2 And the language of the statute is very
3 different than other reconsideration statutes that have
4 been adopted. One of them, the Commission is not hearing
5 today, but in Item 4, that statute required the
6 Commission to also review the Parameters and Guidelines.

7 That was the case with the *Handicapped and*
8 *Disabled* reconsideration that we had last year, with the
9 Brown Act, with SARC. So this is the first time that
10 we've seen the language limited to the Statement of
11 Decision, and limited to only the case law.

12 MEMBER WORTHLEY: So the issues that were
13 raised here would have been appropriately addressed, had
14 we been required to review Parameters and Guidelines; but
15 since we're not, then it's inappropriate for us to
16 consider it.

17 MS. SHELTON: Right. And they are raising
18 issues that were already decided by the Commission.
19 These issues all came up last time, too.

20 CHAIR SHEEHAN: Well, and back to my point,
21 they're issues that were not covered by the San Diego
22 case.

23 MEMBER SMITH: San Diego or other case law.

24 CHAIR SHEEHAN: Say that again?

25 MEMBER SMITH: San Diego or other case law.

1 MS. SHELTON: Right, there's really no other
2 case in point on these issues, though. I mean,
3 San Diego, factually and legally, is pretty much on
4 point.

5 CHAIR SHEEHAN: Did you want to say something?

6 MS. STONE: Just very briefly.

7 CHAIR SHEEHAN: Sure.

8 MS. STONE: Pamela Stone again.

9 Two issues. And I think one of the reasons why
10 you're hearing a lot of the claimants speak on this is
11 because since the time of the initial adoption of the
12 Parameters and Guidelines, there have come to be
13 substantial differences with regard to interpretation,
14 not only amongst the various local entities, but with
15 regard to the Bureau of State Audits, as well as with the
16 State Controller's Office.

17 Now, what has happened is that the Commission
18 on State Mandates gave an advisory opinion to the Bureau
19 of State Audits, which has resulted in more audits from
20 the State Controller's Office. This is an ongoing
21 dispute, and there are substantial differences which are
22 severe with regard to how these present Parameters and
23 Guidelines are being interpreted, which is causing
24 problems all over the map because of the way they are
25 written.

1 And we were hoping that because your Commission
2 had the jurisdiction to reconsider the test claim in
3 light of this statute, that it would clarify, which was
4 part of the directive, some of the statements contained
5 within the Parameters and Guidelines, by clearing up some
6 of the issues in the Statement of Decision.

7 So that was our hope, to be able to preclude
8 what I personally envision coming down the line, which is
9 a plethora of IRCs with regard to the disputes on what is
10 or is not a reimbursable activity.

11 And there's one more thing I'd just like
12 to touch on. So this is the backdrop, this is why we're
13 concerned. It's like: Fix it now, or you're going to be
14 busy forever.

15 The second thing I'd like to bring up very
16 briefly, and in my prior incarnation, as a chief deputy
17 county counsel with Fresno County Counsel's office, no
18 place do you have the right as a non-sworn officer to be
19 notified if something that you think is not laudatory,
20 i.e., you would perceive it as an adverse comment, goes
21 into your personnel file. You're not going to get notice
22 of it. It's not required by due process.

23 Only in POBR, if they're going to put something
24 in your file, which could possibly be perceived by the
25 employee -- because it's always in the eye of the

1 employee, not in the eye of the employer, is there a
2 requirement that the employee be notified and have to
3 sign that they know that this is going in their file.

4 And this is not a de minimis activity. You
5 have to find the employee. You've got to get them in.
6 You know that they're not going to be doing this on their
7 own time. They want to be paid for their time to go down
8 to the personnel office or to the IA office to sign this
9 piece of paper. And they're going to sit there and
10 they're going to want to read it. And you're going to
11 have to make sure that you are with them so that this
12 piece of paper does not accidentally walk out the door.
13 And there was a tremendous amount of testimony on this
14 the first time through.

15 And I can understand how one reading it with
16 the cold, jaundiced eye of an attorney would say that
17 this is de minimis activity. You know, you hand the
18 paper to the guy and he's supposed to sign it.

19 Unfortunately, in my experience with labor
20 relations, which obviously is nowhere near as -- thank
21 God, nowhere near as in depth as Dee Contreras is,
22 nothing in this particular action is de minimis, and
23 there was a whole bunch of testimony on this before.
24 And where we would like it to have been de minimis, in
25 reality, it's not.

1 And so, therefore, because it's not required by
2 due process, nobody else has this right.

3 When I was an employee, if I got a letter
4 saying an "Atta girl," or a "She really should dress
5 better," or whatever, I had no right to notice or be able
6 to go in and sign it. So this is where we substantially
7 agree.

8 Thank you.

9 CHAIR SHEEHAN: I appreciate your comments.

10 MS. SHELTON: Can I clarify a few things?

11 CHAIR SHEEHAN: Sure.

12 MS. SHELTON: One, the Commission did not give
13 an advisory opinion to the Bureau of State Audits. We
14 were complying with an audit. And the Bureau of State
15 Audits never required the Commission to amend the
16 parameters and guidelines.

17 There has been no request or direction from the
18 Legislature to amend the P's and G's. So the audit was
19 based on the plain language of the Statement of Decision,
20 the Parameters and Guidelines, and the test claim
21 legislation.

22 And, two, Ms. Stone was indicating that
23 notating or getting the signature of the officer. When
24 the unsworn officer receives an adverse comment, that's
25 still reimbursable under this decision, because an

1 unsworn officer doesn't have due-process rights.

2 So that has not changed. It's only when the
3 adverse comment leads to a punitive action where due
4 process attaches. And due process attaches when it's a
5 permanent employee who is dismissed, demoted, suspended,
6 receives a written reprimand as a result of that adverse
7 action. Then, and only then, would those two activities
8 be not reimbursable. So it's very limited.

9 CHAIR SHEEHAN: Sean, did that address --

10 MR. WALSH: That addressed my concern.

11 Thank you.

12 CHAIR SHEEHAN: Paula?

13 MS. HIGASHI: You I just wanted to note for
14 the record that the last document that's in the blue
15 admin records we provided to you is a copy of the Bureau
16 of State Audits report which was issued in October 2003,
17 and it is also the letters that we sent to the State
18 Auditor in response to that report and the
19 recommendations.

20 CHAIR SHEEHAN: Okay, all right.

21 All right, because your issue was a little bit
22 different; right?

23 MS. GEANACOU: Yes.

24 CHAIR SHEEHAN: Anybody else on sort of this
25 issue that has been discussed for the last hour or so?

1 If not, I'll bring up the Department of Finance, who has
2 got a little different issue that they want to raise.

3 (No audible response)

4 CHAIR SHEEHAN: Okay, go ahead, Susan.

5 MS. GEANACOU: Good morning, Commission
6 members. Susan Geanacou from the Department of Finance.

7 The Department of Finance basically supports
8 the staff analysis on the POBR matter, with the notable
9 exception being that law's application to school
10 districts and special districts.

11 The Department asserts that POBR is not a
12 reimbursable mandate as to school districts because the
13 districts have the discretion whether or not to form a
14 police department in the first place.

15 Education Code sections 38000 and 72330
16 authorize, but do not require, school districts and
17 community-college districts, respectively, to form police
18 departments. Only after they make the discretionary
19 decision to form a police department would a school
20 district or community-college district even have the
21 police officers to whom POBR would apply.

22 The staff's analysis emphasizes the legislative
23 intent for POBR's application that is found in Government
24 Code section 3301. That section stresses POBR's
25 importance and states, "It is necessary that this chapter

1 be applicable to all public safety officers as defined in
2 this section within the state of California. These
3 officers do include those employed by school districts
4 and community-college districts, Finance does not dispute
5 that POBR applies to officers employed by these
6 districts."

7 However, based largely on this
8 legislative-intent language regarding the importance of
9 statewide application of POBR, the staff's analysis
10 reaches the conclusion that required statewide
11 application of POBR equals reimbursable mandate.
12 Finance asserts that this is incorrect.

13 If the legislative-intent language cited
14 equated to a mandate because of the importance of police
15 protection by school districts, Finance asserts that
16 school districts would be required to form police
17 departments and hire officers. They are not so required.
18 They are merely authorized to do so.

