Hearing Date: March 25, 2004
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ITEM 11
TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 60850, 60851, 60853, 60855

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

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

High School Exit Examination (00-TC-06)

Filed by Trinity Union High School District, Claimant

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EXECUTIVE SUMMARY

Claimant Trinity Union High School District filed this test claim in January 2001 alleging a reimbursable state mandate on school districts by requiring new activities associated with the California High School Exit Examination (HSEE). For reasons discussed in the analysis, staff finds that the test claim legislation imposes a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities.

- **Adequate notice:** notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the HSEE. The notification shall include, at a minimum, the date of the HSEE, the requirements for passing the HSEE, and the consequences of not passing the HSEE, and that passing the HSEE is a condition of graduation. (Ed. Code, § 60850, subds. (e)(1) & (f)(1).)[1]
- **Documentation of adequate notice:** maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)[2]
- **Determining English language skills:** determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE (§ 1217.5).
- **HSEE administration:** administration of the HSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has

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

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

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

- designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210).
- training a test administrator either by a test site or district coordinator as provided in the test publisher's manual. (§§ 1200, subd. (g) & 1210, subd. (b)(3).);
- accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
- maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);
- maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);
- the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 (except for a teacher's time in administering the HSEE during the school day);
- delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212)
- allowing pupils to have additional time to complete the HSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's IEP, and only if this activity is performed by a non-teacher certificated employee, such as an employee holding a service credential. (§ 1215);
- for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents,

and other materials included as part of the HSEE in the manner required by the publisher (§ 1209).

- **Test security/cheating:** Doing the following to maintain test security:
  - having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations (§ 1211, subd. (c));
  - abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211, subd. (d));
  - being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher (§ 1211, subd. (i));
  - HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory (§ 1211, subd. (h));
  - HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit ((§ 1211, subd. (e));
  - providing secure transportation within the district for test materials once they have been delivered to the district (§ 1211, subd. (j)); and
  - for persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g) (§ 1211, subd. (f));
  - limiting access to the HSEE to pupils taking it and employees responsible for its administration (§ 1211, subd. (b));
  - for HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks (§ 1211, subd. (a));
  - marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating (§ 1220).
- **Reporting data to the SPI:** providing HSEE data to the SPI or independent evaluators or the publisher is a state mandate. Specifically, providing the following information on each pupil tested: (1) date of birth, (2) grade level, (3)

gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, and (13) post-high school plans. (§ 1207); and reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and for the district superintendent to certify the accuracy of this information submitted to CDE (§ 1225).

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

Recommendation

Staff recommends that the Commission partially approve the test claim for the activities listed above.

STAFF ANALYSIS

Claimant

Trinity Union High School District

Chronology

1/25/01	Claimant files test claim with the Commission.
2/20/01	Claimant's representative (P. Minney) files original signature pages of claimant's declaration and the authorization to act as representative.
2/27/01	Department of Finance ("DOF") requests an extension of time to comment.
4/3/01	DOF files test claim comments with the Commission.
6/11/01	Claimant files rebuttal to DOF's comments with the Commission.
1/30/03	Commission staff sends claimant a letter regarding intent to amend the test claim as stated in the test claim.
2/3/03	Commission staff sends claimant a letter requesting information and documentation on test claim.
2/4/03	Claimant sends a letter confirming intent to amend test claim.
3/14/03	Claimant amends test claim to add California Code of Regulations, title 5, sections 1200 – 1225.
9/3/03	Steve Smith of MCS Education Services sends a letter to notify that MCS is seeking authorizations to act as the claimant's representative.
9/5/03	Paul Minney sends a letter withdrawing as claimant representative and notifying staff that MCS will be taking over as claimant representative.
9/29/03	Commission staff sends letter to Steve Smith of MCS advising that signed statement from the test claimants authorizing representation are needed for MCS to act as claimant representative.
10/23/03	Steve Smith of MCS Education Services sends a letter to request that David Scribner be designated as claimant representative.
1/30/04	MCS Education Services faxes (1) designation by claimant for Steve Smith of MCS or designee to act as representative for MCS, and (2) designation by MCS of David Scribner of Schools Mandate Group (SMG) to act as claimant representative.
2/4/04	Commission staff issues the draft staff analysis
2/23/04	Claimant representative SMG submits comments on the draft staff analysis, along with cost declarations from six school districts
3/5/04	Staff issues final staff analysis

Background

A. Test Claim Legislation

The test claim legislation[3] that established the high school exit exam (HSEE) was sponsored by Governor Davis in 1999, and enacted during an extraordinary session of the Legislature dedicated to education reform issues. The purpose of the HSEE is to "significantly improve pupil achievement in public high schools and to ensure that students who graduate from public high schools can demonstrate grade-level competency in the state content standards for writing, reading and mathematics."[4] The HSEE tests "eligible pupils"[5] on mathematics through Algebra I, and English/Language arts.[6]

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

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

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

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

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

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

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

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

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

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

The test administrator may be assisted by a test proctor, "an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the [HSEE]."[10] Others with roles in the HSEE are the district coordinator and test site coordinator, whose functions are discussed below.

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

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

B. Prior Law

The test claim legislation included a finding that "[l]ocal proficiency standards established pursuant to Section 51215 of the Education Code are generally set below a high school level and are not consistent with state adopted academic content standards." (Stats. 1999x, ch. 1, § 1). These proficiency standards were enacted in 1977 and repealed by the test claim legislation. They required school districts with grades 6-12 to establish basic skills proficiency standards and administer proficiency assessments (usually tests) that all pupils must pass to graduate. The locally developed tests and standards were aligned to local curriculum, and at a minimum addressed, "reading comprehension, writing and computational skills, in the English language" (former Ed. Code, § 51215, subd. (c)). Different standards and testing

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

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

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

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

procedures were authorized for special education pupils and other pupils with a diagnosed learning disability (former Ed. Code, § 51215, subd. (d)). Assessment of pupil proficiency in English was required at least once during grades 4 through 6, and 7 through 9, and twice during grades 10 and 11. Districts could defer assessing pupils of limited English proficiency until the pupils had received at least 24 months of instruction, including six months of instruction in English (former Ed. Code, § 51216, subd. (a)).

C. Federal Law

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

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

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

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

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

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

> compliance all school districts with the constitutional right to equal protection with respect to handicapped children." [citations omitted.][13]

The *Hayes* court held that FEHA is a federal mandate.[14] *Hayes* also held,

> To the extent the state implemented the act [FEHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[15]

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

Equal Educational Opportunities Act of 1974, Title VI of the Civil Rights Act: The test claim statute states that the HSEE, "regardless of federal financial participation, shall comply with Title VI of the Civil Rights Act (42 U.S.C. § 2000d et seq.), its implementing regulations (34 C.F.R. Part 100), and the Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. 1701)."[16] Title VI of the Civil Rights Act prohibits discrimination on grounds of race, color or national origin on programs or activities receiving federal financial assistance. The EEOA states that all public school children "are entitled to equal educational opportunity without regard to race, color, sex or national origin, [and] the neighborhood is the appropriate basis for determining public school assignments." (20 U.S.C. 1701.)

D. Prior Test Claims

In December 2001, the Commission found that notifying parents about the HSEE (Ed. Code, § 48980, subd. (e), as amended in 2000) is a reimbursable mandate in the *Annual Parent Notification* test claim (99-TC-09 and 00-TC-12). The Trinity Union

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

[14] *Id.* at page 1592.

[15] *Id.* at page 1594.

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

High School District (current claimant) did not plead section 48980. Although the Commission already made findings on section 48980 and therefore does not have jurisdiction over that statute, the *Annual Parent Notification* test claim impacts findings in this claim on section 60850, subdivisions (e)(1) and (f)(1) regarding parental notification, as discussed below.

California's other statewide student-testing requirement is the Standardized Testing and Reporting (STAR) program. On August 24, 2000, the Commission found the STAR statutes and regulations[17] to be partially reimbursable (97-TC-23).

Claimant's Position

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

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

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

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

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

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

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

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

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

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

In March 2003, claimant amended the test claim to add California Code of Regulations, title 5, sections 1200 – 1225. These regulations address HSEE-related topics, including definitions of terms, pupil identification, documentation, pupil

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

information, data for analysis, notice, HSEE district coordinator and test site coordinator, test security, test site delivery, timing/scheduling, allowable accommodations for pupils with disabilities or English learners, requests for accommodations, use of modifications, independent work, invalidation of test scores, cheating, and apportionment. As stated above, this analysis only concerns the HSEE regulations that were operative as of March 2003 when claimant amended the test claim.

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

State Agency Position

In its April 2001 comments[18] on the test claim, DOF states that no provisions are reimbursable because they are either voluntary (in the case of the first field test) or already funded in the budget. According to DOF, test administration, data collection and training staff are already budgeted. Test administration would not be reimbursable since districts already receive a per pupil funding rate for up to 180 days (or its equivalent minutes) of instruction and HSEE administration falls within the time allotted for regular instruction. DOF also states that section 60853, subdivision (b) is merely a statement of legislative intent. This section concerns school district restructuring of academic offerings to pupils who have not demonstrated skills necessary to succeed on the HSEE.

DOF's assertions did not include support by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so."[19] DOF's comments are not relied on by staff, which reaches its own conclusions based on evidence in the record.

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

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[20] recognizes the state constitutional restrictions on the powers of local government to

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

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

[20] Article XIII B, section 6 provides:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates

tax and spend.[21] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[22] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[23] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[24] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[25] Finally, the

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> requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

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

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

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

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

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

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

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

newly required activity or increased level of service must impose costs mandated by the state.[26]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[27] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[28]

This test claim presents the following issues:

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

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

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

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

Duties of the Superintendent of Public Instruction (Ed. Code, § 60850, subds. (a), (b), (d), (e)(2), (e)(3), (e)(4) & (h).): Subdivision (a) of this section requires the SPI to develop the HSEE in accordance with statewide content standards adopted by the State Board of Education (SBE). Subdivision (b) requires the SPI, with the approval of the SBE, to establish a HSEE Standards Panel to assist in the design and composition of the HSEE and to ensure it is aligned with statewide content standards. Subdivision (d) requires the SPI to submit the HSEE to the Statewide Pupil Assessment Review Panel to review the exam. Subdivision (e)(2) requires that the HSEE comply with federal anti-discrimination statutes as mentioned above in the background. Subdivision (e)(3) concerns the validity for the HSEE, which is the SPI's responsibility. Subdivision (e)(4) requires the HSEE to "be scored as a criterion referenced examination." Scoring appears to be the publisher's function based on section 1210, subdivision (b) of the HSEE regulations that requires

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

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

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

returning test materials "in the manner ...required by the publisher." DOF also commented that the publisher scores the HSEE. Subdivision (h) states that the chapter does not prohibit a district from requiring pupils to pass additional exit examinations approved by the district. Because these provisions do not mandate a school district to perform an activity, they are not subject to article XIII B, section 6.

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

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

DOF commented that three field tests were scheduled, the first during fall 2000. DOF states that the CDE randomly selected 200 high schools to participate, but participation was voluntary and schools were given the option to refuse to administer the field test. According to DOF, the second and third field tests were incorporated in the March and May 2001 administrations of the HSEE as part of the actual exam, which is covered by the funds in the budget. DOF argues that to the extent that schools voluntarily participate in field-testing, doing so is not a mandated cost.

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

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

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

HSEE results (Ed. Code, § 60851, subd. (d).): Section 60851, subdivision (d),[29] states:

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

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

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

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

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

Interpretation of statutes, however, is a question of law.[30] Staff cannot rely on claimant's factual assertions in interpreting the test claim statute. Moreover, the "determination whether the statutes...at issue establish a mandate under section 6 is a question of law."[31] The test claim statutes and regulations are silent on the issue of who provides the HSEE results, as is the legislative history[32] of the test claim statute.

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

Adult students (title 5 regulations): Many of the title 5 regulations apply expressly to adult students as well as high school pupils.[33] Section 1200, subdivision (f) defines an "Eligible adult student" as:

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

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

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

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

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

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

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

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

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

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

> **It is the intent** of the Legislature that a school district **consider** restructuring its academic offerings reducing the electives available to any pupil who has not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year. [Emphasis added.]

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

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

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

Staff finds that section 60853, subdivision (b) does not require meetings to discuss restructuring academic offerings to pupils who lack skills to pass the HSEE. The

language of the statute is plainly permissive: "It is the intent of the Legislature that a school district ***consider*** restructuring its academic offerings..." (emphasis added). If the Legislature had intended to require restructuring academic offerings, it could have used mandatory language to do so (e.g., school districts shall restructure...).[34] Stating intent that school districts "consider" restructuring academic offerings does not make the restructuring activity mandatory. Therefore, based on the plain language of section 60853, subdivision (b), staff finds that restructuring academic offerings, or meeting to restructure academic offerings for pupils who lack the skills to pass the HSEE, is not mandated, and thus not subject to article XIII B, section 6.

Similarly, subdivision (c) states that school districts "***should*** prepare students to succeed on the exit examination," and "...districts ***are encouraged to*** use existing resources to ensure that all pupils succeed." [Emphasis added.] Again, mandatory language was not used. "'Should' generally denotes discretion and should not be construed as 'shall.'"[35] There is no compulsion to spend revenue in subdivisions (b) and (c), which is necessary for finding a mandate.[36] Rather, these activities are discretionary, and therefore are not state mandates.[37]

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

Test Proctors (Cal. Code Regs., tit. 5, § 1200, subd. (h).): This section defines a test proctor as "an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the [HSEE]." (Cal. Code Regs., tit. 5, § 1200, subd. (h).) However, there is no requirement for school districts to use proctors for administering the HSEE.[38] Therefore, staff finds that using proctors is discretionary and therefore not an activity mandated by the state.

Permissive accommodations (Cal. Code Regs., tit. 5, §§ 1217, subd. (d), 1218, 1219 & 1219.5.): Section 1217, subdivision (d) authorizes a school district to request an accommodation from the CDE pursuant to section 1218 if the pupils individualized education program (IEP) team or 504 plan team proposes an accommodation for use on the HSEE not included in subdivision (b) of section 1217. Section 1218 authorizes the school district to request accommodations from CDE not included in section 1217, subdivision (b). Section 1218 also specifies the content for the request. Section 1219 requires the district to ensure that all test responses are the

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

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

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

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

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

independent work of the pupil, and prohibits assistance to pupils in determining how the pupil will respond to each question, or leading the pupil to a response. Section 1219 prohibits school personnel from assisting pupils rather than mandating an activity.[39] Section 1219.5 provides that the pupil's scores will be invalidated if a district allows a pupil to take the HSEE using one or more accommodations determined by the CDE to fundamentally alter what the test measures.[40] Because these sections authorize but do not require[41] (or in the case of sections 1219 and 1219.5, merely prohibit) school district activities, staff finds that they are not subject to article XIII B, section 6.

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

> The examination shall be offered to individuals with exceptional needs, as defined in Section 56026,[42] in accordance with paragraph (17) of subsection (a) of Section 1412 of Title 20 of the United States Code and Section 794 and following of Title 29 of the United States Code. Individuals with exceptional needs shall be administered the examination with appropriate accommodations, where necessary.

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

As stated above, the court in *Hayes* stated that the federal Education of the Handicapped Act is a federal mandate. Section 60850, subdivision (g) merely implements the IDEA (an amendment/successor to the federal Education of the Handicapped Act), and IDEA's regulations[43] in administering the HSEE. Therefore, staff finds that section 60850, subdivision (g) is not a state mandate subject to article

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

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

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

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

[43] 34 C.F.R. section 300.138 provides, "The State must have on file with the Secretary [of Education] information to demonstrate that-- (a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary..."

XIII B, section 6, because it was inserted into the HSEE legislation to implement a federal law or regulation.[44]

Similarly, section 1216 of the HSEE regulations states,

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

As with section 60850 above, section 1216 merely implements a federal law (IDEA). Therefore, staff finds that section 1216 is also not a state mandate subject to Article XIII B, section 6.[45]

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

> Where necessary to access the test, pupils ...with disabilities shall take the [HSEE] with those accommodations that are necessary and appropriate to address the pupil's... identified disability(ies) and that have been approved by their individualized education program [IEP] teams or 504 plan teams,[46] including but not limited to those accommodations that the pupil...has regularly used during instruction and classroom assessments, provided that such accommodations do not fundamentally alter what the test measures. Approved accommodations for the [HSEE] must be reflected in the pupil's ...[IEP] or 504 plan.

Subdivision (b) of section 1217 lists accommodations that do not fundamentally alter what the test measures,[47] and subdivision (c) lists accommodations that would fundamentally alter what the test measures.[48]

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

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

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

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

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

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

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

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

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

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." As discussed above, this means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[49] Only one of these findings is necessary to trigger article XIII B, section 6.[50]

The test claim legislation consists of educational testing as a means to measure pupil achievement and school accountability. These activities are within the purview of public education, a program that carries out a governmental function of providing a service to the public.[51] Moreover, the test claim legislation imposes unique requirements on school districts that do not apply generally to all residents and entities of the state.

Therefore, the test claim legislation is a program that carries out the governmental function of educational testing, and a law which, to implement state policy, imposes unique requirements on school districts and does not apply generally to all residents

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

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

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

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

and entities in the state. As such, staff finds that the test claim legislation constitutes a program within the meaning of article XIII B, section 6.

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

Article XIII B, section 6 of the California Constitution states, "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds." To determine if the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before the enactment of the test claim legislation.[52]

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

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

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

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

> The Commission determined that Education Code section 48980, subdivisions (e)... resulted in costs mandated by the state by requiring school districts to provide to parents the following:
> a. Notice that pupils will be required to pass a high school exit examination as a condition of graduation. (Ed. Code, § 48980, subd. (e).)[53]

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

In its February 2004 comments, claimant argues that the APN parameters and guidelines require annual notification, but do not apply to transfer students. Claimant

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

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

points out that section 48981 requires the notice "be sent at the time of registration for the first semester or quarter of the regular school term" but that neither section 48980 nor 48981 require notifications for transfer students.

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

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

Prior law did not require maintaining documentation of HSEE notice to parents.[54] Neither claimant nor DOF commented on maintaining documentation of notice.

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

Determining English language skills (Cal. Code Regs., tit. 5, § 1217.5.): This regulation[55] states: "English learners must read and pass the [HSEE] in English. School districts must evaluate pupils to determine if they possess sufficient English

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[54] Education Code section 49062. California Code of Regulations, title 5, section 432 requires retention of various kinds of pupil records, including "Mandatory Permanent Pupil Records," "Mandatory Interim Pupil Records" and "Permitted Records," each of which is defined to include specified data. Section 437 of the title 5 regulations provides for retention and destruction. However, none of these include the HSEE parental notification. It appears that Mandatory Interim Records (that includes parental prohibitions and authorizations of pupil participation) most closely resembles the HSEE notification. According to section 437, subdivision (c), Mandatory Interim Records, unless forwarded to another district, are "adjudged to be disposable when the student leaves the district or when their usefulness ceases." However, because the length of maintenance for HSEE notification records is specified in neither the statutes nor the regulations, the issue is not addressed in this analysis.

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

language skills at the time of the [HSEE] to be assessed with the test."[56] If not, districts may provide additional time as an accommodation, in addition to instruction pursuant to Education Code section 60852.

Prior law, enacted in 1978, required that pupils of limited English proficiency be assessed to determine their primary language proficiency.[57] These provisions were sunset in 1987.[58] Education Code section 313 requires annual assessments of English-learner pupils' English skills, but not until the 2000-2001 school year,[59] so it does not predate the HSEE legislation.

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

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

Prior law required an English assessment on request, and passage of the English language proficiency assessment to receive a high school diploma. Passage of this assessment for a diploma merely required assigning a pass/fail grade or score. Section 1217.5, on the other hand, also requires assigning a grade or score, and also expressly requires determining whether the pupil would take the HSEE based on the evaluation.

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

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

> Commencing with the 2003-04 school year[60] and each school year thereafter, each pupil completing grade 12 shall successfully pass the exit examination as

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

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

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

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

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

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

Subdivision (b) originally provided:

> A pupil may take the high school exit examination in grade 9 beginning in the 2000-01 school year.[61] Each pupil shall take the high school exit examination in grade 10 beginning in the 2001-02 school year and may take the examination during each subsequent administration, until each section of the examination has been passed.

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

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

DOF comments that these requirements would not be reimbursable since districts already receive a per pupil funding rate for up to 180 days (or equivalent minutes) of instruction and HSEE administration falls within the time allotted for regular instruction. DOF's comments and claimant's rebuttal regarding adequacy of funding is discussed below under issue 3.

Prior law did not require administration of the HSEE. Since a certificated employee (acting as a test administrator,[62] or potentially as test site coordinator,[63] or district coordinator[64] or in another capacity) administers the HSEE during normal classroom hours, the question arises as to whether a teacher's time in doing so is reimbursable.

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

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

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

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

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

Preexisting law states that pupils are not to be enrolled for less than the minimum school day required by law.[65] Minimum school day statutes begin in section 46100, which requires school districts to fix the length of the school day subject to state law. Since before 1959, the state has required public schools to provide education for a minimum of 175 days in a fiscal year.[66] The state has also mandated a minimum number of instructional minutes each school day, which is 240 for grades 4 through 12, exclusive of recesses and lunch.[67] The minimum school days per year and the minimum number of instructional minutes per day did not change as a result of the HSEE statutes or regulations.

During the instructional minutes, school districts are required to teach certain courses, and are required to conform the educational program to state standards.[68] Education Code section 51220 describes the required courses for grades 7 through 12 to include English and Math, among others.

Instructional preparation time is counted as part of the teacher full-time equivalent.[69] A "full-time" teaching position is defined as a position for not less than the minimum school day.[70] School districts may, but are not required to have teachers work longer per school day than the minimum number of minutes.[71] In addition, if a school district compensates a teacher for work that is not part of the teacher's contracted instructional day duties, the same compensation is required to be paid to all teachers that perform like work with comparable responsibilities.[72] Education Code section 45023.5 states that "[n]othing in this section shall be construed as requiring a district to compensate certificated employees for work assignments which are not part of the contracted instructional day duties simply because other employees of the district

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[65] Education Code section 48200.

[66] Education Code section 41420.

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

[68] Education Code section 51041.

[69] Section 41401, subdivision (d).

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

[71] Education Code section 45024.

[72] Education Code section 45023.5.

receive compensation for work assignments which involve different types of service."[73]

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

In a case about adding a domestic violence training course for public safety officers, the court held that it is not a mandate when the test claim legislation directs "local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[74] Similarly, the HSEE legislation merely reallocates instructional time to include administration of the HSEE.

Therefore, based on the plain language of the Education Code, administration of the HSEE is a new activity only if performed by a non-teacher certificated employee, such as an employee holding a service credential.[75] Thus, staff finds that HSEE administration on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, constitutes a new program or higher level of service. Staff also finds that administration of the HSEE on SPI-designated dates to pupils in grade 9 in only the 2000-2001 school year who wish to take the HSEE is also a new program or higher level of service.[76] "Administration" does not include teacher time, and is limited to the activities specified in the title 5 regulations outlined below.

Training: According to section 1200, subdivision (g), test administrators are to be trained in administration of the HSEE, and test site coordinators train the test administrators "as provided in the test publisher's manual."[77] Training is not listed in the regulations as a district coordinator duty, but section 1200 states that administrators are to be trained by either the test site or district coordinators. Therefore, section 1200 gives district coordinators the flexibility to train.

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

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

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

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

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

As to HSEE training generally, where a statute referring to one subject contains a provision, omitting the provision from a similar statute concerning a related subject is significant to show that a different intention existed.[78] Applying this rule, the test claim legislation provisions that do not mention training are significant to show that no training requirement was intended to apply.

Therefore, staff finds that training a test administrator either by a test site or (based on § 1200, subd. (g)) district coordinator as provided in the test publisher's manual[79] is a new program or higher level of service, except that a teacher's time is not reimbursed.

Additional time accommodation: Section 1215 allows pupils to have additional time to complete the HSEE within the test security limits provided in section 1211 (discussed below).[80] This accommodation applies to all pupils, not only those with special needs. Prior law did not allocate additional time for taking the HSEE.

Staff finds that a teacher's additional time to administer the HSEE during normal classroom hours is not a new program or higher level of service. As discussed above under Teacher time, the state has not mandated an increased level of service to administer the HSEE outside the normal school day, which consists of 240 instructional minutes for grades 4 through 12, excluding recess and lunch.[81] State law does not mandate school districts to require teachers to work beyond the minimum school day.

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

Therefore, as discussed above, staff finds that section 1215 is a new program or higher level of service only if additional time is not specified in the pupil's IEP, and only if the test is administered by a non-teacher certificated employee, such as an employee holding a service credential.[82]

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

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

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

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

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

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

parameters and guidelines phase under "test administration" if the Commission approves this test claim.

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

Grade 10 administration: Section 1204[83] requires districts to offer the exam in grade 10 only at the spring administration. This regulation merely specifies the timing of the HSEE for 10th graders, so staff finds that section 1204 does not constitute a new program or higher level of service.

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

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

Preexisting law classifies schools records into three categories: Mandatory Permanent Public Records, Mandatory Interim Pupil Records, and Permitted Records. Under Mandatory Interim Pupil Records, schools are required to keep "results of standardized tests administered within the preceding three years."[84] Under Permitted Records, schools are authorized to keep "standardized test results older than three years."[85]

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

> A specific statutory provision relating to a particular subject, rather than a general statutory provision, will govern in respect to that subject, although the

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

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

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

latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.[86]

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

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

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

(1) responding to inquiries of the publisher;

(2) determining district and school HSEE test material needs;

(3) overseeing acquisition and distribution of the HSEE;

(4) maintaining security over the HSEE using the procedures in section 1211 (discussed below);

(5) overseeing administration of the HSEE;[87]

(6) overseeing collection and return of test material and test data to the publisher;

(7) assisting the publisher in resolving discrepancies in the test information and materials;

(8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE;

(9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests;

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

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

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

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

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

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

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

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

(1) determining site examination and test material needs;

(2) arranging for test administration at the site;

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

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

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

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

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

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

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

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

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

(12) Subdivision (b)(12) provides: Within three working days of completion of site testing, the principal[88] and the [HSEE] test site coordinator shall certify to the [HSEE] district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the [HSEE] in the manner and as otherwise required by the publisher.

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

Test delivery: Section 1212 requires school districts to deliver the booklets for the HSEE to the school test site no more than two working days before the test is to be administered.[89] Prior law did not require HSEE booklet delivery, nor specify its timing, so staff finds that section 1212 constitutes a new program or higher level of service.

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

- training a test administrator either by a test site or district coordinator (§§ 1200, 1210);
- accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
- maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the names of each pupil who took each section, the grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);

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

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

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

- maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);
- designating by the district superintendent, on or before July 1 of each year, a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- designating annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210);
- delivering HSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212).

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

Test security/cheating (Cal. Code Regs., tit. 5, §§ 1211 & 1220.): Section 1211 requires the HSEE test site coordinators to ensure that strict supervision is maintained over each pupil taking the HSEE while in the testing room and during breaks. Subdivision (b) of section 1211 states that access to the HSEE materials is limited to pupils taking the exam and employees responsible for administration of the exam.[90]

Subdivision (c) requires all HSEE district and test site coordinators to sign the HSEE Test Security Agreement set forth in subdivision (d). The Agreement set forth in subdivision (d) requires the coordinator to take necessary precautions to safeguard all tests and test materials by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who will be required to sign the HSEE Test Security Affidavit (this is set forth in subd. (g), and is separate from the Agreement). The Agreement further requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. Subdivision (e) requires HSEE test site coordinators to deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. Subdivision (f) requires persons with access to the exam (including test site coordinators, test administrators, and test proctors)[91] to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit. Subdivision (g) lists the content of the HSEE Test

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

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

Security Affidavit,[92] which prohibits the following: divulging the test contents, copying any part of the test, permitting pupils to remove test materials from the test room, interfering with the independent work of any pupil taking the exam, and compromising the security of the test by any means, including those listed. The Affidavit requires keeping the test secure until it is distributed to pupils, and limiting examinee access to the test materials to the actual testing periods.

Subdivision (h) states that all HSEE district and test site coordinators are responsible for inventory control and requires use of appropriate inventory control forms to monitor and track test inventory. Subdivision (i) states that the security of the test materials delivered to the district is the sole responsibility of the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. Subdivision (j) states that once materials have been delivered to the district, secure transportation within the district is the responsibility of the district.[93,94]

Subdivision (a) of section 1220[95] of the title 5 regulations requires having the HSEE marked "invalid" and not scoring it for any pupil who is found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE. Subdivision (b) requires that the district notify each eligible pupil before administration of the HSEE of the consequences of cheating in subdivision (a).

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

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

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

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

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

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

Supplemental instruction (Ed. Code, §§ 60851, subd. (e) & 60853, subd. (a).): These sections,[96] as added by the test claim legislation, provide in pertinent part:

> Supplemental instruction shall be provided to any pupil who does not demonstrate sufficient progress toward passing the high school exit examination. To the extent that school districts have aligned their curriculum

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

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

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

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

> In order to prepare pupils to succeed on the exit examination, a school district shall use ***regularly available resources and any available supplemental remedial resources***, including, but not limited to, funds available for programs established by Chapter 320 of the Statutes of 1998,[97] Chapter 811 of the Statutes of 1997,[98] Chapter 743 of the Statutes of 1998,[99] and funds available for other similar supplemental remedial programs. [Emphasis added.]

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

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

In *County of Los Angeles v. Commission on State Mandates,*[100] a case about adding a training course for public safety officers, the court held that the test claim statute had "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[101] Similarly, here the Legislature has required districts to reallocate existing, identified,

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

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

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

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

[101] *Ibid.*

supplemental or remedial instruction resources to prepare pupils to succeed on the HSEE.

Therefore, staff finds that supplemental instruction, as set forth in Education Code, sections 60851, subdivision (e), and 60853, subdivision (a), as added by the test claim statute, is not a new program or higher level of service.[102]

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

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

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

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

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

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

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

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

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

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

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

Section 1225, subdivision (a) requires each school district to report to the CDE the number of examinations for each test cycle.[103] Subdivision (b) requires the district superintendent to certify the accuracy of the information submitted to CDE, and specifies that the report be filed with the SPI within 10 working days of completion of each test cycle in the school district. Prior law did not require districts to report the number of examinations or to certify the accuracy of information submitted to CDE. Therefore, staff finds that section 1225 constitutes a new program or higher level of service.

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

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

Issue 2 Summary

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

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

- maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);
- designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher (§ 1209); and
- designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210).
- Also, the HSEE district coordinator's duties[104] listed in section 1209 and the HSEE test site coordinator's duties[105] listed in section 1210

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

(except for a teacher's time in administering the HSEE during the school day); and

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

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

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

requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211, subd. (d));

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

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

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

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

In order for the activities listed above to impose a reimbursable, state mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[106] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

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

Claimant submitted a declaration in support of the contention that the test claim legislation results in increased costs for school districts. The Superintendent of the Trinity Union High School District declared on January 24, 2001, that the Superintendent is informed and believes that prior to enactment of the test claim legislation, the Trinity Union High School District was not required to engage in the test claim activities. The claimant estimated it has incurred, or will incur, costs significantly in excess of $200.[107]

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

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

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

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

state government or programs or services which may be implemented at the option of the state, local agency, or school district.

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

Even though NCLB requires annual assessments in math, reading, and by 2007-08, science (20 U.S.C. § 6311 (b)(3))(A)), and assessments of English proficiency (20 U.S.C. § 6311 (b)(7)), they are not costs mandated by the federal government because the HSEE statute required those activities first and not to implement NCLB.

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

Furthermore, neither NCLB nor IASA constitute costs mandated by the federal government because their applicable requirements are merely conditions on federal funding that neither states nor school districts are required to accept. California is not required to participate in the federal grant programs of NCLB (summarized above under background) or IASA (former 20 U.S.C. § 6311 (a)(1)). Therefore, even though an administration of the HSEE is used to comply with NCLB's assessment programs, such as calculating the Academic Performance Index for state accountability purposes and Adequate Yearly Progress,[108] NCLB is not a federal mandate.

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

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

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

> [t]he statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or **includes additional revenue** that was specifically intended

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

to fund the costs of the state mandate **in an amount sufficient** to fund the cost of the state mandate. [Emphasis added.]

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

> Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), and (c). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.[109]

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

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

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

The state budgets for the past three years also state that the SBE shall annually establish the amount of funding apportioned to districts, and that the amount per test shall not be valid without the approval of DOF.[110]

DOF argues that the activities in the test claim are fully funded in the budget. DOF's assertions, as stated above, are not supported by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so."[111] Staff relies on the law and the record as presented.

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

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

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

Claimant refutes DOF's assertion. The CDE issued the California High School Exit Examination Apportionment Forms[112] to district and county superintendents, stating that each school district will receive $3 per pupil tested (not per subject tested) regardless of whether the pupil took one or both portions of the HSEE. Claimant argues that this amount is insufficient to cover the costs of test administration.

Supporting claimant's position is a report analyzing the 1999-2000 state budget in which the Legislative Analyst's Office stated that other states that have implemented high school exit exams incur costs ranging from $5 to $20 per student each time the exam is administered.[113] The record, however, is silent as to how the HSEE otherwise compares with other states' high school exit examinations, and other states' eligible costs.

The SBE apportions $3 per test administration, which is approved by DOF.[114] There is a rebuttable presumption that in doing so, both the SBE and DOF officially perform their duties,[115] and do so correctly.[116] Therefore, the claimant must rebut both presumptions by showing the nonexistence of the presumed fact:[117] the sufficiency of HSEE funding apportioned to school districts.

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

The first declaration, from the Calistoga Joint Unified School District, states it will incur $1,735 performing the activities in Fiscal Year (FY) 2003-2004, but its total

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

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

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

[115] Evidence Code section 664.

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

[117] Evidence Code section 606.

"appropriation" will be $135.[118] Denair Unified School District's declaration states $2,954 costs for FY 2003-2004, and a total appropriation of $351 during the same period.[119] Similarly, the Grant Joint Union High School District declared $18,511.27 costs for FY 2002-2003, but $8,028 in appropriations.[120] The Ripon Unified School District declared $3,286 in costs for FY 2003-2004, and $648 in appropriations.[121] The Riverdale Joint Unified School District declared $2,997 in costs for FY 2002-2003, versus $930 in appropriations.[122] And the Sierra Unified School District declared $ 3,390 in costs, in contrast to $648 in appropriations.[123]

The Commission must base its findings on substantial evidence in the record.[124]

> ...[S]ubstantial evidence has been defined in two ways: first, as evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[125]

The Commission's finding must be supported by

> ...all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence."[126]

Given that the claimant's six declarations show that school districts incur more than $1,000 in costs in excess of their apportionments, staff finds that claimant has presented substantial evidence to successfully rebut the presumption of the

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

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

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

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

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

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

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

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

[126] *Ibid.*

sufficiency of the $3 appropriation. No state agency has presented evidence to demonstrate the sufficiency of the appropriation or to rebut claimant's evidence.

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

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

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

Conclusion

Staff finds that the test claim legislation imposes a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for school districts to perform the following activities:

- **Adequate notice:** notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the HSEE. The notification shall include, at a minimum, the date of the HSEE, the requirements for passing the HSEE, and the consequences of not passing the HSEE, and that passing the HSEE is a condition of graduation (Ed. Code, § 60850, subds. (e)(1) & (f)(1).);
- **Documentation of adequate notice:** maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE (Cal. Code Regs., tit. 5, § 1208.);
- **Determining English language skills:** determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE (§ 1217.5);
- **HSEE administration:** administration of the HSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on SPI-designated dates to pupils in grade 9 only in the 2000-2001 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a mandate. Administration is limited to the following activities specified in the regulations:
    - training a test administrator either by a test site or district coordinator as provided in the test publisher's manual. (§§ 1200, subd. (g) & 1210, subd. (b)(3));

- allowing pupils to have additional time to complete the HSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's IEP, and only if this activity is performed by a non-teacher certificated employee, such as an employee holding a service credential. (§ 1215);
- accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
- maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);
- maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);
- designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher (§ 1209); and
- designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210).
- Also, the HSEE district coordinator's duties[127] listed in section 1209 and the HSEE test site coordinator's duties[128] listed in section 1210

[127] These duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of

(except for a teacher's time in administering the HSEE during the school day); and

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

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

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

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

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

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

Recommendation

Staff recommends that the Commission partially approve the test claim for the activities listed above.