19 The analysis notes the Carmel Valley case,
20 which stated, "Police and fire protection are two of the
21 most essential and basic functions of local government.
22 However, the application of that case's outcome to this
23 situation, where school districts are not even required
24 by the Legislature to have a police force, appears
25 inconsistent."

1 Finance can understand the Court's reasoning in
2 Carmel Valley, in the Carmel Valley case, since
3 adequately equipping firefighters can be a reasonable
4 expectation of a fire district's normal activities.
5 We fail to see, however, how a school hiring peace
6 officers is consistent with its normal activities, since
7 it is not so required to do; and there are other ways of
8 ensuring school safety.

9 In fact, most school districts in California
10 do not have peace officers. Of the approximately
11 1,200 local educational agencies receiving state school
12 safety grant funding, only approximately 140 of those
13 reported using the funding for hiring peace officers.
14 This situation we are facing is similar to that in the
15 Kern High School District case, in which the court found
16 no reimbursement for required activities that flowed from
17 an underlying discretionary choice.

18 Although the Court in the Kern case noted that
19 a mandate could be found where a local entity is not
20 legally compelled to participate in a program, it
21 expressed this view in the context of a local government
22 being coerced into an activity, or suffering severe
23 penalties for not performing the activity.

24 In this case, schools are not coerced to hire
25 peace officers, nor is there a severe penalty for not

1 doing so.

2 As the staff analysis notes, in neither the
3 Kern case, nor the San Diego case, did the Court clearly
4 define when an exception to the Merced case should be
5 considered or applied. We believe the Court's intent is
6 based on there being a clear relationship between local
7 agencies' normal or expected activities and the activity
8 in question.

9 This relationship does not exist between school
10 districts and POBR since there is no requirement that
11 schools hire peace officers. They have only the option
12 to do so if they choose.

13 A no-reimbursement decision for school
14 districts in this matter would be consistent with recent
15 Commission decisions denying school districts
16 reimbursement for police-officer-related test claim
17 activities. Additionally, comments presented today apply
18 equally to special districts.

19 I'd be glad to answer any questions that my
20 testimony may have prompted.

21 CHAIR SHEEHAN: Questions from the Commission
22 members?

23 *(No audible response)*

24 CHAIR SHEEHAN: No?

25 Thanks, Susan.

1 MR. PALKOWITZ: Good morning. My name is Art
2 Palkowitz on behalf of San Diego Unified School District.

3 I believe this reconsideration was set that the
4 Commission should reevaluate it based on the San Diego
5 Supreme Court case. And as Camille has mentioned, that
6 case involved expulsions that were mandatory and
7 discretionary. The mandatory expulsions were firearms
8 and I think drugs were some of that. And then there was
9 the discretionary expulsions, property damage, those
10 items.

11 So in that case, the Supreme Court said, "Even
12 though expulsion might be discretionary, you still have
13 to have due process, and, therefore, those activities are
14 reimbursable."

15 So in this case what we have here is the
16 argument that schools that take on the task of hiring
17 their own police force because they need safe schools,
18 they should not be reimbursed for the due process.

19 It seems the San Diego case is exactly on
20 point, where you have a discretionary expulsion, we were
21 entitled to get reimbursed for those activities.
22 Here, if we take on and have the discretionary decision
23 to make a police officer or a peace officer part of the
24 district, we still should be reimbursed under POBR, which
25 is really a type of due-process activities.

1 So we feel, based on the Commission staff,
2 those activities should be reimbursable to the school
3 districts.

4 Thank you.

5 CHAIR SHEEHAN: Does anyone -- Camille, do you
6 want to address the issues? That would be helpful.

7 MS. SHELTON: Well, let me just kind of clarify
8 one thing that Mr. Palkowitz just said. Actually, for
9 the discretionary expulsions, the Court did not reimburse
10 them for those because the found, like I said before,
11 that those activities, although there were a few that
12 exceeded federal due-process requirements, they were part
13 and parcel of the federal law and did not create a
14 reimbursable state-mandated program.

15 But getting -- I need to kind of walk you
16 through the analysis because this is difficult. And the
17 reason it's difficult is because the Supreme Court raised
18 the issue, touched it, questioned it, and said, "We
19 shouldn't apply City of Merced for every case," but
20 didn't answer it. So the Commission has the difficult
21 task of trying to resolve the issue now.

22 Walking it through, back in 2001, the Supreme
23 Court determined the In Re Randy G. case. And in that
24 case, the Supreme Court determined that school districts,
25 apart from education, have an obligation to protect

1 pupils from other children and also to protect teachers
2 from violence by students whose conduct in recent years
3 has prompted national concern. And the Court said that
4 the school districts -- or the state has fulfilled its
5 obligation under the State Schools provision of the
6 Constitution, which is in Article I, section 28, by
7 permitting local school districts to establish a police
8 or security force to protect the students and teachers.

9 The reason I bring that up is because that was
10 the very issue that the Supreme Court in the San Diego
11 case looked at. It was in that case where the school
12 districts acknowledged that there were discretionary
13 expulsions, but said, "Even though we have the discretion
14 to expel under certain situations, we should still be
15 reimbursed for the due-process hearing procedures
16 required."

17 And the Supreme Court basically started to
18 acknowledge their argument, and looked at what the Court
19 of Appeal had done. And in the Court's decision, it
20 says, "Indeed, the Court of Appeal below suggests that
21 the present case is distinguishable from City of Merced
22 in light of Article I, section 28, of the Constitution,
23 which is the Victim's Bill of Rights provision for safe
24 schools. That constitutional subdivision states that all
25 students and staff of public, primary, elementary, and

1 junior high and senior high schools have the inalienable
2 right to attend campuses which are safe, secure, and
3 peaceful.

4 The Court of Appeal below concluded, "In
5 light of the school district's constitutional obligation
6 to provide a safe educational environment, the
7 due-process hearing costs cannot properly be viewed as
8 a non-reimbursable downstream consequence."

9 In response to the Court of Appeal, the Supreme
10 Court says, "Upon reflection, we agree with the district,
11 that there is reason to question the extension of a
12 holding of the City of Merced, so as to preclude
13 reimbursement under Article XIII B, section 6, of the
14 State Constitution and Government Code section 17514.
15 And the reason they said that was because to do that, to
16 find that it would not be reimbursable, would conflict
17 with past decisions. And it mentioned the Carmel Valley
18 case.

19 Carmel Valley is a case dealing with the
20 regulations that require safety equipment for
21 firefighters. And the Court said, even though, you know,
22 a local fire department may have the discretion on how
23 many firefighters to employ, and which would obviously
24 impact the costs for reimbursement, that decision, to
25 employ firefighters, is not based on costs, necessarily,

1 or mandate reimbursement; it's based on the safety
2 procedures.

3 And so, therefore, the Court was saying it
4 would conflict with Carmel Valley to hold that just
5 simply because they make a discretionary decision, they
6 shouldn't be reimbursed for downstream mandatory
7 activities.

8 And then the Court said, "Well, but we're not
9 going to decide that difficult issue here today." Again,
10 you have to decide that.

11 But here, we've got -- the Court did say,
12 though, that providing a safe -- let me get that part of
13 the record -- that the school's obligation to provide a
14 safe school does constitute a service to the public; and,
15 therefore, it did qualify as a program. Just simply --
16 not just education, but apart from education, the safety
17 of those two students does qualify as a program under
18 Article XIII B, section 6.

19 And number two, because of the way the courts
20 have interpreted the POBR legislation, that it really is
21 necessary to protect the health, safety and welfare of
22 the public. For those reasons, you know, we are
23 recommending that the Commission continue to approve
24 reimbursement for school districts in this case.

25 But I can answer any questions.

1 MEMBER WORTHLEY: Just a comment.

2 To me, even if we were to rule otherwise, what
3 would prohibit the school from just contracting with the
4 police department or the county sheriff's office to
5 provide those services, and we're right back under a
6 reimbursement situation? So it's like they'd be asking
7 us to make a change that really doesn't accomplish
8 anything, because you could easily get around it by just
9 contracting out those services. So why not treat these
10 people the same way? I don't see any point in treating
11 it differently.

12 MS. SHELTON: Many school districts do contract
13 with county services. I know that some of the larger
14 school districts, like San Diego and I'm sure Los Angeles
15 have their own security force. But they've made that
16 decision based on the circumstances of their environment.

17 And, you know, given the language and the
18 similarity between the *Expulsions* decision and the
19 similarity to the facts of this case, I was following the
20 Chief Justice's language, and there's just no way that
21 I can see to really go around it.

22 With respect to, you know, the argument that,
23 you know, they should be treated differently than special
24 districts, special districts also have the authority to
25 hire peace officers. There is no mandate in any state

1 statute or the Constitution that requires them to hire
2 peace officers. So I don't understand the rationale of
3 applying a different result to school districts than to
4 special districts.

5 And then the one final point, under Carmel
6 Valley, it did say that fire protection and police
7 protection were governmental functions to the public.
8 And there were governmental functions for local
9 government. In the Constitution, local government is
10 defined to include school districts. The Constitution
11 does not separate school districts from local agencies,
12 in the definition of who is entitled to reimbursement
13 under Article XIII B, section 6.

14 So that's the rationale.

15 CHAIR SHEEHAN: All right, any questions on
16 this?

17 MS. GEANACOU: I have a couple of comments, if
18 I may. Very brief ones, I think.

19 CHAIR SHEEHAN: Absolutely.

20 MS. GEANACOU: Again, Susan Geanacou,
21 Department of Finance.

22 There was some testimony just a moment ago
23 about the need for schools to provide a safe school
24 environment. We're in no way attempting to dispute that
25 important --

1 CHAIR SHEEHAN: We didn't interpret your
2 comments that way.

3 MS. GEANACOU: Good.

4 My only comment on that is, I don't think that
5 principals should be given more or less weight in this
6 test claim than it may have been given in immediate,
7 prior, similar test claims involving activities having to
8 do with school districts hiring police officers, and
9 those activities not being found to be reimbursable.
10 We're mindful of the legislative intent; however, that is
11 not determinative of this mandate.

12 Additionally, on the issue of contracting out,
13 yes, some school districts do contract out for the
14 provision of services to provide a safe campus for their
15 employees and for the students. However, in those cases,
16 the school district would still be incurring the cost of
17 those contracted-out activities and might be seeking
18 reimbursement for those contracted services.

19 So there might still be the issue of a district
20 seeking reimbursement under that factual scenario.

21 And lastly, I may have misspoken or I may have
22 been misunderstood. Finance was asserting that we
23 believe both school districts and special districts
24 should be denied reimbursement under this test claim, not
25 that they be treated differently. Just to amplify on

1 what Ms. Shelton was saying.

2 CHAIR SHEEHAN: I understood that.

3 MS. GEANACOU: Okay, thank you.

4 CHAIR SHEEHAN: All right, any other --
5 Well, let me try, in terms of the chair, my
6 comments on this one.

7 The reconsideration legislation that directed
8 us really gave us a narrow scope in which to look at.
9 Notwithstanding that, I do understand the issue on the
10 audit and the claims; and I think that issue does need to
11 be dealt with. But I think if we try and deal with that
12 in the context of this, we are exceeding our jurisdiction
13 under the statute that was given -- that the Legislature
14 directed us to do.

15 So what I would like to do is move forward on
16 the staff recommendation and then also have a discussion
17 about pulling together a group on developing some sort of
18 reasonable reimbursement under the Parameters and
19 Guidelines, and see if we can address the other issue.
20 So I appreciate the issue that was brought before; but at
21 least this member feels that is a bit outside the
22 jurisdiction of what is before us today but a very
23 legitimate issue. And I understand sometimes you don't
24 have any other way to get it before us, other than to
25 bring it up on an issue like this.

1 So that is at least the direction that I would
2 like to go: Deal with the legislation that directed us
3 on this reconsideration, and have a discussion about
4 pulling together a working group to talk about possible
5 amendments to the Proposed Parameters and Guidelines.

6 So with that, what I'd like to do is see if
7 there is a motion on the staff recommendation?

8 MR. WALSH: I move to approve the staff
9 recommendation.

10 CHAIR SHEEHAN: All right. Is there a second?

11 MEMBER OLSEN: Yes.

12 CHAIR SHEEHAN: All right, we have a motion and
13 a second.

14 All those in favor, say "aye."

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

16 CHAIR SHEEHAN: Opposed?

17 MEMBER SMITH: No.

18 CHAIR SHEEHAN: Abstentions?

19 *(No audible response)*

20 CHAIR SHEEHAN: So Mr. Smith opposed.

21 MEMBER WORTHLEY: Madam Chair, if I might.

22 CHAIR SHEEHAN: Yes.

23 MEMBER WORTHLEY: I voted for this only on the
24 basis of the comments you made previous to that, which is
25 I do believe that we have to deal with these issues. And

1 I think it's a good example of how whatever was in place
2 when these Parameters and Guidelines were set in motion,
3 the law is not a static situation. And so you have
4 different interpretations coming down, either by court
5 decisions or what's happening within various agencies and
6 their interpreting them. And so we need to deal with
7 those issues. And I think that that's an appropriate --
8 I am glad this issue has been brought before our
9 Commission. I think we need to deal with them. I'm only
10 voting for it because I believe, as you've stated, we
11 have a very limited jurisdiction on this. But I do think
12 we need to address those issues.

13 MR. WALSH: I share those sentiments as well.

14 MS. STONE: Madam Chair, we do appreciate this.

15 At the time the original Parameters and Guidelines were
16 adopted, there was no legislative authority to have a
17 reasonable reimbursement methodology, which I think has,
18 in part, resulted in this absolute mess. And we were
19 hoping that this could be an avenue to adopt a reasonable
20 reimbursement methodology that would hopefully -- not
21 everybody will be thrilled, but it would be a lot less of
22 a hair-pulling situation.

23 And thank you very much.

24 CHAIR SHEEHAN: Yes, and I think, as you
25 pointed out, we don't want to deal with it through IRCs

1 coming back and back and back. I mean, that doesn't help
2 anybody.

3 MS. SHELTON: Just one thing. To do that, to
4 change the P's and G's, we would need a request to amend.

5 CHAIR SHEEHAN: Yes, yes.

6 MS. SHELTON: So somebody would still need to
7 file that.

8 CHAIR SHEEHAN: And I think in terms of the
9 issuing -- the working group, pulling it together,
10 figuring out what the process issue is to get to where we
11 need to go, but more importantly, the substance issue and
12 where we can agree on the reasonable reimbursement
13 methodology.

14 So I don't know if we need a motion or --

15 MS. HIGASHI: Why don't we move to Item 7,
16 which is the proposed Statement of Decision?

17 CHAIR SHEEHAN: Okay, and then come back on --

18 MS. HIGASHI: Yes.

19 CHAIR SHEEHAN: Camille.

20 MS. SHELTON: Item 7 is the proposed Statement
21 of Decision which accurately reflects the Commission's
22 vote in this case.

23 We recommend that you adopt the decision and
24 allow staff to make any minor modifications to include
25 the vote count and witness list.

1 CHAIR SHEEHAN: So do we have a motion on
2 Item 7?

3 MEMBER OLSEN: So moved.

4 CHAIR SHEEHAN: Second?

5 MEMBER WALSH: Second.

6 CHAIR SHEEHAN: All right, all those in favor,
7 say "aye."

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

9 MS. HIGASHI: Opposed?

10 MEMBER SMITH: No.

11 CHAIR SHEEHAN: Okay, Mr. Smith opposes that.
12 All right, if the Commission -- I mean, I can entertain a
13 motion, if the Commission would like, to put together a
14 working group to develop a reasonable reimbursement, to
15 pull all the interested parties together, and move
16 forward.

17 MEMBER WORTHLEY: Are we allowed to do that
18 without this being on our agenda today?

19 MEMBER LUJANO: We can direct that.

20 CHAIR SHEEHAN: Yes, we can direct staff to do
21 that, to pull that together.

22 MS. HIGASHI: That's fine.

23 MEMBER WORTHLEY: Then I would so move.

24 CHAIR SHEEHAN: But I think it reflects the
25 sentiment of the Commission in this very -- you know,

1 we understand the issues that are coming before all of
2 you and trying to resolve it. So let's just do that.
3 We'll direct staff to pull it together.

4 MS. HIGASHI: All right.

5 CHAIR SHEEHAN: And any members who would like
6 to participate in that, we would certainly -- the staff
7 will certainly make you aware of when those meetings are.