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EXHIBIT A

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
(916) 323-3562

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COMMISSION ON STATE MANDATES

TEST CLAIM FORM

TEST CLAIM NUMBER: CSM 00-TC-06

LOCAL AGENCY OR SCHOOL DISTRICT SUBMITTING CLAIM

Trinity Union High School District

CONTACT PERSON — **TELEPHONE NO.**

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REPRESENTATIVE ORGANIZATION TO BE NOTIFIED

Mandated Cost Systems, Inc.
Attn.: Steve Smith, President
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Sacramento, California 95825

THIS TEST CLAIM ALLEGES THE EXISTENCE OF A REIMBURSABLE STATE MANDATED PROGRAM WITHIN THE MEANING OF SECTION 17514 OF THE GOVERNMENT CODE AND SECTION 6, ARTICLE XIII B OF THE CALIFORNIA CONSTITUTION. THIS TEST CLAIM IS FILED PURSUANT TO SECTION 17551(A) OF THE GOVERNMENT CODE.

IDENTIFY SPECIFIC SECTION(S) OF THE CHAPTERED BILL OR EXECUTIVE ORDER ALLEGED TO CONTAIN A MANDATE, INCLUDING THE PARTICULAR STATUTORY CODE SECTION(S) WITHIN THE CHAPTERED BILL, IF APPLICABLE.

Ch. 1/99 (SB 2X)
Ch. 135/99 (AB 2539)

Education Code §§ 60850, 60851, 60853, and 60855

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

NAME AND TITLE OF AUTHORIZED REPRESENTATIVE — **TELEPHONE NO.**

Paul C. Minney, Attorney — (925) 746-7660

SIGNATURE OF AUTHORIZED REPRESENTATIVE — **DATE**

Paul C. Minney

January 25, 2001

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Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant,
Trinity Union High School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity High School District	CSM No. _____ Statutes of 1999, Chapter 1 (SB 2X) Statutes of 1999, Chapter 135 (AB 2539) Education Code Sections 60850, 60851, 60853, and 60855 *High School Exit Examination*

High School Exit Examination

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TEST CLAIM EXECUTIVE SUMMARY

SUMMARY OF THE TEST CLAIM LEGISLATION

Statutes of 1999, Chapter 1, enacted on March 29, 1999 and effective July 25, 2000 and Statutes of 1999, Chapter 135, enacted on July 19, 2000 and operative on January 1, 2001 (the test claim legislation) added and amendment portions of the Education Code.[1] Among other things, the test claim legislation requires: (1) The Superintendent of Public Instruction and the State Board of Education to develop the high school exit examination (HSEE); (2) The HSEE to be field-tested; (3) School districts, beginning with the 2001-02 school year, to offer the HSEE to all pupils in grade 10; (4) School districts to offer the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction; (5) School districts to provide results of the HSEE to each pupil within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration; (6) School districts to restructure its academic curriculums, reducing available electives to any pupil who has not demonstrated the skills necessary to pass the HSEE, so that the pupil can be provided supplemental instruction during the school year; and (7) school districts to provide information as required to the Superintendent of Public Instruction and independent evaluators.

OVERVIEW OF MANDATES LAW

For the Commission on State Mandates (Commission) to find that the test claim legislation imposes a reimbursable state mandated program, the legislation: (1) must be subject to article XIII B, section 6 of the California Constitution, or in other words, the legislation must

[1] Statutes of 1999, Chapter 135 was enacted for Code maintenance and only made minor technical amendments to Education Code section 60855.

impose a "program" upon local governmental entities; (2) the "program" must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service; and (3) the newly required program or increased level of service must be state mandated within the meaning of Government Code section 17514.

QUESTIONS PRESENTED

1. **Does the Test Claim Legislation Impose a "Program" Upon School Districts Within the Meaning of the Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the High School Exit Examination?**

   Short Answer: YES. The test claim legislation requires school districts to perform numerous activities associated with the administration of the high school exit examination. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Furthermore, the test claim legislation only applies to public schools and as such imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Therefore, these activities constitute a "program" within the meaning of article XIII B, section 6 of the California Constitution.

2. **Does the Test Claim Legislation Represent a "New Program" or a "Higher Level of Service" Within the Meaning of Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the High School Exit Examination?**

   Short Answer: YES. The test claim legislation activities are in excess of the requirements outlined in prior law, which required school districts to administer several standardized tests. Prior law did not require school districts to administer the high school exit examination. Therefore, the activities associated with administering the high school exit examination imposed upon school districts by the test claim legislation represents a

"new program" or "higher level of service" within the meaning of article XIII B, section 6 of the California Constitution.

3. **Does the Test Claim Legislation Impose "Costs Mandated by the State" Upon School Districts Within the Meaning of Government Code Section 17514?**

Short Answer: YES. None of the "exceptions" listed in Government Code section 17556 apply and state law was not enacted in response to any federal requirement. Therefore, the test claim legislation does impose costs mandated by the state upon school districts.

CONCLUSION

The following activities represent reimbursable state-mandated activities imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

A. Selected school districts must field test the high school exit examination (HSEE) according to the Superintendent of Public Instruction's directions; (Ed. Code, § 60850, subd. (c).)

B. Administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administration of any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed; (Ed. Code, § 60851, subd. (b).)

C. Administration of the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction; (Ed. Code, § 60851, subd. (c).)

D. Providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for the pupil to re-take that portion of the exam at the next administration; (Ed. Code, § 60851, subd. (d).)

E. Meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE; and (Ed. Code, § 60853, subd. (b).)

F. Provide information as requested by the Superintendent of Public Instruction and independent evaluators. (Ed. Code, § 60855.)

G. Training of school district staff regarding the administration of the HSEE;

H. Modification of school district policies and procedures to reflect the requirements outlined in the test claim legislation; and

I. Any additional activities identified as reimbursable during the Parameters and Guidelines phase.

TEST CLAIM ANALYSIS

ANALYSIS

Statutes of 1999, Chapter 1, enacted on March 29, 1999 and effective July 25, 2000 and Statutes of 1999, Chapter 135, enacted on July 19, 2000 and operative on January 1, 2001 (the test claim legislation) added and amended portions of the Education Code.[2] Among other things, the test claim legislation requires:

(1) The Superintendent of Public Instruction and the State Board of Education to develop the high school exit examination (HSEE);

(2) The HSEE to be field-tested;

(3) School districts, beginning with the 2001-02 school year, to offer the HSEE to all pupils in grade 10;

(4) School districts to offer the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction;

(5) School districts to provide results of the HSEE to each pupil within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration;

(6) School districts to restructure its academic curriculums, reducing available electives to any pupil who has not demonstrated the skills necessary to pass the HSEE, so that the pupil can be provided supplemental instruction during the school year; and

(7) School districts to provide information to the Superintendent of Public Instruction and independent evaluators as necessary.

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[2] Chapter 135, Statutes of 1999 was enacted for Code maintenance and only made minor technical amendments to Education Code section 60855.

In order for a statute or executive order, which is the subject of a test claim, to impose a reimbursable state mandated program, the language: (1) must impose a program upon local governmental entities; (2) the program must be new, thus constituting a "new program," or it must create an increased or "higher level of service" over the former required level of service; and (3) the newly required program or increased level of service must be state mandated.

The court has defined the term "program" to mean programs that carry out the governmental function of providing services to the public, or a law, which to implement a state policy, imposes unique requirements on local agencies or school districts that do not apply generally to all residents and entities in the state. To determine if a required program is "new" or imposes a "higher level of service," a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[3] To determine if the new program or higher level of service is state mandated, a review of state and federal statutes, regulations, and case law must be undertaken.[4]

1. Does the Test Claim Legislation Impose a "Program" Upon School Districts Within the Meaning of the Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the High School Exit Examination?

The test claim legislation added sections to the Education Code, which require school districts to perform the following activities:

A. Selected school districts must field test the high school exit examination (HSEE) according to the Superintendent of Public Instruction's directions; (Ed. Code, § 60850, subd. (c).)

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[3] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[4] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1594; Government Code sections 17513, 17556.

B. Administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administration of any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed; (Ed. Code, § 60851, subd. (b).)

C. Administration of the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction; (Ed. Code, § 60851, subd. (c).)

D. Providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for the pupil to re-take that portion of the exam at the next administration; (Ed. Code, § 60851, subd. (d).)

E. Meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE; and (Ed. Code, § 60853, subd. (b).)

F. Provide information as requested by the Superintendent of Public Instruction and independent evaluators. (Ed. Code, § 60855.)

The California Supreme Court in *County of Los Angeles v. State of California*, defined "program" as:

> "Programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[5]

[5] *County of Los Angeles, supra* (1987) 43 Cal.3d 46, 56.

The California Appellate Court in *Carmel Valley Fire Protection District v. State of California,* found the following regarding the *County of Los Angeles* "program" holding:

> "The [Supreme] Court concluded that the term 'program' has two alternative meanings: 'programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.' (Citation omitted.) *[O]nly one of these findings is necessary to trigger reimbursement.*"[6] (Emphasis added.)

The test claim legislation clearly passes both tests outlined by *County of Los Angeles* and reiterated in *Carmel Valley*. First, the test claim legislation requires school districts to administer the HSEE to public school students. Public education in California is a peculiarly governmental function administered by local agencies as a service to the public. Second, the test claim legislation only applies to public schools and as such imposes unique requirements upon school districts that do not apply generally to all residents and entities of the state. Therefore, administering the HSEE constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.[7]

2. Does the Test Claim Legislation Represent a "New Program" or a "Higher Level of Service" Within the Meaning of Article XIII B, Section 6 of the California Constitution by Requiring School Districts to Administer the High School Exit Examination?

To determine if a required program is "new" or imposes a "higher level of service," a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation.[8]

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

[7] *Long Beach Unified School Dist, supra* (1990) 225 Cal.App.3d 155, 172 (The court found that although numerous private schools exits, education in the state is considered a peculiarly governmental function and public education is administered by local agencies to provide a service to the public. Based on these findings, the court held that public education constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.)

[8] *Lucia Mar Unified School Dist, supra* (1988) 44 Cal.3d 830, 835 (The court found legislation that shifts activities from the state to a local entity represents a new program especially when the local entity was not required to perform

Prior Law: Administering Standardized Tests to Pupils

California has a long history of administering standardized examinations. The Standardized Testing and Reporting (STAR) test, the most recent addition to California's standardized testing requirements, has its roots in the 1959 Education Code. Since the 1950s, the Legislature has made numerous amendments to the Education Code related to standardized testing. In 1965, the Code required schools to administer fundamental skills tests to pupils in grades 1 and 2. Students in grades 2 through 8 are tested with the Stanford 9 in reading, written expression (language), spelling, and mathematics. Students in grades 9 through 11 are tested in reading, writing (language), mathematics, history-social science, and science. The questions for the STAR augmentation cover reading, writing, and mathematics in grades 2 through 11. The purpose of the STAR testing program is to help measure how well students are learning basic academic skills. As part of the STAR program, students are to be given additional test questions that match state-adopted content standards for reading, writing, and mathematics.

The Golden State Examination (GSE) Program was established in 1983 to offer rigorous examinations in key academic subjects to students in grades 7-12 and to recognize students who demonstrate outstanding achievement on each examination. The GSE was reauthorized in 1991, and reenacted in 1995. The GSE recognizes students who achieve high honors, honors, and recognition levels of achievement on each examination. Students who meet or surpass these levels are recognized as Golden State Scholars. All Golden State Scholars receive academic excellence awards from the state, and high honors and honors designees receive a gold insignia

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that activity at the time the legislation was enacted. The court concluded that under these circumstances the activity is "new" insofar as the local entity is concerned.)

on their diplomas. Notice of success on the GSE becomes part of a student's permanent transcript, signifying high achievement to colleges, universities, and employers.

The first Golden State Examinations, first-year algebra and geometry, were offered in 1987; examinations are also now offered in U.S. history, economics, biology, chemistry, second-year coordinated science, written composition, government/civics, reading/literature, high school mathematics, physics, and Spanish language. The examinations assess students' knowledge of these subjects and their application of that knowledge. Examinations include multiple-choice and written-response questions. The science examinations also include lab tasks.

Although prior law requires school districts to administer certain standardized tests, prior law did not require school districts to administer a standardized test such as the HSEE.

Current Requirements: The Test Claim Legislation[9]

The test claim legislation added and amended several sections of the Education Code making the administration of the HSEE a requirement. The following activities are new or impose a higher level of service when compared to prior law.

Test Claim Legislation Activity: Selected school districts must field test the high school exit examination (HSEE) according to the Superintendent of Public Instruction's directions. Education Code section 60850, subdivision (c), provides:

> "(c) The Superintendent of Public Instruction shall require that the examination be field tested before actual implementation to ensure that the examination is free from bias and that its content is valid and reliable."[10]

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[9] The State Board of Education has proposed regulations for the high school exit examination (attached as Exhibit D). The Board proposes to add sections 1200-1216 to Title 5, Chapter 2, Division 1 of the California Code of Regulations. These proposed regulations may include additional reimbursable activities not claimed in this test claim. The claimant will amend the test claim filing to include any additional activities upon adoption of the Board's regulations.

[10] Education Code section 60850 is attached as Exhibit C.

Although prior law requires school districts to administer several different standardized examinations, prior law did not require school districts to engage in field-testing of the HSEE. Therefore, the activities associated with field-testing the HSEE represent a new program imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administration of any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed. Education Code section 60851, subdivision (b), provides:

> "(b) A pupil may take the high school exit examination in grade 9 beginning in the 2000-01 school year. Each pupil shall take the high school exit examination in grade 10 beginning in the 2001-02 school year and may take the examination during each subsequent administration, until each section of the examination has been passed."[11]

Although prior law requires school districts to administer several different standardized examinations, prior law did not require school districts to administer the HSEE to pupils in grade 10 beginning in the 2001-02 school year and administer any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed. Therefore, the activities associated with administering the HSEE to pupils in grade 10 beginning in the 2001-02 school year represent a new program imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Administration of the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction. Education Code section 60851, subdivision (c), provides:

"(c) The exit examination shall be offered in each public school and state special school that provides instruction in grades 10, 11, or 12, on the dates designated by the Superintendent of Public Instruction. An exit examination may not be administered on any date other than those designated by the Superintendent of Public Instruction as examination days or makeup days."

Although prior law requires school districts to administer several different standardized examinations, prior law did not require school districts to administer the HSEE to pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction. Therefore, the activities associated with administering the HSEE to pupils in grade 10, 11, or 12 on the designated dates represent a new program imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for the pupil to re-take that portion of the exam at the next administration. Education Code section 60851, subdivision (d), provides:

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

Although prior law requires school districts to administer several different standardized examinations, prior law did not require school districts to provide HSEE results within eight weeks of administering the exam and in time for pupils that failed any portion of the exam to re-take that portion of the exam at the next administration. Therefore, the activities associated with

[11] Education Code section 60851 is attached as Exhibit C.

providing HSEE results represent a new program imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE. Education Code section 60853, subdivision (b), provides:

> "(b) It is the intent of the Legislature that a school district consider restructuring its academic offerings reducing the electives available to any pupil who has not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year."[12]

Although prior law requires school districts to administer several different standardized examinations, prior law did not require school districts to meet to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE. Subdivision (b) clearly provides that it is the Legislature's intent that school districts *consider* restructuring academic offerings to pupils not demonstrating sufficient competency on the HSEE. Therefore, school district staff must, at a minimum, meet to discuss whether modifications to course offerings should be made for those pupils. Therefore, the activities associated with meeting to discuss restructuring academic offerings to pupils not demonstrating the skills necessary to succeed on the HSEE represent a new program imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

Test Claim Legislation Activity: Provide information as requested by the Superintendent of Public Instruction and independent evaluators. Education Code section 60855 provides:

[12] Education Code section 60853 is attached as Exhibit C.

"(a) By January 15, 2000, the Superintendent of Public Instruction shall contract for a multiyear independent evaluation of the high school exit examination that is established pursuant to this chapter. The evaluation shall be based on information gathered in field testing and annual administrations of the examination. . . ."[13]

Some of the information that must be provided to the Superintendent of Public Instruction and/or the independent evaluator includes analysis of: (1) pupil performance; (2) the examination's effects on college attendance; and (3) whether the examination has differential effects on certain subgroups. In addition, evaluations must separately consider test results for a number of subgroups. Although prior law requires school districts to administer several different standardized examinations, prior law did not require school districts to provide information to the Superintendent of Public Instruction and independent evaluators on the HSEE results. Therefore, the activities associated with providing information to the Superintendent of Public Instruction and independent evaluators represent a new program imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution.

3. Does the Test Claim Legislation Impose "Costs Mandated by the State" Upon School Districts Within the Meaning of Government Code Section 17514?

None of the "exceptions" listed in Government Code section 17556 apply[14] and state law was not enacted in response to any federal requirement. Therefore, the test claim legislation does impose costs mandated by the state upon school districts.

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[13] Education Code section 60855 is attached as Exhibit C.

[14] Government Code section 17556 provides several exceptions to reimbursement. Specifically, section 17556 provides that the Commission shall not find costs mandated by the state if it concludes that the test claim legislation: (1) is issued in response to a specific request by a local governmental entity; (2) implements a court mandate; (3) implements federal law; (4) can be financed through a fee or assessment charged by a local governmental entity; (5) provides for offsetting savings that result in no net costs to local governmental entities or includes additional revenue specifically intended to fund the costs of the mandate in an amount sufficient to fund the mandate; (6) implements a ballot proposition; or (7) creates a new crime or infraction, eliminates a crime or infraction, or changed the penalty for a crime or infraction related to the enforcement of the crime or infraction.

CONCLUSION

The following activities represent reimbursable state-mandated activities imposed upon school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

A. Selected school districts must field test the high school exit examination (HSEE) according to the Superintendent of Public Instruction's directions; (Ed. Code, § 60850, subd. (c).)

B. Administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administration of any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed; (Ed. Code, § 60851, subd. (b).)

C. Administration of the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction; (Ed. Code, § 60851, subd. (c).)

D. Providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for the pupil to re-take that portion of the exam at the next administration; (Ed. Code, § 60851, subd. (d).)

E. Meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE; and (Ed. Code, § 60853, subd. (b).)

F. Provide information as requested by the Superintendent of Public Instruction and independent evaluators. (Ed. Code, § 60855.)

G. Training of school district staff regarding the administration of the HSEE;

H. Modification of school district policies and procedures to reflect the requirements outlined in the test claim legislation; and

I. Any additional activities identified as reimbursable during the Parameters and Guidelines phase.

AUTHORITY FOR THE TEST CLAIM

The Commission on State Mandates has the authority pursuant to Government Code Section 17551, subdivision (a), to hear and decide a claim by a local agency or school district that the local agency or school district is entitled to reimbursement by the state for costs mandated by the state as required by article XIII B, section 6 of the California Constitution. Trinity Union High School District is a "school district" as defined in Government Code section 17519. This test claim is filed pursuant to Title 2, California Code of Regulations, section 1183.

ESTIMATED COSTS RESULTING FROM THIS MANDATE

It is estimated that Trinity Union High School District will incur costs in excess of $200.00 to comply with the requirements outlined in the *High School Exit Examination* Test Claim.

APPROPRIATIONS

Any funds appropriated by the test claim legislation will be identified as offsetting savings against claimed costs at the Parameters and Guidelines phase.

CERTIFICATION

I certify by my signature below that the statements made in this document are true and correct of my knowledge, and as to all other matters, I believe them to be true and correct based on information or belief.

Executed on January 25, 2001 at Walnut Creek, California, by:

GIRARD & VINSON

Paul C. Minney

PAUL C. MINNEY, ESQ.
Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Trinity Union High
School District

AUTHORIZATION TO ACT AS REPRESENTATIVE FOR TRINITY UNION HIGH SCHOOL DISTRICT'S TEST CLAIM

HIGH SCHOOL EXIT EXAMINATION

I, Bob Lowden, hereby authorize Paul C. Minney (or designee) of the Law Office of Girard & Vinson to act as the representative and sole contact of Trinity Union High School District in this Test Claim. All correspondence and communications regarding this Test Claim should be forwarded to:

Paul C. Minney, Esq.
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1676 North California Boulevard, Suite 450
Walnut Creek, California, 94596
Telephone: (925) 746-7660
Facsimile: (925) 935-7995

Dated: January 24, 2001

BOB LOWDEN
Superintendent
Trinity Union High School District

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321 Victory Lane, Box 1227
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Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant,
Trinity Union High School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. _____ DECLARATION OF BOB LOWDEN *High School Exit Examination*

I, Bob Lowden, make the following declaration and statement. As Superintendent, I have knowledge of Trinity Union High School District's (claimant's) high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapter 1 and Statutes of 1999, Chapter 135, which require school districts to perform the

following activities:

1. Selected school districts must field test the high school exit examination (HSEE) according to the Superintendent of Public Instruction's directions; (Ed. Code, § 60850, subd. (c).)
2. Administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administration of any part of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination has been passed; (Ed. Code, § 60851, subd. (b).)
3. Administration of the HSEE to all pupils in grades 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction; (Ed. Code, § 60851, subd. (c).)
4. Providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for the pupil to re-take that portion of the exam at the next administration; (Ed. Code, § 60851, subd. (d).)
5. Meetings to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE; and (Ed. Code, § 60853, subd. (b).)
6. Provide information as requested by the Superintendent of Public Instruction and independent evaluators. (Ed. Code, § 60855.)

I am informed and believe that before the test claim legislation, there was no responsibility for the claimant to engage in the activities set forth above. It is estimated that the claimant will/has incurred significantly more than $200.00 to implement these new activities

mandated by the state for which the claimant has not been reimbursed by any federal, state, or local agency, and for which it cannot otherwise obtain reimbursement.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on January 24, 2001 in Weaverville, California.

BOB LOWDEN
Superintendent
Trinity Union High School District

Senate Bill No. 2

CHAPTER 1

An act to amend Sections 37252 and 48980 of, to add Chapter 8 (commencing with Section 60850) to Part 33 of, and to repeal Article 2.5 (commencing with Section 51215) of Chapter 2 of Part 28 of, the Education Code, relating to education accountability, and making an appropriation therefor.

[Approved by Governor March 29, 1999. Filed with Secretary of State March 29, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

SB 2, O'Connell. Education accountability: high school exit examination.

(1) Existing law requires the governing board of each school district maintaining any or all of grades 7 to 12, inclusive, to offer summer school instructional programs for pupils enrolled in those grades who were assessed as not meeting the district's adopted standards of proficiency in basic skills. Existing law requires the summer school programs also to be offered to pupils who were enrolled in grade 12 during the prior school year after the completion of grade 12, and upon the successful completion of the summer program, authorizes these pupils to be reassessed for purposes of meeting the district's standards of proficiency.

This bill would instead require these school districts to offer summer school instruction for pupils who do not demonstrate sufficient progress toward passing the exit examination required for high school graduation. The bill would delete the authorization for the reassessment of pupils who were enrolled in grade 12 during the prior school year and successfully completed the summer program after the completion of grade 12. The bill would provide that these provisions become operative on January 1, 2000.

(2) Existing law requires the governing board of each school district maintaining a junior or senior high school to adopt standards of proficiency in basic skills for pupils and requires the governing board of each school district maintaining grade 6 or 8, or the equivalent, to adopt standards of proficiency in basic skills for pupils attending these grades. These standards are required to be directly related to the district's instructional program and to include reading comprehension, writing, and computation skills, in the English language. Existing law requires the governing board of each school district to take appropriate steps to ensure that the progress towards proficiency in basic skills is assessed in the English language during the regular instructional program at least once during the 4th

through 6th grade, inclusive, once during the 7th through 9th grade, inclusive, and twice during the 10th through 11th grade, inclusive. Proficiency assessments are required to be used to determine whether pupils need additional assistance in basic skills and if so, the appropriate content and mode of any additional assistance. Existing law prohibits an English-speaking pupil or limited-English-proficient pupil from receiving a high school diploma unless he or she passes the English language proficiency assessment normally required for graduation. If a pupil does not demonstrate sufficient progress toward mastery of basic skills to meet prescribed standards upon exit from the 6th, 8th, or 12th grade, whichever is appropriate, existing law authorizes the principal to arrange a conference between the parent or guardian of the pupil and a certificated employee familiar with the pupil's progress to discuss the results of the individual pupil assessment and recommended actions to further the pupil's progress. Notices to pupils in grades 9 to 12, inclusive, are required to inform the parent or guardian that the pupil will not receive a high school diploma unless the prescribed standards are met. Instruction in basic skills is required to be provided for any pupil who does not demonstrate sufficient progress toward mastery of basic skills and continue until the pupil has been given numerous opportunities to achieve mastery. Existing law allows that instruction to be provided in summer school programs. Existing law prohibits a pupil who was enrolled in the 9th grade, or the equivalent thereof, from receiving a diploma of graduation from high school if he or she has not met the standards of proficiency in basic skills prescribed by the secondary school district governing board and the school district has developed and made available to the pupil remedial instruction programs in basic skills for at least 2 consecutive sessions.

This bill would make these provisions inoperative on July 31, 1999, and repeal the provisions on January 1, 2000.

(3) Existing law requires pupils to complete certain coursework as a condition to graduation from high school. Existing law, the Standardized Testing and Reporting Program, requires school districts, charter schools, and county offices of education to administer to each of its pupils in grades 2 to 11, inclusive, an achievement test.

This bill would require the Superintendent of Public Instruction, with a High School Exit Examination Standards Panel established by the Superintendent of Public Instruction and with the approval of the State Board of Education, to develop a high school exit examination in language arts and mathematics in accordance with the statewide academically rigorous content standards adopted by the State Board of Education. The bill would require the State Board of Education to adopt a high school exit examination that is aligned with statewide academically rigorous content standards. Commencing with the 2003–04 school year and each school year thereafter, the bill would

require each pupil completing grade 12 to successfully complete the exit examination as a condition of receiving a diploma of graduation, thereby imposing a state-mandated local program. The bill would require the State Board of Education, in consultation with the Superintendent of Public Instruction, to study the appropriateness of other criteria by which pupils may demonstrate their competency and receive a diploma.

This bill would impose a state-mandated local program by requiring that the exit examination be offered in each public school and state special school that provides instruction in grade 9, 10, 11, or 12 on the dates designated by the Superintendent of Public Instruction, requiring that the results of the examination be returned to each pupil taking the test within 8 weeks of the administration of the exit examination, and requiring provision of supplemental instruction to any pupil who does not demonstrate sufficient progress toward passing of the examination.

This bill would, notwithstanding any other provision of law, require a school district to use regularly available resources, general funds appropriated for after school programs, the Student Academic Partnership Program, funds appropriated to prevent social promotion, and funds for other similar supplemental remedial programs to prepare pupils to succeed on the exit examination. To the extent this would permit expenditure of existing funds for purposes not currently authorized, it would make an appropriation.

This bill would appropriate $2,000,000 from the Federal Trust Fund, from GOALS 2000 funds, to the Superintendent of Public Instruction for the purpose of developing the exit examination. The bill would also appropriate $250,000 from the General Fund to the Superintendent of Public Instruction to provide support services therefor.

(4) Existing law requires, at the beginning of the first semester or quarter of the regular school term, the governing board of each school district to notify the parent or guardian of its minor pupils regarding the right or responsibility of the parent or guardian under certain provisions of law.

This bill would additionally require that notice to include notice that, commencing in the 2003–04 school year, and each school year thereafter, each pupil completing the 12th grade will be required to successfully pass the high school exit examination, and would be required to include, at a minimum, the date of the examination, the requirements for passing the examination, and the consequences of not passing the examination and to inform parents and guardians that passing the examination is a condition of graduation, thereby imposing a state-mandated local program.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that

reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares both of the following:

(a) Local proficiency standards established pursuant to Section 51215 of the Education Code are generally set below a high school level and are not consistent with state adopted academic content standards.

(b) In order to significantly improve pupil achievement in high school and to ensure that pupils who graduate from high school can demonstrate grade level competency in reading, writing, and mathematics, the state must set higher standards for high school graduation.

SEC. 2. Section 37252 of the Education Code is amended to read:

37252. (a) The governing board of each district maintaining any or all of grades 7 to 12, inclusive, shall offer summer school instructional programs, using the amount computed pursuant to Section 42239, for pupils enrolled in grades 7 to 12, inclusive, who do not demonstrate sufficient progress toward passing the exit examination required for high school graduation pursuant to Chapter 8 (commencing with Section 60850) of Part 33. Sufficient progress shall be determined on the basis of either of the following:

(1) The results of the assessments administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 and the minimum levels of proficiency recommended by the State Board of Education pursuant to Section 60648.

(2) The pupils' grades and other indicators of academic achievement designated by the district.

(b) The summer school programs shall also be offered to pupils who were enrolled in grade 12 during the prior school year after the completion of grade 12.

(c) (1) For purposes of this section a pupil shall be considered to be enrolled in a grade immediately upon completion of the preceding grade.

(2) For purposes of this section a school district offering a year-round educational program may offer the summer school

instructional program authorized by this section during the intersessions of the year-round education program.

(3) For the purposes of this section, pupils who do not possess sufficient English language skills to be assessed as set forth in Sections 60850 and 60853, shall be considered pupils who do not demonstrate sufficient progress towards passing the exit examination required for high school graduation and shall receive supplemental instruction designed to assist the pupils succeed on the high school exit examination.

SEC. 3. Section 48980 of the Education Code is amended to read:

48980. (a) At the beginning of the first semester or quarter of the regular school term, the governing board of each school district shall notify the parent or guardian of its minor pupils regarding the right or responsibility of the parent or guardian under Sections 35291, 46014, 48205, 48207, 48208, 49403, 49423, 49451, 49472, 51240, and 51550 and Chapter 2.3 (commencing with Section 32255) of Part 19.

(b) The notification also shall advise the parent or guardian of the availability of individualized instruction as prescribed by Section 48206.3, and of the program prescribed by Article 9 (commencing with Section 49510) of Chapter 9.

(c) The notification shall also advise the parents and guardians of all pupils attending a school within the district of the schedule of minimum days and pupil-free staff development days, and if any minimum or pupil-free staff development days are scheduled thereafter, the governing board shall notify parents and guardians of the affected pupils as early as possible, but not later than one month before the scheduled minimum or pupil-free day.

(d) The notification also may advise the parent or guardian of the importance of investing for future college or university education for their children and of considering appropriate investment options including, but not limited to, United States Savings Bonds.

(e) Commencing with the 2000–01 school year, and each school year thereafter, the notification shall advise the parent or guardian of the pupil that, commencing with the 2003–04 school year, and each school year thereafter, each pupil completing 12th grade will be required to successfully pass the high school exit examination administered pursuant to Chapter 8 (commencing with Section 60850) of Part 33. The notification shall include, at a minimum, the date of the examination, the requirements for passing the examination, and shall inform the parents and guardians regarding the consequences of not passing the examination and shall inform parents and guardians that passing the examination is a condition of graduation.

(f) Each school district that elects to provide a fingerprinting program pursuant to Article 10 (commencing with Section 32390) shall inform parents or guardians of the program as specified in Section 32390.

(g) Until July 1, 1998, the notification shall also advise the parent or guardian of the availability of the employment-based school attendance options pursuant to subdivision (f) of Section 48204.

(h) The notification shall also include a copy of the district's written policy on sexual harassment established pursuant to Section 212.6, as it relates to pupils.

(i) Commencing July 1, 1998, the notification shall include a copy of the written policy of the school district adopted pursuant to Section 51870.5 regarding access by pupils to Internet and online sites.

(j) The notification shall advise the parent or guardian of all current statutory attendance options and local attendance options available in the school district. That notification shall include all options for meeting residency requirements for school attendance, programmatic options offered within the local attendance areas, and any special programmatic options available on both an interdistrict and intradistrict basis. That notification shall also include a description of all options, a description of the procedure for application for alternative attendance areas or programs, an application form from the district for requesting a change of attendance, and a description of the appeals process available, if any, for a parent or guardian denied a change of attendance. The notification shall also include an explanation of the current statutory attendance options including, but not limited to, those available under Section 35160.5, Chapter 5 (commencing with Section 46600) of Part 26, subdivision (f) of Section 48204, and Article 1.5 (commencing with Section 48209) of Chapter 2 of Part 27. The State Department of Education shall produce this portion of the notification and shall distribute it to all school districts.

(k) It is the intent of the Legislature that the governing board of each school district annually review the enrollment options available to the pupils within their districts and that the school districts strive to make available enrollment options that meet the diverse needs, potential, and interests of California's pupils.

(*l*) The notification shall advise the parent or guardian that no pupil may have his or her grade reduced or lose academic credit for any absence or absences excused pursuant to Section 48205 when missed assignments and tests that can reasonably be provided are satisfactorily completed within a reasonable period of time, and shall include the full text of Section 48205.

SEC. 4. Article 2.5 (commencing with Section 51215) of Chapter 2 of Part 28 of the Education Code shall become inoperative on July 31, 1999, and as of January 1, 2000, is repealed.

SEC. 5. Chapter 8 (commencing with Section 60850) is added to Part 33 of the Education Code, to read:

CHAPTER 8. HIGH SCHOOL EXIT EXAMINATION

60850. (a) The Superintendent of Public Instruction, with the approval of the State Board of Education, shall develop a high school exit examination in language arts and mathematics in accordance with the statewide academically rigorous content standards adopted by the State Board of Education pursuant to Section 60605. To facilitate the development of the examination, the superintendent shall review any existing high school subject matter examinations that are linked to, or can be aligned with, the statewide academically rigorous content standards for language arts and mathematics adopted by the State Board of Education. By October 1, 2000, the State Board of Education shall adopt a high school exit examination that is aligned with statewide academically rigorous content standards.

(b) The Superintendent of Public Instruction, with the approval of the State Board of Education, shall establish a High School Exit Examination Standards Panel to assist in the design and composition of the exit examination and to ensure that the examination is aligned with statewide academically rigorous content standards. Members of the panel shall include, but are not limited to, teachers, administrators, school board members, parents, and the general public. Members of the panel shall serve without compensation for a term of two years and shall be representative of the state's ethnic and cultural diversity and gender balance. The Superintendent shall also make the best effort to ensure representation of the state's diversity relative to urban, suburban, and rural areas. The State Department of Education shall provide staff to the panel.

(c) The Superintendent of Public Instruction shall require that the examination be field tested before actual implementation to ensure that the examination is free from bias and that its content is valid and reliable.

(d) Before the State Board of Education adopts the exit examination, the Superintendent of Public Instruction shall submit the examination to the Statewide Pupil Assessment Review Panel established pursuant to Section 60606. The panel shall review all items or questions to ensure that the content of the examination complies with the requirements of Section 60614.

(e) The exit examination prescribed in subdivision (a) shall conform to the following standards or it shall not be required as a condition of graduation:

(1) The examination may not be administered to a pupil who did not receive adequate notice as provided for in paragraph (1) of subdivision (f) regarding the test.

(2) The examination, regardless of federal financial participation, shall comply with Title VI of the Civil Rights Act (42 U.S.C. Sec. 2000d

et seq.), its implementing regulations (34 C.F.R. Part 100), and the Equal Educational Opportunities Act of 1974 (20 U.S.C. Sec. 1701).