8 So, okay.

9 MS. HIGASHI: Would you like to take a
10 five-minute break?

11 CHAIR SHEEHAN: That would be wonderful.

12 *(A recess was taken from 11:27 a.m.*
13 *to 11:36 a.m.)*

14 CHAIR SHEEHAN: All right, why don't we
15 reconvene at the April 26th meeting of the Mandates
16 Commission?

17 And we'll move on to Item Number 8. Item
18 Number 8, the *Charter Schools*.

19 MS. HIGASHI: Item 8 will be presented by
20 Commission Counsel Eric Feller.

21 CHAIR SHEEHAN: Great.

22 MR. FELLER: Good morning -- it's still
23 morning. The *Charter Schools III* test claim statutes
24 make various changes to the charter school funding and
25 accountability laws. Claimants seek reimbursement for

1 charter school, as well as school district activities.
2 For reasons explained in the analysis, staff finds first
3 that charter schools are not eligible claimants.

4 Basically, three reasons for that:

5 First, that they're voluntarily created.

6 Second, that they're not part of the definition
7 of "school districts" in the Commission's statutory
8 scheme, that's Government Code 17519.

9 And third, this is perhaps not emphasized
10 enough in the analysis, is because Education 47610 says
11 that charter schools are exempt from laws governing
12 school districts, which includes exemption from the
13 Commission's reimbursement statutes.

14 The second finding in the analysis is that the
15 Commission does not have jurisdiction over some of the
16 statutes that were already pled and decided in the
17 *Charter Schools II* test claim as specified.

18 Third, as to Education Code section 47640
19 through 47647 regarding plans for pupils with
20 disabilities, the findings are that these statutes are
21 federal mandates and therefore are notable.

22 Fourth, various other test claim statutes are
23 not reimbursable because they do not require an activity
24 of school districts.

25 So for reasons stated in the analysis, staff

1 finds the following are reimbursable:

2 First, making written findings on denial of a
3 charter school petition, for reasons specified in
4 statute.

5 Second, except for local education agencies
6 that charge fees under Ed. Code section 47613,
7 subdivision (c), transferring funds in lieu of property
8 taxes to a charter school.

9 And third, for school districts or county
10 offices of education that are chartering authorities,
11 including the revenue and expenditures generated by the
12 charter school in the school district or county office of
13 education's annual statement, in Department of Education
14 specified format for the period of May 22nd, 2000, to
15 July 30th, 2001, only.

16 The Department of Finance, based on their
17 comments, disagrees that these last two activities are
18 reimbursable: Specifically, transferring funds in lieu
19 of property taxes, and including revenues and
20 expenditures in the school district or county office of
21 ed's annual statement.

22 No other parties commented on the draft staff
23 analysis. Staff recommends the Commission adopt this
24 analysis that partially approves the test claim for the
25 specified activities.

1 Would the parties and witnesses please state
2 your names for the record?

3 MR. SCRIBNER: Good morning -- soon to be
4 afternoon. David Scribner representing claimants.
5 Actually, I'd like to yield the mike to Eric Premack, to
6 begin the testimony this morning on this test claim, if I
7 might.

8 So next up will be Eric Premack.

9 MR. PREMACK: Good morning. My name is Eric
10 Premack with the Charter Schools Development Center and
11 Charter Voice. Charter Voice is an advocacy organization
12 representing charter schools through the state.
13 I'm here on behalf of my colleague, Jennifer McQuarrie,
14 our real lobbyist, who is over in the building, working
15 some bills.

16 This issue is a very, very important
17 fundamental threshold issue for charter schools.
18 We take issue with both of the points in the written
19 analysis and the third point that was just brought up
20 verbally.

21 We believe that charter schools are an eligible
22 claimant. With regard to the staff analysis argument
23 that charter schools are created voluntarily and,
24 therefore, are not eligible claimants. I would point out
25 that school districts are also created voluntarily

1 through a process that looks and feels very similar to
2 the process by which one creates a charter school.
3 There's a petition. You present it to a local authority
4 for consideration. They have a set of criteria by which
5 they judge the petition. They can either grant or deny
6 the petition. If the petition is not granted, you can
7 appeal to the State Board.

8 The same thing happens with regard to how
9 school districts are formed and created and dissolved and
10 unified. The same thing happens with regard to charter
11 schools.

12 Therefore, we think that that argument is sort
13 of a red herring and sort of absurd on its face. It's
14 sort of like saying, well, you opted to get up in the
15 morning, therefore, it's not a mandate.

16 With regard to whether the charter schools are
17 deemed to be an eligible claimant under the Government
18 Code, the Charter Schools Act was amended last year to
19 clarify this point in part. And it says, "For purposes
20 of determining eligibility for, and allocation of, state
21 and federal categorical aid, a charter school shall be
22 deemed a school district."

23 So we think that in terms of both the
24 constitutional analysis, as well as the statutory
25 analysis, that charter schools clearly are deemed to be a

1 school district and are, therefore, an eligible claimant.

2 With regard to the exemption issue, charter
3 schools are exempted from a broad range of statutes that
4 normally govern school districts. There are, however,
5 a growing list of statutes from which we are not exempt.
6 And the costs associated with those, in complying with
7 those can be staggering, and can profoundly upset the
8 financial planning and operations of charter schools.
9 And to us, that just relates to the fundamental purpose
10 of why is this provision in the Constitution in the first
11 place?

12 The courts have repeatedly found that the
13 purpose of this is to preclude the state from shifting
14 responsibility of the local agencies that are
15 ill-equipped to assume those burdens. The charter
16 schools, many of the ones we work with, operate on very
17 thin financial margins; and for the state to be able to
18 impose additional costs on them, in our view,
19 fundamentally upsets this primary constitutional purpose
20 on which all of these statutes rest.

21 Moreover, we think that just common sense and
22 fairness demands this as well. The negative impact on a
23 charter school of imposing some of these costs is huge.
24 Many of these schools have long-term multi-year financial
25 commitments that they have to make. Being able to

1 fulfill those commitments is very difficult. Potential
2 lenders look at you and think, "Well, if the state just
3 heaped all those costs on you last year, what are they
4 going to heap on you next year? And how much higher
5 interest rate do we have to put on your facility's loan?"
6 Or this or that? When you're out there trying to hire
7 teachers and staff, they wonder, "Are you going to be
8 around two or three or four years from now, or is the
9 state just going to eat away at you?"

10 We appeal to you both on a constitutional
11 basis, statutory basis, commonsense basis. We think it's
12 a very important fundamental policy issue in front of you
13 here today. We would urge you to reject the staff
14 analysis on these points.

15 Any questions?

16 CHAIR SHEEHAN: Questions for Mr. Premack?

17 *(No audible response)*

18 CHAIR SHEEHAN: Thank you.

19 Eric, you'll respond and -- let's -- we'll give
20 you a chance to respond on those after people testify.

21 Go ahead.

22 MR. SCRIBNER: Sure, thank you.

23 I would just like to mirror a lot of the
24 comments that Mr. Premack had made. I think there was an
25 interesting statement that was made in this test-claim

1 analysis that relates to the discretionary ability to
2 establish a charter school. And yet you approve
3 education mandates every single month -- well, not every
4 month -- every once in a while.

5 CHAIR SHEEHAN: Just when we feel like it.

6 MR. SCRIBNER: You've approved education
7 mandates in the past, and yet you don't look at whether
8 or not portions of those districts have actually been
9 discretionarily established or whether there will be new
10 schools that come on, on an annual basis, that the school
11 has chosen to open a new school site for any number of
12 reasons, whether or not they've decided to unify.
13 And yet charters are getting hit because charters are a
14 new entity. They're created and established now on a
15 regular basis, and they are challenging the districts.
16 As Mr. Premack said, districts were not required to
17 have -- whether they be unified or whether they be
18 elementary only or high school only, that is a choice
19 that's being made on a site-by-site basis. And, again,
20 opening new sites is a choice-by-choice basis.

21 But yet you do not distinguish in education
22 mandate determinations whether or not this will be
23 limited to a point in time. Only the sites that are in
24 effect at the time of this decision shall be deemed
25 reimbursable because any new sites that come afterwards

1 are discretionary. That doesn't occur; but that's
2 occurring here with the charter mandate. You're saying
3 that you've decided to do it, it's discretionary.