(3) The examination shall have instructional and curricular validity.

(4) The examination shall be scored as a criterion referenced examination.

(f) For purposes of this section, the following terms have the following meanings:

(1) "Adequate notice" means that the pupil and his or her parent or guardian have received written notice, at the commencement of the pupil's 9th grade, and each year thereafter through the annual notification process established pursuant to Section 48980, or if a transfer pupil, at the time the pupil transfers. A pupil who has taken the exit examination in the 10th grade is deemed to have had "adequate notice" as defined in this paragraph.

(2) "Curricular validity" means that the examination tests for content found in the instructional textbooks. For the purposes of this section, any textbook or other instructional material adopted pursuant to this code and consistent with the state's adopted curriculum frameworks shall be deemed to satisfy this definition.

(3) "Instructional validity" means that the examination is consistent with what is expected to be taught. For the purposes of this section, instruction that is consistent with the state's adopted curriculum frameworks for the subjects tested shall be deemed to satisfy this definition.

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

(h) Nothing in this chapter shall prohibit a school district from requiring pupils to pass additional exit examinations approved by the governing board of the school district as a condition for graduation.

60851. (a) Commencing with the 2003–04 school year and each school year thereafter, each pupil completing grade 12 shall successfully pass the exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school. Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), and (c). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.

(b) A pupil may take the high school exit examination in grade 9 beginning in the 2000–01 school year. Each pupil shall take the high school exit examination in grade 10 beginning in the 2001–02 school year and may take the examination during each subsequent administration, until each section of the examination has been passed.

(c) The exit examination shall be offered in each public school and state special school that provides instruction in grades 10, 11, or 12, on the dates designated by the Superintendent of Public Instruction. An exit examination may not be administered on any date other than those designated by the Superintendent of Public Instruction as examination days or makeup days.

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

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

(1) The results of the assessments administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 and the minimum levels of proficiency recommended by the State Board of Education pursuant to Section 60648.

(2) The pupils' grades and other indicators of academic achievement designated by the district.

60852. Notwithstanding Section 60851, if a school district determines that a pupil does not possess sufficient English language skills to be assessed pursuant to Section 60850, the district may defer the requirement that the pupil pass the high school exit examination for a period of up to 24 calendar months of enrollment in the California public school system until the pupil has completed six months of instruction in reading, writing, and comprehension in the English language. Nothing in this section shall be construed to allow

any pupil to receive a diploma of graduation from high school without passing the exit examination, in English, prescribed by Section 60850.

60853. (a) In order to prepare pupils to succeed on the exit examination, a school district shall use regularly available resources and any available supplemental remedial resources, including, but not limited to, funds available for programs established by Chapter 320 of the Statutes of 1998, Chapter 811 of the Statutes of 1997, Chapter 743 of the Statutes of 1998, and funds available for other similar supplemental remedial programs.

(b) It is the intent of the Legislature that a school district consider restructuring its academic offerings reducing the electives available to any pupil who has not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year.

(c) A school district should prepare pupils to succeed on the exit examination. In preparing pupils to succeed, school districts are encouraged to use existing resources to ensure that all pupils succeed. The state has created programs such as the Class Size Reduction Program, staff development programs, after school programs, and others, in addition to providing general purpose funding, in order to assist school districts in providing an education that will help all pupils succeed.

60855. (a) By January 15, 2000, the Superintendent of Public Instruction shall contract for a multiyear independent evaluation of the high school exit examination that is established pursuant to this chapter. The evaluation shall be based upon information gathered in field testing and annual administrations of the examination and shall include all of the following:

(1) Analysis of pupil performance, broken down by grade level, gender, race or ethnicity, and subject matter of the examination, including any trends that become apparent over time.

(2) Analysis of the exit examination's effects, if any, on college attendance, pupil retention, graduation, and dropout rates, including analysis of these effects on the population subgroups described in subdivision (b).

(3) Analysis of whether the exit examination is likely to have, or has, differential effects, whether beneficial or detrimental, on population subgroups described in subdivision (b).

(b) Evaluations conducted pursuant to this section shall separately consider test results for each of the following population subgroups, provided that information concerning individuals shall not be gathered or disclosed in the process of preparing this evaluation.

(1) English language learners and non-English language learners.

(2) Individuals with exceptional needs and individuals without exceptional needs.

(3) Pupils that qualify for free or reduced price meals and are enrolled in schools that qualify for assistance under Title 1 of the Improving America's Schools Act of 1994 (P.L. 103-382) and pupils that do not qualify for free or reduced price meals and are not enrolled in schools that quality for assistance under Title 1 of the Improving America's Schools Act of 1994 (P.L. 103-382) Act.

(4) Any group of pupils that has been determined by the independent evaluator to be differentially affected by the exit examination established pursuant to this chapter.

(c) Evaluation reports shall include recommendations to improve the quality, fairness, validity, and reliability of the examination. The independent evaluator may also make recommendations for revisions in design, administration, scoring, processing, or use of the examination.

(d) The independent evaluator shall report to the Governor, the Office of the Legislative Analyst, the Superintendent of Public Instruction, the State Board of Education, the Secretary for Education, and the chairs of the education policy committees in both houses of the Legislature, in accordance with the following schedule:

(1) Preliminary report on field testing by July 1, 2000.

(2) First annual report by February 1, 2002.

(3) Regular biennial reports by February 1 of even-numbered years following 2002.

60856. After adoption and the initial administrations of the high school exit examination the State Board of Education, in consultation with the Superintendent of Public Instruction, shall study the appropriateness of other criteria by which high school pupils who are regarded as highly proficient but unable to pass the high school exit examination may demonstrate their competency and receive a high school diploma. This criteria shall include, but is not limited to, an exemplary academic record as evidenced by transcripts and alternative tests of equal rigor in the academic areas covered by the high school exit examination. If the State Board of Education determines that other criteria are appropriate and do not undermine the intent of this chapter that all high school graduates demonstrate satisfactory academic proficiency, the board shall forward its recommendations to the Legislature for enactment.

SEC. 6. The sum of two million two hundred fifty thousand dollars ($2,250,000) is hereby appropriated to the Superintendent of Public Instruction in accordance with the following schedule:

(a) The sum of two million dollars ($2,000,000) is hereby appropriated from the Federal Trust Fund, from GOALS 2000 funds, for the purpose of developing a high school exit examination pursuant to Section 60850 of the Education Code.

(b) The sum of two hundred fifty thousand dollars ($250,000) is hereby appropriated from the General Fund to provide support

services related to the high school exit examination established pursuant to Section 60850 of the Education Code.

SEC. 7. Sections 1 and 2 of the act adding this section shall become operative on January 1, 2000.

SEC. 8. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

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Assembly Bill No. 2539

CHAPTER 135

An act to amend Sections 651, 680, 4112, 4982, 4998, 4998.2, 4998.5, 4998.6, 6086.65, and 17537.11 of the Business and Professions Code, to amend Sections 1102.2, 1103, and 2924c of the Civil Code, to amend Sections 131.4, 703.140, and 704.115 of the Code of Civil Procedure, amend Sections 1201, 2210, 2502, 9528, and 9706 of the Commercial Code, to amend Sections 5222, 7236, 14000, 14030, 14030.1, 14035, 14036, and 25207 of the Corporations Code, to amend Sections 1209, 17210, 17284.5, 17620, 23812, 24255, 35012, 35160.5, 37252, 44225.6, 44227, 44259, 44275.3, 44424, 47611.5, 47612.5, 51871.5, 54685.2, 54685.3, 60200.2, 60855, 66293, and 81149 of, to amend and renumber Section 39006 of, and to amend and renumber the heading of Chapter 8 (commencing with Section 60850) of Part 33 of Division 4 of Title 2 of, the Education Code, to amend Section 8040 of the Elections Code, to amend Sections 243, 2040, 3021, 4065, and 5002 of the Family Code, to amend Section 18210 of the Financial Code, to amend Section 55702 of the Food and Agricultural Code, to amend Sections 3540.1, 7222, 15346.9, 18935, 19827.3, 20395, 20397, 20677, 21070.5, 21071, 21073.7, 21370, 21572, 22825.01, 22875, 31469.5, 51298, 53601, 53635, 54985, 69915, 72114.2, and 91007 of the Government Code, to amend Sections 1357.50, 1368, 1368.04, 1370.4, 1374.32, 1386, 1507.3, 1596.7927, 25390.4, 32121.7, 33333.6, 33334.17, 44287, 51451, 104550, 104556, 104557, 112040, 115813, and 128375 of, and to amend and renumber Section 13933 of, the Health and Safety Code, to amend Sections 384, 791.02, 1035, 1765.1, 1874.81, 10123.68, 10145.3, 10169, 10169.2, 10176.61, 11629.92, and 12967 of, and to amend and renumber Sections 1785.89, 10140, 10141, and 12698 of, the Insurance Code, to amend Sections 1174.5, 1777.5, 1777.7, 3762, 6394.5, 6429, 6434, and 6650 of the Labor Code, to amend Sections 273.84, 296.1, 487c, 666, 830.32, 1463, 2962, 6129, 11166.3, 11170.6, 12000, and 13510 of the Penal Code, to amend Section 2357 of the Probate Code, to amend Section 12102 of the Public Contract Code, to amend Sections 2715.5, 31164, and 42923 of the Public Resources Code, to amend Sections 237, 2512, 2613, 6471, and 6472 of the Revenue and Taxation Code, to amend Sections 426, 1666, 5204, 9980, 12808, 12815, 13377, 16020.1, 21051, 22511.56, 34505.9, and 35790.1 of the Vehicle Code, to amend Sections 361.5, 727.3, 727.31, 827, 1788, 1789.5, 9564, 14105.26, and 25002 of the Welfare and Institutions Code, and to amend Section 1 of Chapter 868 of the Statutes of 1998, and Section 7 of Chapter 84 of the Statutes of 1999, relating to maintenance of the codes.

[Approved by Governor July 19, 2000. Filed with Secretary of State July 19, 2000.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2539, Committee on Judiciary. Maintenance of the codes.

Existing law directs the Legislative Counsel to advise the Legislature from time to time as to legislation necessary to maintain the codes.

This bill would restate existing provisions of law to effectuate the recommendations made by the Legislative Counsel to the Legislature for consideration during 2000, and would not make any substantive change in the law.

The people of the State of California do enact as follows:

SECTION 1. Section 651 of the Business and Professions Code is amended to read:

651. (a) It is unlawful for any person licensed under this division or under any initiative act referred to in this division to disseminate or cause to be disseminated any form of public communication containing a false, fraudulent, misleading, or deceptive statement, claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed. A "public communication" as used in this section includes, but is not limited to, communication by means of mail, television, radio, motion picture, newspaper, book, list or directory of healing arts practitioners, Internet, or other electronic communication.

(b) A false, fraudulent, misleading, or deceptive statement, claim, or image includes a statement or claim that does any of the following:

(1) Contains a misrepresentation of fact.

(2) Is likely to mislead or deceive because of a failure to disclose material facts.

(3) (A) Is intended or is likely to create false or unjustified expectations of favorable results, including the use of any photograph or other image that does not accurately depict the results of the procedure being advertised or that has been altered in any manner from the image of the actual subject depicted in the photograph or image.

(B) Use of any photograph or other image of a model without clearly stating in a prominent location in easily readable type the fact that the photograph or image is of a model is a violation of subdivision (a). For purposes of this paragraph, a model is anyone other than an actual patient, who has undergone the procedure being advertised, of the licensee who is advertising for his or her services.

(C) Use of any photograph or other image of an actual patient that depicts or purports to depict the results of any procedure, or presents "before" and "after" views of a patient, without specifying in a prominent location in easily readable type size what procedures

to, teacher observation, anecdotal records, norm referenced tests, and criterion referenced tests.

(k) Provision for an annual program progress report and program evaluation by the Orange County Superintendent of Schools to be submitted to the State Department of Education.

SEC. 50. Section 60200.2 of the Education Code is amended to read:

60200.2. (a) In addition to the findings authorized under subparagraphs (A) and (B) of paragraph (5) of subdivision (c) of Section 60200, if the state board finds that the use of a commercial brand name, product, or corporate or company logo in an instructional material is authorized under a contract entered into under paragraph (3) of subdivision (a) of Section 35182.5 as added by Assembly Bill 117 of the 1999–2000 Regular Session, the state board may allow the use of that instructional material.

(b) This section shall become operative only if Section 35182.5 as proposed by Assembly Bill 117 of the 1999–2000 Regular Session is enacted and takes effect.

SEC. 51. The heading of Chapter 8 (commencing with Section 60850) of Part 33 of Division 4 of Title 2 of the Education Code is amended and renumbered to read:

CHAPTER 9. HIGH SCHOOL EXIT EXAMINATION

SEC. 52. Section 60855 of the Education Code is amended to read:

60855. (a) By January 15, 2000, the Superintendent of Public Instruction shall contract for a multiyear independent evaluation of the high school exit examination that is established pursuant to this chapter. The evaluation shall be based upon information gathered in field testing and annual administrations of the examination and shall include all of the following:

(1) Analysis of pupil performance, broken down by grade level, gender, race or ethnicity, and subject matter of the examination, including any trends that become apparent over time.

(2) Analysis of the exit examination's effects, if any, on college attendance, pupil retention, graduation, and dropout rates, including analysis of these effects on the population subgroups described in subdivision (b).

(3) Analysis of whether the exit examination is likely to have, or has, differential effects, whether beneficial or detrimental, on population subgroups described in subdivision (b).

(b) Evaluations conducted pursuant to this section shall separately consider test results for each of the following population subgroups, provided that information concerning individuals shall not be gathered or disclosed in the process of preparing this evaluation.

(1) English language learners and non-English language learners.

(2) Individuals with exceptional needs and individuals without exceptional needs.

(3) Pupils that qualify for free or reduced price meals and are enrolled in schools that qualify for assistance under Title 1 of the Improving America's Schools Act of 1994 (P.L. 103-382) and pupils that do not qualify for free or reduced price meals and are not enrolled in schools that qualify for assistance under Title 1 of the Improving America's Schools Act of 1994 (P.L. 103-382).

(4) Any group of pupils that has been determined by the independent evaluator to be differentially affected by the exit examination established pursuant to this chapter.

(c) Evaluation reports shall include recommendations to improve the quality, fairness, validity, and reliability of the examination. The independent evaluator may also make recommendations for revisions in design, administration, scoring, processing, or use of the examination.

(d) The independent evaluator shall report to the Governor, the Office of the Legislative Analyst, the Superintendent of Public Instruction, the State Board of Education, the Secretary for Education, and the chairs of the education policy committees in both houses of the Legislature, in accordance with the following schedule:

(1) Preliminary report on field testing by July 1, 2000.

(2) First annual report by February 1, 2002.

(3) Regular biennial reports by February 1 of even-numbered years following 2002.

SEC. 53. Section 66293 of the Education Code is amended to read:

66293. The California Postsecondary Education Commission shall report to the Legislature and Governor on the representation and utilization of ethnic minorities and women among academic, administrative, and other employees at the community colleges, the California State University, and the University of California, pursuant to Section 66903.3.

SEC. 54. Section 81149 of the Education Code is amended to read:

81149. (a) Notwithstanding any provision of law, a community college district may acquire for use any facility previously used by the United States military and closed as a result of action by the federal Defense Base Closure and Realignment Commission, or purchase any offsite building constructed prior to January 1, 1998 that meets the structural requirements of the 1976 Uniform Building Code, or subsequent additions to that code, but that does not meet the requirements of Section 81130, for use as a school building, as defined in Section 81130.5, if the governing board of the district finds that all of the following conditions have been met:

(1) A structural engineer has inspected the building or facility and submitted a report to the governing board of the community college district that certifies that the building or facility is in substantial compliance with the requirements of this article, or describes in

EDUCATION CODE
SECTION 60850-60856

60850. (a) The Superintendent of Public Instruction, with the approval of the State Board of Education, shall develop a high school exit examination in language arts and mathematics in accordance with the statewide academically rigorous content standards adopted by the State Board of Education pursuant to Section 60605. To facilitate the development of the examination, the superintendent shall review any existing high school subject matter examinations that are linked to, or can be aligned with, the statewide academically rigorous content standards for language arts and mathematics adopted by the State Board of Education. By October 1, 2000, the State Board of Education shall adopt a high school exit examination that is aligned with statewide academically rigorous content standards.

(b) The Superintendent of Public Instruction, with the approval of the State Board of Education, shall establish a High School Exit Examination Standards Panel to assist in the design and composition of the exit examination and to ensure that the examination is aligned with statewide academically rigorous content standards. Members of the panel shall include, but are not limited to, teachers, administrators, school board members, parents, and the general public. Members of the panel shall serve without compensation for a term of two years and shall be representative of the state's ethnic and cultural diversity and gender balance. The Superintendent shall also make the best effort to ensure representation of the state's diversity relative to urban, suburban, and rural areas. The State Department of Education shall provide staff to the panel.

(c) The Superintendent of Public Instruction shall require that the examination be field tested before actual implementation to ensure that the examination is free from bias and that its content is valid and reliable.

(d) Before the State Board of Education adopts the exit examination, the Superintendent of Public Instruction shall submit the examination to the Statewide Pupil Assessment Review Panel established pursuant to Section 60606. The panel shall review all items or questions to ensure that the content of the examination complies with the requirements of Section 60614.

(e) The exit examination prescribed in subdivision (a) shall conform to the following standards or it shall not be required as a condition of graduation:

(1) The examination may not be administered to a pupil who did not receive adequate notice as provided for in paragraph (1) of subdivision (f) regarding the test.

(2) The examination, regardless of federal financial participation, shall comply with Title VI of the Civil Rights Act (42 U.S.C. Sec. 2000d et seq.), its implementing regulations (34 C.F.R. Part 100), and the Equal Educational Opportunities Act of 1974 (20 U.S.C. Sec. 1701).

(3) The examination shall have instructional and curricular validity.

(4) The examination shall be scored as a criterion referenced examination.

(f) For purposes of this section, the following terms have the following meanings:

(1) "Adequate notice" means that the pupil and his or her parent or guardian have received written notice, at the commencement of the pupil's 9th grade, and each year thereafter through the annual notification process established pursuant to Section 48980, or if a

transfer pupil, at the time the pupil transfers. A pupil who has taken the exit examination in the 10th grade is deemed to have had "adequate notice" as defined in this paragraph.

(2) "Curricular validity" means that the examination tests for content found in the instructional textbooks. For the purposes of this section, any textbook or other instructional material adopted pursuant to this code and consistent with the state's adopted curriculum frameworks shall be deemed to satisfy this definition.

(3) "Instructional validity" means that the examination is consistent with what is expected to be taught. For the purposes of this section, instruction that is consistent with the state's adopted curriculum frameworks for the subjects tested shall be deemed to satisfy this definition.

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

(h) Nothing in this chapter shall prohibit a school district from requiring pupils to pass additional exit examinations approved by the governing board of the school district as a condition for graduation.

60851. (a) Commencing with the 2003-04 school year and each school year thereafter, each pupil completing grade 12 shall successfully pass the exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school. Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), and (c). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.

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

(c) The exit examination shall be offered in each public school and state special school that provides instruction in grades 10, 11, or 12, on the dates designated by the Superintendent of Public Instruction. An exit examination may not be administered on any date other than those designated by the Superintendent of Public Instruction as examination days or makeup days.

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

(e) Supplemental instruction shall be provided to any pupil who does not demonstrate sufficient progress toward passing the exit examination. To the extent that school districts have aligned their curriculum with the state academic content standards adopted by the State Board of Education, the curriculum for supplemental instruction shall reflect those standards and shall be designed to assist the pupils to succeed on the exit examination. Nothing in this chapter shall be construed to require the provision of supplemental services

using resources that are not regularly available to a school or school district, including summer school instruction provided pursuant to Section 37252. In no event shall any action taken as a result of this subdivision cause or require reimbursement by the Commission on State Mandates. Sufficient progress shall be determined on the basis of either of the following:

(1) The results of the assessments administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 and the minimum levels of proficiency recommended by the State Board of Education pursuant to Section 60648.

(2) The pupils' grades and other indicators of academic achievement designated by the district.

60852. Notwithstanding Section 60851, if a school district determines that a pupil does not possess sufficient English language skills to be assessed pursuant to Section 60850, the district may defer the requirement that the pupil pass the high school exit examination for a period of up to 24 calendar months of enrollment in the California public school system until the pupil has completed six months of instruction in reading, writing, and comprehension in the English language. Nothing in this section shall be construed to allow any pupil to receive a diploma of graduation from high school without passing the exit examination, in English, prescribed by Section 60850.

60853. (a) In order to prepare pupils to succeed on the exit examination, a school district shall use regularly available resources and any available supplemental remedial resources, including, but not limited to, funds available for programs established by Chapter 320 of the Statutes of 1998, Chapter 811 of the Statutes of 1997, Chapter 743 of the Statutes of 1998, and funds available for other similar supplemental remedial programs.

(b) It is the intent of the Legislature that a school district consider restructuring its academic offerings reducing the electives available to any pupil who has not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year.

(c) A school district should prepare pupils to succeed on the exit examination. In preparing pupils to succeed, school districts are encouraged to use existing resources to ensure that all pupils succeed. The state has created programs such as the Class Size Reduction Program, staff development programs, after school programs, and others, in addition to providing general purpose funding, in order to assist school districts in providing an education that will help all pupils succeed.

60855. (a) By January 15, 2000, the Superintendent of Public Instruction shall contract for a multiyear independent evaluation of the high school exit examination that is established pursuant to this chapter. The evaluation shall be based upon information gathered in field testing and annual administrations of the examination and shall include all of the following:

(1) Analysis of pupil performance, broken down by grade level, gender, race or ethnicity, and subject matter of the examination, including any trends that become apparent over time.

(2) Analysis of the exit examination's effects, if any, on college attendance, pupil retention, graduation, and dropout rates,

including analysis of these effects on the population subgroups described in subdivision (b).

(3) Analysis of whether the exit examination is likely to have, or has, differential effects, whether beneficial or detrimental, on population subgroups described in subdivision (b).

(b) Evaluations conducted pursuant to this section shall separately consider test results for each of the following population subgroups, provided that information concerning individuals shall not be gathered or disclosed in the process of preparing this evaluation.

(1) English language learners and non-English language learners.

(2) Individuals with exceptional needs and individuals without exceptional needs.

(3) Pupils that qualify for free or reduced price meals and are enrolled in schools that qualify for assistance under Title 1 of the Improving America's Schools Act of 1994 (P.L. 103-382) and pupils that do not qualify for free or reduced price meals and are not enrolled in schools that qualify for assistance under Title 1 of the Improving America's Schools Act of 1994 (P.L. 103-382).

(4) Any group of pupils that has been determined by the independent evaluator to be differentially affected by the exit examination established pursuant to this chapter.

(c) Evaluation reports shall include recommendations to improve the quality, fairness, validity, and reliability of the examination. The independent evaluator may also make recommendations for revisions in design, administration, scoring, processing, or use of the examination.

(d) The independent evaluator shall report to the Governor, the Office of the Legislative Analyst, the Superintendent of Public Instruction, the State Board of Education, the Secretary for Education, and the chairs of the education policy committees in both houses of the Legislature, in accordance with the following schedule:

(1) Preliminary report on field testing by July 1, 2000.

(2) First annual report by February 1, 2002.

(3) Regular biennial reports by February 1 of even-numbered years following 2002.

60856. After adoption and the initial administrations of the high school exit examination the State Board of Education, in consultation with the Superintendent of Public Instruction, shall study the appropriateness of other criteria by which high school pupils who are regarded as highly proficient but unable to pass the high school exit examination may demonstrate their competency and receive a high school diploma. This criteria shall include, but is not limited to, an exemplary academic record as evidenced by transcripts and alternative tests of equal rigor in the academic areas covered by the high school exit examination. If the State Board of Education determines that other criteria are appropriate and do not undermine the intent of this chapter that all high school graduates demonstrate satisfactory academic proficiency, the board shall forward its recommendations to the Legislature for enactment.

Title 5, California Code of Regulations

Division 1, Chapter 2

High School Exit Examination

1. Amend the title of Subchapter 6. to read:

Subchapter 6. ~~Pupil Organizations~~ High School Exit Examination

2. Add Articles 1. through 6. to Subchapter 6. to read:

Article 1. General

§ 1200. Definitions.

For the purposes of the high school exit examination, the following definitions shall apply:

(a) "Section," "portion," and "part(s)" of the examination shall refer to either the English/language arts section of the high school exit examination or the mathematics section of the high school exit examination.

(b) An "administration" means an eligible pupil's or adult student's taking of both the English/language arts and mathematics sections of the high school exit examination or either section during a test cycle.

(c) "Test cycle" means one of the multiple opportunities provided each year by the Superintendent of Public Instruction for a pupil or eligible adult student to take the high school exit examination.

(d) "Grade level" for the purposes of the high school exit examination means the grade assigned to the pupil by the school district.

(e) "Eligible pupil" means one who is enrolled in a California public school in any of grades

9, 10, 11, or 12 who has not passed either the English/language arts section or the mathematics section of the high school exit examination.

(f) "Eligible adult student" means a person enrolled in an adult school operated by a school district. This term does not include pupils who are concurrently enrolled in high school and adult school.

(g) "Test administrator" means a certificated employee of a school district who has received training in the administration of the high school exit examination from the high school exit examination district or test site coordinator.

(h) "Test proctor" is an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the high school exit examination.

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 313, 52504, 60851, and 60852, Education Code.

Article 2. Administration

§ 1203. Pupil or Adult Student Identification.

School personnel at the test site shall be responsible for the accurate identification of eligible pupils or adult students who are to be administered the high school exit examination.

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 52504 and 60851, Education Code.

§ 1204. Documentation.

School districts shall maintain a record of all pupils and adult students who participate in each administration of the high school exit examination. This record shall include the following

information for the English/language arts section and separately for the mathematics section:

(a) The date on which each section of the examination was offered.

(b) The names of each pupil and adult student who took each section of the examination.

(c) The grade level of each pupil who took each section of the examination.

(d) Whether each pupil or adult student passed or did not pass the section or sections of the examination taken.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(d), Education Code.

§ 1205. Pupil or Adult Student Information.

School districts shall maintain in each pupil's or adult student's permanent record the following information:

(a) The date on which the pupil or adult student took each section of the examination.

(b) Whether the pupil or adult student passed or did not pass each section of the examination taken.

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 60851(a) and (d), Education Code.

§ 1206. Data for Analysis of Pupil Performance.

(a) Each school district shall provide the publisher of the high school exit examination the following information for each pupil tested for purposes of the analyses required pursuant to Education Code Section 60855:

(1) Date of birth

(2) Grade level

(3) Gender

(4) Language fluency and home language

(5) Special program participation

(6) Participation in free or reduced priced meals

(7) Participation in Title 1 of Improving America's Schools Act of 1994

(8) Testing accommodations

(9) Handicapping condition or disability

(10) Ethnicity

(11) District mobility

(12) Parent education

(13) Post-high school plans

(b) The information is for the purposes of aggregate analyses only and shall be provided and collected as part of the testing materials for the high school exit examination.

(c) School districts shall provide the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60855, Education Code.

§ 1207. Notice.

A school district shall maintain documentation that the parent or guardian of each pupil has received written notification as required by Education Code sections 48980(e) and 60850(f)(1).

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 48980(e), 52504, and 60850(e) and (f), Education Code.

§ 1208. High School Exit Examination District Coordinator.

(a) On or before December 15, 2000, and July 1 of each subsequent school year, the superintendent of each school district shall designate from among the employees of the school district a high school exit examination district coordinator. The superintendent shall notify the publisher of the high school exit examination of the identity and contact information for the high school exit examination district coordinator. The high school exit examination district coordinator shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the high school exit examination.

(b) The high school exit examination district coordinator's responsibilities shall include, but not be limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school examination and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of examinations and test materials to individual schools and sites.

(4) Maintaining security over the high school exit examination and test data using the procedure set forth in Section 1213. The high school exit examination district coordinator shall sign the Test Security Agreement set forth in Section 1213 prior to receipt of the test materials.

(5) Overseeing the administration of the high school exit examination to eligible pupils or adult students.

(6) Overseeing the collection and return of all test materials and test data to the publisher within any required time periods.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all examinations and test materials are received from school test sites within the school district no later than the close of school on the day following administration of a section of the high school exit examination.

(9) Ensuring that all examinations and test materials received from school test sites within the school district have been placed in a secure school district location by the end of the day following the administration of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be returned to a designated location in the school district for pickup by the test publisher no more than four (4) working days following administration of the English/language arts or the mathematics section in the school district.

(11) School districts shall ensure that the high school exit examinations and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received until the time they are delivered to the test sites.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c), Education Code.

§ 1209. High School Exit Examination Test Site Coordinator.

(a) Annually at each test site, the superintendent of the school district shall designate a high school exit examination test site coordinator from among the employees of the school district.

The high school exit examination test site coordinator, shall be available to the high school exit examination district coordinator for the purpose of resolving issues that arise as a result of the administration of the high school exit examination.

(b) The high school exit examination test site coordinator's responsibilities shall include, but not be limited to, all of the following:

(1) Determining site examination and test material needs.

(2) Arranging for test administration at the site.

(3) Training the test administrator(s) and proctors as provided in the test publisher's manual.

(4) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

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

(6) Maintaining security over the examination and test data.

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

(8) Overseeing the administration of the high school exit examination to eligible pupils or adult students at the test site.

(9) Overseeing the collection and return of all testing materials to the high school exit examination district coordinator.

(10) Assisting the high school exit examination district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the high school exit examination district coordinator and the number of examinations collected for return

to the high school exit examination district coordinator.

(11) Overseeing the collection of all pupil or adult student data as required to comply with Sections 1204, 1205, and 1206 of these regulations.

(12) Within three (3) working days of completion of site testing, the principal and the high school exit examination test site coordinator shall certify to the high school exit examination district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the high school exit examination in the manner and as otherwise required by the publisher.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c) , Education Code.

Article 3. Accommodations

§ 1210. Pupils with Disabilities.

(a) Pupils with disabilities shall take the high school exit examination with those accommodations for testing delineated in the pupil's individualized education program or 504 plan that do not alter what the test measures.

(b) Accommodations that do not alter what the test measures include, but are not limited to:

(1) Presentation accommodations:

(A) Large print versions; test items enlarged through mechanical or electronic means; Braille transcriptions provided by the test publisher or a designee; markers, masks, or other means to maintain visual attention to the test or test items; reduced numbers of items per page; signed or oral presentation of directions and items except for items that measure reading.

(B) Items that measure reading must be read by the pupil through visual or tactile means.

(2) Response accommodations:

(A) The pupil may use varied means to provide responses to the examination, including verbal, written, or signed responses; responses made with mechanical or electronic assistance, as long as the mechanical or electronic device is used solely to record the pupil's response. If a person is required to transcribe the pupil's responses to the format required by the examination, the transcriber shall be an employee of the school district who has signed the Test Security Affidavit. Transcribed responses must accurately reflect the responses of the pupil without addition or modification by the transcriber.

(B) The test administrator shall provide a calculator to any pupil whose individualized education program or 504 plan requires its use during the test, and the test administrator shall assure that the calculator does not store formulas or other information prior to the examination and immediately upon the pupil having completed the examination.

(C) Pupils may use those assistive devices and technologies that are regularly used during testing except that no technology or assistive device may be used that alters what the test measures.

(3) Timing/scheduling accommodations: Additional time to complete the examination, within the limits imposed by test security as provided in the directions for test administration; more frequent breaks during the regularly scheduled sitting (the pupil shall be supervised by school personnel that have signed the Test Security Affidavit during testing and during all breaks); multiple sessions to complete the test, within the limits imposed by test security as provided in the directions for test administration.

(4) Setting accommodations: Special or adaptive furniture; special lighting or acoustics; an individual carrel or study enclosure; a separate room except that the pupil must be directly supervised by school personnel who have signed the Test Security Affidavit.

(c) The use by a pupil of any presentation format, response mode, assistive device, or other unique accommodation not addressed in subdivisions (a) and (b) above or Sections 1211 or 1212 below shall be considered by the Superintendent of Public Instruction through a request submitted six weeks in advance of the pupil's proposed administration of the high school exit examination and will be provided, as appropriate, upon approval of the Superintendent of Public Instruction.

(d) Notwithstanding the accommodations otherwise authorized herein, no accommodation shall be provided if the accommodation is determined by the Superintendent of Public Instruction to alter what the test measures.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

§ 1211. English Language Learners.

Pupils who are classified as English language learners on the California English Language Development Assessment at the time of administration of the high school exit examination may utilize the following accommodations:

(a) A word-only primary-language-to-English glossary.

(b) Testing in a separate room, individually, or in a small group, to the extent test security can be maintained.

(c) Extended testing time.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

§ 1212. Independent Work of the Pupil.

School districts shall implement accommodations as appropriate for each pupil with an individualized education program or 504 plan that specifies accommodations to be used during testing, and shall ensure that all test responses are the independent work of the pupil. School districts and school district personnel are prohibited from assisting any pupil in determining how the pupil will respond to each question, and are prohibited from leading or directing the pupil to a particular response. No assistive device or technology that provides a response to a pupil, or that when used, alters what the test measures or assists the pupil in determining how to respond, or leads or directs the pupil to a particular response, shall be used.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

Article 4. Test Security

§ 1213. Test Security.

(a) High school exit examination test site coordinators shall ensure that strict supervision is maintained over each pupil or adult student who is being administered the high school exit examination both while the pupil or adult student is in the room in which the test is being administered and during any period in which the pupil or adult student is, for any purpose, granted a break from testing.

(b) Access to the high school exit examination, including any item on any administration of the examination, is limited to pupils taking the examination for the purpose of graduation from

high school and adult students taking the examination for the purpose obtaining a diploma of graduation and employees of a school district directly responsible for administration of the examination.

(c) All high school exit examination district and test site coordinators shall sign the High School Exit Examination Test Security Agreement set forth in subdivision (d).

(d) The High School Exit Examination Test Security Agreement shall be as follows:

HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AGREEMENT

(1) The coordinator will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test's security.

(2) The coordinator will keep on file the names of persons having access to examinations and test materials. All persons having access to the materials shall be required by the coordinator to sign the High School Exit Examination Test Security Affidavit that will be kept on file in the school district office.

(3) The coordinator will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates as provided in California Code of Regulations, Title 5, Division 1, Chapter 2, Subchapter 6.

By signing my name to this document, I am assuring that I and anyone having access to the test materials will abide by the above conditions.

By: _____

Title: _____

School District: _____

Date: _____

(e) Each high school exit examination test site coordinator shall deliver the examinations and test materials only to those persons actually administering the high school exit examination on the date of testing and only upon execution of the High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the High School Exit Examination, including but not limited to the high school exit examination test site coordinator, test administrators, and test proctors, shall acknowledge the limited purpose of their access to the test by signing the High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(g) The High School Exit Examination Test Security Affidavit shall be completed by each test administrator and test proctor:

HIGH SCHOOL EXIT EXAMINATION TEST SECURITY AFFIDAVIT

I acknowledge that I will have access to the high school exit examination for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other person.

(2) I will not copy any part of the test or test materials.

(3) I will keep the test secure until the test is actually distributed to pupils.

(4) I will limit access to the test and test materials by test examinees to the actual testing periods.

(5) I will not permit pupils or adult students to remove test materials from the room where

testing takes place.

(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.

(7) I will return all test materials to the designated high school exit examination test site coordinator upon completion of the test.

(8) I will not interfere with the independent work of any pupil or adult student taking the examination and I will not compromise the security of the test by means including, but not limited to:

(A) Providing eligible pupils or adult students with access to test questions prior to testing.

(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure high school exit examination test booklet or document.

(C) Coaching eligible pupils or adult students during testing or altering or interfering with the pupil's or adult student's responses in any way.

(D) Making answer keys available to pupils or adult students.

(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.

(F) Failing to follow test administration directions specified in test administration manuals.

(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.

Signed: _____

Print Name: _____

Position: _____

School: _____

School District: _____

Date: _____

(h) To maintain the security of the high school exit examination, all high school exit examination district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.

(i) The security of the test materials that have been duly delivered to the school district is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher.

(j) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

§ 1214. Test Site Delivery.

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

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

Article 5. Cheating

§ 1215. Cheating.

(a) Any pupil or adult student found to have cheated or assisted others in cheating, or to have compromised the security of the high school exit examination shall have his or her test marked as "invalid" and the pupil or adult student shall not receive a score from that test administration.

(b) The school district shall notify each eligible pupil or adult student prior to each administration of the high school exit examination of the provisions of subdivision (a).

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(b) and (c), Education Code.

Article 6. Apportionment

§ 1216. Apportionment.

(a) For each test cycle, each school district shall report to the California Department of Education the number of examinations administered.

(b) The superintendent of each school district shall certify the accuracy of all information submitted. The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within ten (10) working days of completion of each test cycle in the school district.

(c) The amount of funding to be apportioned to the school district for the high school exit examination shall be equal to the product of the amount established by the State Board of Education to enable school districts to meet the requirements of subdivisions (a), (b) and (c) of Education Code section 60851 times the number of tests administered to pupils and adult students in the school district as determined by the certification of the school district

superintendent pursuant to subdivision (b). For purposes of this apportionment, administration of the high school exit examination includes the following items:

(1) All staffing costs, including the high school exit examination district coordinator, test site coordinators, and proctors, staff training, and other staff expenses related to testing.

(2) All expenses incurred at the school district and test site level related to testing.

(3) All transportation costs of delivering and retrieving tests and test materials within the school district.

(4) All costs associated with mailing reports of test results.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(a), Education Code.

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AUTHOR'S DIRECT E-MAIL:
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June 11, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: **Rebuttal Comments to Department of Finance's Opposition**
High School Exit Examination, CSM 00-TC-06
Trinity Union High School District, Claimant
Statutes of 1999, Chapters 1 and 135
Education Code Sections 60850, 60851, 60853, and 60855

Dear Ms. Higashi:

On April 3, 2001, the Department of Finance (DOF) filed comments on the *High School Exit Exam* Test Claim. Overall, DOF contends that the test claim legislation does not impose a reimbursable state-mandated program upon school districts because funding appropriated for administering the examination offset all costs incurred by school districts resulting in no net costs. DOF further contends that several activities are either not required under the test claim legislation or are covered by current instructional time. The claimant will address each of DOF's arguments in separate sections below.

Department of Finance's Overall Contention: Appropriations Offset All Costs Associated With Test Administration

DOF contends that the amount appropriated in the budget for the administration of the high school exit examination adequately covers all costs that are, and will be, incurred by school districts. DOF makes this contention with no legal support or statistical analysis that this will be the result. The California Department of Education (CDE), on March 9, 2001, issued the California High School Exit Examination Apportionment Forms to all district and county

superintendents. These forms indicate that each school district and charter school will receive $3.00 per student tested with any or all subjects of the examination per test cycle (not per subject tested).

Government Code section 17556, subdivision (e), provides that the Commission shall not find costs mandated by the state if the Commission finds that:

> "(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the mandate *in an amount sufficient to fund the cost of the state mandate*." (Emphasis added.)

School districts and charter schools are entitled to a $3.00 per student tested with any or all subjects of the examination per test cycle. DOF is not contending that the test claim legislation provides offsetting *savings* to school districts and charter schools. Rather, DOF contends that additional revenue is *sufficient to cover the costs of test administration* and therefore, *school districts are not entitled to reimbursement for the test claim activities*. The claimant disagrees.

The claimant has incurred over $3.00 per student to administer the exam. Attached is a declaration from Mr. Bob Lowden, Superintendent of Trinity Union High School District, which provides that the claimant administered the examination to 126 students. Based on the $3.00 per student appropriation, the claimant will receive $378 for administering the test. As outlined in the declaration, a small sample of the training costs alone incurred by Trinity Union came to over $500. Declarations provided by Burbank Unified School District and Del Norte County Unified School District provide additional support for the conclusion that the $3.00 per student appropriation is insufficient to cover the costs associated with administering the exit examination. Moreover, these declarations do not purport to encompass all of the activities and costs incurred by school districts, but it does evidence that the $3.00 per student appropriation will not cover the costs associated with administering the high school exit examination.

Based on the information contained in the attached declarations, the claimant concludes that school districts will easily incur more than the $3.00 per student appropriation to administer the examination. Therefore, the claimant concludes that the test claim has imposed a reimbursable state-mandated program upon school districts and that Government Code section 17556, subdivision (e), is inapplicable to this test claim. DOF's specific arguments are addressed in more detail below.

Department of Finance's First Contention: Field Testing of the Exit Examination was Initially Optional and Other Field Tests are Covered in the Appropriation Amount

DOF stated that three field tests of the high school exit examination would be administered by the Department of Education. DOF contends that the first field test was voluntary and the costs associated with the second field test administered in March and the final field test to be administered in May will be covered by the $3.00 appropriation. As outlined above, the $3.00 appropriation is insufficient to cover the costs of the March and May high school exit examination field tests. In addition, the appropriation does not rise to the level required in Government Code section 17556, subdivision (e), to completely offset any claims that the activities associated with field-testing the examination are reimbursable under the California Constitution and Government Code.

Reasonable evidence does not support DOF's contention that the test claim legislation does not impose costs mandated by the state upon school districts. Furthermore, DOF has not provided any legal arguments to refute the claimant's assertion that the test claim legislation has imposed a new program or higher level of service upon school districts. Based on these facts, the claimant concludes that the activities associated with field-testing the examination constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Department of Finance's Second and Third Contentions: Administration of the Exit Examination is Part of Regular Instruction

DOF contends that administration of the exit examination falls within the time allotted for regular instruction and therefore activities [B] and [C] does not represent reimbursable state-mandated activities. DOF takes a rather narrow view of the test claim legislation and appears to assume that administration of the exam is limited to actually passing out the booklets. The claimant intends "test administration" to cover test security at the school site, care of test materials, activities engaged in by the Testing Coordinator, and other activities as will be defined in the Parameters and Guidelines if this test claim is successful.

Based on DOF's limited view of the activities school sites must engage in to meet the requirements outlined in the test claim legislation, it concludes that the $3.00 is sufficient to cover the costs of administering the exam. As outlined above, this is simply not the case despite DOF's assertion that "the costs associated with the actual administration [of the exam] should be minimal." The appropriation does not rise to the level required in Government Code section 17556, subdivision (e), to completely offset any claims that the activities associated with administering the examination are reimbursable under the California Constitution and Government Code.

Reasonable evidence does not support DOF's contention that the test claim legislation does not impose costs mandated by the state upon school districts. Furthermore, DOF has not provided any legal arguments to refute the claimant's assertion that the test claim legislation has imposed a new program or higher level of service upon school districts. Based on these facts, the claimant concludes that the activities associated with administering the high school exit examination constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.[1]

Department of Finance's Fourth Contention: Providing Exam Results to Pupils

DOF contends that the "amount provided in the budget covers the costs associated with reporting of test results, including postage." An interesting contention since the cost of postage, the envelope, copying, and staff time to mail out exam results could easily account for one-third of the $3.00 appropriation. Moreover, the appropriation does not rise to the level required in Government Code section 17556, subdivision (e), to completely offset any claims that the activities associated with providing exam results are reimbursable under the California Constitution and Government Code.

Reasonable evidence does not support DOF's contention that the test claim legislation does not impose costs mandated by the state upon school districts. Furthermore, DOF has not provided any legal arguments to refute the claimant's assertion that the test claim legislation has imposed a new program or higher level of service upon school districts. Based on these facts, the claimant concludes that the activities associated with providing exam results constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Department of Finance's Fifth Contention: Meeting to Discuss Restructuring Academic Offerings to Pupils

DOF contends that meetings to discuss restructuring academic offerings of pupils who do not demonstrate the skills necessary to succeed on the exam are not a reimbursable activity. In addition, DOF contends, "to the extent that schools decide to restructure or change their academic offerings in light of student performance on the HSEE, such . . . activity would be conducted on a voluntary basis and is therefore not a cost mandated by the State."

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[1] The activities school districts engage in to administer the high school exit examination are not unlike those included in the *Standardized Testing and Reporting* test claim. Therefore, reimbursement for the administration of the exit examination would include the labor time of administrators, teachers, and other school district personnel. However, teacher time would be limited to any time outside the standard school day and costs associated with teachers would be limited to any compensation paid *in addition* to their normal salary.

Education Code section 60853, subdivision (b), provides:

> "(b) *It is the intent of the Legislature that a school district consider restructuring its academic offerings* reducing electives available to any pupil who had not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year." (Emphasis added.)

The claimant contends that the Legislature requires, at a minimum, that the school site *meet* to determine if such restructuring is necessary to enable students to garner the skills necessary to pass the exit examination. If the Commission adopts DOF's position on this activity, it would in essence be ignoring Legislative intent: that school districts *consider* restructuring academic offerings. School districts must meet in order to determine the best course of action for those pupils who do not demonstrate the skills necessary to succeed on the exit examination.

Section 60853 provides the Legislature's overall intent that school districts prepare pupils to pass the exit examination. Subdivision (a) provides, "a school district shall use regularly available resources and any available supplemental resources" to prepare pupils to pass the exit examination. Subdivision (c) begins with, "[a] school district should prepare pupils to succeed on the exit examination." These statements of intent evidence the Legislature's overriding concern that school districts help prepare pupils to pass the exit examination. Based on these clear statements of Legislative intent, the claimant concludes that the activities associated with school districts meeting to discuss potential restructuring of academic offerings represent a reimbursable state-mandate.

Department of Finance's Sixth Contention: Providing Information to the Superintendent of Public Instruction and Independent Evaluators

DOF contends, " [t]he costs associated with the data collections unique to the HSEE will be covered by the amount provided in the budget." As outlined above, the appropriation does not rise to the level required in Government Code section 17556, subdivision (e), to completely offset any claims that the activities associated with providing requested information are reimbursable under the California Constitution and Government Code.

Reasonable evidence does not support DOF's contention that the test claim legislation does not impose costs mandated by the state upon school districts. Furthermore, DOF has not provided any legal arguments to refute the claimant's assertion that the test claim legislation has imposed a new program or higher level of service upon school districts. Based on these

facts, the claimant concludes that the activities associated with providing information to the Superintendent of Public Instruction and independent evaluators constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Department of Finance's Seventh Contention: Training

DOF contends, "[s]taff training required for the administration of the HSEE will be covered by the amount provided in the budget." The attached declarations prove otherwise. The claimant and other declarant school districts incurred more than the $3.00 per student appropriation in training costs. The training costs attested to in the declaration do not represent all of the costs incurred by the claimant. Moreover, the appropriation does not rise to the level required in Government Code section 17556, subdivision (e), to completely offset any claims that the activities associated with staff training are reimbursable under the California Constitution and Government Code.

Reasonable evidence does not support DOF's contention that the test claim legislation does not impose costs mandated by the state upon school districts. Furthermore, DOF has not provided any legal arguments to refute the claimant's assertion that the test claim legislation has imposed a new program or higher level of service upon school districts. Based on these facts, the claimant concludes that the activities associated with training district staff constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Department of Finance's Eighth Contention: Modifications of School District Policies and Procedures

DOF contends, "[t]he amount in the budget covers all district costs required by HSEE statutes." DOF's contention is without merit when the attached declarations are considered. Clearly, the $3.00 appropriation is not sufficient to cover all of the costs associated with administering the exit examination. As such, the appropriation does not rise to the level required in Government Code section 17556, subdivision (e), to completely offset any claims that the activities associated with modifying district policies and procedures are reimbursable under the California Constitution and Government Code.

Reasonable evidence does not support DOF's contention that the test claim legislation does not impose costs mandated by the state upon school districts. Furthermore, DOF has not provided any legal arguments to refute the claimant's assertion that the test claim legislation has imposed a new program or higher level of service upon school districts. Based on these

facts, the claimant concludes that the activities associated with modifying school district policies and procedures constitute reimbursable state-mandated activities within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

If you have any questions concerning these comments, please feel free to call me at (916) 646-1400.

Sincerely,
LAW OFFICES OF SPECTOR,
MIDDLETON, YOUNG & MINNEY, LLP

Paul C. Minney
ATTORNEY AT LAW

Enc: Declaration of Mr. Bob Lowden, Superintendent, Trinity Union High School District

Declaration of Dr. Caroline K. Brumm, Coordinator of Student and Program Evaluation, Burbank Unified School District

Declaration of Doug Stark, Assistant Superintendent of Curriculum and Instruction, Del Norte County Unified School District

C: Mailing List

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Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant,
Trinity Union High School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF BOB LOWDEN IN REBUTTAL TO THE DEPARTMENT OF FINANCE'S APRIL 3, 2000 COMMENTS *High School Exit Examination*

I, Bob Lowden, make the following declaration and statement. As Superintendent, I have knowledge of Trinity Union High School District's high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapter 1 and Statutes of 1999, Chapter 135. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state. Furthermore, I am aware of the Department of Finance's

contention that this appropriation is sufficient to cover all of the costs of administering the high school exit examination.

The following breakdown of costs incurred by my District are meant to be supportive of the position that the $3.00 per pupil appropriation is insufficient to cover all of the costs associated with administering the exit examination. The following *should not be considered a complete list* of the activities my District engaged in or the costs associated with administering the exit examination.

Number of Student Administrations

Name of School	Number of Students
Trinity High School	124
Alps View High School	1
Community School	1
Total Students	126
	x $3.00
Total Appropriation	$378.00

District Training Costs

Activity	Cost
Superintendent/Principal One-day training	$527.00
Total Cost	$527.00

Care for Exam Materials

Activity	Cost
Employee time to open and check boxes	$48
Employee time to box materials and return	$48
Total Cost	$96.00

Test Coordinator/School Counselor

Activity	Cost
Coordinate exit examination activities	$272.00
Total Cost	$272.00

Total

Sample of Costs Incurred	$895.00
Estimated Appropriation	-$378.00
Reimbursable Costs	$517.00

As stated above, the foregoing *does not list all of the activities or costs associated with administering the exit examination.* Rather, the activities and costs listed above are a small sample of the activities and costs incurred by my District to administer the exit examination. For example, my District will engage in, and incur costs associated with, additional training, test security, providing test results to pupils, responding to information requests, and modifying District policies and procedures. My District has yet to engage in numerous activities required by the test claim legislation since these activities relate to procedures occurring after the exam administration and receipt of exam results. In addition, the required activities and procedures may change as the first administration and the May administration are completed and the data analyzed by the Superintendent of Public Instruction.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on June 11, 2001 in Weaverville, California.

BOB LOWDEN,
Superintendent
Trinity Union High School District

Burbank Unified School District
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Burbank, California 91505
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Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant,
Trinity Union High School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF DR. CAROLINE K. BRUMM IN REBUTTAL TO THE DEPARTMENT OF FINANCE'S APRIL 3, 2000 COMMENTS *High School Exit Examination*

I, Dr. Caroline K. Brumm, make the following declaration and statement. As Coordinator of Student and Program Evaluation, I have knowledge of Burbank Unified School District's high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapter 1 and Statutes of 1999, Chapter 135. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state. Furthermore, I am aware of

the Department of Finance's contention that this appropriation is sufficient to cover all of the costs of administering the high school exit examination.

The following breakdown of costs incurred by my District are meant to be supportive of the position that the $3.00 per pupil appropriation is insufficient to cover all of the costs associated with administering the exit examination. The following *should not be considered a complete list* of the activities my District engaged in or the costs associated with administering the exit examination.

Number of Student Administrations

Name of School	Number of Students
Burbank High School	688
Burroughs High School	619
Monterey High School	16
Total Students	1323
	x $3.00
Total Appropriation	$3,969.00

District Training Costs

Activity	Cost
Administrations	$600.00
Site Test Coordinators	$900.00
District Test Coordinator	$300.00
Pre-Identification of Students	$350.00
Total Cost	$2,150.00

Care for Exam Materials

Activity	Cost
Receiving	$100.00
Shipping	$250.00
Distribution	$200.00
Retrieval	$250.00
Accounting	$350.00
Total Cost	$1,150.00

Test Coordinator/School Counselor

Activity	Cost
Distribution	$600.00
Scheduling – Students/Teachers	$500.00
Retrieval/Accounting/Administration	$750.00
Teacher Coverage	$1,500.00
Total Cost	$3,350.00

Total

Sample of Costs Incurred	$6,650.00
Estimated Appropriation	-$3,969.00
Reimbursable Costs	$2,681.00

As stated above, the foregoing *does not list all of the activities or costs associated with administering the exit examination*. Rather, the activities and costs listed above are a small sample of the activities and costs incurred by my District to administer the exit examination. For example, my District will engage in, and incur costs associated with, additional training, test security, providing test results to pupils, responding to information requests, and modifying District policies and procedures. My District has yet to engage in numerous activities required by the test claim legislation since these activities relate to procedures occurring after the exam administration and receipt of exam results. In addition, the required activities and procedures may change as the first administration and the May administration are completed and the data analyzed by the Superintendent of Public Instruction.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on June 8, 2001 in Burbank, California.

DR. CAROLINE K. BRUMM
Coordinator Student and
Program Evaluation

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Attorney for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant,
Trinity Union High School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF DOUG STARK IN REBUTTAL TO THE DEPARTMENT OF FINANCE'S APRIL 3, 2000 COMMENTS *High School Exit Examination*

I, Doug Stark, make the following declaration and statement. As Assistant Superintendent of Curriculum and Instruction, I have knowledge of Del Norte County Unified School District's high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapter 1 and Statutes of 1999, Chapter 135. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state. Furthermore, I am

Test Coordinator/School Counselor

Activity	Cost
In-service Time	
Training	
Implementation	
Total Cost	$3,308.44

Total

Sample of Costs Incurred	$7,309.91
Estimated Appropriation	-$1,131.00
Reimbursable Costs	$6,178.91

As stated above, the foregoing *does not list all of the activities or costs associated with administering the exit examination.* Rather, the activities and costs listed above are a small sample of the activities and costs incurred by my District to administer the exit examination. For example, my District will engage in, and incur costs associated with, additional training, test security, providing test results to pupils, responding to information requests, and modifying District policies and procedures. My District has yet to engage in numerous activities required by the test claim legislation since these activities relate to procedures occurring after the exam administration and receipt of exam results. In addition, the required activities and procedures may change as the first administration and the May administration are completed and the data analyzed by the Superintendent of Public Instruction.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on June 6, 2001 in Crescent City, California.

DOUG STARK
Assistant Superintendent
Curriculum and Instruction

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I am employed in the county of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 7 Park Center Drive, Sacramento, California 95825.

On **June 12, 2001**, I served the foregoing document(s) described as

Rebuttal Comments to Department of Finance's Opposition
High School Exit Examination
CSM 00-TC-06

to the persons/parties listed on the attached Mailing List and to the Commission on State Mandates via first class mail.

And served via facsimile to the following individuals from the Mailing List:

Mr. Gerry Shelton, Department of Education, School Business Services
Mr. Keith B. Petersen, President, Sixten & Associates

_X_ (**STATE**) I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

___ (**FEDERAL**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **June 12, 2001**, at **Sacramento, California.**

LANI WOODS

Claim Number 00-TC-06 **Claimant** Trinity Union High School District

Subject Chapters 1/99, 135/99

Issue High School Exit Examination

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Education Mandated Cost Network

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Interested Party

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Claim Number 00-TC-06 **Claimant** Trinity Union High School District

Subject Chapters 1/99, 135/99

Issue High School Exit Examination

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S.M.Y.&M.

LAW OFFICES OF SPECTOR, MIDDLETON, YOUNG & MINNEY, LLP

MARCH 14, 2003

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MATTHEW D. MARINELLI
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Ms. Paula Higashi, Executive Director
Commission on State Mandates
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Sacramento, California 95814

Re: **Amendment of Test Claim**
High School Exit Examination, CSM 00-TC-06
Trinity Union High School District, Claimant
Statutes of 1999, Chapters 1 and 135
Education Code Sections 60850, 60851, 60853, and 60855
Title 5, California Code of Regulations, Sections 1200-1225

Dear Ms. Higashi:

On January 25, 2001, the Trinity Union High School District ("claimant") filed the *High School Exit Examination* test claim contending that the state has imposed reimbursable state-mandated activities upon school districts related to the provision of the exam to high school students. This amendment adds the California Department of Education's regulations, sections 1200-1225, to this test claim. The Department's regulations include additional activities, not referenced in the Education Code, which school districts must engage in when administering the exit examination. Moreover, several sections of the regulations provide additional support for the contentions outlined in the original test claim filing.

Title 5, California Code of Regulations, Sections 1200-1225 Impose Reimbursable State-Mandated Activities Upon School Districts

The claimant contends that Title 5, California Code of Regulations, sections 1200-1225 impose reimbursable state-mandated activities upon school districts related to the administration of the high school exit exam. The following sections detail the specific regulation and activity or activities imposed by the regulation.

Section 1203

Section 1203, detailing the student identification requirements before administering the exit examination, is an additional activity that falls under claimed activities [B] and [C] of the conclusion section as described in the original test claim filing. Section 1203 provides additional support concerning the numerous activities that will be claimed in the parameters and guidelines phase under "test administration" if the Commission approves this test claim. As such, the claimant requests that staff consider section 1203 as additional support for the activities claimed in sections [B] and [C] of the test claim conclusion.

Section 1205

Section 1205 outlines the specific documentation that school districts are required to maintain regarding pupil and adult student participation in each test cycle of the exit exam. Specifically, section 1205 requires school districts to maintain the following information:

1. The date on which each section of the exam was offered.
2. The names of each pupil and adult student who took each section of the examination.
3. The grade level of each pupil who took each section of the examination.
4. Whether each pupil or adult student passed or did not pass the section or sections of the examination given.

The activities outlined above were not required before the California Department of Education adopted the current regulations. As such, the activities associated with maintaining this information represents a new program imposed upon school districts. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

Section 1206

Section 1206 outlines additional information that each school district must maintain for each pupil or adult student that takes the exit exam. Specifically, section 1206 requires a pupil's or adult student's permanent record to include:

1. The date on which the pupil or adult student took each section of the examination.

2. Whether the pupil or adult student passed or did not pass each section of the examination taken.

Moreover, section 1206 requires that the information outlined in section 1205 and included in section 1206 shall be created and entered in each pupil's or adult student's record before the next test cycle.

The activities outlined above were not required before the California Department of Education adopted the current regulations. As such, the activities associated with maintaining this information represents a new program imposed upon school districts. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

Section 1207

Section 1207 outlines additional information that school districts must provide the publisher of the exit exam for each pupil or adult student tested. The items listed in section 1207 shall be included in section [F] of the conclusion in the original test claim. School districts were not required to perform the reporting requirements outlined in section 1207 before the adoption of the current exit exam regulations. As such, these activities represent a new program imposed upon school district. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

The claimant suggests that staff consider the requirements outlined in section 1207 with the reporting requirements outlined in Education Code section 60855 as claimed under section [F] in the conclusion of the test claim. The claimant contends that section 1207 provides additional activities and evidence that the state and California Department of Education have imposed reimbursable activities upon school districts related to the provision of information to the state and test publisher.

Section 1208

Section 1208 requires school districts to maintain documentation that the parent or guardian of each pupil has received written notification of the exit exam as required by

Education Code sections 48980, subdivision (e) and 60850, subdivisions (e) and (f). The activities outlined above were not required before the California Department of Education adopted the current regulations. As such, the activities associated with maintaining this information represents a new program imposed upon school districts. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

Section 1209

Section 1209 outlines additional activities school districts must engage in related to the designation of a high school exit examination district coordinator, reporting requirements to the state, and the specific activities the coordinator is required to perform under the Department's new regulations. These activities were not required before the California Department of Education adopted the current regulations. As such, the activities outlined in section 1209 represent a new program imposed upon school districts. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

Section 1210

Section 1210 outlines additional activities school districts must engage in related to the designation of a high school exit examination test site coordinator and the specific activities the coordinator is required to perform under the Department's new regulations. These activities were not required before the California Department of Education adopted the current regulations. As such, the activities outlined in section 1210 represent a new program imposed upon school districts. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

Section 1212

Section 1212 outlines the requirements related to the delivery of exam materials to the school district test sites. These activities were not required before the California Department of Education adopted the current regulations. As such, the activities outlined in section 1212 represent a new program imposed upon school districts. While the state provides a $3.00 per student appropriation to help offset the costs of administering the exam, the claimant has shown that this appropriation does not constitute an offset under Government Code section 17556 as claimed by the Department of Finance to eliminate reimbursement for the claimed activities. The claimant hereby incorporates by reference its rebuttal comments dated June 11, 2001 filed in response to the Department of Finance's opposition.

* * *

Based on the foregoing, the claimant contends that Title 5, California Code of Regulations, sections 1200-1225 impose reimbursable state-mandated activities upon school districts. Attached to this amendment is a declaration from the claimant reiterating that the test claim legislation and resultant regulations has imposed $1,000 in costs to the district due to administering the exit exam. If you have any questions or comments concerning this letter, please feel free to contact me at (916) 646-1400.

I certify under penalty of perjury by my signature below that the statements made in this document are true and correct of my knowledge, and as to all other matters, I believe them to be true and correct based on information or belief.

Executed on March 14, 2003 at Sacramento, California, by:

Sincerely,
LAW OFFICES OF SPECTOR,
MIDDLETON, YOUNG & MINNEY, LLP

David E. Scribner
ATTORNEY AT LAW

Enc. Declaration, California Department of Education Regulations, Seven Copies of Complete Package

SMY&M

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I am employed in the county of Sacramento, State of California. I am over the age of 18 and not a party to the within action; my business address is 7 Park Center Drive, Sacramento, California 95825.

March 14, 2003, I served the foregoing document(s) described as

Amendment of Test Claim

High School Exit Examination, CSM 00-TC-06

to the Commission on State Mandates via first class mail and facsimile.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 14, 2003, at **Sacramento, California.**

Melanie McAlpine

Trinity Union High School District
321 Victory Lane, Box 1227
Weaverville, California 96093
Telephone: (530) 623-6104
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Attorneys for Mandated Cost Systems, Inc. and
Authorized Representative of Claimant,
Trinity Union High School District

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

	CSM No. 00-TC-06
In Re Test Claim Amendment:	DECLARATION OF BOB LOWDEN
Trinity Union High School District	*High School Exit Examination*

I, Bob Lowden, make the following declaration and statement. As Superintendent, I have knowledge of Trinity Union High School District's high school exit examination procedures and requirements. I am familiar with the provisions and requirements of the Title 5, California Code of Regulations, sections 1200-1225. The regulations amended to the test claim originally filed by my District added activities school districts are required to perform as outlined in the attached

amendment. Based on these new activities, my District has incurred more than $1,000 in costs to administer the exit examination and adhere to both the enacted legislation and promulgated regulations.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on March 13, 2003, in Weaverville, California.

BOB LOWDEN,
Superintendent
Trinity Union High School District

Title 5, California Code of Regulations

Division 1, Chapter 2

California High School Exit Examination

Subchapter 6. California High School Exit Examination

Article 1. General

§ 1200. Definitions.

For the purposes of the high school exit examination, the following definitions shall apply:

(a) "Section," "portion," and "part(s)" of the examination shall refer to either the English/language arts section of the high school exit examination or the mathematics section of the high school exit examination.

(b) An "administration" means an eligible pupil's or eligible adult student's taking both the English/language arts and mathematics sections of the high school exit examination or either section during a test cycle.

(c) "Test cycle" means one of the opportunities provided each year by the Superintendent of Public Instruction for an eligible pupil or eligible adult student to take the high school exit examination.

(d) "Grade level" for the purposes of the high school exit examination means the grade assigned to the pupil by the school district.

(e) "Eligible pupil" means one who is enrolled in a California public school in any of grades 9, 10, 11, or 12 who has not passed either the English/language arts section or the mathematics section of the high school exit examination.

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

(g) "Test administrator" means a certificated employee of a school district who has received training in the administration of the high school exit examination from the high school exit examination district or test site coordinator.

(h) "Test proctor" is an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the high school exit examination.

(i) "School districts" includes school districts, county offices of education, and any charter school that does not elect to be part of the school district or county office of education that granted the charter.

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 52504 and 60851, Education Code.

Article 2. Administration

§ 1203. Pupil or Adult Student Identification.

School personnel at the test site shall be responsible for the accurate identification of eligible pupils or adult students who are to be administered the high school exit examination through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851, Education Code.

§ 1204. Grade 10 Census.

Each pupil in grade 10 shall take the high school exit examination only at the spring administration.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(b), Education Code.

§ 1205. Documentation.

School districts shall maintain a record of all pupils and adult students who participate in each test cycle of the high school exit examination. This record shall include the following information for (1) the English/language arts section, and (2) the mathematics section, for each test cycle:

(a) The date on which each section of the examination was offered.

(b) The names of each pupil and adult student who took each section of the examination.

(c) The grade level of each pupil who took each section of the examination.

(d) Whether each pupil or adult student passed or did not pass the section or sections of the examination taken.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(d), Education Code.

§ 1206. Pupil or Adult Student Information.

(a) School districts shall maintain in each pupil's or adult student's permanent record the following information:

(1) The date on which the pupil or adult student took each section of the examination.

(2) Whether the pupil or adult student passed or did not pass each section of the examination taken.

(b) The record required by Section 1205 shall be created and the information required by subdivision (a) of this section shall be entered in each pupil's or adult student's record prior to the subsequent test cycle.

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 60851(a) and (d), Education Code.

§ 1207. Data for Analysis of Pupil or Adult Student Performance.

(a) Each school district shall provide the publisher of the high school exit examination the following information for each pupil or adult student tested for purposes of the analyses required pursuant to Education Code Section 60855:

(1) Date of birth

(2) Grade level

(3) Gender

(4) Language fluency and home language

(5) Special program participation

(6) Participation in free or reduced priced meals

(7) Enrolled in a school that qualifies for assistance under Title 1 of the Improving America's Schools Act of 1994

(8) Testing accommodations

(9) Handicapping condition or disability

(10) Ethnicity

(11) District mobility

(12) Parent education

(13) Post-high school plans

(b) The information is for the purposes of aggregate analyses only and shall be provided and collected as part of the testing materials for the high school exit examination.

(c) School districts shall provide the same information for each eligible pupil enrolled in an alternative or off-campus program as is provided for all other eligible pupils.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60855, Education Code.

§ 1208. Notice.

A school district shall maintain documentation that the parent or guardian of each pupil has received written notification as required by Education Code sections 48980(e) and 60850(f)(1). Note: Authority Cited: Section 33031, Education Code. Reference: Sections 48980(e), and 60850(e) and (f), Education Code.

§ 1209. High School Exit Examination District Coordinator.

(a) On or before July 1 of each school year, the superintendent of each school district shall designate from among the employees of the school district a high school exit examination district coordinator. The superintendent shall notify the publisher of the high school exit examination of the identity and contact information for the high school exit examination district coordinator. The high school exit examination district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the high school exit examination.

(b) The high school exit examination district coordinator's responsibilities shall include, but not be limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school examination and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of examinations and test materials to individual schools and sites.

(4) Maintaining security over the high school exit examination and test data using the procedure set forth in Section 1211. The high school exit examination district coordinator shall sign the Test Security Agreement set forth in Section 1211 prior to receipt of the test materials.

(5) Overseeing the administration of the high school exit examination to eligible pupils or adult students.

(6) Overseeing the collection and return of all test materials and test data to the publisher within any required time periods.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all examinations and test materials are received from school test sites within the school district no later than the close of the school day on the school day following administration of the high school exit examination.

(9) Ensuring that all examinations and test materials received from school test sites within the school district have been placed in a secure school district location by the end of the day following the administration of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be ready for pick-up by the publisher at a designated location in the school district no more than five (5) working days following administration of the English/language arts or the mathematics section in the school district.

(11) Ensuring that the high school exit examinations and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

(c) Within seven (7) working days of completion of school district testing, the superintendent and the high school exit examination district coordinator shall certify to the California Department of Education that the school district has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the high school exit examination in the manner and as otherwise required by the publisher.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c) , Education Code.

§ 1210. High School Exit Examination Test Site Coordinator.

(a) Annually, the superintendent of the school district shall designate a high school exit examination test site coordinator for each test site, including, but not limited to, each charter school, each court school, and each school or program operated by a school district, from among the employees of the school district. The high school exit examination test site coordinator, or the site principal or his or her designee, shall be available to the high school exit examination district coordinator for the purpose of resolving issues that arise as a result of the administration of the high school exit examination.

(b) The high school exit examination test site coordinator's responsibilities shall include, but not be limited to, all of the following:

(1) Determining site examination and test material needs.

(2) Arranging for test administration at the site.

(3) Training the test administrator(s) and test proctors as provided in the test publisher's manual.

(4) Completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials.

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

(6) Maintaining security over the examination and test data as required by Section 1211.

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

(8) Overseeing the administration of the high school exit examination to eligible pupils or adult students at the test site.

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

(10) Assisting the high school exit examination district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the high school exit examination district coordinator and the number of examinations collected for return to the high school exit examination district coordinator.

(11) Overseeing the collection of all pupil or adult student data as required to comply with Sections 1204, 1205, and 1206 of these regulations.

(12) Within three (3) working days of completion of site testing, the principal and the high school exit examination test site coordinator shall certify to the high school exit examination district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the high school exit examination in the manner and as otherwise required by the publisher.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c) , Education Code.

§ 1211. Test Security.

(a) High school exit examination test site coordinators shall ensure that strict supervision is maintained over each pupil or adult student who is being administered the high school exit examination both while the pupil or adult student is in the room in which the test is being administered and during any period in which the pupil or adult student is, for any purpose, granted a break from testing.

(b) Access to the high school exit examination materials is limited to pupils taking the examination for the purpose of graduation from high school and adult students taking the

examination for the purpose of obtaining a diploma of graduation and employees of a school district directly responsible for administration of the examination.

(c) All high school exit examination district and test site coordinators shall sign the California High School Exit Examination Test Security Agreement set forth in subdivision (d).

(d) The California High School Exit Examination Test Security Agreement shall be as follows:

CALIFORNIA HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AGREEMENT

(1) The coordinator will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test's security.

(2) The coordinator will keep on file the names of persons having access to examinations and test materials. All persons having access to the materials shall be required by the coordinator to sign the California High School Exit Examination Test Security Affidavit that will be kept on file in the school district office.

(3) The coordinator will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates as provided in California Code of Regulations, Title 5, Division 1, Chapter 2, Subchapter 6.

By signing my name to this document, I am assuring that I and anyone having access to the test materials will abide by the above conditions.

By:

Title:

School District:

Date:

(e) Each high school exit examination test site coordinator shall deliver the examinations and

test materials only to those persons actually administering the high school exit examination on the date of testing and only upon execution of the California High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the California High School Exit Examination, including but not limited to the high school exit examination test site coordinator, test administrators, and test proctors, shall acknowledge the limited purpose of their access to the test by signing the California High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(g) The California High School Exit Examination Test Security Affidavit shall be completed by each test administrator and test proctor:

CALIFORNIA HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AFFIDAVIT

I acknowledge that I will have access to the high school exit examination for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other person.

(2) I will not copy any part of the test or test materials.

(3) I will keep the test secure until the test is actually distributed to pupils.

(4) I will limit access to the test and test materials by test examinees to the actual testing periods.

(5) I will not permit pupils or adult students to remove test materials from the room where testing takes place.

(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.

(7) I will return all test materials to the designated high school exit examination test site coordinator upon completion of the test.