4 It needs to be the same then for school
5 districts on every single education mandate that may be
6 approved in the future, that it must be a point in time,
7 because then have you would have to make a determination
8 whether the new sites that come on line are mandated or
9 discretionary. And turning a blind eye to that then
10 creates two different decisions being made: Creating
11 charters, holding them out differently than districts.
12 As far as the Government Code goes, unfortunately, I
13 don't have anything to say about the Government Code
14 section. It says what it says. The only distinction
15 that can be made is that the Government Code was
16 established well before charter schools came into play.
17 Charters are now getting more recognition as related to
18 funding and their position in the state and state
19 government as it relates to finances and the necessary
20 facilities issues that are being raised. And that is an
21 evolving process.

22 Again, I would like to back up Eric Premack's
23 statements as it relates to the exception portions of the
24 Education Code. That, again, is really not an issue
25 here. The fact that charters can be excepted from

1 programs does not mean that they're excepted from the
2 Education Code as a whole. They are not. It's clear
3 that they are not. They still have to do testing. They
4 still have to do a lot of the things that schools do.
5 The only way that this exception language that was
6 brought up this morning would apply is whether or not
7 they are excepted to the activities that we are seeking
8 in the test claim, and there is no exception to those
9 activities in the Education Code. They have to perform
10 those.

11 We're not seeking discretionary activities from
12 some other program. We are seeking activities that are
13 required to establish just the genesis of the school. It
14 must be followed.

15 So citing the broad waiver language in the
16 Ed. Code means nothing in this decision and really should
17 not even be considered because that doesn't apply to what
18 we're seeking this morning.

19 Thank you.

20 CHAIR SHEEHAN: Thanks.

21 No questions?

22 *(No audible response)*

23 CHAIR SHEEHAN: Okay.

24 Why don't you go ahead; and then, Eric, we'll
25 have you respond.

1 MR. TROY: Dan Troy with the Department of
2 Finance. I'm going to raise issues that are a little bit
3 different from the prior testifiers.

4 Would you like staff to --

5 CHAIR SHEEHAN: Okay.

6 MR. FELLER: Mr. Premack said that school
7 districts are also voluntarily created. I think the same
8 could be said for cities and counties. They're also
9 voluntarily created.

10 What you have -- the differences for charter
11 schools is that they're a new animal that didn't exist in
12 1979, when Prop. 4 was adopted, whereas school districts,
13 cities and counties did exist in 1979; and, therefore,
14 the voter intent is obvious that those were
15 reimbursable -- are reimbursable entities, as the
16 definitions in the Government Code make clear -- 17519 --
17 expressly the definition of a school district.

18 The charter is somewhat analogous to an earlier
19 contract between the district and the charter school.
20 And there's actually cases in other jurisdictions, not in
21 California, on this point. It's in the nature of a
22 contract, in that it's voluntarily entered into by the
23 parties with the school district to provide certain
24 services to students there.

25 As far as Ed. Code 47610 and the applicability

1 here, obviously, I disagree with Mr. Scribner. Charter
2 schools, it says, expressly are generally excepted from
3 the laws of governing school districts. Of course, the
4 Legislature opts them in when it believes that certain
5 laws should apply to charter schools. STAR testing, for
6 example, recently hiring credentialed teachers, I think
7 was actually something pointed out in this test claim.
8 If they exist, those are things that they have to do.
9 The difference is -- and the Legislature has opted them
10 in for purposes of Prop. 98 funding and for purposes of
11 categorical aid. And that, to me, kind of emphasizes the
12 point that the Legislature has not opted them in to
13 reimbursement funding under Article XIII B, section 6, of
14 the State Constitution. The fact that the Legislature
15 opts them in to certain programs and defines them as a
16 school district for obviously certain purposes, including
17 in this test claim, one that was discussed, Students with
18 Disabilities, which is a federal program. But the
19 Legislature has not expressly done so for purposes of
20 mandate reimbursement.

21 That was all the comments I had, unless there's
22 any questions.

23 CHAIR SHEEHAN: Okay, any questions for
24 Mr. Feller?

25 *(No audible response)*

1 CHAIR SHEEHAN: Okay, come on back up, Dan.

2 MR. SCRIBNER: I'll work backwards.

3 CHAIR SHEEHAN: Okay.

4 MR. SCRIBNER: Mr. Feller spoke of the
5 Legislature's ability to add charters where it deems
6 necessary. That's actually not true. In both bills that
7 have brought forth money -- small amounts of money -- for
8 reimbursement of the oldest of the old claims, school
9 districts have been defined to include community-college
10 districts and charter schools. So the \$56 million two
11 years ago, \$60 million last year, charter schools have
12 been included in the definition of a school district so
13 that they can receive reimbursement money through the
14 mandate-reimbursement process.

15 Now -- so that, again, puts us in a strange
16 position I guess, because what Mr. Feller said as it
17 relates to charters and the 1979 enactment of Prop. 4 and
18 then the changes in 1984 to the Government Code do create
19 a bit of a duality. Charter schools don't show up in the
20 Government Code as far as a definition for an eligible
21 claimant, and yet they are being treated as one by the
22 Legislature.

23 CHAIR SHEEHAN: In certain places.

24 MR. SCRIBNER: For reimbursement of mandated
25 programs. They have been treated by the Legislature as

1 an eligible claimant because they have been listed in the
2 funding mechanism to get paid for mandates.

3 So when Mr. Premack said that this is a
4 commonsense kind of thing, it actually is because you
5 have all of these actions that are taking place for
6 charters as it relates to funding for mandates, and yet
7 you have one entity that's saying, "No, that's not the
8 case." But the Legislature, the Controller are moving in
9 a different direction. And there's a little hitch in our
10 giddyup for some reason.

11 The point that Mr. Feller raises as far as this
12 being a contract, that's an interesting point. I think
13 that he may have not stressed enough the point that I
14 would like to stress, and that is there are no California
15 cases that show that this is a contract in that sense.
16 These are all other jurisdictions; and that has not been
17 raised here in California at this point.

18 And to the fact that charters weren't in
19 existence in '79 or in '84, that's true. But the
20 Legislature amends the Government Code constantly. And
21 it has always applied retroactively to everything. You
22 are going to have an item today that tinkered with the
23 section to eliminate a program that was established by
24 the electorate in 1979. But you were going to go forward
25 and apply it now, even though decisions were made without

1 any knowledge of what happened here in 2005.

2 The same thing with charters. Charters came on
3 after, yes, they did. But that does not mean that they
4 are somehow waiving their right to get reimbursed for the
5 mandated activities that they have they have to do on a
6 daily basis.

7 Thank you.

8 CHAIR SHEEHAN: Thanks.

9 MEMBER SMITH: A question for Eric.

10 Have charter schools ever been through this
11 process here at the Commission for any other mandate,
12 special ed. or instructional minutes?

13 MR. FELLER: Not to my knowledge. Maybe
14 Ms. Higashi has more information on that.

15 MS. HIGASHI: This is the first test claim in
16 which a charter school was listed as a claimant, filing
17 the actual test claim.

18 There have been other test claims where at
19 different points in our Ed. Code history when charter
20 schools were more closely affiliated with the school
21 district, that when mandated activities were drafted or
22 that, in my recollection is we're talking about one that
23 Mr. Scribner worked on when he worked at the Commission
24 as a law student and as a staff counsel, that he is
25 talking about one that was on the Michelle Montoya

1 requirements for fingerprinting. And I think on that
2 particular one, there was a footnote in the P's and G's
3 or something that allowed school districts to claim costs
4 of fingerprinting for their charter schools that were
5 within their districts, or something to that effect.
6 But the umbilical cord was very tight back then. In more
7 recent times, the legislation, I believe, has changed the
8 relationship of charter schools to districts and to the
9 state; and there's much more independence and different
10 types of entities. And we haven't really looked at all
11 of those types of entities and other issues.

12 MEMBER SMITH: Is staff aware of any other
13 guidance from the Legislature? I mean, just -- are they
14 aware that they may or may not be excluded from the
15 Government Code, depending on interpretation? I mean,
16 would that be shocking to them?