(8) I will not interfere with the independent work of any pupil or adult student taking the examination and I will not compromise the security of the test by means including, but not limited to:

(A) Providing eligible pupils or adult students with access to test questions prior to testing.

(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure high school exit examination test booklet or document.

(C) Coaching eligible pupils or adult students during testing or altering or interfering with the pupil's or adult student's responses in any way.

(D) Making answer keys available to pupils or adult students.

(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.

(F) Failing to follow test administration directions specified in test administration manuals.

(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.

Signed:

Print Name:

Position:

School:

School District:

Date:

(h) To maintain the security of the high school exit examination, all high school exit examination district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.

(i) The security of the test materials that have been duly delivered to the school district is the

sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher.

(j) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c), Education Code.

§ 1212. Test Site Delivery.

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

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c), Education Code.

Article 3. Accommodations

§ 1215. Timing/Scheduling.

All pupils and adult students may have additional time to complete the examination, within the limits imposed by test security as provided in Section 1211.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(c), Education Code.

§ 1216. Allowable Accommodations for Pupils or Adult Students with Disabilities, or for English Learners.

The purpose of the high school exit examination is to assure that pupils and adult students who graduate from high school have demonstrated in English the skills, knowledge and abilities embodied in the state standards in English language arts and mathematics selected for the high

school exit examination. To assure that the high school exit examination is a valid measure of each pupil's or adult student's skills, knowledge and abilities in relationship to these standards, accommodations will be allowed that are necessary and appropriate to afford access to the test, consistent with federal law, so long as the accommodations do not fundamentally alter what the examination is designed to measure.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

§ 1217. Pupils or Adult Students with Disabilities.

(a) Where necessary to access the test, pupils or adult students with disabilities shall take the high school exit examination with those accommodations that are necessary and appropriate to address the pupil's or adult student's identified disability(ies) and that have been approved by their individualized education program teams or 504 plan teams, including but not limited to those accommodations that the pupil or adult student has regularly used during instruction and classroom assessments, provided that such accommodations do not fundamentally alter what the test measures. Approved accommodations for the high school exit examination must be reflected in the pupil's or adult student's individualized education program or 504 plan.

(b) Accommodations that do not fundamentally alter what the test measures include, but may not be limited to:

(1) Presentation accommodations: Large print versions; test items enlarged through mechanical or electronic means; Braille transcriptions provided by the test publisher or a designee; markers, masks, or other means to maintain visual attention to the test or test items; reduced numbers of items per page; audio presentation on the math portion of the test, provided that an audio presentation is the pupil's or adult student's only means of accessing written material.

(2) Response accommodations:

(A) Verbal, written, or signed responses; responses made with mechanical or electronic assistance as long as the mechanical or electronic device is used solely to record the pupil's or adult student's response. If a person is required to transcribe the pupil's or adult student's responses to the format required by the examination, the transcriber shall be an employee of the school district who has signed the Test Security Affidavit.

(B) Assistive devices and technologies that are regularly used during testing provided that no technology or assistive device may be used that fundamentally alters what the test measures.

(3) Scheduling accommodations: More frequent breaks during the regularly scheduled test session; multiple sessions, provided that a pupil or adult student does not have access to test items that will be presented in a future session or sessions.

(4) Setting accommodations: Special or adaptive furniture; special lighting or acoustics; an individual carrel or study enclosure; a separate room provided that the pupil or adult student is directly supervised by school personnel who have signed the Test Security Affidavit.

(c) The following accommodations are not allowed because they have been determined to fundamentally alter what the test measures:

(1) Calculators on the math portion of the test.

(2) Audio or oral presentation of the English/language arts portion of the test.

(d) If the pupil's or adult student's individualized education program team or 504 plan team proposes an accommodation for use on the high school exit examination that is not included in subdivision (b), the school district may submit a request for accommodation pursuant to Section 1218.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

§ 1217.5. English Language Learners.

English learners must read and pass the high school exit examination in English. School

districts must evaluate pupils to determine if they possess sufficient English language skills at the time of the examination to be assessed with the test. If the pupil does not possess sufficient English language skills to be assessed, the school district, in addition to the instruction in reading, writing, and comprehension in the English language specified in Education Code section 60852, may provide additional time as provided in Section 1215.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(e)(2), Education Code.

§ 1218. Requests for Accommodations.

(a) The school district may file a request for accommodation with the California Department of Education for a case-by-case determination of the use of accommodations that are not included in Section 1217(b). Requests must be received by the California Department of Education at least nine (9) weeks in advance of the pupil's or adult student's proposed administration of the high school exit examination.

(b) The request for accommodation must include:

(1) A description of the pupil's or adult student's disability(ies).

(2) A description of the requested accommodation.

(3) A statement that the pupil's or adult student's individualized education program team or 504 plan team has determined that the requested accommodation is appropriate and necessary to address the pupil's or adult student's identified disability(ies).

(4) An explanation of how the requested accommodation would allow the pupil or adult student to access the high school exit examination.

(c) The California Department of Education shall make a determination of whether the requested accommodation would fundamentally alter what the test measures. The California Department of Education's determination shall be the final administrative decision.

(d) The California Department of Education shall issue its decision on each request and shall

inform the school district in writing at least six (6) weeks in advance of the pupil's or adult student's proposed administration of the high school exit examination.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850, Education Code.

§ 1219. Independent Work of the Pupil or Adult Student.

In implementing accommodations pursuant to Section 1216 or 1217, school districts shall ensure that all test responses are the independent work of the pupil. School districts and school district personnel are prohibited from assisting any pupil in determining how the pupil or adult student will respond to each question, and are prohibited from leading or directing the pupil or adult student to a particular response.

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60850(g), Education Code.

§ 1219.5. Invalidation of Test Scores.

If a school district allows a pupil or adult student to take the high school exit examination with one or more accommodations that are determined by the California Department of Education to fundamentally alter what the test measures, that pupil's or adult student's test score or scores will be invalidated.

Note: Authority Cited: Section 33031, Education Code. Reference: Sections 60850(c) and (g), Education Code.

Article 4. Cheating

§ 1220. Cheating.

(a) Any pupil or adult student found to have cheated or assisted others in cheating, or to have compromised the security of the high school exit examination shall have his or her test marked as "invalid" and the pupil or adult student shall not receive a score from that test administration.

(b) The school district shall notify each eligible pupil or adult student prior to each

administration of the high school exit examination of the provisions of subdivision (a).

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(b) and (c), Education Code.

Article 5. Apportionment

§ 1225. Apportionment.

(a) For each test cycle, each school district shall report to the California Department of Education the number of examinations administered.

(b) The superintendent of each school district shall certify the accuracy of all information submitted. The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within ten (10) working days of completion of each test cycle in the school district.

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

Note: Authority Cited: Section 33031, Education Code. Reference: Section 60851(a), Education Code.

Schools Mandate Group
a JPA Dedicated to Making the State Accountable to You

February 20, 2004

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: **Comments on the Draft Staff Analysis**
High School Exit Examination, CSM 00-TC-06
Trinity Union High School District, Claimant
Statutes of 1999, Chapters 1 and 135
Education Code Sections 60850, 60851, 60853, and 60855

Dear Ms. Higashi:

On February 4, 2004, your office issued its draft staff analysis on the *High School Exit Examination* test claim. The ultimate conclusion in the draft staff analysis is to deny the activities found to represent a new program because the original declarations do not meet the new $1,000 minimum claim amount. It must be noted that the declarations were filed to meet the previous $200 minimum claim amount. Attached to these comments are additional declarations that provide sufficient support that school districts have incurred more than $1,000 while engaging in the activities staff lists in the draft analysis as new programs. Please note that the declarations include the statement that school districts are responsible for sending exam results to students. While the claimant agrees with most of the analysis, some issues of disagreement remain and will be discussed below.

ADEQUATE NOTICE: TRANSFER STUDENTS – DRAFT STAFF ANALYSIS PAGE 11

On page 11 of the draft staff analysis, staff finds that the activities associated with providing notice to pupils concerning the high school exit examination is not subject to article XIII B, section 6 since the activities are found to be reimbursable under the *Annual Parent Notification* test claim. The claimant agrees with staff's analysis in part. The issue concerns notice to *transfer students*. Education code section 60850 provides that the exam may not be administered to a pupil that has not received "adequate notice" of the exam. Subdivision (f)(1) defines "adequate notice" to mean that the pupil and his parent or guardian have received written notification of the exam at the beginning of the school year or *at the time the pupil transfers*.

The draft staff analysis correctly points out that the *Annual Parent Notification* test claim decision, which occurred after this test claim was filed seeking notification activities, includes the annual written notification of the exam thereby meeting the mandated requirement outlined in Education Code section 60850. Annual parent notifications are performed pursuant to Education Code section 48980 and includes the high school exit examination notification. As the test claim name implies such notification occurs *annually*.

Education Code section 48981 provides that "the notice be sent at the time of registration for the first semester or quarter of the regular school term." However, there is no requirement in Education Code section 48980 or 48981 that such notifications be given to *transfer students*. Therefore, special notice must be given to transfer students as the *Annual Parent Notification* test claim is inapplicable to this group of students. Since school districts were not providing notice of the high school exit examination to transfer students before the enactment of the test claim legislation, this activity imposes a new program upon school districts. In addition, the costs associated with meeting the activities imposed upon school districts for the *High School Exit Examination* test claim exceed the $1,000 minimum claim amount even after applying the required offset.[1]

Based on the foregoing, the claimant requests that staff modify its analysis to include the activities associated with providing notice of the exam to transfer students that have not taken the exam in the 10th grade.

RESTRUCTURING ACADEMIC OFFERINGS – DRAFT STAFF ANALYSIS PAGE 12

The claimant disagrees with staff's interpretation of Education Code section 60853 and the claimant's clarification outlined in its Rebuttal to the Department of Finance's comments on the test claim. The claimant is not seeking the activities associated with actually restructuring its academic offerings for pupils that have not demonstrated the skills necessary to pass the exam. The claimant is seeking reimbursement for the initial meeting where a district must *consider* engaging in such activities.

Education Code section 60853, subdivision (b), provides:

> "(b) *It is the intent of the Legislature that a school district consider restructuring its academic offerings* reducing electives available to any pupil who had not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year." (Emphasis added.)

[1] *See* declarations attached documenting activities and resultant costs for one year. These declarations *do not* include the costs of performing this activity as it was not listed in the draft staff analysis as a new program or higher level of service.

The claimant contends that the Legislature requires that the school site *meet* to determine if such restructuring is necessary to enable students to garner the skills necessary to pass the exit examination. If the Commission adopts DOF's position on this activity, it would in essence be ignoring Legislative intent: that school districts *consider* restructuring academic offerings. School districts must meet in order to determine the best course of action for those pupils who do not demonstrate the skills necessary to succeed on the exit examination.

Section 60853 provides the Legislature's overall intent that school districts prepare pupils to pass the exit examination. Subdivision (a) provides, "a school district shall use regularly available resources and any available supplemental resources" to prepare pupils to pass the exit examination. Subdivision (c) begins with, "[a] school district should prepare pupils to succeed on the exit examination." These statements of intent evidence the Legislature's overriding concern that school districts help prepare pupils to pass the exit examination. Based on these clear statements of Legislative intent, the claimant concludes that the activities associated with school districts meeting to discuss potential restructuring of academic offerings represent a reimbursable state-mandate.

Based on the foregoing, the claimant requests that staff modify its analysis to include the activities associated with an initial meeting in which school districts consider restructuring academic offerings to pupils who have not demonstrated the necessary skills to pass the exam.

HIGH SCHOOL EXIT EXAMINATION TEST RESULTS – DRAFT STAFF ANALYSIS PAGES 28-29

Attached to these comments are several declarations that include an affirmative statement that school districts are required to provide notice to pupils and their parents or guardians concerning test results. As such, the claimant requests that the staff analysis be modified to include this activity as reimbursable.

Declarations to Support Costs – Draft Staff Analysis 39-41

Attached to these comments are several declarations that support the conclusion that the $3 appropriation is insufficient to cover all of the costs associated with performing the new activities listed in the draft staff analysis. Only those activities Commission staff found to represent a new program or higher level of service are included in these declarations. Moreover, the declarations include affirmative statements that it is the school district's responsibility to provide exam results. Therefore, the claimant requests that the staff analysis be modified finding that the claimant has rebutted to presumption that the funding appropriated to school districts is sufficient to cover the new program or higher level of service and as such the activities listed in the analysis represent reimbursable state-mandated activities.

* * *

If you have any questions concerning this letter, please feel free to contact me at (916) 444-7260.

Sincerely,
SCHOOLS MANDATE GROUP

David E. Scribner, Esq.
Executive Director

Enc: Declarations from Calistoga, Denair, Grant, Ripon, Riverdale, and Sierra School Districts

Cc: Mailing List

High School Exit Examination Mail List	
Executive Director State Board of Education 721 Capitol Mall, Room 558 Sacramento, CA 95814	Dr. Carol Berg Education Mandated Cost Network 1121 L Street, Suite 1060 Sacramento, CA 95814
Mr. Keith B. Petersen Sixten & Associates 5252 Balboa Avenue, Suite 807 San Diego, CA 92117	Mr. Keith Gmeinder Department of Finance 915 L Street, 8th Floor Sacramento, CA 95814
Ms. Michelle Nelson Gilroy Teacher's Association 7949 Wren Avenue, Suite A Gilroy, CA 95020	Mr. Gerald Shelton California Department of Education 1430 N Street, Suite 2213 Sacramento, CA 95814
Mr. Jim Spano State Controller's Office 300 Capitol Mall, Suite 518 Sacramento, CA 95814	Ms. Beth Hunter Centration, Inc. 8316 Red Oak Street, Suite 101 Rancho Cucamonga, CA 91730
Ms. Sandy Reynolds Reynolds Consulting Group P.O. Box 987 Sun City, CA 92586	Mr. Steve Shields Shields Consulting Group, Inc. 1536 36th Street Sacramento, CA 95816
Ms. Marianne O'Malley Legislative Analyst's Office 925 L Street, Suite 1000 Sacramento, CA 95814	Ms. Susan Geanacou Department of Finance 915 L Street, Suite 1190 Sacramento, CA 95814
Mr. Michael Havey State Controller's Office 3301 C Street, Suite 500 Sacramento, CA 95816	Ms. Paula Higashi Commission on State Mandates 980 Ninth Street, Suite 300 Sacramento, CA 95814

Calistoga Joint Unified School District
1520 Luke Street
Calistoga, California 94515
Telephone: (707) 942-4703
Facsimile: (707) 942-6589

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF SYLVIA JIMINEZ-MARTIN *High School Exit Examination*

I, Sylvia Jiminez-Martin, Counselor & District Test Coordinator make the following declaration and statement. As Counselor & District Test Coordinator, I have knowledge of Calistoga Joint Unified School Districts' high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapters 1 and 135, and all applicable regulations. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state.

The Commission on State Mandates' staff issued its draft staff analysis on February 4, 2004 listing the following activities as imposing a new program or higher level of service upon school districts:

Documentation of adequate notice: Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)

Determining English language skills: Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE. (Cal. Code Regs., tit. 5, § 1217.5.)

HSEE administration: Administration of the HSEE on designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (b)(3).)

- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)

- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)

- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)

- Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)

- For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

- Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)

- Also, the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 and referenced below (except for a teacher's time in administering the HSEE during the school day);

    - o District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE, (9) ensuring all exams and materials received

from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered, (Cal. Code Regs., tit. 5, § 1212.)

Test security/cheating: For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks. (Cal. Code Regs., tit. 5, § 1211, subd. (a).)

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

Reporting data to the SPI: Providing HSEE data to the SPI or independent evaluators or the publisher is a new program or higher level of service. Specifically, providing the following

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

Reporting exam results to students: Providing test results to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. Exam results are generally in writing and mailed to each student by the school district.

In Fiscal Year 2003/04, my District will incur $1,735 performing the activities listed above. My District's total appropriation for this same period will be $135. As such, my District has incurred more than the $1,000 minimum claim amount for this test claim. In addition, even if my District's costs were not in excess of the $1,000 minimum claim amount, my District has the ability to combine claims with other school districts within the county to meet the higher threshold.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on February 19, 2004 in Calistoga, California.

S. Jimenez-Martinez

Sylvia Jiminez-Martinez, Counselor &
District Test Coordinator, Calistoga Joint
Unified School District

Denair Unified School District
3460 Lester Road
Denair, California 95316
Telephone: (209) 632-7514
Facsimile: (209) 632-9194

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim:	CSM No. 00-TC-06
Trinity Union High School District	DECLARATION OF EDWARD E. PARRAZ *High School Exit Examination*

I, Edward E. Parraz, Superintendent make the following declaration and statement. As Superintendent, I have knowledge of Denair Unified School Districts' high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapters 1 and 135, and all applicable regulations. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state.

The Commission on State Mandates' staff issued its draft staff analysis on February 4, 2004 listing the following activities as imposing a new program or higher level of service upon school districts:

Documentation of adequate notice: Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)

Determining English language skills: Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE. (Cal. Code Regs., tit. 5, § 1217.5.)

HSEE administration: Administration of the HSEE on designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (b)(3).)

- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)

- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)

- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)

- Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)

- For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

- Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)

- Also, the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 and referenced below (except for a teacher's time in administering the HSEE during the school day);

    - District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following

administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered, (Cal. Code Regs., tit. 5, § 1212.)

Test security/cheating: For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks. (Cal. Code Regs., tit. 5, § 1211, subd. (a).)

- Limiting access to the HSEE to pupils taking it and employees responsible for its administration. (Cal. Code Regs., tit. 5, § 1211, subd. (b).)

- Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations. (Cal. Code Regs., tit. 5, § 1211, subd. (c).)

- Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. (Cal. Code Regs., tit. 5, § 1211, subd. (d).)

- HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. (Cal. Code Regs., tit. 5, § 1211, subd. (e).)

- For persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g). (Cal. Code Regs., tit. 5, § 1211, subd. (f).)

- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory. (Cal. Code Regs., tit. 5, § 1211 subd. (h).)

- Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. (Cal. Code Regs., tit. 5, § 1211, subd. (i).)

- Providing secure transportation within the district for test materials once they have been delivered to the district. (Cal. Code Regs., tit. 5, § 1211, subd. j).)

- Marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating. (Cal. Code Regs., tit. 5, § 1220.)

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

Reporting exam results to students: Providing test results to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. Exam results are generally in writing and mailed to each student by the school district.

In 2003/04, my District has incurred $2,954 performing the activities listed above. My District's total appropriation for this same period was $351. As such, my District has incurred more than the $1,000 minimum claim amount for this test claim. In addition, even if my District's costs were not in excess of the $1,000 minimum claim amount, my District has the ability to combine claims with other school districts within the county to meet the higher threshold.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on February 19, 2004 in Denair, California.

Edward E. Parraz, Superintendent
Denair Unified School District

Grant Joint Union High School District
1333 Grand Avenue
Sacramento, California 95838
Telephone: (916) 286-4849
Facsimile: (916) 263-0572

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

	CSM No. 00-TC-06
In Re Test Claim:	DECLARATION OF Uve Dahmen
Trinity Union High School District	*High School Exit Examination*

I, Uve Dahmen, Coordinator of Testing and Assessment make the following declaration and statement. As Coordinator of Testing and Assessment, I have knowledge of the Grant Joint Union High School District's high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapters 1 and 135, and all applicable regulations. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state.

The Commission on State Mandates' staff issued its draft staff analysis on February 4, 2004 listing the following activities as imposing a new program or higher level of service upon school districts:

Documentation of adequate notice: Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)

Determining English language skills: Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE. (Cal. Code Regs., tit. 5, § 1217.5.)

HSEE administration: Administration of the HSEE on designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE

(Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (b)(3).)

- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)

- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)

- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)

- Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)

- For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

- Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)

- Also, the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 and referenced below (except for a teacher's time in administering the HSEE during the school day);

    - o District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and

return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE ~~that the district~~ has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered, (Cal. Code Regs., tit. 5, § 1212.)

Test security/cheating: For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks. (Cal. Code Regs., tit. 5, § 1211, subd. (a).)

- Limiting access to the HSEE to pupils taking it and employees responsible for its administration. (Cal. Code Regs., tit. 5, § 1211, subd. (b).)

- Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations. (Cal. Code Regs., tit. 5, § 1211, subd. (c).)

- Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. (Cal. Code Regs., tit. 5, § 1211, subd. (d).)

- HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. (Cal. Code Regs., tit. 5, § 1211, subd. (e).)

- For persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g). (Cal. Code Regs., tit. 5, § 1211, subd. (f).)

- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory. (Cal. Code Regs., tit. 5, § 1211 subd. (h).)

- Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. (Cal. Code Regs., tit. 5, § 1211, subd. (i).)

- Providing secure transportation within the district for test materials once they have been delivered to the district. (Cal. Code Regs., tit. 5, § 1211, subd. j).)

- Marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE,

and notifying each eligible pupil before administration of the HSEE of these consequences of cheating. (Cal. Code Regs., tit. 5, § 1220.)

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

Reporting exam results to students: Providing test results to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. Exam results are generally in writing and mailed to each student by the school district.

In the 2002/2003 fiscal year of the high school exit examination, my District has incurred $18,511.27 performing the activities listed above. My District's total appropriation for this same period was $8,028.00. As such, my District has incurred more than the $1,000 minimum claim amount for this test claim. In addition, even if my District's costs were not in excess of the $1,000 minimum claim amount, my District has the ability to combine claims with other districts to meet the higher threshold.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on February 18, 2004 in Sacramento, California.

Uve Dahmen, Coordinator of Testing and Assessment
Grant Joint Union High School District

Ripon Unified School District
304 N. Acacia Avenue
Ripon, California 95366
Telephone: (209) 599-2131
Facsimile: (209) 599-6271

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF LISA M. BOJE *High School Exit Examination*

I, Lisa M. Boje, Director of Curriculum and Instruction make the following declaration and statement. As Director of Curriculum and Instruction, I have knowledge of Ripon Unified School Districts' high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapters 1 and 135, and all applicable regulations. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state.

The Commission on State Mandates' staff issued its draft staff analysis on February 4, 2004 listing the following activities as imposing a new program or higher level of service upon school districts:

Documentation of adequate notice: Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)

Determining English language skills: Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE. (Cal. Code Regs., tit. 5, § 1217.5.)

HSEE administration: Administration of the HSEE on designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (b)(3).)

- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)

- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)

- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)

- Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)

- For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

- Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)

- Also, the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 and referenced below (except for a teacher's time in administering the HSEE during the school day);

    - District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following

administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered, (Cal. Code Regs., tit. 5, § 1212.)

Test security/cheating: For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks. (Cal. Code Regs., tit. 5, § 1211, subd. (a).)

- Limiting access to the HSEE to pupils taking it and employees responsible for its administration. (Cal. Code Regs., tit. 5, § 1211, subd. (b).)

- Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations. (Cal. Code Regs., tit. 5, § 1211, subd. (c).)

- Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. (Cal. Code Regs., tit. 5, § 1211, subd. (d).)

- HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. (Cal. Code Regs., tit. 5, § 1211, subd. (e).)

- For persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g). (Cal. Code Regs., tit. 5, § 1211, subd. (f).)

- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory. (Cal. Code Regs., tit. 5, § 1211 subd. (h).)

- Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. (Cal. Code Regs., tit. 5, § 1211, subd. (i).)

- Providing secure transportation within the district for test materials once they have been delivered to the district. (Cal. Code Regs., tit. 5, § 1211, subd. j).)

- Marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating. (Cal. Code Regs., tit. 5, § 1220.)

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

Reporting exam results to students: Providing test results to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. Exam results are generally in writing and mailed to each student by the school district.

In Fiscal Year 2003/04, my District has incurred $3,286 performing the activities listed above. My District's total appropriation for this same period was $648. As such, my District has incurred more than the $1,000 minimum claim amount for this test claim. In addition, even if my District's costs were not in excess of the $1,000 minimum claim amount, my District has the ability to combine claims with other districts in the county to meet the higher threshold.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on February 6, 2004 in Ripon, California.

Lisa M. Boje, Director of Curriculum and Instruction, Ripon Unified School District

Riverdale Joint Unified School District
3086 W. Mt. Whitney
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Riverdale, California 93656
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF BROOKE CAMPBELL *High School Exit Examination*

I, Brooke Campbell, Assistant Principal make the following declaration and statement. As Assistant Principal, I have knowledge of Riverdale Joint Unified School Districts' high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapters 1 and 135, and all applicable regulations. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state.

The Commission on State Mandates' staff issued its draft staff analysis on February 4, 2004 listing the following activities as imposing a new program or higher level of service upon school districts:

Documentation of adequate notice: Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)

Determining English language skills: Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE. (Cal. Code Regs., tit. 5, § 1217.5.)

HSEE administration: Administration of the HSEE on designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (b)(3).)

- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)

- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)

- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)

- Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)

- For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

- Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)

- Also, the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 and referenced below (except for a teacher's time in administering the HSEE during the school day);

    - o District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no

later than the close of the school day on the school day following administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered, (Cal. Code Regs., tit. 5, § 1212.)

Test security/cheating: For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks. (Cal. Code Regs., tit. 5, § 1211, subd. (a).)

- Limiting access to the HSEE to pupils taking it and employees responsible for its administration. (Cal. Code Regs., tit. 5, § 1211, subd. (b).)

- Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations. (Cal. Code Regs., tit. 5, § 1211, subd. (c).)

- Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. (Cal. Code Regs., tit. 5, § 1211, subd. (d).)

- HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. (Cal. Code Regs., tit. 5, § 1211, subd. (e).)

- For persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g). (Cal. Code Regs., tit. 5, § 1211, subd. (f).)

- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory. (Cal. Code Regs., tit. 5, § 1211 subd. (h).)

- Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. (Cal. Code Regs., tit. 5, § 1211, subd. (i).)

- Providing secure transportation within the district for test materials once they have been delivered to the district. (Cal. Code Regs., tit. 5, § 1211, subd. j).)

- Marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating. (Cal. Code Regs., tit. 5, § 1220.)

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

Reporting exam results to students: Providing test results to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. Exam results are generally in writing and mailed to each student by the school district.

In 2002/03, my District incurred $2,997 performing the activities listed above. My District's total appropriation for this same period was $930. As such, my District has incurred more than the $1,000 minimum claim amount for this test claim. In addition, even if my District's costs were not in excess of the $1,000 minimum claim amount, my District has the ability to combine claims with other school districts within the county to meet the higher threshold.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on February 19, 2004 in Riverdale, California.

Brooke Campbell, Assistant Principal
Riverdale Joint Unified School District

Sierra Unified School District
29143 Auberry Road
Prather, California 93651
Telephone: (559) 855-3662
Facsimile: (559) 855-3585

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In Re Test Claim: Trinity Union High School District	CSM No. 00-TC-06 DECLARATION OF A.J. REMPEL *High School Exit Examination*

I, A.J. Rempel, Director of Educational Services/Special Projects make the following declaration and statement. As Director of Education Services/Special Projects, I have knowledge of Sierra Unified School Districts' high school exit examination procedures and requirements. I am familiar with the provisions and requirements of Statutes of 1999, Chapters 1 and 135, and all applicable regulations. In addition, I am familiar with the provisions and requirements by which my District may receive the $3.00 per pupil test administration appropriation from the state.

The Commission on State Mandates' staff issued its draft staff analysis on February 4, 2004 listing the following activities as imposing a new program or higher level of service upon school districts:

Documentation of adequate notice: Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)

Determining English language skills: Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE. (Cal. Code Regs., tit. 5, § 1217.5.)

HSEE administration: Administration of the HSEE on designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

- Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) and 1210, subd. (b)(3).)

- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification. (Cal. Code Regs., tit. 5, § 1203.)

- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken. (Cal. Code Regs., tit. 5, § 1205.)

- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE and whether or not the pupil passed each section of the HSEE. (Cal. Code Regs., tit. 5, § 1206.)

- Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual. (Cal. Code Regs., tit. 5, § 1209.)

- For the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. (Cal. Code Regs., tit. 5, § 1209.)

- Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE. (Cal. Code Regs., tit. 5, § 1210.)

- Also, the HSEE district coordinator's duties listed in section 1209 and the HSEE test site coordinator's duties listed in section 1210 and referenced below (except for a teacher's time in administering the HSEE during the school day);

    - o District Coordinator duties are: (1) responding to inquiries of the publisher, (2) determining district and school HSEE test material needs, (3) overseeing acquisition and distribution of the HSEE, (4) maintaining security over the HSEE using the procedures in section 1211, (5) overseeing administration of the HSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following

administration of the HSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the HSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Test site coordinator's duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the HSEE to eligible pupils at the test site; (9) overseeing the collection and return of all testing materials to the HSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three (3) working days of completion of site testing, certifying with the principal to the HSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the HSEE in the manner and as otherwise required by the publisher. Teacher time spent on these activities is not reimbursable and as such is not claimed as part of this declaration.

- Delivery of HSEE booklets to the school test site no more than two working days before the test is to be administered, (Cal. Code Regs., tit. 5, § 1212.)

Test security/cheating: For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks. (Cal. Code Regs., tit. 5, § 1211, subd. (a).)

- Limiting access to the HSEE to pupils taking it and employees responsible for its administration. (Cal. Code Regs., tit. 5, § 1211, subd. (b).)

- Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations. (Cal. Code Regs., tit. 5, § 1211, subd. (c).)

- Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. (Cal. Code Regs., tit. 5, § 1211, subd. (d).)

- HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. (Cal. Code Regs., tit. 5, § 1211, subd. (e).)

- For persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g). (Cal. Code Regs., tit. 5, § 1211, subd. (f).)

- HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory. (Cal. Code Regs., tit. 5, § 1211 subd. (h).)

- Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. (Cal. Code Regs., tit. 5, § 1211, subd. (i).)

- Providing secure transportation within the district for test materials once they have been delivered to the district. (Cal. Code Regs., tit. 5, § 1211, subd. j).)

- Marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating. (Cal. Code Regs., tit. 5, § 1220.)

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

Reporting exam results to students: Providing test results to each pupil taking the examination within eight weeks of the examination administration and in time for the pupil to take any section of the examination not passed at the next administration. Exam results are generally in writing and mailed to each student by the school district.

In 2003/04, my District has incurred $3,390 performing the activities listed above. My District's total appropriation for this same period was $648. As such, my District has incurred more than the $1,000 minimum claim amount for this test claim. In addition, even if my District's costs were not in excess of the $1,000 minimum claim amount, my District has the ability to combine claims with other districts to meet the higher threshold.

I know the foregoing facts personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except where stated upon information and belief and where so stated I declare that I believe them to be true.

Executed on February 13, 2004 in Prather, California.

A.J. Rempel, Director of Educational Services/Special Projects, Sierra Unified School District

COMMISSION ON STATE MANDATES
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SACRAMENTO, CA 95814
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February 4, 2004

Mr. David E. Scribner
Schools Mandate Group
One Capitol Mall, Suite 200
Sacramento CA 95814

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: **Draft Staff Analysis and Hearing Date**
High School Exit Examination, 00-TC-06
Trinity Union High School District, Claimant
Education Code Sections 60850, 60851, 60853, 60855
Statutes 1999x, Chapter 1; Statutes 1999, Chapter 135
California Code of Regulations, Title 5, Sections 1200 - 1225

Dear Mr. Scribner:

The draft staff analysis for this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **February 25, 2004**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is tentatively set for hearing on Thursday, **March 25, 2004** at 9:30 p.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about March 4, 2004. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

If you have any questions on the above, please contact Eric Feller at (916) 323-8221.

Sincerely,

Paula Higashi
Executive Director

Enc. Draft Staff Analysis

cc. Mailing List (current mailing list attached)

MAILED: Mail List / FAXED:
DATE: 2/4/21 INITIAL: YS
CHRON: FILE: ✓
WORKING BINDER:

Hearing Date: March 25, 2004
J:\MANDATES\2000\tc\00-tc-06\TC\dsa.doc

ITEM ___
TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Sections 60850, 60851, 60853, 60855

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

California Code of Regulations, Title 5, Sections 1200 - 1225

High School Exit Examination (00-TC-06)

Filed by Trinity Union High School District

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN THE FINAL ANALYSIS

STAFF ANALYSIS

Claimant

Trinity Union High School District

Chronology

1/25/01	Claimant files test claim with the Commission
2/20/01	Claimant's representative (P. Minney) files original signature pages of claimant's declaration and the authorization to act as representative
2/27/01	Department of Finance ("DOF") requests an extension of time to comment
4/3/01	DOF files test claim comments with the Commission
6/11/01	Claimant files rebuttal to DOF's comments with the Commission
1/30/03	Commission staff sends claimant a letter regarding intent to amend the test claim as stated in the test claim
2/3/03	Commission staff sends claimant a letter requesting information and documentation on test claim
2/4/03	Claimant sends a letter confirming intent to amend test claim
3/14/03	Claimant amends test claim to add California Code of Regulations, title 5, sections 1200 – 1225.
9/3/03	Steve Smith of MCS Education Services sends a letter to notify that MCS is seeking authorizations to act as the claimant's representative.
9/5/03	Paul Minney sends a letter withdrawing as claimant representative and notifying staff that MCS will be taking over as claimant representative.
9/29/03	Commission staff sends letter to Steve Smith of MCS advising that signed statement from the test claimants authorizing representation are needed for MCS to act as claimant representative.
10/23/03	Steve Smith of MCS Education Services sends a letter to request that David Scribner be designated as claimant representative.
1/30/04	MCS Education Services faxes (1) designation from claimant for Steve Smith of MCS or designee to act as representative for MCS, and (2) designation by MCS of David Scribner of Schools Mandate Group to act as claimant representative.
2/4/04	Commission staff issues the draft staff analysis

Background

A. Test Claim Legislation

The test claim legislation[1] that established the high school exit exam (HSEE) was sponsored by Governor Davis in 1999, and enacted during an extraordinary session of the Legislature dedicated to education reform issues. The purpose of the HSEE is to "significantly improve pupil achievement in public high schools and to ensure that students who graduate from public high schools can demonstrate grade-level competency in the state content standards for writing, reading and mathematics."[2] The HSEE tests "eligible pupils"[3] on mathematics through Algebra I, and English/Language arts.[4]

The test claim legislation originally required high school students, beginning in the 2003-04 school year to pass the HSEE as a condition of receiving a diploma or graduating from high school.[5] Statutes 2001, chapter 716 (Assem. Bill No. 1609) authorizes the State Board of Education (SBE) to delay the date upon which passing the HSEE is required for graduation. The SBE has postponed the HSEE requirement for graduation until the class of 2006, and has shortened the length of the HSEE from three to two days.[6]

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

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

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

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

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

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

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

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

> a certificated employee of a school district who has received training in the administration of the [HSEE] from the high school exit examination district or test site coordinator.[7]

The Test administrator may be assisted by a Test proctor, "an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the [HSEE]."[8] Others with roles in the HSEE are the district coordinator and test site coordinator, whose functions are discussed below.

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

Additionally the HSEE regulations were amended in May 2003 and are in the process of being amended again. According to the California Department of Education's (CDE) website,[9] the comment period for the latter regulation amendments ended September 30, 2003. The amended regulations, like the statutes, are not before the Commission, and staff makes no findings on regulations adopted subsequent to March 2003, when the test claim was amended to add the regulations[10] (the May 2003 amendments to the regulations are footnoted).

B. Prior Law

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

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

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

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

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

once during grades 4 through 6, and 7 through 9, and twice during grades 10 and 11. Districts could defer assessing pupils of limited English proficiency until the pupils had received at least 24 months of instruction, including six months of instruction in English (former Ed. Code, § 51216, subd. (a)).