17 MS. HIGASHI: The staff analyses that have
18 issued for this hearing are available, and we have folks
19 from the Capitol that are on the mailing lists, the
20 e-mail list for the documents. And certainly
21 Mr. Feller's analysis seems to be pretty clear on that
22 point. So I would guess they're aware. I have not had
23 any discussion specifically with --

24 MEMBER SMITH: I got it.

25 MS. HIGASHI: -- any Ed Committee members.

1 MEMBER SMITH: I would suggest, whatever
2 happens today, that we write a letter to the appropriate
3 legislators or committees, just to make them aware that,
4 you know, based on different interpretations, it could be
5 said that these folks are eligible or not eligible. That
6 kind of puts them in a weird spot that, to me, is just
7 beyond bizarre that the state would mandate something
8 that, no, you can't claim it back. I think there's
9 something missing here, and I don't know quite what it
10 is.

11 I think that the Legislature needs to give us
12 some guidance on what they intend to do with charter
13 schools. A lot of students go to charter schools. It's
14 important they get the money. The Controller supports
15 them. I just feel like we're in a position now like
16 we're trying to figure this all out without any guidance
17 from the Legislature.

18 MS. HIGASHI: We could certainly do that.

19 CHAIR SHEEHAN: Great.

20 Eric, did you want to --

21 MR. FELLER: I'm not familiar with the bills
22 that Mr. Scribner referred to, so I can't comment on
23 those.

24 The fact that the Government Code is amended
25 constantly, obviously it's been amended just last year.

1 Again, not with regards to charter schools. Likewise,
2 the charter school statute has not been amended to
3 declare themselves school districts for purposes of
4 Article XIII B, section 6, even though they are
5 considered school districts for many other purposes in
6 the law.

7 And then as to waiving the right to
8 reimbursement, a right has to exist before it's waived;
9 and I just don't see it here based on the statutes and
10 the way I read this -- the charter school statutory
11 scheme, as well as the Commission's statutory scheme.

12 CHAIR SHEEHAN: Did you want to add something?
13 Can you just identify yourself for the record?

14 MS. CONDON: Absolutely.

15 Hello. I'm Alexandra Condon. I'm a teacher,
16 CTA member, and I'm speaking on behalf of the CTA; and I
17 have a question and then a statement.

18 My first question will probably go to staff.
19 Charter schools that are completely dependent within the
20 district, are they covered currently under mandates? So
21 we have charter schools that are dependent, and we have
22 charter schools that are independent. There are charter
23 schools that are dependent.

24 MS. HIGASHI: I think that's the class of
25 charter school that I was thinking of, where the district

1 is still filing reimbursement claims because the school
2 is still within the district.

3 MS. CONDON: That's why I didn't know when you
4 were talking about the fingerprinting, I didn't know if
5 that was one specific thing or all mandates?

6 MS. HIGASHI: I think those are the types of
7 schools I was thinking of. Because at the time when that
8 decision was made, it was a different situation with
9 charter schools.

10 MS. CONDON: Correct, because it's dependent
11 and independent. I do want to make that clarification as
12 well.

13 And at CTA, we also would agree with the staff
14 analysis that charter schools are independent and should
15 not be reimbursed under the state mandates.

16 Thank you.

17 MEMBER OLSEN: Madam Chair?

18 CHAIR SHEEHAN: Yes, Ms. Olsen?

19 MEMBER OLSEN: I'd also like to delve into this
20 issue of dependent and independent.

21 My only personal experience with charter
22 schools are with what I think is being termed "dependent
23 charter schools" within the Los Angeles Unified School
24 District.

25 CHAIR SHEEHAN: Chartered by the district.

1 MEMBER OLSEN: And so I guess I just need more
2 clarification on what an independent charter school is,
3 and how the staff analysis applies to dependents versus
4 independents.

5 CHAIR SHEEHAN: Okay, Eric, do you want to
6 address that? And then if we need to get more
7 information, we can do that.

8 MR. FELLER: There's no distinction in the
9 analysis. A charter school is a charter school for
10 purposes of this analysis.

11 On your first question about the difference
12 between the two, I will defer to the charter school folks
13 on that. They have much more expertise on that.

14 CHAIR SHEEHAN: Do you want to address that?

15 MR. PREMACK: Sure. The concepts of dependent
16 versus independent, are not -- and you won't find the
17 words "dependent" or "independent" or even the concepts
18 in the code. It all has to do with what's the degree of
19 relationship between the school and the district. And
20 we, in practice, have a huge range of charter schools.
21 At one end of the spectrum, we have schools that function
22 largely as an arm of the district. They may rely on the
23 district for budget. The district manages their
24 finances, they might be located in district facilities,
25 their staff might be employees of the district. They may

1 rely on the district for a broad range of support is
2 services.

3 On the other end of the spectrum, we have
4 charter schools that are operated as more independent
5 corporations, where they have their own budgets, their
6 own staff, their own -- what have you, and everything in
7 between.

8 We think that this notion that somehow if you
9 have a closer relationship with the district, that you're
10 somehow more worthy of money, we just don't track with
11 that. We think the issue here is very fundamental. And
12 to say that kids that are served on this end of the
13 spectrum are worth less money and get disparate treatment
14 and are discriminated against versus ones that are in
15 this end of the spectrum. They're all the same kids, and
16 they all have the same needs.

17 And the financial effect on the institutions is
18 very similar, and, actually, can be much more painful on
19 this end because the level of reserves and flexibility to
20 absorb these costs is even lower.

21 So we would take issue with this notion that
22 these are somehow different. We think they're eligible
23 claimants throughout the spectrum.

24 CHAIR SHEEHAN: Regardless of how the -- okay.

25 MEMBER OLSEN: I'm not sure that answers my

1 question, though. I mean, that answers part of my
2 question.

3 The other part of my question is, based on your
4 comments, I could read it one of two ways. One way is,
5 okay, so the ones that are -- the more independent you
6 become, the less likely you are to have a successful
7 claim under the statute, given what we're being asked to
8 approve today, which, ergo, the more dependent you are,
9 the greater likelihood there is that you can, in fact,
10 claim either independently or through the school district
11 for these costs. Or, I mean, the other -- the
12 alternative interpretation is no charter school anywhere
13 can get reimbursed under this decision. And I guess
14 that's what I'm trying to get clarification on.

15 MS. SHELTON: Maybe I can help. Some of the
16 older test claims have been mandates on a school
17 district. So the school district is filing the
18 reimbursement claim. And they may -- you know, when they
19 get the money, they may be doling it out to their -- you
20 know, the activities that their individual schools and
21 then the district are performing.

22 But this is the first time the Commissioner has
23 had to deal directly with the issue whether or not a
24 charter school is an eligible claimant for the activities
25 they specifically perform, and in this case are trying to

1 get reimbursed to actually create the charter school.
2 So that may be the difference. With the older ones, it's
3 because the mandate is on the district.

4 CHAIR SHEEHAN: In those statutes you were
5 talking about, you did refer back to, in the P's and G's,
6 that they would file on behalf of the charters in those?

7 MS. HIGASHI: In the ones that I'm recalling.
8 I don't have a copy of those particular P's and G's with
9 me.

10 The other comment I wanted to make is just that
11 the charter school laws evolve every year, and they
12 continue to change. So whatever decisions the Commission
13 has been making in the past several years are all
14 dependent on the law at that point in time.

15 CHAIR SHEEHAN: Right.

16 MS. HIGASHI: So the situation has changed, a
17 number of charter schools that exist today is much
18 higher -- I can't remember the exact number. And the
19 standards for establishing charter schools are much
20 broader than they were at the beginning. And so that's
21 also a very difficult question to answer, because we have
22 not necessarily -- unless a P's and G's amendment comes
23 in, unless a subsequent test claim is filed on changes in
24 statutes, it would not be before the Commission, and we
25 would not necessarily be aware of those changes, unless

1 they come up in the context of an agenda item.

2 CHAIR SHEEHAN: Do you want to -- I mean, I
3 think it sort of evolved, and we're backing into this.

4 MEMBER OLSEN: Right, I just think --

5 CHAIR SHEEHAN: Versus the Legislature says
6 they're eligible or defining them under the Government
7 Code.

8 MEMBER OLSEN: I guess I'm actually hoping that
9 Camille is going to save me here by saying: Well, it's a
10 really technical issue and we actually don't have the
11 ability to decide on it, and we are really only looking
12 at this part of it.

13 Because I think that this is really important.
14 The reason -- the whole reason for charter schools on
15 some level is that school districts were not providing
16 the services that a particular subset of their population
17 needed. And the charter school was a way of addressing
18 that and addressing it so all kids, regardless of their
19 economic status, could get an education.