C. Federal Law

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

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

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

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

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

> required recipient states to demonstrate a policy that assures all handicapped children the right to a free appropriate education. (20 U.S.C. § 1412 (a).) The act is not merely a funding statute; rather, it establishes an enforceable substantive right to a free appropriate public education in recipient states [citations omitted]. ... The Supreme Court has noted that Congress intended the act to establish "a basic floor of opportunity that would bring into compliance all school districts with the constitutional right to equal protection with respect to handicapped children." [citations omitted.][11]

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

The *Hayes* court held that FEHA is a federal mandate.[12] *Hayes* also held,

> To the extent the state implemented the act [FEHA] by freely choosing to impose new programs or higher levels of service upon local school districts, the costs of such programs or higher levels of service are state mandated and subject to subvention.[13]

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

3. Equal Educational Opportunities Act of 1974, Title VI of the Civil Rights Act: The test claim statute states that the HSEE, "regardless of federal financial participation, shall comply with Title VI of the Civil Rights Act (42 U.S.C. § 2000d et seq.), its implementing regulations (34 C.F.R. Part 100), and the Equal Educational Opportunities Act of 1974 (EEOA) (20 U.S.C. 1701)."[14] Title VI of the Civil Rights Act prohibits discrimination on grounds of race, color or national origin on programs or activities receiving Federal financial assistance. The EEOA states that all public school children "are entitled to equal educational opportunity without regard to race, color, sex or national origin, [and] the neighborhood is the appropriate basis for determining public school assignments." (20 U.S.C. 1701.)

D. Prior Test Claims

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

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[12] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1592.

[13] *Id.* at page 1594.

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

California's other statewide student-testing requirement is the Standardized Testing and Reporting (STAR) program. On August 24, 2000, the Commission found the STAR statutes and regulations[15] to be partially reimbursable (97-TC-23).

Claimant's Position

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

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

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

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

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

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

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

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

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

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

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

Claimant's responses to DOF's comments are in the "discussion" section of this analysis.

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

State Agency Position

In its April 2001 comments[16] on the test claim, DOF states that no provisions are reimbursable because they are either voluntary (in the case of the first field test) or already funded in the budget. According to DOF, test administration, data collection and training staff are already budgeted. Test administration would not be reimbursable since districts already receive a per pupil funding rate for up to 180 days (or its equivalent minutes) of instruction and the administration of the HSEE falls within the time allotted for regular instruction. DOF also states that section 60853,[17] subdivision (b) is merely a statement of legislative intent. This section concerns school district restructuring of academic offerings to pupils who have not demonstrated skills necessary to succeed on the HSEE.

DOF's assertions did not include support by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so."[18] DOF's comments are not relied on by staff, which reaches its own conclusions based on evidence in the record.

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

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[19] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[20] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[21] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school

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

[17] All statutory references are to the Education Code unless otherwise indicated. References to regulations are to California Code of Regulations, title 5, sections 1200-1225, unless otherwise indicated.

[18] Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1).

[19] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

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

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

district to engage in an activity or task.[22] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[23] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[24] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[25]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[26] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[27]

This test claim presents the following three issues:

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

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[22] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates*, *supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. (*Id.* at p. 754.)

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

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

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

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

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

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

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

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

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

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

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

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

DOF commented that three field tests were scheduled, the first during fall 2000. DOF states that the CDE randomly selected 200 high schools to participate, but participation was voluntary and schools were given the option to refuse to administer the field test. According to DOF, the second and third field tests were incorporated in the March and May 2001 administrations of the HSEE as part of the actual exam, which is covered by the funds in the budget. DOF argues that to the extent that schools voluntarily participate in field-testing, doing so is not a mandated cost.

Claimant contends that the $3 appropriation per test administration is insufficient to cover the costs of the March and May 2001 HSEE field tests. According to claimant, the

appropriation does not rise to the level required in Government Code section 17556, subdivision (e) to completely offset any claims that the activities associated with field-testing the HSEE are reimbursable. This is discussed under issue 3 below.

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

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

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

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

Staff finds that this statute prohibits giving the HSEE without providing adequate notice pursuant to section 48980.

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

> The Commission determined that Education Code section 48980, subdivisions (e)... resulted in costs mandated by the state by requiring school districts to provide to parents the following:
> a. Notice that pupils will be required to pass a high school exit examination as a condition of graduation. (Ed. Code, § 48980, subd. (e).)[28]

The Commission does not have jurisdiction to readdress the issue here. Further, staff finds that section 60850, subdivisions (e)(1) and (f)(1), does not mandate any further activities on school districts. Therefore, section 60850, subdivisions (e)(1) and (f)(1), is not subject to Article XIII B, section 6.

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

Adult students (title 5 regulations): Many of the title 5 regulations apply expressly to adult students as well as high school pupils.[29] Section 1200, subdivision (f) defines an "Eligible adult student" as:

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

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

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

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

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

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

> **It is the intent** of the Legislature that a school district **consider** restructuring its academic offerings reducing the electives available to any pupil who has not demonstrated the skills necessary to succeed on the exit examination, so that the pupil can be provided supplemental instruction during the regularly scheduled academic year. [Emphasis added.]

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

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

Section 60853, subdivision (b) does not require meetings to discuss restructuring academic offerings to pupils who lack skills to pass the HSEE. The language of the

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

statute is plainly permissive: "It is the intent of the Legislature that a school district ***consider*** restructuring its academic offerings..." (emphasis added). If the Legislature had intended to require restructuring academic offerings, it could have used mandatory language to do so (e.g., school districts shall restructure...).[30] Stating intent that school districts "consider" restructuring academic offerings does not make the restructuring activity mandatory. Therefore, based on the plain language of section 60853, subdivision (b), staff finds that restructuring academic offerings, or meeting to restructure academic offerings for pupils who lack the skills to pass the HSEE, is not mandated, and thus not subject to article XIII B, section 6.

Similarly, subdivision (c) states that school districts "***should*** prepare students to succeed on the exit examination," and "...districts ***are encouraged to*** use existing resources to ensure that all pupils succeed." [Emphasis added.] Again, mandatory language was not used. ""Should" generally denotes discretion and should not be construed as "shall."""[31] These activities are discretionary, and therefore are not state mandates.[32]

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

Test Proctors (Cal. Code Regs., tit. 5, § 1200, subd. (h)): This section defines a test proctor as "an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the [HSEE]." (Cal. Code Regs., tit. 5, § 1200, subd. (h).) However, there is no requirement for school districts to use proctors for administering the HSEE.[33] Therefore, staff finds that using proctors is discretionary and therefore not an activity mandated by the state.

Permissive accommodations (Cal. Code Regs., tit. 5, §§ 1217, subd. (d), 1218, 1219 & 1219.5): Section 1217, subdivision (d) authorizes a school district to request an accommodation from the CDE pursuant to section 1218 if the pupils individualized education program (IEP) team or 504 plan team proposes an accommodation for use on the HSEE not included in subdivision (b) of section 1217. Section 1218 authorizes the school district to request accommodations from CDE not included in Section 1217, subdivision (b). Section 1218 also specifies the content for the request. Section 1219 requires the district to ensure that all test responses are the independent work of the pupil, and prohibits assistance to pupils in determining how the pupil will respond to each question, or leading the pupil to a response. Section 1219 prohibits school personnel from assisting pupils rather than mandating an activity.[34] Section 1219.5 provides that the pupil's scores will be invalidated if a district allows a pupil to take the HSEE using one or more accommodations determined by the CDE to fundamentally alter what the test

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

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

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

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

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

measures.[35] Because these sections authorize but do not require[36] (or in the case of sections 1219 and 1219.5, merely prohibit) school district activities, staff finds that they are not subject to article XIII B, section 6.

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

> The examination shall be offered to individuals with exceptional needs, as defined in Section 56026,[37] in accordance with paragraph (17) of subsection (a) of Section 1412 of Title 20 of the United States Code and Section 794 and following of Title 29 of the United States Code. Individuals with exceptional needs shall be administered the examination with appropriate accommodations, where necessary.

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

As stated above, the court in *Hayes* stated that the federal Education of the Handicapped Act is a federal mandate. Section 60850, subdivision (g) merely implements the IDEA (an amendment/successor to the federal Education of the Handicapped Act), and IDEA's regulations[38] in administering the HSEE. Therefore, staff finds that section 60850, subdivision (g) is not a state mandate subject to Article XIII B, section 6, because it was inserted into the HSEE legislation to implement a federal law or regulation.[39]

Similarly, section 1216 of the HSEE regulations states,

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

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

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

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

[38] 34 C.F.R. section 300.138 provides, "The State must have on file with the Secretary [of Education] information to demonstrate that-- (a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary;"

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

As with section 60850 above, section 1216 merely implements a federal law (IDEA). Therefore, staff finds that section 1216 is also not a state mandate subject to Article XIII B, section 6.[40]

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

> Where necessary to access the test, pupils ...with disabilities shall take the [HSEE] with those accommodations that are necessary and appropriate to address the pupil's... identified disability(ies) and that have been approved by their individualized education program [IEP] teams or 504 plan teams,[41] including but not limited to those accommodations that the pupil...has regularly used during instruction and classroom assessments, provided that such accommodations do not fundamentally alter what the test measures. Approved accommodations for the [HSEE] must be reflected in the pupil's ...[IEP] or 504 plan.

Subdivision (b) of section 1217 lists accommodations that do not fundamentally alter what the test measures,[42] and subdivision (c) lists accommodations that would fundamentally alter what the test measures.[43]

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

In summary, because the test claim statutes and regulations discussed above are not state mandates, they are not subject to article XIII B, section 6, i.e., Education Code section 60850, subdivisions (a), (b), (c), (d), (e)(2), (e)(3), (e)(4), (g) and (h), Education Code

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

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

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

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

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

section 60853, subdivisions (b) and (c), and California Code of Regulations, title 5, sections 1200, subd. (h), 1216, 1217, 1218, 1219 and 1219.5.

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

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

In order for the test claim legislation to be subject to article XIII B, section 6 of the California Constitution, the legislation must constitute a "program." As discussed above, this means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[44] Only one of these findings is necessary to trigger article XIII B, section 6.[45]

The test claim legislation consists of educational testing as a means to measure pupil achievement and school accountability. These activities are within the purview of public education, a program that carries out a governmental function of providing a service to the public.[46] Moreover, the test claim legislation imposes unique requirements on school districts that do not apply generally to all residents and entities of the state.

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

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

Article XIII B, section 6 of the California Constitution states, "whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds." To determine if the "program" is new or imposes a higher level of service, the test claim legislation is compared to the legal requirements in effect immediately before the enactment of the test claim legislation.[47]

Documentation of notice (Cal. Code. Regs., tit. 5, § 1208.): Section 1208 of the title 5 regulations requires school districts to "maintain documentation that the parent or

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

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

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

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

guardian of each pupil has received written notification as required by Education Code sections 48980 (e) and 60850 (f)(1)."

Prior law did not require maintaining documentation of HSEE notice to parents.[48] Neither claimant nor DOF commented on maintaining documentation of notice.

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

Determining English language skills (Cal. Code Regs., tit. 5, § 1217.5.): This regulation[49] states: "English learners must read and pass the [HSEE] in English. School districts must evaluate pupils to determine if they possess sufficient English language skills at the time of the [HSEE] to be assessed with the test."[50] If not, districts may provide additional time as an accommodation, in addition to instruction pursuant to Education Code section 60852.

Prior law, enacted in 1978, required that pupils of limited English proficiency be assessed to determine their primary language proficiency.[51] These provisions were sunset in 1987.[52] Education Code section 313 requires annual assessments of English-learner pupils' English skills, but not until the 2000-2001 school year,[53] so it does not predate the HSEE legislation.

Prior law, repealed by the test claim statute, required a "limited-English proficient pupil" to "be assessed for basic skills in the English language upon his or her own request or

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[48] Education Code section 49062. California Code of Regulations, title 5, section 432 requires retention of various kinds of pupil records, including "Mandatory Permanent Pupil Records," "Mandatory Interim Pupil Records" and "Permitted Records," each of which is defined to include specified data. Section 437 of the title 5 regulations provides for retention and destruction. However, none of these include the HSEE parental notification. It appears that Mandatory Interim Records (that includes parental prohibitions and authorizations of pupil participation) most closely resembles the HSEE notification. According to section 437, subdivision (c), Mandatory Interim Records, unless forwarded to another district, are "adjudged to be disposable when the student leaves the district or when their usefulness ceases." However, because the length of maintenance for HSEE notification records is specified in neither the statutes nor the regulations, the issue is not addressed in this analysis.

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

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

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

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

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

upon the request of his or her parent or guardian." (former Ed. Code, § 51216, subd. (a).) This statute also provided,

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

Prior law required an English assessment on request, and passage of the English language proficiency assessment to receive a high school diploma. Passage of this assessment for a diploma merely required assigning a pass/fail grade or score. Section 1217.5, on the other hand, also requires assigning a grade or score, and also expressly requires determining whether the pupil would take the HSEE based on the evaluation.

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

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

Subdivision (a) of section 60851, as originally enacted reads:

> Commencing with the 2003-04 school year[54] and each school year thereafter, each pupil completing grade 12 shall successfully pass the exit examination as a condition of receiving a diploma of graduation or a condition of graduation from high school. Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), (c), and (d). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.

Subdivision (b) originally provided:

> A pupil may take the high school exit examination in grade 9 beginning in the 2000-01 school year.[55] Each pupil shall take the high school exit examination in grade 10 beginning in the 2001-02 school year and may take the examination during each subsequent administration, until each section of the examination has been passed.

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

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

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

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

DOF comments that these requirements would not be reimbursable since districts already receive a per pupil funding rate for up to 180 days (or equivalent minutes) of instruction and the administration of the HSEE falls within the time allotted for regular instruction. DOF's comments and claimant's rebuttal regarding adequacy of funding is discussed below under issue 3.

Prior law did not require administration of the HSEE. Since a certificated employee (acting as a test administrator,[56] or potentially as test site coordinator,[57] or district coordinator[58] or in another capacity) administers the HSEE during normal classroom hours, the question arises as to whether a teacher's time in doing so is reimbursable.

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

Preexisting law states that pupils are not to be enrolled for less than the minimum school day required by law.[59] Minimum school day statutes begin in section 46100, which requires school districts to fix the length of the school day subject to state law. Since before 1959, the state has required public schools to provide education for a minimum of 175 days in a fiscal year.[60] The state has also mandated a minimum number of instructional minutes each school day, which is 240 for grades 4 through 12, exclusive of recesses and lunch.[61] The minimum school days per year and the minimum number of instructional minutes per day did not change as a result of the HSEE statutes or regulations.

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

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

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

[59] Education Code section 48200.

[60] Education Code section 41420.

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

During the instructional minutes, school districts are required to teach certain courses, and are required to conform the educational program to state standards.[62] Education Code section 51220 describes the required courses for grades 7 through 12 to include English and Math, among others.

Instructional preparation time is counted as part of the teacher full-time equivalent.[63] A "full-time" teaching position is defined as a position for not less than the minimum school day.[64] School districts may, but are not required to have teachers work longer per school day than the minimum number of minutes.[65] In addition, if a school district compensates a teacher for work that is not part of the teacher's contracted instructional day duties, the same compensation is required to be paid to all teachers that perform like work with comparable responsibilities.[66] Education Code section 45023.5 states that "[n]othing in this section shall be construed as requiring a district to compensate certificated employees for work assignments which are not part of the contracted instructional day duties simply because other employees of the district receive compensation for work assignments which involve different types of service."[67]

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

In a case about adding a domestic violence training course for public safety officers, the court held that it is not a mandate when the test claim legislation directs "local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[68] Similarly, the HSEE legislation merely reallocates instructional time to include administration of the HSEE.

Therefore, based on the plain language of the Education Code, administration of the HSEE is a new activity only if performed by a non-teacher certificated employee, such as an employee holding a service credential.[69] Thus, staff finds that HSEE administration

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[62] Education Code section 51041.

[63] Section 41401, subdivision (d).

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

[65] Education Code section 45024.

[66] Education Code section 45023.5.

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

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

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

on SPI-designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, constitutes a new program or higher level of service. Staff also finds that administration of the HSEE on SPI-designated dates to pupils in grade 9 in only the 2000-01 school year who wish to take the HSEE is also a new program or higher level of service.[70] "Administration" does not include teacher time, and is limited to the activities specified in the title 5 regulations outlined below.

Training: According to section 1200, subdivision (g), test administrators are to be trained in administration of the HSEE, and test site coordinators train the test administrators "as provided in the test publisher's manual."[71] Training is not listed in the regulations as a district coordinator duty, but section 1200 states that administrators are to be trained by either the test site or district coordinators. Therefore, section 1200 gives district coordinators the flexibility to train.

As to HSEE training generally, where a statute referring to one subject contains a provision, omitting the provision from a similar statute concerning a related subject is significant to show that a different intention existed.[72] Applying this rule, the test claim legislation provisions that do not mention training are significant to show that no training requirement was intended to apply.

Therefore, staff finds that training a test administrator either by a test site or (based on § 1200, subd. (g)) district coordinator as provided in the test publisher's manual[73] is a new program or higher level of service, except that a teacher's time is not reimbursed.

Additional time accommodation: Section 1215 allows pupils to have additional time to complete the HSEE within the test security limits provided in section 1211 (discussed below).[74]

Staff finds that a teacher's additional time to complete the HSEE during normal classroom hours is not a new program or higher level of service. As discussed above under Teacher time, the state has not mandated an increased level of service to administer the HSEE outside the normal school day, which consists of 240 instructional minutes for grades 4 through 12, excluding recess and lunch.[75] State law does not mandate school districts to require teachers to work beyond the minimum school day.

Therefore, staff finds that section 1215 is not a new program or higher level of service.

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

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

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

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

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

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

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

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

Grade 10 administration: Section 1204[76] requires districts to offer the exam in grade 10 only at the spring administration. This regulation merely specifies the timing of the HSEE for 10th graders, so staff finds that section 1204 does not constitute a new program or higher level of service.

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

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

Preexisting law classifies schools records into three categories: Mandatory Permanent Public Records, Mandatory Interim Pupil Records, and Permitted Records. Under Mandatory Interim Pupil Records, schools are required to keep "results of standardized tests administered within the preceding three years."[77] Under Permitted Records, schools are authorized to keep "standardized test results older than three years."[78]

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

> A specific statutory provision relating to a particular subject, rather than a general statutory provision, will govern in respect to that subject, although the latter,

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

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

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

standing alone, would be broad enough to include the subject to which the more particular provision relates.[79]

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

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

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

(1) responding to inquiries of the publisher,

(2) determining district and school HSEE test material needs,

(3) overseeing acquisition and distribution of the HSEE,

(4) maintaining security over the HSEE using the procedures in section 1211 (discussed below),

(5) overseeing administration of the HSEE,[80]

(6) overseeing collection and return of test material and test data to the publisher,

(7) assisting the publisher in resolving discrepancies in the test information and materials,

(8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the HSEE,

(9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests,

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

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

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

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

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

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

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

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

(1) determining site examination and test material needs;

(2) arranging for test administration at the site;

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

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

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

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

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

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

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

(10) assisting the HSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the HSEE district coordinator and the number of examinations collected for return to the HSEE district coordinator; (11) overseeing the collection of all pupil data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations.

(11) Subdivision (b)(12) provides: Within three (3) working days of completion of site testing, the principal[81] and the [HSEE] test site coordinator shall certify to the [HSEE] district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the [HSEE] in the manner and as otherwise required by the publisher.

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

Test delivery: Section 1212 requires school districts to deliver the booklets for the HSEE to the school test site no more than two working days before the test is to be administered.[82] Prior law did not require HSEE booklet delivery, nor specify its timing, so staff finds that section 1212 constitutes a new program or higher level of service.

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

- Training a test administrator either by a test site or district coordinator (§§ 1200, 1210).
- Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
- Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the names of each pupil who took each section, the grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);
- Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);

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

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

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

- Designating by the district superintendent, on or before July 1 of each year, a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);
- Designating annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210);
- Delivering HSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212).

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

Test security/cheating (Cal. Code Regs., tit. 5, §§ 1211 & 1220.): Section 1211 requires the HSEE test site coordinators to ensure that strict supervision is maintained over each pupil taking the HSEE while in the testing room and during breaks. Subdivision (b) of section 1211 states that access to the HSEE materials is limited to pupils taking the exam and employees responsible for administration of the exam.[83]

Subdivision (c) requires all HSEE district and test site coordinators to sign the HSEE Test Security Agreement set forth in subdivision (d). The Agreement set forth in subdivision (d) requires the coordinator to take necessary precautions to safeguard all tests and test materials by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who will be required to sign the HSEE Test Security Affidavit (set forth in subd. (g)). The Agreement further requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates. Subdivision (e) requires HSEE test site coordinators to deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit. Subdivision (f) requires persons with access to the exam (including test site coordinators, test administrators, and test proctors)[84] to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit (not to be confused with the Test Security Agreement). Subdivision (g) lists the content of the HSEE Test Security Affidavit,[85] which prohibits

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

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

[85] Prior to the May 2003 amendment to section 1211, subdivision (g), this section required the affidavit to be "completed by each test administrator and test proctor." However, the more expansive list in subdivision (f), which included the test site

the following: divulging the test contents, copying any part of the test, permitting pupils to remove test materials from the test room, interfering with the independent work of any pupil taking the exam, and compromising the security of the test by any means, including those listed. The Affidavit requires keeping the test secure until it is distributed to pupils, and limiting examinee access to the test materials to the actual testing periods.

Subdivision (h) states that all HSEE district and test site coordinators are responsible for inventory control and requires use of appropriate inventory control forms to monitor and track test inventory. Subdivision (i) states that the security of the test materials delivered to the district is the sole responsibility of the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher. Subdivision (j) states that once materials have been delivered to the district, secure transportation within the district is the responsibility of the district.[86,87]

Subdivision (a) of section 1220[88] of the title 5 regulations requires having the HSEE marked "invalid" and not scoring it for any pupil who is found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE. Subdivision (b) requires that the district notify each eligible pupil before administration of the HSEE of the consequences of cheating in subdivision (a).

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

- For HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks (§ 1211, subd. (a));
- Limiting access to the HSEE to pupils taking it and employees responsible for its administration (§ 1211, subd. (b));

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coordinator, was in place in May 2003 and more specifically governs who is required to sign the affidavit.

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

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

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

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

HSEE results (Ed. Code, § 60851, subd. (d)).: Section 60851, subdivision (d),[89] states:

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

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

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

DOF commented that the publisher is required to score all tests within an appropriate time frame so that pupils receive their results within eight weeks of testing. DOF states that the amount provided in the budget covers the costs associated with reporting of test results, including mailings. Claimant disputes the adequacy of the funding, which is analyzed in issue 3 below.

Staff wrote to the claimant's representative in February 2003 requesting information as to reporting exam results to determine which activities the school or school district performs, and which are performed by the HSEE publisher. Staff received no response. The statute does not state that the district must provide the HSEE results.

Therefore, based on lack of evidence in the record, staff finds that providing HSEE results to all pupils within eight weeks of administering the HSEE and providing results to pupils that failed any portion of the HSEE in time for the pupil to retake that portion of it at the next administration is not a new program or higher level of service.

Supplemental instruction (Ed. Code, §§ 60851, subd. (e) & 60853, subd. (a).): These sections,[90] as added by the test claim legislation, provide in pertinent part:

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

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

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

> In order to prepare pupils to succeed on the exit examination, a school district shall use ***regularly available resources and any available supplemental remedial resources***, including, but not limited to, funds available for programs established by Chapter 320 of the Statutes of 1998,[91] Chapter 811 of the Statutes of 1997,[92]

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

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

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

Chapter 743 of the Statutes of 1998,[93] and funds available for other similar supplemental remedial programs. [Emphasis added.]

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

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

In *County of Los Angeles v. Commission on State Mandates,*[94] a case about adding a training course for public safety officers, the court held that the test claim statute had "directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training."[95] Similarly, here the Legislature has required districts to reallocate existing, identified, supplemental or remedial instruction resources to prepare pupils to succeed on the HSEE.

Therefore, staff finds that supplemental instruction, as set forth in Education Code, sections 60851, subdivision (e), and 60853, subdivision (a), as added by the test claim statute, is not a new program or higher level of service.[96]

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

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

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

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

[95] *Ibid.*

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

(3) Analysis of whether the exit examination has or is likely to have differential effects, whether beneficial or detrimental, on population subgroups described in subdivision (b).

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

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

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

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

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

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

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

(1) date of birth,
(2) grade level,
(3) gender,
(4) language fluency and home language,
(5) special program participation,
(6) participation in free or reduced priced meals,
(7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994,
(8) testing accommodations,

(9) handicapping condition or disability,
(10) ethnicity,
(11) district mobility,
(12) parent education, and
(13) post-high school plans.

Section 1225, subdivision (a) requires each school district to report to the CDE the number of examinations for each test cycle.[97] Subdivision (b) requires the district superintendent to certify the accuracy of the information submitted to CDE, and specifies that the report be filed with the SPI within ten (10) working days of completion of each test cycle in the school district. Prior law did not require districts to report the number of examinations or to certify the accuracy of information submitted to CDE. Therefore, staff finds that section 1225 constitutes a new program or higher level of service.

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

Issue 2 Summary

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

- **Documentation of adequate notice:** Maintaining documentation that the parent or guardian of each pupil received written notification of the HSEE. (Cal. Code Regs., tit. 5, § 1208.)
- **Determining English language skills:** Determining whether English-learning pupils possess sufficient English language skills at the time of the HSEE to be assessed with the HSEE (§ 1217.5);
- **HSEE administration:** administration of the HSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-02 school year, and subsequent administrations for students who do not pass until each section of the HSEE has been passed, and administration of the HSEE on SPI-designated dates to pupils in grade 9 only in the 2000-01 school year who wish to take the HSEE (Ed. Code, § 60851, subd. (a).), except a teacher's time administering the HSEE is not a new program or higher level of service. Administration is limited to the following activities specified in the regulations:

  Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual is a new program or higher level of service. (Cal. Code Regs., tit. 5, §§ 1200, subd. (g) & 1210, subd. (b)(3)).

  Accurately identifying eligible pupils who take the HSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);

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

Maintaining a record of all pupils who participate in each test cycle of the HSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the HSEE taken (§ 1205);

Maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the HSEE, and whether or not the pupil passed each section of the HSEE (§ 1206);

Designation by the district superintendent, on or before July 1 of each year, of a district employee as the HSEE district coordinator, and notifying the publisher of the HSEE of the identity and contact information of that individual (§ 1209);

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

Designation annually by the district superintendent a HSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the HSEE district coordinator to resolve issues that arise as a result of administration of the HSEE (§ 1210).

Also, the HSEE district coordinator's duties[98] listed in section 1209 and the HSEE test site coordinator's duties[99] listed in section 1210 (except for a teacher's time in administering the HSEE during the school day); and

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

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

- **Test security/cheating:** for HSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the HSEE, both while in the testing room and during any breaks (§ 1211, subd. (a));

  Limiting access to the HSEE to pupils taking it and employees responsible for its administration (§ 1211, subd. (b));

  Having all HSEE district and test site coordinators sign the HSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations (§ 1211, subd. (c));

  Abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the HSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211, subd. (d));

  HSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the HSEE Test Security Affidavit ((§ 1211, subd. (e));

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

For persons with access to the HSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the HSEE Test Security Affidavit set forth in subdivision (g) (§ 1211, subd. (f));

HSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory (§ 1211, subd. (h));

Being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher (§ 1211, subd. (i));

Providing secure transportation within the district for test materials once they have been delivered to the district (§ 1211, subd. (j));

And marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the HSEE, and notifying each eligible pupil before administration of the HSEE of these consequences of cheating (§ 1220).

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

Staff also finds that all other test claim legislation is either not mandated, not a program, or not a new program or higher level of service.

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

In order for the activities listed above to impose a reimbursable, state mandated program under article XIII B, section 6 of the California Constitution, two criteria must apply. First, the activities must impose costs mandated by the state.[100] Second, no statutory exceptions as listed in Government Code section 17556 can apply. Government Code section 17514 defines "costs mandated by the state" as follows:

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

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

Claimant submitted a declaration in support of the contention that the test claim legislation results in increased costs for school districts. The Superintendent of the Trinity Union High School District declared on January 24, 2001, that the Superintendent is informed and believes that prior to enactment of the test claim legislation, the Trinity Union High School District was not required to engage in the test claim activities. The claimant estimated it has incurred, or will incur, costs significantly in excess of $200.[101]

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

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

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

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

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

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

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

Furthermore, neither NCLB nor IASA constitute costs mandated by the federal government because their applicable requirements are merely conditions on federal funding that neither states nor school districts are required to accept. California is not required to participate in the federal grant programs of NCLB (summarized above under background) or IASA (former 20 U.S.C. § 6311 (a)(1)). Therefore, even though an administration of the HSEE is used to comply with NCLB's assessment programs, such as calculating the Academic Performance Index for state accountability purposes and Adequate Yearly Progress,[102] NCLB is not a federal mandate.

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

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

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

> [t]he statute or executive order provides for offsettings savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or **includes additional revenue** that was specifically intended to fund the costs of the state mandate **in an amount sufficient** to fund the cost of the state mandate. [Emphasis added.]

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

> Funding for the administration of the exit examination shall be provided for in the annual Budget Act. The Superintendent of Public Instruction shall apportion funds appropriated for this purpose to enable school districts to meet the requirements of subdivisions (a), (b), and (c). The State Board of Education shall establish the amount of funding to be apportioned per test administered, based on a review of the cost per test.[103]

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

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

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

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

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

The state budgets for the past three years also state that the SBE shall annually establish the amount of funding apportioned to districts, and that the amount per test shall not be valid without the approval of DOF.[104]

DOF argues that the activities in the test claim are fully funded in the budget. DOF's assertions, as stated above, are not supported by "documentary evidence ... authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so."[105] Staff relies on the law and the record as presented.

Claimant refutes DOF's assertion. The CDE issued the California High School Exit Examination Apportionment Forms[106] to all district and county superintendents, stating that each school district will receive $3 per pupil tested (not per subject tested) regardless of whether the pupil took one or both portions of the HSEE. Claimant argues that this amount is insufficient to cover the costs of test administration.

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

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

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

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

administered.[107] The record, however, is silent as to how the HSEE otherwise compares with other states' high school exit examinations, and other states' eligible costs.

The SBE apportioned $3 per test administration, which was approved by DOF. There is a rebuttable presumption that in doing so, both the SBE and DOF have officially performed their duties,[108] and have done so correctly.[109] Therefore, the claimant must rebut both presumptions by showing the nonexistence of the presumed fact:[110] the sufficiency of HSEE funding apportioned to school districts.

Claimant submitted three declarations in support of its claim. The first, from claimant Trinity Union High School District,[111] alleges $378 in test appropriation (revenue) but $895 in costs incurred, (stating it is a partial list of costs) as follows:

$527	**Superintendent/principal one-day training,**[112]
$96	**Employee time** to open and check exam material boxes, and box and return materials
$272	**The test site coordinator/school counselor** to coordinate exit exam activities.
$895	Sample of costs incurred
$378	Estimated Appropriation (126 students at $3 each)
$517	Costs in excess of appropriation[113] ("reimbursable costs" in declaration)

The second declaration, from the Burbank Unified School District,[114] also partially itemizes costs as follows:

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

[108] Evidence Code section 664.

[109] Taxara v. Gutierrez, 114 Cal. App. 4th 945, 949.

[110] Evidence Code section 606.

[111] Declaration of Bob Lowden, Superintendent of Trinity Union High School District, June 11, 2001.

[112] This activity may not be eligible for reimbursement depending on the Principal's capacity as to the HSEE. As discussed above, "Test administrators" are to be trained (Cal. Code. Regs., tit. 5, § 1200, subd. (g)), and "Test site coordinators" train the test administrators (Cal. Code Regs., tit. 5, § 1210, subd. (b)(3)). Section 1200, subdivision (g) implies that "District Coordinators" may also train test administrators.

[113] Under Government Code section 17564, claimant would need to incur $1000 in costs for reimbursement by the State Controller's Office. Claimant alleged costs of "more than $1000" in its March 13, 2003 declaration submitted with the test claim amendment.

[114] Declaration of Dr. Caroline K. Brumm, Coordinator Student and Program Evaluation, Burbank Unified School District, June 8, 2001.

$2,150	**District training costs,**[115] broken down as follows: Administrations $600, Site Test Coordinators, $900, District Test Coordinator $300, Pre-Identification of Students $350
$1,150	**Care for Exam materials,** broken down as follows: receiving $100, shipping $250, distribution $200, retrieval $250, accounting $350
$3,350	**Test coordinator/School counselor,** broken down as follows: distribution $600, scheduling – students/teachers $500, retrieval/accounting/administration/ $750, Teacher coverage $1500
$6,650	Sample of Costs incurred
$3,969	Estimated appropriation (1323 students at $3 each)
$2,681	Costs in excess of appropriation ("reimbursable costs" in declaration)

Claimant submitted a third declaration from Del Norte Unified School District[116] that partially itemizes costs as follows:

$3,621.08	**District Training Costs**, not broken down, but listed as: training staff,[117] demographics, printing, in-service time
$380.39	**Care for Exam Materials**, clerical assistance to prep and care for exam materials
$3,308.44	**Test Coordinator/School Counselor,** In-service time, training,[118] implementation
$7,309.91	Sample of Costs incurred
$1,131.00	Estimated appropriation (1,323 pupils at $3 each)
$6,178.91	Costs in excess of appropriation ("reimbursable costs" in declaration)

The Commission must base its findings on substantial evidence in the record.[119]

> ...[S]ubstantial evidence has been defined in two ways: first, as evidence of ponderable legal significance ... reasonable in nature, credible, and of solid value [citation]; and second, as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[120]

The Commission's finding must be supported by

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[115] These activities may or may not be eligible for reimbursement (footnote 112, *ante*).

[116] Declaration from Doug Stark, Assistant Superintendent, Del Norte Unified School District, June 6, 2001.

[117] These activities may or may not be eligible for reimbursement (footnote 112, *ante*).

[118] *Ibid.*

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

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

> ...all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence."[121]

The administrative record, including claimant's declarations, does not rebut the presumption that $3 per student is sufficient to cover the costs of the HSEE.

Claimant's cost argument is based on three school district declarations, none of which is sufficient to rebut the presumptions from DOF and SBE that $3 per administration is sufficient to fund the HSEE.

The first declaration, from Trinity Union High School District, alleges $517 in costs in excess of appropriation. But Trinity's costs would need to exceed $1000 in excess of appropriation to be eligible to file a reimbursement claim under Government Code section 17564. Moreover, Trinity alleged $527 in Superintendent/principal one-day training that may not be reimbursable unless the Superintendent/principal was acting as a test administrator (who is trained according to Cal.Code Regs., tit. 5, § 1200, subd. (g)) or a test site coordinator (who trains the test administrator according to Cal.Code Regs., tit. 5, § 1210, subd. (b)(3)). It is unknown whether the training cost allegation represents the employee's time, cost of training, or both. If the Superintendent/principal training cost is removed from Trinity's declaration, its alleged costs do not exceed its appropriation.

The second declaration from Burbank Unified School District alleges ineligible costs such as training for the District Test Coordinator ($300) and Teacher coverage ($1500). It also includes costs that would not be reimbursable unless determined so under parameters and guidelines, such as training in Pre-identification of Students ($350), and scheduling students/teachers ($500). If these alleged costs ($2,650) are subtracted from Burbank's alleged costs ($6650), the remaining $4000 is only $31 in excess of its estimated appropriation ($3,969). This is far below the $1000 in costs needed to file a reimbursement claim under Government Code section 17564.

The third declaration, from the Del Norte Unified School District, lacks specificity to determine whether or not the categories of activities alleged would be eligible for reimbursement. For example, it is unknown whether alleged costs for "training staff" "demographics" "printing" and "in-service time" would be eligible for reimbursement because those labels do not sufficiently describe activities. Equally ambiguous are Del Norte's allegations of Test Coordinator/School Counselor in-service time, training, and implementation.