20 And whether or not they're successful, that's
21 outside of this and that. You know, that's a different
22 debate.

23 But it seems to me that they're providing the
24 services on behalf of public school children. I mean,
25 that's just sort of elemental to me, unless somebody can

1 dispute that, which seems to me, therefore, that they are
2 acting like school districts. And that's --

3 MS. SHELTON: Can I respond?

4 MEMBER OLSEN: A barrier which I'm not able to
5 get past here.

6 MS. SHELTON: We don't disagree with your
7 policy arguments. We just think that it is for the
8 Legislature to determine. Because at this point, the
9 Legislature has specifically defined school districts,
10 very specifically, to include school districts, county
11 offices of education, and community college districts.
12 The list is specific. There is a rule of statutory
13 construction that says when the Legislature specifically
14 defines something and does not include something, that
15 means that they intended not to include it. And so at
16 this point the Commission cannot adopt something that
17 goes beyond the plain language of a statute. That's for
18 the Legislature to change or to amend.

19 And at this point, the Commission doesn't have
20 the authority to change that.

21 MEMBER OLSEN: That's what I was hoping you
22 were going to say.

23 CHAIR SHEEHAN: Although it would get their
24 attention.

25 MEMBER SMITH: Paula?

1 MS. HIGASHI: Yes?

2 MEMBER SMITH: How long -- is this a
3 reconsideration?

4 MS. HIGASHI: No, this is a new test claim.

5 MEMBER SMITH: Okay. A new test claim.

6 MS. HIGASHI: This is the first hearing on the
7 test claim.

8 MEMBER SMITH: Would it be wise to seek some
9 legislative guidance here before we make a decision?

10 MS. HIGASHI: That's a question I would leave
11 to the Commission members.

12 And let me also note just informationwise, we
13 have another charter-school-related test claim for the
14 May hearing, and that's on collective bargaining.

15 MEMBER SMITH: Okay.

16 MR. PREMACK: I would note that the costs of
17 collective bargaining are absolutely staggering. I sit
18 on the board of a nonprofit, very independent charter
19 school. It used to be a Conservation Corps down in
20 Oakland. The costs of going through the collective
21 bargaining process, absolutely staggering. We measure
22 our legal bills in the tens of thousands of dollars.
23 We recognize fully our responsibility to go through the
24 bargaining process. But the costs -- you know, we have a
25 hard time managing our budget, to begin with. The costs

1 of going through that process are huge.

2 Part of the understanding that we reached with
3 the Davis Administration when that law went through is
4 that our costs would be covered when we went through that
5 process.

6 MEMBER SMITH: Well, we look forward to that
7 next month.

8 But I think for this meeting, all I see, any
9 action on this today is firing a shot over there saying,
10 "Hey, wake up, an issue is coming towards you that you're
11 ultimately to settle." So I just wonder if we shouldn't
12 do that more diplomatically by a letter or knock on their
13 doors and just say, "This is a -- we don't know if this
14 is something you intended to keep charter schools out or
15 not," but one could argue that they would never be
16 reimbursed by state-mandated activity. So I don't know
17 if we have the time on the schedule, but this would be a
18 good one to put over so we could seek some guidance.

19 CHAIR SHEEHAN: Yes, I think what's being
20 suggested is to postpone this a month, you know, send a
21 letter to the legislative leadership. It is bubbling
22 because it's coming. We've got other ones coming. You
23 know, what is the direction, the guidance, in terms of
24 that.

25 I think she addressed your issue.

1 MEMBER OLSEN: Right.

2 CHAIR SHEEHAN: It's sort of they pick and
3 choose; and we don't necessarily have the complete legal
4 authority, without some further direction from the
5 Legislature, to make that determination.

6 MS. HIGASHI: I'd be happy, if that's the
7 pleasure of the Commission, to continue this --

8 MEMBER SMITH: I would move to continue it.

9 CHAIR SHEEHAN: For another month?

10 MEMBER SMITH: Right.

11 MS. HIGASHI: -- and I'll send a letter to the
12 Ed. Committee --

13 CHAIR SHEEHAN: You know, that the other one is
14 coming.

15 MS. HIGASHI: -- Ed. Committee, Fiscal
16 Committee folks in leadership.

17 CHAIR SHEEHAN: Did you want to add something?

18 MR. SCRIBNER: No, no, we'll be patient. We
19 will wait. I think that's an excellent idea, and I do
20 agree that it would create more of a forceful effect if
21 you would vote today, rather than saying, "Give us
22 direction."

23 CHAIR SHEEHAN: At least we could put them on
24 notice that this issue is bubbling out there.

25 MR. SCRIBNER: That would be excellent. We

1 would agree wholeheartedly.

2 MEMBER WORTHLEY: Madam Chair, I would support
3 the motion.

4 My only comment is I think it's disingenuous
5 for the government to authorize and allow something to
6 exist and say you're exempt, and then turn around and put
7 burdens on you and then say, "We won't pay for it." I
8 mean, you can't have it both ways. I think it's
9 disingenuous on their part to do that. So I support the
10 motion.

11 CHAIR SHEEHAN: On any level. On many levels,
12 right?

13 MEMBER WORTHLEY: Right.

14 MEMBER SMITH: Okay, so does that need a
15 motion, Anne, for continuance?

16 CHAIR SHEEHAN: No, I think we'll continue it.
17 It's the sense the Commission that we will send a letter
18 to the Legislature. We will schedule it for next -- and
19 then we will have both and can consolidate and have
20 similar discussion on these issues and at least let them
21 know what is coming.

22 MR. SCRIBNER: Thank you.

23 CHAIR SHEEHAN: We'll put over 9, obviously.
24 And that brings us to Item 10.

25 MS. HIGASHI: It brings us to Item 10.

1 CHAIR SHEEHAN: Yes. I'm sorry, did you want
2 to come back next month?

3 MR. TROY: Yes. Dan Troy, Department of
4 Finance.

5 My issues are much more minor. Otherwise, we
6 agree with the staff analysis, just on a couple of
7 points, and we'd be happy to come back next month and do
8 it again.

9 CHAIR SHEEHAN: Thanks, Dan.

10 MS. HIGASHI: This brings us to Item 10, a test
11 claim on *Firearm Hearings for Discharged Inpatients*.
12 Commission Counsel Debra Borzelleri will present this
13 item.

14 MS. BORZELLERI: Good morning.

15 This test claim addresses amendments to Welfare
16 and Institutions Code section 8103. That section
17 established weapons restrictions for certain individuals
18 who have been detained in county-designated facilities
19 for treatment and evaluation as a result of potential
20 mental disorder or chronic alcoholism, and then also
21 addresses procedures for challenging those weapons
22 restrictions. The purpose of the original test-claim
23 legislation was to impose greater control on the sale and
24 transfer of firearms in order to ensure they don't fall
25 into the hands of criminal offenders or the mentally

1 incompetent.

2 Welfare and Institutions Code section 8103,
3 subdivisions (f) and (g), were affected by the test claim
4 legislation. Because subdivision (f) was declared
5 unconstitutional for due-process issues, a 1999 statute
6 was enacted to cure the problems with subdivision (f).
7 The main issue in dispute was whether Government Code
8 section 17556, subdivision (b), was applicable to deny
9 the test claim.

10 Staff finds that the original test-claim
11 legislation actually created the mandate and, thus,
12 Government Code section 17556, subdivision (b), is not
13 applicable to deny the claim.

14 However, since no mandate existed for the
15 period of time after section 8103, subdivision (f) was
16 declared unconstitutional until the curative statute was
17 enacted, staff finds that any activities carried out
18 under section 8103, subdivision (f), are not reimbursable
19 until the effective date of the new test-claim statute,
20 which is September 29, 1999.

21 Activities that are being claimed as
22 reimbursable are for hearings that may be requested by
23 the discharged inpatient. Specifically, those are
24 District Attorney services, legal secretary services, and
25 expert witness services.

1 Staff finds that only the District Attorney
2 services are mandated by the test-claim legislation, but
3 notes that the claimant may wish to address the other
4 activities claimed at the Parameters and Guidelines stage
5 as reasonably necessary to comply with the test-claim
6 legislation.