Therefore, based on evidence in the administrative record, staff finds that claimant has not rebutted the presumption that the HSEE funding apportioned to school districts is sufficient to cover the costs of HSEE administration.

Conclusion

Staff finds that the test claim legislation does not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Specifically, staff finds

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[121] *Ibid.*

that the test claim legislation does not impose costs mandated by the state because, as stated in Government Code section 17556, subdivision (e):

> The statute or executive order provides for offsetting savings to ... school districts which result in no net costs to the ... school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

Recommendation

Staff recommends that the Commission deny the test claim.

High School Exit Exam Test Claim (00-TC-07)
Summary

Code section	Summary	Subject to Article XIII B?	New Program or Higher Level of Service	Costs Mandated by the State?
Education Code section 60850, subd (a)	Requires Supt. of Public Instruction (SPI) to develop HSEE	No. SPI activity.		
Education Code section 60850, subd (b)	Requires SPI, with approval of SBE, to establish a HSEE Standards Panel	No. SPI activity.		
Education Code section 60850, subd (c)	Requires SPI to ensure the HSEE is field tested	No evidence of school dist. activity, and statute doesn't mandate.		
Education Code section 60850, subd (d)	Requires SPI to submit HSEE to the Statewide Pupil Assessment Review Panel to review the HSEE	No. SPI activity.		
Education Code section 60850 subd. (e)(1)	Prohibits administering HSEE without adequate notice (see (f)(1))	No, just a prohibition, and found to be reimbursable in the *Annual Parent Notification* claim 99-TC-09 & 00-TC-12.		
Education Code section 60850 subd. (e)(2)	Requires HSEE to comply with Federal Antidiscrimination law	No. SPI activity.		
Education Code section 60850 subd. (e)(3)&(4)	Requires HSEE to have instructional and curricular validity and be scored as a criterion referenced exam	No. Does not require district activity.		
Education Code section 60850, subd (f)	Defines terms, including "adequate notice" (see (e)(1)).	No. Found to be a mandate in *Annual Parent Notification* claim 99-TC-09 & 00-TC-12.		
Education Code section 60850, subd (g)	Requires exam to be offered to individuals w/exceptional needs (i.e., disabled pupils),	No. Federal mandate.		

	and w/accommodations			
Education Code section 60850, subd (h)	Allows school districts to require additional exit exams as condition for graduation	No. Does not require an activity.		
Education Code section 60851 (a)-(c)	Administer HSEE		Yes, new activity.	No.
Education Code section 60851 (d)	HSEE results		No evidence district provides results.	
Education Code section 60851 (e)	Supplemental instruction		No. Just requires reallocation of existing resources.	
Education Code section 60853 (a)	Supplemental instruction, identifying resources.		No. Just requires reallocation of existing resources.	
Education Code section 60853 (b)&(c)	Restructuring academic offerings.	No. Does not require district activity.		
Education Code section 60855	Reporting data to SPI.		No.	
Title 5, § 1200	Definitions	Proctors in subd. (h) not mandated – no activity required.	Test administrator must be trained (subd. (g)), but teacher time not reimbursable. District and test site coordinators train others.	
Title 5, § 1203	Pupil Identification		Yes, new activity.	No.
Title 5, § 1204	Offer HSEE to grade 10		No, merely specifies timing.	
Title 5, § 1205	Documentation/record keeping		Yes, new activity.	No.
Title 5, § 1206	Maintaining pupil information		Yes, new activity.	No.
Title 5, § 1207	Pupil data reporting		Yes, new activity	No.
Title 5, § 1208	Maintain documentation of notice		Yes, new activity.	No.
Title 5, § 1209	HSEE District coordination		Yes, new activities.	No.
Title 5, § 1210	HSEE Test Site coordination		Yes, new activities.	No.

Title 5, § 1211	HSEE Security (agreement & affidavit)		Yes.	No.
Title 5, § 1212	Test delivery		Yes, new activity.	No.
Title 5, § 1215	Additional time to complete HSEE		No.	
Title 5, § 1216	Allowable accommodations for disabled or English-learner pupils	No. Federal mandate.		
Title 5, § 1217(a)-(c)	Accommodations and modifications	No. Federal mandate.		
Title 5, § 1217 (d)	Authorizes a school district to request an accommodation from the CDE	No. Permissive – not mandated.		
Title 5, § 1217.5	English language learners		Yes. Determine if English-learner pupil has sufficient English language skills to be assessed w/HSEE	No.
Title 5, § 1218	Section 1218 authorizes the school district to request accommodations from CDE	No. Permissive – not mandated.		
Title 5, § 1219	Requires district to ensure all test responses are independent work of pupil, prohibits assistance to pupils or leading pupil to a response	No. Prohibits a district activity.		
Title 5, § 1219.5	Invalidation of test scores	No. Prohibits district activity.		
Title 5, § 1220	Invalidate test for cheating		Yes.	No.
Title 5, § 1225	Apportionment reporting to CDE.		Yes, new activity	No.

Title 5. EDUCATION

Division 1. State Department of Education

Chapter 2. Pupils

Subchapter 6. California High School Exit Examination

Article 1. General

§ 1200. Definitions.

For the purposes of the high school exit examination, the following definitions shall apply:

(a) "Section," "portion," and "part(s)" of the examination shall refer to either the English/language arts section of the high school exit examination or the mathematics section of the high school exit examination.

(b) An "administration" means an eligible pupil's or eligible adult student's taking both the English/language arts and mathematics sections of the high school exit examination or either section during a test cycle.

(c) "Test cycle" means one of the opportunities provided each year by the Superintendent of Public Instruction for an eligible pupil or eligible adult student to take the high school exit examination.

(d) "Grade level" for the purposes of the high school exit examination means the grade assigned to the pupil by the school district.

(e) "Eligible pupil" means one who is enrolled in a California public school in any of grades ~~9,~~ 10, 11, or 12 who has not passed either the English/language arts section or the mathematics section of the high school exit examination.

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

(g) "Test administrator" means a certificated employee of a school district or a person assigned by a nonpublic school to implement a student's Individualized Education Program (IEP) who has received training in the administration of the high school exit examination from the high school exit examination district or test site coordinator.

(h) "Test proctor" is an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the high school exit

examination.

(i) "School districts" includes school districts, county offices of education, and any charter school that does not elect to be part of the school district or county office of education that granted the charter.

NOTE: Authority Cited: Section 33031, Education Code. Reference: Sections 52504, 60850 and 60851, Education Code.

Article 2. Administration

§ 1204. Grade 10 Census.

~~Each pupil in grade 10 shall take the high school exit exam only at the spring administration.~~ Each school district must first offer the exam to each pupil in grade 10 only at the spring administration (March or May). If a pupil is absent at the spring administration, the school district must offer a make-up test at the next test date designated by the Superintendent of Public Instruction or on the next designated test date selected by the school district.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(b)~~, Education Code.

§ 1209. High School Exit Examination District Coordinator.

(a) On or before July 1 of each school year, the superintendent of each school district shall designate from among the employees of the school district a high school exit examination district coordinator. The superintendent shall notify the publisher of the high school exit examination of the identity and contact information for the high school exit examination district coordinator. The high school exit examination district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the high school exit examination.

(b) The high school exit examination district coordinator's responsibilities shall include, but not be limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school examination and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of examinations and test materials to individual

schools and sites.

(4) Maintaining security over the high school exit examination and test data using the procedure set forth in Section 1211. The high school exit examination district coordinator shall sign the Test Security Agreement set forth in Section 1211 prior to receipt of the test materials.

(5) Overseeing the administration of the high school exit examination to eligible pupils or adult students, in accordance with the manuals or other instructions provided by the test publisher for administering and returning the test.

(6) Overseeing the collection and return of all test materials and test data to the publisher within any required time periods.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all examinations and test materials are received from school test sites within the school district no later than the close of the school day on the school day following administration of the high school exit examination.

(9) Ensuring that all examinations and test materials received from school test sites within the school district have been placed in a secure school district location by the end of the day following the administration of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be ready for pick-up by the publisher at a designated location in the school district no more than five (5) working days following administration of the English/language arts or the mathematics section in the school district.

(11) Ensuring that the high school exit examinations and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

(c) Within seven (7) working days of completion of school district testing, the superintendent and the high school exit examination district coordinator shall certify to the California Department of Education that the school district has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the high school exit examination in the manner and as otherwise required by the publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(c)~~, Education

Code.

§ 1211. Test Security.

(a) High school exit examination test site coordinators shall ensure that strict supervision is maintained over each pupil or adult student who is being administered the high school exit examination both while the pupil or adult student is in the room in which the test is being administered and during any period in which the pupil or adult student is, for any purpose, granted a break from testing.

(b) Access to the high school exit examination materials is limited to pupils taking the examination for the purpose of graduation from high school and adult students taking the examination for the purpose of obtaining a diploma of graduation, ~~and~~ employees of a school district directly responsible for administration of the examination, and persons assigned by a nonpublic school to implement students' IEPs.

(c) All high school exit examination district and test site coordinators shall sign the California High School Exit Examination Test Security Agreement set forth in subdivision (d).

(d) The California High School Exit Examination Test Security Agreement shall be as follows:

CALIFORNIA HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AGREEMENT

(1) The coordinator will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test's security.

(2) The coordinator will keep on file the names of persons having access to examinations and test materials. All persons having access to the materials shall be required by the coordinator to sign the California High School Exit Examination Test Security Affidavit that will be kept on file in the school district office.

(3) The coordinator will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates as provided in California Code of Regulations, Title 5, Division 1, Chapter 2, Subchapter 6.

By signing my name to this document, I am assuring that I, and anyone having access to the test materials will abide by the above conditions.

By: _____

Title: _____

School District: _____

Date: _____

(e) Each high school exit examination test site coordinator shall deliver the examinations and test materials only to those persons actually administering the high school exit examination on the date of testing and only upon execution of the California High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the California High School Exit Examination, including but not limited to the high school exit examination test site coordinator, test administrators, ~~and~~ test proctors, and persons assigned by a nonpublic school to implement students' IEPs, shall acknowledge the limited purpose of their access to the test by signing the California High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(g) The California High School Exit Examination Test Security Affidavit shall be as follows: ~~completed by each test administrator and test proctor:~~

CALIFORNIA HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AFFIDAVIT

I acknowledge that I will have access to the high school exit examination for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other person.

(2) I will not copy any part of the test or test materials.

(3) I will keep the test secure until the test is actually distributed to pupils.

(4) I will limit access to the test and test materials by test examinees to the actual testing periods.

(5) I will not permit pupils or adult students to remove test materials from the room where testing takes place.

(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.

(7) I will return all test materials to the designated high school exit examination test site coordinator upon completion of the test.

(8) I will not interfere with the independent work of any pupil or adult student taking the examination and I will not compromise the security of the test by means including, but not limited to:

(A) Providing eligible pupils or adult students with access to test questions prior to testing.

(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure high school exit examination test booklet or document.

(C) Coaching eligible pupils or adult students during testing or altering or interfering with the pupil's or adult student's responses in any way.

(D) Making answer keys available to pupils or adult students.

(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.

(F) Failing to follow test administration directions specified in test administration manuals.

(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.

Signed: _____

Print Name: _____

Position: _____

School: _____

School District: _____

Date: _____

(h) To maintain the security of the high school exit examination, all high school exit examination district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.

(i) The security of the test materials that have been duly delivered to the school district is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher.

(j) Once materials have been duly delivered to the school district, Ssecure transportation of the test materials within a school district (including to non-public schools, (for students placed through the IEP process), court and community schools, and home and hospital care) is the responsibility of the school district. ~~once materials have been duly delivered to the school district.~~

(k) No test may be administered in a private home or location except by a test administrator as defined in section 1200 (g) who signs a security affidavit. No test shall be administered to a pupil by the parent or guardian of that pupil. This subdivision does not prevent classroom aides from assisting in the administration of the test under the supervision of a credentialed school district employee provided that the classroom aide does not assist his or her own child and that the classroom aide signs

a security affidavit.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850 and 60851~~(e)~~, Education Code.

§ 1212. Test Site Delivery.

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

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(e)~~, Education Code.

Article 3. Accommodations/Modifications

§ 1215. Timing/Scheduling.

All pupils and adult students may have additional time to complete the examination, within the limits imposed by test security as provided in Section 1211.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(e)~~, Education Code.

§ 1216. Allowable Accommodations for Pupils or Adult Students with Disabilities, or for English Learners.

The purpose of the high school exit examination is to assure that pupils and adult students who graduate from high school have demonstrated in English the skills, knowledge and abilities embodied in the state standards in English language arts and mathematics selected for the high school exit examination. To assure that the high school exit examination is a valid measure of each pupil's or adult student's skills, knowledge and abilities in relationship to these standards, accommodations will be allowed that are necessary and appropriate to afford access to the test, consistent with federal law, so long as the accommodations do not fundamentally alter what the examination is designed to measure.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(g)~~, Education Code.

§ 1217. ~~Pupils or Adult Students with Disabilities.~~ **Accommodations and Modifications**

(a) Where necessary to access the test, pupils or adult students with disabilities shall take the high school exit examination with those accommodations that are necessary and appropriate to address the pupil's or adult student's identified disability(ies) and that have been approved by their individualized education program teams or 504 plan teams, including but not limited to those accommodations that the pupil or adult student has regularly used during instruction and classroom assessments, provided that such accommodations do not fundamentally alter what the test measures. Approved accommodations for the high school exit examination must be reflected in the pupil's or adult student's individualized education program or 504 plan.

(b) Accommodations that do not fundamentally alter what the test measures include, but may not be limited to:

(1) Presentation accommodations: Large print versions; test items enlarged through mechanical or electronic means; Braille transcriptions provided by the test publisher or a designee; markers, masks, or other means to maintain visual attention to the test or test items; reduced numbers of items per page; audio presentation on the math portion of the test, provided that an audio presentation is the pupil's or adult student's only means of accessing written material.

(2) Response accommodations:

(A) Verbal, written, or signed responses; responses made with mechanical or electronic assistance as long as the mechanical or electronic device is used solely to record the pupil's or adult student's response. If a person is required to transcribe the pupil's or adult student's responses to the format required by the examination, the transcriber shall be an employee of the school district who has signed the Test Security Affidavit.

(B) Assistive devices and technologies that are regularly used during testing provided that no technology or assistive device may be used that fundamentally alters what the test measures.

(3) Scheduling accommodations: More frequent breaks during the regularly scheduled test session; multiple sessions, provided that a pupil or adult student does not have access to test items that will be presented in a future session or sessions.

(4) Setting accommodations: Special or adaptive furniture; special lighting or acoustics; an individual carrel or study enclosure; a separate room provided that the pupil or adult student is directly supervised by school personnel who have signed the Test Security Affidavit.

(c) The following are modifications ~~accommodations are not allowed~~ because they ~~have been determined to~~ fundamentally alter what the test measures:

(1) Calculators on the math portion of the test.

(2) Audio or oral presentation of the English/language arts portion of the test.

(d) If the pupil's or adult student's individualized education program team or 504 plan team proposes an accommodation for use on the high school exit examination that is not included subdivision (b), the school district may submit a request for accommodation pursuant to Section 1218.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(g)~~, Education Code.

§ 1217.5. English Learners.

English learners must read and pass the high school exit examination in English. School districts must evaluate pupils to determine if they possess sufficient English language skills at the time of the examination to be assessed with the test. If the pupil does not possess sufficient English language skills to be assessed, the school district, in addition to the instruction in reading, writing, and comprehension in the English language specified in Education Code section 60852, may provide additional time as provided in Section 1215.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(e)(2)~~, Education Code.

§ 1218.5. Use of Modifications.

(a) If the pupil's IEP or Section 504 Plan indicates that it is appropriate and necessary for a pupil to take the test with a modification(s) as defined in Education Code section 60850, or as specified in Section 1217(c), or determined pursuant to Section 1218, the school district must then administer the test to the pupil with these modifications.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 60850 and 60851, Education Code; and 34 CFR Section 300.138(a).

§ 1219. Independent Work of the Pupil or Adult Student.

In implementing accommodations pursuant to Section 1216 or 1217, school districts shall ensure that all test responses are the independent work of the pupil. School districts and school district personnel are prohibited from assisting any pupil in determining how the pupil or adult student will

respond to each question, and are prohibited from leading or directing the pupil or adult student to a particular response.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(g)~~, Education Code.

§ 1219.5. Invalidation of Test Scores.

If a school district allows a pupil or adult student to take the high school exit examination with one or more accommodations that are determined by the California Department of Education to fundamentally alter what the test measures, that pupil's or adult student's test score or scores will be invalidated.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 60850~~(g)~~, Education Code.

Article 4. Cheating

§ 1220. Cheating.

(a) Any pupil or adult student found to have cheated or assisted others in cheating, or to have compromised the security of the high school exit examination shall have his or her test marked as "invalid" and the pupil or adult student shall not receive a score from that test administration.

(b) The school district shall notify each eligible pupil or adult student prior to each administration of the high school exit examination of the provisions of subdivision (a).

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(b) and (c)~~, Education Code.

Article 5. Apportionment

§ 1225. Apportionment.

(a) For each test cycle, each school district shall report to the California Department of Education the number of examinations administered.

(b) The superintendent of each school district shall certify the accuracy of all information submitted. The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within ten (10) working days of completion of each test cycle in the school district.

(c) The amount of funding to be apportioned to the school district for the high school exit examination shall be equal to the product of the amount per administration established by the State Board of Education to enable school districts to meet the requirements of subdivisions (a), (b) and (c) of Education Code section 60851 times the number of tests administered to pupils and adult students

in the school district as determined by the certification of the school district superintendent pursuant to subdivision (b).

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(a)~~, Education Code.

04/24/03

EXHIBIT C

DEPARTMENT OF FINANCE
GRAY DAVIS, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

April 3, 2001

Ms. Paula Higashi
Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of January 31, 2001, the Department of Finance has reviewed test claim, High School Exit Exam (00-TC-06), submitted by the Trinity Union High School District related to costs incurred under Chapter 1, Statutes of 1999 and Chapter 135, statutes of 1999. We are responding to the following activities identified as reimbursable state mandates by the claimants:

Activity A: Field Testing the High School Exit Exam (HSEE).

A total of three field tests were scheduled to occur during the current year. The first field test occurred during the fall of 2000. The Department of Education randomly selected 200 high schools to participate in field-testing. However, participation was voluntary and schools were given the option of refusing to administer the field test. To the extent that schools decided to volunteer and participate in the field-testing, this activity does not constitute a mandated cost. The second field test was incorporated in the March HSEE as part of the actual exam, and is covered the amount provided in the budget. Likewise, the third field-testing of items will be incorporated in the May HSEE and will be covered by the amount provided in the budget. In future years, field-testing is expected to occur in the same manner.

Activity B: Administration of the HSEE in the 2001-02 school year to all pupils in grade 10 and administering parts of the HSEE to all pupils who were in grade 10 in the 2001-02 school year until each section of the examination is passed.

This requirement would not be reimbursable, since districts already receive a per pupil funding rate for up to 180 days (or its equivalent minutes) of instruction and the administration of the HSEE falls within the time allotted for regular instruction. Therefore, the costs associated with the actual administration should be minimal and should be offset by the amount provided in the budget.

Activity C: Administration of the HSEE to all pupils in grades 10, 11, and 12 on the dates designated by the Superintendent of Public Instruction (SPI).

Similar to Activity B, this requirement would not be reimbursable, since districts already receive a per pupil funding rate for up to 180 days (or its equivalent minutes) of instruction and the administration of the HSEE falls within the time allotted for regular instruction.

Activity D: Providing HSEE results to all pupils within eight weeks of administering the exam and providing HSEE results to pupils that failed any portion of the exam in time for those pupils to re-take that portion of the exam at the next administration.

All test-takers are to receive their results within eight weeks of taking the exam. The test publisher is required to score all tests within an appropriate time frame so that pupils will receive their results within eight weeks of testing. The amount provided in the budget covers the costs associated with reporting of test results, including mailings.

Activity E: Meeting to discuss restructuring academic offerings to pupils who do not demonstrate the skills necessary to succeed on the HSEE.

Section 60853(b) does not require schools to restructure their academic offerings. This section merely states Legislative intent. To the extent that schools decide to restructure or change their academic offerings in light of student performance on the HSEE, such an activity would be conducted on a voluntary basis and is therefore not a cost mandated by the State.

Activity F: Providing information as requested by the SPI and independent evaluators.

This information will be provided and collected as part of the testing process for the HSEE or is already provided through previously required data collections. The costs associated with the data collections unique to the HSEE will be covered by the amount provided in the budget.

Activity G: Training of school district staff regarding the administration of the HSEE.

Staff training required for the administration of the HSEE will be covered by the amount provided in the budget.

Activities H and I: Modifications of school district policies and procedures, and any additional reimbursable activities.

The amount provided in the budget covers all district costs required by HSEE statutes. To the extent that districts conduct activities not required under legislation, including modifications of policy and procedure, those activities would not represent costs mandated by the State.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your January 31, 2001, letter have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Michael Wilkening, Principal Program Budget Analyst at (916) 445-0328, or Jim Lombard, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Kathryn Radtkey-Gaither
Program Budget Manager

Attachment

PROOF OF SERVICE

Test Claim Name: "High School Exit Examination"
Test Claim Number CSM 00-TC-06

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On April 3, 2001, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
1300 I Street, Suite 950
Sacramento, CA 95814

E-8
Mr. John Mockler, Executive Director
State Board of Education
721 Capitol Mall, Room 532
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Mandated Cost Systems, Inc.
Attention: Steve Smith
2275 Watt Avenue, Suite C
Sacramento, CA 95825

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Paige Vorhies
3301 C Street, Room 500
Sacramento, CA 95816

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

E-8
Department of Education
School Business Services
Attention: Gerry Shelton
560 J Street, Suite 150
Sacramento, CA 95814

B-8
State Controller's Office
Division of Audits
Attention: Jim Spano
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Spector, Middleton, Young & Minney
Attention: Paul C. Minney
7 Park Center Drive
Sacramento, CA 95825

Trinity Union High School District
Attention: Bob Lowden
321 Victory Lane, Box 1227
Weaverville, CA 96093

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 3, 2001, at Sacramento, California.

Jennifer Nelson

Adopted: 11/30/95
Amended: 04/24/97
Amended: 01/27/00
Amended: 05/23/02

AMENDED PARAMETERS AND GUIDELINES

Annual Parent Notification

consolidated from:

CSM 4445 (portion)

Education Code Section 48980, Subdivision (g)[1]
Statutes of 1990, Chapter 10

Interdistrict Transfer Requests: Parent's Employment

CSM 4453

Education Code Section 48980, Subdivisions (g) and (j)[2]
Statutes of 1990, Chapter 10
Statutes of 1993, Chapter 1296

Notification to Parents: Pupil Attendance Alternatives

CSM 4461

Education Code Section 48980, Subdivisions (a), (b), and (h)[3]
Statutes of 1977, Chapter 36
Statutes of 1979, Chapter 236
Statutes of 1980, Chapter 975
Statutes of 1985, Chapter 459
Statutes of 1986, Chapter 97
Statutes of 1987, Chapter 1452
Statutes of 1988, Chapter 65
Statutes of 1990, Chapter 403
Statutes of 1992, Chapter 906

Annual Parent Notification

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[1] Former subdivision (e), relettered as subdivision (f) by Statutes of 1997, chapter 929; relettered as subdivision (g) by Statutes of 1999, chapter 1X.
[2] Former subdivisions (e) and (g), relettered as subdivisions (f) and (i) by Statutes of 1997, chapter 929; relettered as subdivisions (g) and (j) by Statutes of 1999, chapter 1X.
[3] Former subdivision (f), relettered as subdivision (g) by Statutes of 1997, chapter 929; relettered as subdivision (h) by Statutes of 1999, chapter 1X.

CSM 4462 (portion)

Education Code Section 35291
Statutes of 1977, Chapter 965
Statutes of 1986, Chapter 87

Schoolsite Discipline Rules

CSM 4474 (portion)

Education Code Section 48900.1
Statutes of 1988, Chapter 1284

Pupil Suspensions: Parent Classroom Visits

CSM 4488

Education Code Section 58501
Statutes of 1975, Chapter 448
Statutes of 1981, Chapter 469

Alternative Schools Annual Notification

CSM 97-TC-24

Education Code Section 48980, Subdivisions (c) and (i)[4]
Statutes of 1997, Chapter 929

Annual Parent Notification - Staff Development

CSM 99-TC-09 and CSM 00-TC-12

Education Code Section 48980, Subdivision (e)
Education Code Section 48980, Subdivision (l)
Education Code Section 48980, Subdivision (m)
Education Code Section 49063, Subdivision (k)

Statutes of 1998, Chapter 846, Section 19
Statutes of 1998, Chapter 1031, Section 1
Statutes of 1999, Chapter 1X, Section 3
Statutes of 2000, Chapter 73, Section 1

Annual Parent Notification: 1998-2000 Statutes

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[4] Former subdivision (h), relettered as subdivision (i) by Statutes of 1999, chapter 1X.

I. SUMMARY OF THE MANDATE

Education Code section 35291[5] requires the school district governing board to annually notify the parent or guardian of all pupils of the availability of rules of the district pertaining to student discipline.

Education Code section 48980, as of January 1, 1975,[6] required school districts to notify, at beginning of the first semester or quarter of the regular school term, the parent or guardian of its minor pupils regarding the right of the parent or guardian under the sections specified therein.[7] Numerous statutes enacted after January 1, 1975, added or amended subdivisions and thereby increased the number of items about which the parent or guardian was to be annually notified.

Education Code section 48900.1 requires the governing board of school districts to prepare and distribute to all parents the written notice of the governing board's policy authorizing teachers to provide that the parent or guardian of a pupil who has been suspended by a teacher pursuant to Education Code section 48910, for reasons specified in subdivision (i) or (k) of section 48900, attend a portion of a school day in his or her child's or ward's classroom. All other reimbursable activities for section 48900.1, such as preparation of policies and procedures, notice to parents to attend class, follow-up contact, and parent meeting remain the subject of separate parameters and guidelines, CSM 4474, adopted by the Commission on State Mandates (Commission) on June 27, 1996.

Education Code section 58501[8] requires school districts to provide parents or guardians with a prescribed written notice on the alternative schools program; requires school districts and county offices of education to make available the alternative schools law at the offices of the principal, county superintendent of schools' office and district administrative office for anyone who requests this information; and requires school districts and county offices of education to annually post the alternative schools notice in at least two places at each school site for the entire month of March.

Education Code section 48980, subdivision (e), requires school districts to provide notice that pupils will be required to pass a high school exit examination as a condition of graduation. Subdivision (l) requires school districts to provide notice that no pupil may have his or her grade reduced or lose academic credit for any excused absences if the pupil makes up any missed assignments and tests. Subdivision (l) also requires school districts to provide a copy of the complete text of Education Code section 48205. Subdivision (m) requires school districts, until January 1, 2005, to provide notice of the availability of state funds to cover the costs of advanced placement examination fees pursuant to section 52244.

Education Code section 49063, subdivision (k), requires school districts to provide notice that a prospectus of school curriculum is available upon request for review at the pupil's school.

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[5] Amended by Statutes of 1977, chapter 965, and Statutes of 1986, chapter 87.

[6] Former Education Code section 10921.

[7] Education Code sections 46014, 49403, 49423, 49451, 49472, 51240, and 51550.

[8] Former Education Code section 5811.5, as added by Statutes of 1975, chapter 448. Renumbered by Statutes of 1976, chapter 1010.

Commission on State Mandates Decisions

The Commission determined that current Education Code sections 35291, 48980, subdivisions (a), (b), (c), (e), (g), (h), (i), (j), (l), and (m), 48900.1, 49063, subdivision (k), and 58501 impose a new program or higher level of service, and costs mandated by the state, for school districts and county offices of education.[9]

The following eight statements of decisions include these determinations:

1. *Notification to Parents: Pupil Attendance Alternatives* (CSM 4453)[10]

   (References to subdivisions (e) and (g), refer to current subdivisions (g) and (j), respectively.)

   The Commission determined that Education Code section 48980, subdivisions (e)[11] and (g)[12] result in costs mandated by the state by requiring the school districts to:

   a. Pursuant to subdivision (e), develop and include as part of the notification to parents or guardians an advisement of the availability of employment-based school attendance options. (Note: This subdivision was operative until July 1, 1998.)[13]

   b. Pursuant to subdivision (g), provide or disseminate the notification to parents or guardians including information provided by the California Department of Education explaining the current statutory attendance options, and developing and including all current statutory and local attendance options which are unique to each district, and a procedure for alternative attendance areas or programs all as part of the annual notification, and to develop and distribute school district application forms for requesting a change of attendance, and a description of the appeals process for those applicants who are denied.

   The Commission further determined, at its January 19, 1995 hearing of the test claim entitled *Interdistrict Transfers: Parent's Employment*,[14] that Education Code section 48980, subdivision (e), is subject to a filing date of December 17, 1993, which permits eligible school districts to claim an additional year of reimbursement for the subdivision (e) activity (i.e., commencing on July 1, 1992 rather than July 1, 1993).

   The Commission concluded that the provisions of Education Code section 48980, subdivision (g),[15] do not impose a new program or higher level of service in an existing program by requiring school districts to conduct an annual review of the enrollment options available to the pupils within their districts and that the school districts strive to

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[9] Article XIII B, section 6, of the California Constitution, and Government Code section 17514.

[10] Statutes of 1993, chapter 1296; filed February 16, 1994; statement of decision adopted August 15, 1994, and amended February 23, 1995.

[11] Added by Statutes of 1990, chapters 10 and 403. Relettered as subdivision (f) by Statutes of 1997, chapter 929; relettered as subdivision (g) by Statutes of 1999, chapter 1X.

[12] Added by Statutes of 1993, chapter 1296. Relettered as subdivision (i) by Statutes of 1997, chapter 929; relettered as subdivision (j) by Statutes of 1999, chapter 1X.

[13] Education Code section 48980, subdivision (e), Statutes of 1994, chapter 1262.

[14] CSM 4445; Statutes of 1992, chapter 507; filed December 17, 1993.

[15] Statutes of 1993, chapter 1296.

make available enrollment options that meet the diverse needs, potential, and interests of California's pupils.

2. *Interdistrict Transfers: Parent's Employment* (CSM 4445)[16]

   (References to subdivision (e), refer to current subdivision (g).)

   The Commission observed that this test claim alleged a state-mandated program in Education Code section 48980, subdivision (e).[17] However, the Commission noted that this subdivision was previously addressed in the test claim entitled *Notification to Parents: Pupil Attendance Alternatives* and determined in the statement of decision for this claim that a reimbursable state-mandated program was contained in subdivision (e). The Commission made its final determination on Education Code section 48980, subdivision (e), in the amended statement of decision for *Notification to Parents: Pupil Attendance Alternatives*.

3. *Annual Parent Notification* (CSM 4461)[18]

   (References to subdivisions (e), (f), and (g), refer to current subdivisions (g), (h), and (j), respectively.)

   The Commission found that law prior to 1975 (recodified by Statutes of 1976, chapter 1010) did not require school districts to annually notify parents of, in subdivision (a), Education Code sections 48205, 48207, 48208, and Chapter 2.3 (commencing with section 32255) of Part 19; in subdivision (b), Education Code section 48206.3 and Article 9 (commencing with section 49510) of Chapter 9; and in subdivision (f),[19] Education Code section 212.6, all effective beginning July 1, 1993.[20] For the above-mentioned sections, the Commission determined the following:

   a. A negligible reimbursable state-mandated program exists for annually reviewing and modifying the content of the parent notification to incorporate changes within the new sections referenced in these subdivisions.

   b. The additional printing and distribution of these sections (in a cost effective manner) result in a reimbursable state-mandated program.

   This test claim was filed on September 2, 1994, and based on this filing date, the period of reimbursement for any state-mandated program herein commences on July 1, 1993. Therefore, the requirement to notify parents of their rights under the above-mentioned sections does not result in a one-time reimbursable state-mandated program by requiring

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[16] Statutes of 1992, chapter 507; filed December 17, 1993; statement of decision adopted January 19, 1995.

[17] Relettered as subdivision (f) by Statutes of 1997, chapter 929; relettered as subdivision (g) by Statutes of 1999, chapter IX.

[18] Statutes of 1992, chapter 906; filed September 2, 1994; adopted August 24, 1995.

[19] Relettered as subdivision (g) by Statutes of 1997, chapter 929; relettered as subdivision (h) by Statutes of 1999, chapter IX.

[20] The Commission noted that Article 3 (commencing with section 56030) of Chapter 1, Part 30, which was added after Statutes of 1976, chapter 1010, was deleted by Statutes of 1993, chapter 1296, and therefore is no longer a subject of this claim. Also, Education Code section 35291 is the subject of test claim CSM 4462.

school districts to draft, review, and have approved these additional items in the annual notification, because these items were required before July 1, 1993.

Finally, the Commission found no reimbursable state-mandated programs in Education Code section 48980, subdivisions (c), (d), (e), or (g), for the purpose of this test claim. The Commission noted that subdivisions (e) and (g) are the subject of the *Notification to Parents: Pupil Attendance Alternatives* test claim (CSM 4453).

4. *Schoolsite Discipline Rules* (CSM 4462)[21]

The Commission determined that Education Code section 35291[22] resulted in costs mandated by the state by requiring the school districts to annually notify the parent or guardian of all pupils of the availability of rules of the district pertaining to student discipline in combination with the requirement of Education Code section 48980, effective beginning July 1, 1993.[23] The Commission noted that these additional costs should be minimal.

Further, the Commission determined that a limited reimbursable state-mandated program exists in Education Code section 35291.5, which remained the subject of the parameters and guidelines for *Schoolsite Discipline Rules*.

5. *Pupil Suspensions: Parent Classroom Visits* (CSM 4474)[24]

The Commission found that the portion of the test claim concerning the notice of policy activity in Education Code section 48900.1, involving the preparation and distribution to all parents of a written notice of the governing board's policy on parent classroom visits, is to be reimbursed with other consolidated parental notifications. Specifically, this includes the requirement in Education Code section 48900.1 for the governing board of school districts to prepare and distribute to all parents the written notice of the governing board's policy authorizing teachers to provide that the parent or guardian of a pupil who has been suspended by a teacher pursuant to Education Code section 48910, for reasons specified in subdivisions (i) or (k) of section 48900, attend a portion of a school day in his or her child's or ward's classroom. The Commission also found that the policy must take into consideration reasonable factors preventing compliance, and the parent visit is to be limited to the class of suspension. The test claim was filed March 9, 1994 (as part of CSM 4474) and is reimbursable from July 1, 1993.

The Commission directed that all other reimbursable activities for Education Code section 48900.1, such as preparation of policies and procedures, notice to parents to

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[21] Statutes of 1986, chapter 87; filed September 16, 1994; adopted August 24, 1995.

[22] Amended by Statutes of 1977, chapter 965, and Statutes of 1986, chapter 87.

[23] The Commission observed that, although law prior to 1975 (recodified by Statutes of 1976, chapter 1010) did not require governing boards to notify parents/guardians of the availability of discipline rules, the law did require governing boards to prescribe such rules.

[24] This claim was originally filed as CSM 4458 and was then split into two claims. *Pupil Classroom Suspensions* remains the subject of CSM 4458 and *Pupil Suspensions: Parent Classroom Visits* was renumbered CSM 4474. CSM 4474, Statutes of 1988, chapter 1284, retains the original filing date, March 9, 1994. The statement of decision for CSM 4474 was adopted February 29, 1996.

attend class, follow-up contact, and parent meeting remain the subject of separate parameters and guidelines for CSM 4474, adopted June 27, 1996.