7 Do we have anybody here?

8 MR. KAYE: Yes.

9 MS. BORZELLERI: Please step forward. Thank
10 you.

11 MR. KAYE: Good morning -- I should say "good
12 afternoon."

13 This is Leonard Kaye, again, with the County of
14 Los Angeles.

15 We concur with Commission Staff Analysis, and
16 we appreciate the sensitivity and the scholarship by
17 which they conducted their inquiry.

18 This is a complicated matter involving the
19 various types of hearings for discharged psychiatric hold
20 patients for which there is a 72-hour hold and a
21 fourteen-hour hold. And so there is no dispute here.
22 And we look forward to developing the Parameters and
23 Guidelines as Commission staff have mentioned. And I
24 think, based upon our experience recently, we look
25 forward also to develop a reasonable reimbursement

1 methodology, because what we're looking at is, with all
2 due respect, I mentioned that we filed the test claim
3 back about six years ago, and what we're looking at is
4 small units of time for all the District Attorney's
5 offices up and down the state by which they conducted
6 these hearings. And I think that that would make the
7 most sense: To come up with some sort of standard time
8 to do a statewide cost estimate and develop this and
9 bring this back before you shortly.

10 So thank you very much.

11 CHAIR SHEEHAN: We'll hear from Ms. Geanacou.

12 Are you next?

13 MS. GEANACOU: I guess I am. I wasn't sure if
14 you had questions.

15 Department of Finance, Susan Geanacou. We
16 support the staff's analysis on this test claim.

17 CHAIR SHEEHAN: Great.

18 Questions? Comments?

19 *(No audible response)*

20 CHAIR SHEEHAN: Move the recommendation?

21 MEMBER SMITH: I will move staff's
22 recommendation.

23 CHAIR SHEEHAN: Second?

24 MEMBER OLSEN: Yes.

25 CHAIR SHEEHAN: We have a motion and a second

1 to move the draft staff recommendation.

2 With no further comments, all those in favor,
3 say "aye."

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

5 CHAIR SHEEHAN: Opposed?

6 *(No audible response)*

7 CHAIR SHEEHAN: All right.

8 MS. BORZELLERI: Item 9.

9 CHAIR SHEEHAN: No, Item 11.

10 MS. BORZELLERI: I'm sorry, Item 11.

11 The only issue for the Commission is whether
12 the Statement of Decision accurately reflects the
13 Commission's decision on the previous item and requests
14 the Commission to allow staff to make minor changes,
15 including those that reflect the testimony.

16 MEMBER SMITH: So moved.

17 MEMBER OLSEN: Second.

18 CHAIR SHEEHAN: We have a motion and a second.

19 All those in favor?

20 *(A chorus of "ayes" were heard.)*

21 CHAIR SHEEHAN: Any opposed?

22 *(No audible response)*

23 CHAIR SHEEHAN: That passes.

24 All right, so that takes us to --

25 MS. HIGASHI: Item 15, *Mandate Reform*.

Commission on State Mandates – April 26, 2006

1 CHAIR SHEEHAN: 15, *Mandate Reform*.

2 MS. HIGASHI: Cathy Cruz.

3 MS. CRUZ: Good afternoon. On April 14th, 2006
4 the Center for Collaborative Policy issued its final
5 assessment report reforming the mandate reimbursement
6 process. It included the staff recommendation to clarify
7 that the Legislature's ideas for reform would be fully
8 considered, that the Legislature and its staff are
9 encouraged to participate in the process, and that the
10 final report will be formally submitted to the
11 Legislature for their review and approval.

12 It also clarified the Legislative Analyst's role in the
13 process. It included an appendix consisting of all the
14 recommendations, supplemental material, and comments
15 provided by interested parties to the Center for
16 Collaborative Policy.

17 I'd like to report that Commission staff is now
18 in the process of initiating an interagency agreement
19 with the Center, so that a neutral facilitator may guide
20 and manage the collaborative process.

21 We're working with the Department of Finance
22 and the Legislature to obtain the funding necessary to
23 support the process, and are working with Finance, the
24 Legislature, and other stockholders to encourage their
25 participation.

1 Also, we have updated our Web site for mandate
2 reform, so that interested parties may sign up for the
3 electronic mailing list. In the next month or so, we
4 will begin posting biweekly updates to report on the
5 progress of the project.

6 So that conclusions my report, unless you have
7 questions.

8 MEMBER SMITH: *(Pointing)*

9 CHAIR SHEEHAN: Nick?

10 MEMBER SMITH: Just a comment, similar to the
11 last time, the Controller is just real excited about this
12 process and read the final draft assessment. And it's
13 very interesting, even to learn perception about the
14 stakeholder's tasks. I see some of the things that we
15 can all do better as we sit up here. And I'm real proud
16 to be part of this.

17 So thank you, staff, for excellent work; and
18 I'm very excited to move forward with this process.

19 Thanks.

20 MS. CRUZ: Thank you.

21 CHAIR SHEEHAN: Thanks.

22 Any other questions?

23 *(No audible response)*

24 MS. SHEEHAN: Thank you, Cathy.

25 MS. HIGASHI: Item 17.

1 CHAIR SHEEHAN: 16.

2 Does Camille have anything to report?

3 MS. SHELTON: I have nothing to report.

4 CHAIR SHEEHAN: Okay.

5 17, Paula?

6 MS. HIGASHI: Item 17, I have nothing to add
7 other than no action was taken on our budget yesterday in
8 the Assembly. They actually didn't get to our item. So
9 we will be scheduled for another hearing.

10 CHAIR SHEEHAN: Okay. Anything in the
11 Senate?

12 MS. HIGASHI: The Senate will be rescheduling
13 us after the May revision, I believe.

14 CHAIR SHEEHAN: Okay.

15 MS. HIGASHI: And then this afternoon, in Local
16 Government Committee, there will be a hearing and a few
17 mandates bills are on the agenda.

18 CHAIR SHEEHAN: Okay, all right. Very good.

19 MS. HIGASHI: Obviously, the hearing agendas
20 for the coming months will be adjusted and, if necessary,
21 we may schedule a June meeting. And what I would do is
22 check with you before we do that.

23 CHAIR SHEEHAN: Okay.

24 MS. HIGASHI: But in the event we need to,
25 because of timing --

1 CHAIR SHEEHAN: On some of the issues that
2 require action; right.

3 MS. HIGASHI: -- on some of these issues.

4 Correct.

5 CHAIR SHEEHAN: So we'll check schedules in
6 terms of June.

7 MS. HIGASHI: But we will be making some
8 adjustments in what was previously presented for the
9 hearing calendar.

10 CHAIR SHEEHAN: Yes, because a few were put
11 over, and that's going to back things up a bit.

12 Okay, is there any public comment before we go
13 into closed session on any item that was not on the
14 agenda today that anyone would like to testify?

15 *(No audible response)*

16 CHAIR SHEEHAN: If not, then we will go into
17 closed session pursuant to the Government Code section.

18 Thank you all for being here.

19 Okay, the Commission will now meet in closed
20 executive session pursuant to Government Code sections
21 11126, subdivision (a), and 17526, to confer on personnel
22 matters listed on the published notice and agenda.
23 We will convene in open session at this location in
24 approximately -- I don't know -- ten or 15 minutes.
25 But we have concluded our regular scheduled agenda items.

1 And so we will just reconvene to report and then adjourn
2 the meeting.

3 *(Closed executive session was held from*
4 *12:20 p.m. to 12:31 p.m.)*

5 CHAIR SHEEHAN: All right, the Commission met
6 in closed executive session pursuant to Government Code
7 section 11126, subdivision (a), and 17526, to confer on
8 personnel matters listed on the published notice and
9 agenda.

10 All required reports from closed session having
11 been made and with no further business to discussion,
12 we'll entertain a motion to adjourn.

13 MEMBER SMITH: Motion to adjourn.

14 CHAIR SHEEHAN: All those in favor of
15 adjourning, say "aye."

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

17 CHAIR SHEEHAN: We are adjourned, thank you.

18 *(Proceedings concluded at 12:32 p.m.)*

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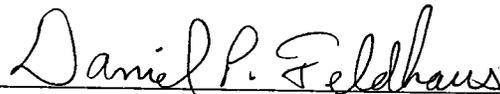
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I hereby certify that the foregoing proceedings were duly reported by me at the time and place herein specified;

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

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

In witness whereof, I have hereunto set my hand on May 2, 2006.



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