6. *Alternative Schools Annual Notification* (CSM 4488)[25]

The Commission determined that Education Code section 58501[26] resulted in costs mandated by the state by requiring the following:

a. That school districts provide parents and guardians with a prescribed annual written notice on the alternative schools program.

b. That school districts and county offices of education make available the alternative schools law at the offices of the principal, county superintendent of schools and district administrative office for anyone who requests this information.

c. That school districts and county offices of education annually post the alternative schools notice in at least two places at each school site for the entire month of March.

The test claim was filed September 29, 1995, and is reimbursable from July 1, 1994.

7. *Annual Parent Notification – Staff Development* (CSM 97-TC-24)[27]

(References to subdivision (h), refer to current subdivision (i).)

The Commission determined that Education Code section 48980, subdivisions (c) and (h)[28], resulted in costs mandated by the state by requiring the following:

a. That school districts provide parents and guardians with annual written notice of the schedule of minimum days and pupil-free staff development days.

b. That school districts include a copy of the school district's written policy regarding pupil access to the Internet and on-line sites as part of the annual written notifications to parents and guardians.

8. *Annual Parent Notification: 1998-2000 Statutes* (CSM 99-TC-09, 00-TC-12)[29]

The Commission determined that Education Code section 48980, subdivisions (e), (l), and (m), and Education Code section 49063, subdivision (k), resulted in costs mandated by the state by requiring school districts to provide to parents the following:

a. Notice that pupils will be required to pass a high school exit examination as a condition of graduation. (Ed. Code, § 48980, subd. (e).)

b. Notice that no pupil may have his or her grade reduced or lose academic credit for any excused absences if the pupil makes up any missed assignments or tests. (Ed. Code, § 48980, subd. (l).)

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[25] Statutes of 1975, chapter 448, and Statutes of 1981, chapter 469; filed September 29, 1995; statement of decision adopted November 15, 1996.

[26] As added by Statutes of 1975, chapter 448, and amended by Statutes of 1981, chapter 469.

[27] Statutes of 1997, chapter 929; filed May 12, 1998; statement of decision adopted August 26, 1999.

[28] Relettered as subdivision (i) by Statutes of 1999, chapter 1X.

[29] CSM 99-TC-09; Statutes of 1998, chapters 846 and 1031, and Statutes of 1999, chapter 1X; filed May 17, 2000. CSM 00-TC-12; Statutes of 2000, chapter 73; filed May 11, 2001. Statement of decision adopted December 12, 2001.

c. A copy of the complete text of Education Code section 48205. (Ed. Code, § 48980, subd. (l).)

d. Notice of the availability of state funds to cover the costs of advanced placement examination fees. (Ed. Code, § 48980, subd. (m).)

e. Notice that a prospectus of school curriculum is available for review at the pupil's school, upon request. (Ed. Code, § 49063, subd. (k).)

II. ELIGIBLE CLAIMANTS

Any "school district," as defined in Government Code section 17519, except for community colleges, that incurs increased costs as a result of this mandate is eligible to claim reimbursement.

III. PERIOD OF REIMBURSEMENT

At the time the first seven test claims were filed, Government Code section 17557 stated that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for that fiscal year. The first seven test claims were received on different dates, resulting in the following effective periods for reimbursement:

July 1, 1992	Education Code section 48980, subdivision (g)[30]
July 1, 1993	Education Code section 35291 Education Code section 48900.1 Education Code section 48980, subdivisions (a), (b), and (h)
January 1, 1994	Education Code section 48980, subdivision (j)
July 1, 1994	Education Code section 58501
July 1, 1997	Education Code section 48980, subdivision (c)
July 1, 1998	Education Code section 48980, subdivision (i)

Effective September 22, 1998, Government Code section 17557 states that a test claim must be submitted on or before June 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. Following are the effective periods of reimbursement for the *Annual Parent Notification: 1998-2000 Statutes* test claim:

July 1, 1999	Education Code section 48980, subdivision (e) Education Code section 48980, subdivision (l) Education Code section 49063, subdivision (k)[31]
July 5, 2000	Education Code section 48980, subdivision (m)[32]

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[30] The activity pursuant to this subdivision is only reimbursable until July 1, 1998.

[31] Education Code section 48980, subdivisions (e) and (l), were operative June 25, 1999, and September 25, 1998, respectively, and Education Code section 49063, subdivision (k), was operative January 1, 1999. Therefore, activities pursuant to these code sections are reimbursable beginning with the 1999-2000 school year.

[32] Education Code section 48980, subdivision (m), was operative July 5, 2000. Therefore, activities pursuant to this code section are reimbursable beginning with the 2000-2001 school year. In addition, they are only reimbursable until January

Pursuant to Government Code section 17561, actual costs for one fiscal year shall be included in each claim, and estimated costs for the subsequent year may be included in the same claim, if applicable.

If the total costs for a given fiscal year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

The State Controller shall not require school districts or county offices of education to re-file or amend fiscal years 1999-2000 or 2000-2001 reimbursement claims for the costs incurred under the parameters and guidelines prior to the addition of *Annual Parent Notification: 1998-2000 Statutes* activities (the items specified in section I, *Commission on State Mandates Decisions*, 1-7). The State Controller shall issue separate claiming instructions for claims for the costs incurred under *Annual Parent Notification: 1998-2000 Statutes* (the items specified in section I, *Commission on State Mandates Decisions*, 8)[33] for fiscal years 1999-2000 and 2000-2001.[34]

The State Controller shall combine the claiming instructions for the items specified in section I, *Commission on State Mandates Decisions*, 1-8, for claims submitted for fiscal year 2001-2002 and subsequent fiscal years.

IV. REIMBURSABLE ACTIVITIES

For each eligible claimant, the following activities are eligible for reimbursement:

1. Annual Review and Update

To annually review Education Code section 48980, subdivisions (a), (b), (c), (e), (g), (h), (i), (j), (l), and (m), Education Code section 49063, subdivision (k), and the sections referenced therein, for any change to scope and content; prepare or modify the annual parent notification and attendance application as necessary; and to have those changes approved by the governing board.

2. Printing

To annually print or otherwise reproduce the parent notification and district alternative attendance application as well as any notification/application provided by the state, including the policy concerning required parent classroom visits following a pupil's classroom suspension and the notice of alternative schools.

3. Distribution

To annually distribute in a cost-effective manner a copy of the district parent notification and district alternative attendance application, along with any state-provided alternative attendance notification /application, to the parent or guardian of continuing and new students, including the policy concerning required parent classroom visits following a pupil's

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1, 2005. If the sunset date of Education Code section 52244 is postponed or eliminated, the parameters and guidelines may be amended to extend or remove the reimbursement period termination date for this code section.

[33] Statutes of 1998, chapters 846 and 1031, Statutes of 1999, chapter 1X, and Statutes of 2000, chapter 73.

[34] Claimants can claim 2.5 increased pages for fiscal year 1999-2000, and 3 increased pages for fiscal year 2000-2001. See Table 1.

classroom suspension and the notice of alternative schools, to the parent or guardian of continuing and new students.

4. Alternative School Laws

To make available the text of the alternative schools law at the principal's office, county superintendent of schools' office, and district administrative office for anyone who requests this information.

5. Posting Notice of Alternative Schools

To annually post the alternative schools notice in at least two places at each school site for the entire month of March.

6. Providing Notice of Minimum Days or Pupil-Free Staff Development Days Scheduled After the First Day of School.

If the schedule of minimum days or pupil-free staff development days are scheduled after the first day of school, to prepare and distribute notice of these days to parents or guardians.

Uniform Cost Allowance

The Commission is adopting uniform cost allowances[35] for reimbursement in lieu of payment of total actual costs incurred. The uniform cost allowances cover all costs (direct and indirect) of performing activities 1 through 6 described above.

- Uniform Cost Allowance for Activities 1 through 5. (See Table1.)

  The uniform cost allowance is comprised of a fixed cost per page applied to the number of "claimable pages" in the printed notification/application and then multiplying that product by the number of notifications/applications distributed to parents and guardians. "Claimable pages" refers to pages including additional notification information, which the state has required on or after January 1, 1975.[36]

  If a school district is not in full compliance with a given mandate, it is not eligible to claim reimbursement. For example, if a district fails to furnish a notification relating to transfers based on parent employment, it may not claim that portion of the page count for reimbursement. Regarding Education Code section 48980, subdivision (j), information *available* at a district or schoolsite office or other location may not be claimed as information *sent or otherwise distributed* to the parent/guardian of all pupils in the district.

  For fiscal years 1992-1993 and 1993-1994, the uniform cost allowance is $.0500 times the specified number of additional pages of the notification/application material. The cost per page shall be adjusted each subsequent year by the Implicit Price Deflator.[37]

  In lieu of the actual number of notifications/applications distributed to parents and guardians, the claimant may substitute the actual district enrollment at the time of distribution or the district's annual average daily attendance (ADA) as the multiplier.

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[35] As defined in Government Code section 17557.

[36] Pages measured as 8.5 by 11 inches, or fractions thereof.

[37] As defined in Government Code section 17523.

Total reimbursement for a given fiscal year is then determined by the following formula:

(Appropriate per page rate) times (specified number of pages of notification/ application material) times one of the following: (the sets of notifications/applications distributed), (actual district enrollment at the time of distribution), or (the district's annual ADA).[38]

[38] Periods of reimbursement for the components differ – see section III. Period of Reimbursement. Specified number of pages is the same for all districts, with the exception of Education Code section 48980, subdivision (h). For this component, the specified number varies according to district population. See Table 1.

TABLE 1.

SCHEDULE OF PAGES ALLOWED UNDER UNIFORM COST ALLOWANCE

CSM and section	1992-93	1993-94 1st Half	1993-94 2nd Half	1994-95 through 1996-97	1997-98	1998-99	1999-2000	2000-01 & following FYs
4445; § 48980 (g)	.25	.25	.25	.25	.25			
4453; § 48980 (j) District Population:								
0-500			1	1	1	1	1	1
501-2,500			3	3	3	3	3	3
2,501-25,000			6	6	6	6	6	6
25,001+			9	9	9	9	9	9
4461; § 48980 (a), (b), (h) with 4462 § 35291		2.65	2.65	2.75	2.75	2.75	2.75	2.75
4474; § 48900.1		.25	.25	.25	.25	.25	.25	.25
4448; § 58501				.25	.25	.25	.25	.25
97-TC-24 § 48980								
(c)					1.5	1.5	1.5	1.5
(i)						2	2	2
99-TC-09, 00-TC-12 § 48980								
(e)							.50	.50
(l) combined							1.50	1.50
(m)							n/a	.50
§ 49063 (k)							.50	.50
Total pages:[39] District Population:	.25	3.15						
0-500			4.15	4.5	6	7.75	10.25	10.75
501-2,500			6.15	6.5	8	9.75	12.25	12.75
2,501-25,000			9.15	9.5	11	12.75	15.25	15.75
25,001+			12.15	12.5	14	15.75	18.25	18.75

[39] The requirements in Education Code section 48980, subdivision (i), do not apply to all school districts. Beginning in fiscal year 1998-1999, the totals for these districts would be two pages less than the totals listed in this table.

- Uniform Cost Allowance for Activity 6.

  The uniform cost allowance for preparing and distributing notice of minimum days or pupil-free staff development days scheduled after the first day of school is $0.2500 per notice for fiscal year 1997-1998. The cost per notice shall be adjusted each subsequent year by the Implicit Price Deflator.

V. CLAIM PREPARATION AND SUBMISSION

Each claim for reimbursement pursuant to this mandate must be timely filed and provide documentation in support of the reimbursement claimed for this mandate.

A. Uniform Cost Allowance Reimbursement

Report the number of parent notifications/applications distributed during the fiscal year (or enrollment or ADA). If a given mandate was not, in fact, fully complied with, specify the number of pages or fractional pages to be deducted for that fiscal year from the total page count. If minimum days or pupil-free staff development days are scheduled after the first day of school, report the number of notices distributed to parents or guardians.

B. Exceptional Costs

The Commission has not identified any circumstances which would cause a school district to incur additional costs to implement this mandate which have not already been incorporated in the uniform cost allowance.

If and when the Commission recognizes any unique circumstances which can cause the school district to incur additional reasonable costs to implement this mandate, these unique implementation costs will be reimbursed for specified fiscal years in addition to the uniform cost allowance.

School districts which incur these recognized unique costs will be required to support those actual costs in the following manner:

1. Narrative Statement of Costs Incurred

   Provide a detail written explanation of the costs associated with the unique circumstances to be recognized by the Commission.

2. Employee Salaries and Benefits

   Identify the employee(s) and their job classification, describe the mandated functions performed, and specify the actual number of hours devoted to each function, the productive hourly rate, and the related benefits. The staff time claimed must be supported by source documentation, such as time reports, however the average number of hours devoted to each function may be claimed if supported by a documented time study.

3. Services and Supplies

   Only the expenditures which can be identified as a direct cost of the mandate can be claimed. List the cost of materials which have been consumed or expended specifically for the purpose of this mandate.

4. Allowable Overhead Cost

a. School districts must use the J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

b. County offices of education must use the J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

VI. SUPPORTING DATA

For auditing purposes, all costs claimed must be traceable to source documents and/or worksheets to show evidence of the validity of claimed costs from the date of initial payment of the claim. Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district is subject to audit no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended. However, if no funds are appropriated for the program for the fiscal year for which the claim is made, the time for the State Controller to initiate an audit shall commence to run from the date of initial payment of the claim.

A. Uniform Allowance Reimbursement

Agency must retain documentation which indicates the total number of notifications/applications distributed (actual, enrollment, or ADA) as well as a sample copy of the material distributed.

B. Reimbursement of Unique Costs

In addition to maintaining the same documentation as required for uniform cost allowance reimbursement, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs.

VII. OFFSETTING SAVINGS AND REIMBURSEMENTS

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds, and other state funds, shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S OFFICE REQUIRED CERTIFICATION

An authorized representative of the claimant will be required to provide a certification of claim, as specified in the State Controller's claiming instructions, for those costs mandated by the state contained herein.

IX. PARAMETERS AND GUIDELINES AMENDMENTS

Parameters and guidelines may be amended pursuant to Title 2, California Code of Regulations section 1183.2.

X. CONSOLIDATION OF CLAIMS

The subject Parameters and Guidelines shall be entitled *Annual Parent Notification*, and represent a consolidation of the following eight statements of decision:

1) CSM 4445, *Interdistrict Transfer Requests: Parent's Employment*, Education Code section 48980, subdivision (e), portion only.[40]
2) CSM 4453, *Notification to Parents: Pupil Attendance Alternatives*
3) CSM 4461, *Annual Parent Notification*
4) CSM 4462, *Schoolsite Discipline Rules*, Education Code section 35291, portion only
5) CSM 4474, *Pupil Suspensions, Parent Classroom Visits*, policy notification portion only
6) CSM 4488, *Alternate Schools Annual Notification*
7) CSM 97-TC-24, *Annual Parent Notification: Staff Development*
8) CSM 99-TC-09, *Annual Parent Notification: 1998 and 1999 Statutes; and* CSM 00-TC-12, *Annual Parent Notification: 2000 Statutes*

[40]The statement of decision for CSM 4445, *Interdistrict Transfer Requests: Parent's Employment*, included two sections. Education Code section 48204, subdivision (f), Statutes of 1986, chapter 172, Statutes of 1990, chapter 10, and Statutes of 1992, chapter 507, became the subject of its own parameters and guidelines with the same title, adopted July 20, 1995. Education Code section 48980, subdivision (e), Statutes of 1990, chapter 10, became the subject of this consolidated set of parameters and guidelines, CSM 4461, *Annual Parent Notification*.

EXHIBIT E

outh Carolina. Moore v. s, 148 SC 326, 146 SE 92 (1928).

exas. American Mortg. Corp. v. ell, 130 Tex 107, 108 SW2d 193).

Utah. Sjostrom v. Bishop, 15 Utah 2d 378, 393 P2d 472 (1964).

Vermont. State v. Goyet, 119 Vt 167, 122 A2d 862 (1956).

Washington. City of Seattle v. Reed, 6 Wash 2d 186, 107 P2d 239 (1940).

Wisconsin. In Interest of K.D.J., 153 Wis 2d 249, 450 NW2d 499 (1989).

[6]Ohio. State v. Morgan, 164 Ohio St 529, 133 NE2d 104 (1956).

Rhode Island. The language "until the parties are reconciled" is directory rather than mandatory. Hamel v. Hamel, 426 A2d 259 (RI 1981).

[7]California. "[W]hile the language upon its face seems to be mandatory, the cardinal canon of interpretation requires, of course, that we give effect to the intention of the lawmakers, though it may seem opposed to the letter of the statute." In re Chalbourne's Estate, 15 Cal App 363, 114 P 1012 (1911); In re Mitchell's Estate, 20 Cal 2d 503, 123 P2d 503 (1942).

Illinois. Castaneda v. Illinois Human Rights Commission, 132 Ill 2d 304, 547 NE2d 437 (1989); Rankin v. Rankin, 322 Ill App 90, 54 NE2d 58 (1944).

New York. Hardman v. Bowen, 39 NY 196 (1868); Olp v. Town of Brighton, 173 Misc 1079, 19 NYS2d 546 (1940).

Ohio. Orndorff v. Ohio Power Co., 75 Ohio App 94, 61 NE2d 213 (1943).

Pennsylva Borough of Pleasant Hills v. Carroll, 182 Pa Super 102, 125 A2d 466 (1956).

Washington. State v. Bartholomew, 104 Wash 2d 844, 710 P2d 196 (1985).

[8]State v. Bartholomew, 104 Wash 2d 844, 710 P2d 196 (1985).

[9]North Carolina. North Carolina State Art Soc., Inc. v. Bridges, 235 NC 125, 69 SE2d 1 (1952).

Ohio. Schmidt v. Weather Seal, Inc., 71 Ohio App 387, 50 NE2d 362 (1943).

Pennsylvania. Appeal of Baldwin, 153 Pa Super 358, 33 A2d 773 (1943); Commonwealth v. Kowell, 209 Pa Super 386, 228 A2d 50 (1967).

South Dakota. Application of Megan (Chicago & N.W. Ry. Co. v. Buckingham Transp. Co. of Colorado), 69 SD 1, 5 NW2d 729 (1942).

[10]In re McQuiston's Adoption, 238 Pa 304, 86 A 205 (1913).

Illinois. Miller v. Illinois Dept. of Public Aid, 94 Ill App 3d 11, 418 NE2d 178 (1981); In Interest of Pryor, 111 Ill App 3d 851, 444 NE2d 763 (1983).

[11]Kiernan v. Roadway Exp., Inc., 15 Conn App 625, 545 A2d 1158 (1988).

[12]Connecticut. LeConche v. Elligers, 215 Conn 701, 579 A2d 1 (1990).

[13]California. People v. Harner, 213 Cal App 3d 1400, 262 Cal Rptr 422 (1989).

Florida. Williamson v. State, 510 So 2d 1052 (Fla App 1987).

Texas. State v. City of Greenville, 726 SW2d 162 (Tex App Dallas 1986).

A statute called for the disbarment of a prosecuting attorney can be classified as mandatory. Green v. County Attorney of Anderson County, 592 SW2d 69 (Tex Civ App 1979).

[14]Connecticut. Fidelity Trust Co. v. BVD Associates, 196 Conn 270, 492 A2d 180 (1985).

§57.03. Aids in determining whether provision is mandatory or directory.

All pertinent intrinsic and extrinsic aids to construction are applicable when determining whether statutory provisions are mandatory or directory.[1] However, there is no simple mechanical test for determining whether a provision should be given mandatory or directory effect.[2]

Where the language of a statute is clear and unambiguous, courts may hold that the construction intended by the legislature is obvious from the language used.[3] The ordinary meaning of language should always be favored.[4] The form of the verb used in a statute, i.e., something "may," "shall" or "must" be done, is the single most important textual consideration determining whether a statute is mandatory or directory. It is still not the sole determinant, and what it naturally connotes can be overcome by other considerations.[5] The courts of Arizona have interpreted "may" to be both permissive and mandatory. When the exact meaning cannot be ascertained from the language of the statute, the courts, in the search to determine the legislative intent, look to the words, context, subject matter, effects and consequences as well as to the spirit and purpose of the statute.[6]

In the words of a court:

> "Ordinarily, the use of the word 'shall' in a statute carries with it the presumption that it is used in the imperative rather than in the directory sense. But this is not a conclusive presumption. Both the character and context of the legislation are controlling . . .. The mandatory sense to the word 'shall' should not be given, if by so doing the door to miscarriages of justice should be opened."[7]

It has also been said by a court that even though it is generally held that the word "may" ordinarily suggests a power rather than a duty, this rule is not to be slavishly followed where the contrary is indicated by the statute's context.[8] "Should" generally denotes discretion and should not be construed as "shall."[9] Conversely: "[I]n certain instances the word 'may' has the effect of 'must.' But, ordinarily, the use of the permissive term carries no mandate. It is only where the context indicates or where the object to be attained

compels such a construction that the imperative shall be deemed the legislative intent."[10] It has been held that, when a time period is provided in a statute to safeguard individual rights, it is then deemed that "shall" should be deemed mandatory.[11]

The intent of the legislature may be implied from the language used.[12] The question whether the language in a statute is mandatory or directory is to be determined on a case-by-case basis, and the criterion whether such requirement is mandatory or directory is whether such requirement is essential to preserve the rights of the parties.[13] It can also be inferred on grounds of policy and reasonableness.[14] It has been held that when a statute is amended and the shift in language is from "shall" to "may" there is clear manifestation of intent that the statute be permissive.[15] The word "may" is construed as mandatory when the statute in question concerns the public interest or affects the rights of third persons.[16] "Shall" can be construed as "may" to avoid frustrating the expansive purpose of the act in question.[17] In cases where no apparent actual or potential injury results to anyone from the failure to adhere to the provisions of a statute, a directory construction usually prevails in the absence of facts indicating that a mandatory construction was intended.[18] Statutory requirements that are of the essence of the thing required by statute are mandatory, while those things which are not of the essence are directory.[19] When a statute specifies what result will ensue if its terms are not complied with, the statute is deemed mandatory.[20] It is also said that in determining whether or not a statute is mandatory or directory, the general rule is that when a statute provides what results shall follow a failure to comply with its terms it is mandatory and must be obeyed. However, if it merely requires certain things to be done and nowhere prescribes results that follow, such a statute is merely directory.[21]

As explained by one court:

> "There is no universal rule by which directory provisions in a statute may, under all circumstances, be distinguished from those which are mandatory. Consideration must be given to the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the act, and finally, whether or not there is a public or private right involved."[22]

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[1]See chs 48, 49.

United States. Planned Parenthood Federation of America v. Heckler, 712 F2d 650 (CA DC 1983).

Wisconsin. Midwest Mut. Ins. Co. v. Nicolazzi, 138 Wis 2d 192, 405 NW2d 732 (Ct App 1987).

[2]**California.** People v. Wilson, 191 Cal App 3d 161, 236 Cal Rptr 280 (1987).

[3]**United States.** The use of the word "shall" in the statute, although not entirely controlling, is of significant importance and indicates an intention that the statute be construed as mandatory. United States v. Chavez, 627 F2d 953 (CA9 1980).

Kentucky. Starks v. Kentucky Health Facilities, 684 SW2d 5 (Ky App 1985).

Maryland. Harvey v. State, 51 Md App 113, 441 A2d 1094 (1982).

New Jersey. McDonald v. Board of Chosen Freeholders, 99 NJL 170, 122 A 801 (1923).

New Mexico. Vaughn v. United Nuclear Corp., 98 NM 481, 650 P2d 3 (1982).

North Carolina. Spruill v. Davenport, 178 NC 364, 100 SE 527 (1919).

Ohio. State v. Hale, 24 Ohio App 166, 156 NE 221 (1927).

Pennsylvania. The intention of the legislature helps determine whether a statute is mandatory or directory. Beers v. Unemployment Compensation Board of Review, 118 Pa Commw 248, 546 A2d 1260 (1988).

Vermont. In re Mullestein, 148 Vt 170, 531 A2d 890 (1987).

Washington. Singleton v. Frost, 108 Wash 2d 723, 742 P2d 1224 (1987).

[4]**United States.** Minor v. Mechanics' Bank of Alexandria, 1 Pet (26 US) 46, 7 L Ed 47 (1828).

Alaska. State v. Eluska, 698 P2d 174 (Alaska App 1985).

Arkansas. Arkansas State Highway Commission v. Mabry, 222 Ark 261, 315 SW2d 900 (1958).

Delaware. State v. Layton, 38 Del 556, 194 A 886 (1937).

Florida. In re Forfeiture of One 1984 Ford Van 150, 521 So 2d 244 (Fla App 1988).

Illinois. Village of Elmwood Park v. Forest Preserve Dist. of Cook County, 21 Ill App 3d 597, 316 NE2d 140 (1974).

Provision in the Marriage and Dissolution of Marriage Act relating to the award of reasonable attorney's fees in a proceeding for the enforcement of a child support order has been held to be mandatory when the word "shall" is used. Sostak v. Sostak, 113 Ill App 3d 954, 447 NE2d 1345 (1983).

Indiana. Board of Com'rs v. Davis, 136 Ind 503, 36 NE 141 (1894); In re Ordinance No. 464 of Common Council of Jasper, 133 Ind App 1, 176 NE2d 906 (1961).

Nebraska. In re Estate of Pike, 168 Neb 1, 95 NW2d 350 (1959); State v. Stratton, 220 Neb 854, 374 NW2d 31 (1985).

As a general rule in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. Moyer v. Douglas & Lomason & Co., 212 Neb 680, 325 NW2d 64 (1982).

New Hampshire. The use of the word "may" in the context of the statute was meant to make the finding of a "manifest educational hardship" permissive rather than mandatory. Appeal of Peirce, 122 NH 762, 451 A2d 363 (1982).

Ohio. McCarter v. City of Cincinnati, 3 Ohio App 3d 244, 44 NE2d 1053 (1981).

3 Cal. 4th 1, *; 832 P.2d 899, **;
10 Cal. Rptr. 2d 183, ***; 1992 Cal. LEXIS 3490

PHILIP I. MONCHARSH, Plaintiff and Appellant, v. HEILY & BLASE et al., Defendants and Respondents.

No. S020997

SUPREME COURT OF CALIFORNIA

3 Cal. 4th 1; 832 P.2d 899; 10 Cal. Rptr. 2d 183; 1992 Cal. LEXIS 3490; 92 Cal. Daily Op. Service 6647; 92 Daily Journal DAR 10607

July 30, 1992, Decided

SUBSEQUENT HISTORY:

Rehearing Denied September 24, 1992, Reported at 1992 Cal. LEXIS 4745.

PRIOR HISTORY: Superior Court of Santa Barbara County, No. 179759, Thomas R. Adams, Jr., Judge.

DISPOSITION: The judgment of the Court of Appeal is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant attorney challenged a judgment of the Court of Appeal (California), which affirmed the trial court's denial of appellant's petition to vacate and modify an arbitration award pursuant to *Cal. Civ. Proc. Code § 1286.2*, and granted appellee law firm's motion to confirm the award pursuant to *Cal. Civ. Proc. Code § 1285*.

OVERVIEW: Appellant attorney signed an employment agreement with appellee law firm, which provided that appellee was entitled to 80 percent of any fee appellant received from a client who retained him upon the termination of his employment. Appellee sought to recover fees appellant received from such clients. Pursuant to the agreement, the matter was submitted to an arbitrator, who ruled in favor of appellee. Appellant sought to vacate and modify the award pursuant to *Cal. Civ. Proc. Code § 1286.2*, and appellee sought to confirm the award pursuant to *Cal. Civ. Proc. Code § 1285*. The trial court ruled in appellee's favor, and the appellate court affirmed. The court affirmed the lower court's judgments and held that an arbitration award reached under a contractual agreement was not subject to judicial review except on the grounds set forth in *Cal. Civ. Proc. Code § § 1286.2*, 1286.6. The court held that it found no reason why the strong presumption in favor of the finality of the arbitral award should not apply. Further, an error of law apparent on the face of the award that caused substantial injustice did not provide grounds for judicial review.

OUTCOME: The court affirmed the judgment that denied appellant attorney's request to vacate an arbitration award and granted appellee law firm's request to confirm the award. The court held that arbitration awards were subject to judicial review only on statutorily specified grounds, and that an error of law on the face of the award that caused substantial injustice was not a ground for judicial review.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods

[HN1] In cases involving private arbitration, the scope of arbitration is a matter of agreement between the parties, and the powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN2] *Cal. Civ. Proc. Code § 1280* et seq., as enacted and periodically amended by the legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. Through this detailed statutory scheme, the legislature has expressed a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution. Courts will indulge every intendment to give effect to such proceedings.

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN3] Parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final. The very essence of the term arbitration in this context connotes a binding award. When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive.

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN4] Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action. The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award according to what is just and good. As a consequence, arbitration awards are generally immune from judicial review. Parties who stipulate in an agreement that controversies that may arise out of it shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN5] Both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, the merits of the controversy between the parties are not subject to judicial review. Courts will not review the validity of the arbitrator's reasoning, and a court may not review the sufficiency of the evidence supporting an arbitrator's award.

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN6] With narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN7] See *Cal. Civ. Proc. Code § 1286.2.*

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN8] See *Cal. Civ. Proc. Code § 1286.6.*

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN9] A majority of California appellate decisions have followed the modern rule, and limit judicial review of private arbitration awards to those grounds specified in *Cal. Civ. Proc. Code § § 1286.2*, 1286.6.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
[HN10] Arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.

Civil Procedure > Alternative Dispute Resolution > Judicial Review
[HN11] It is within the powers of the arbitrator to resolve the entire merits of the controversy submitted by the parties. *Cal. Civ. Proc. Code § § 1286.2(d)*, 1286.6(b), (c). The merits include all the contested issues of law and fact submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
[HN12] *Cal. Civ. Proc. Code § 1281.2(b)* states that when a written agreement to arbitrate exists, the court shall compel the parties to arbitrate their dispute unless it determines that grounds exist for the revocation of the agreement. Although this statute does not expressly state whether grounds must exist to revoke the entire contract, the arbitration agreement only, or some other provision of the contract, a fair reading of the statutory scheme reveals the legislature must have meant revocation of the arbitration agreement.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
[HN13] If a contract includes an arbitration agreement, and grounds exist to revoke the entire contract, such grounds would also vitiate the arbitration agreement. If an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR Methods
[HN14] When the alleged illegality goes to only a portion of the contract that does not include an arbitration agreement, the entire controversy, including the issue of illegality, remains arbitrable.

Civil Procedure > Alternative Dispute Resolution > Validity of ADR MethodsCivil Procedure > Appeals > Reviewability > Preservation for Review
[HN15] Unless a party is claiming that the entire contract is illegal, or that the arbitration agreement itself is illegal,

he or she need not raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator. Failure to raise the claim before the arbitrator, however, waives the claim for any future judicial review.

Civil Procedure > Alternative Dispute Resolution > Judicial Review

[HN16] The rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award.

COUNSEL:

Philip I. Moncharsh, in pro. per., Townsend & Townsend, Paul W. Vapnek and Mark L. Pettinari for Plaintiff and Appellant.

DeWitt F. Blase, in pro. per., Heily & Blase and John R. Johnson for Defendants and Respondents.

JUDGES: Opinion by Lucas, C. J., with Panelli, Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Kennard, J., with Mosk, J., concurring.

OPINIONBY: LUCAS, C. J.

OPINION: [*6] [**900] [***184]

We granted review in this case to decide, inter alia, the extent to which a trial court may review an arbitrator's decision for errors of law. For the reasons discussed below, we conclude an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties. There are, however, limited exceptions to this general rule, which we also discuss below.

FACTS

On June 16, 1986, appellant Philip Moncharsh, an attorney, was hired by respondent Heily & Blase, a law firm. As a condition of employment as an associate attorney in the firm, Moncharsh signed an agreement containing a number of provisions governing various aspects of his employment. One provision (hereafter referred to as paragraph X-C) stated: "X C. Employee-attorney agrees not to do anything to cause, encourage, induce, entice, recommend, suggest, mention or otherwise cause or contribute to any of Firm's clients terminating the attorney-client relationship with Firm, and/or substituting [**901] [***185] Firm and retaining or associating Employee-attorney or any other attorney or firm as their legal counsel. In the event that any Firm client should terminate the attorney-client relationship with Firm and substitute Employee-attorney or another attorney or law firm who[m] Employee-attorney suggested, recommended or directed as client's successor attorney, then, in addition to any costs which client owes Firm up to the time of such substitution, as to all fees which Employee-attorney may actually receive from that client or that client's successor attorney on any such cases, Blase will receive eighty percent (80%%) of said fee and Employee-attorney will receive twenty percent (20%%) of said fee."

Moncharsh terminated his employment with Heily & Blase on February 29, 1988. DeWitt Blase, the senior partner at Heily & Blase, contacted 25 or 30 of Moncharsh's clients, noted that they had signed retainer agreements with his firm, and explained that he would now be handling their cases. Five clients, whose representation by Moncharsh predated his association with Heily & Blase, chose to have Moncharsh continue to represent them. A sixth client, Ringhof, retained Moncharsh less than two weeks before he left the firm. Moncharsh continued to represent all six clients after he left the firm.

When Blase learned Moncharsh had received fees at the conclusion of these six cases, he sought a quantum meruit share of the fees as well as a percentage of the fees pursuant to paragraph X-C of the employment agreement. Blase rejected Moncharsh's offer to settle the matter for only a [*7] quantum meruit share of the fees. The parties then invoked the arbitration clause of the employment agreement n1 and submitted the matter to an arbitrator.

n1 The arbitration clause provided: "Any dispute arising out of this Agreement shall be subject to arbitration under the rules of the American Arbitration Association. No arbitrator shall have any power to alter, amend, modify or change any of the terms of this agreement. The decision of the arbitrator shall be final and binding on Firm and Employee-attorney." None of the rules of the American Arbitration Association have any bearing on the issues raised in this case.

The arbitrator heard two days of testimony n2 and the matter was submitted on the briefs and exhibits. In his brief, Moncharsh argued (1) Heily & Blase was entitled to only a quantum meruit share of the fees, (2) Moncharsh and Blase had an oral agreement to treat differently the cases Moncharsh brought with him to Heily & Blase, (3) the employment agreement had

terminated and was therefore inapplicable, (4) the agreement was one of adhesion and therefore unenforceable, and (5) paragraph X-C is unenforceable because it violates public policy, the Rules of Professional Conduct of the State Bar, and because it is inconsistent with *Fracasse v. Brent (1972) 6 Cal.3d 784 [100 Cal.Rptr. 385, 494 P.2d 9]*, and *Champion v. Superior Court (1988) 201 Cal.App.3d 777 [247 Cal.Rptr. 624]*.

n2 The hearing before the arbitrator was not reported.

In its brief, Heily & Blase contended paragraph X-C (1) is clear and unequivocal, (2) is not unconscionable, and (3) represented a reasonable attempt to avoid litigation and was thus akin to a liquidated damages provision. In addition, "To the extent it becomes important to the Arbitrator's decision," Heily & Blase alleged that Moncharsh solicited the six clients to remain with him, and further suggested that Moncharsh retained those six because it was probable that financial settlements would soon be forthcoming in all six matters, Heily & Blase contrasted these six matters with the other cases Moncharsh left with the firm, all of which allegedly required a significant amount of additional legal work.

The arbitrator ruled in Heily & Blase's favor, concluding that any oral side agreement between Moncharsh and Blase was never documented and that Moncharsh was thus bound by the written employee agreement. Further, the arbitrator ruled that, "except for client Ringhof, [paragraph X-C] is not unconscionable, and it does not violate the rules of professional conduct. At the time Mr. Moncharsh agreed to the employment contract, he was a mature, experienced attorney, with employable [**902] [***186] skills. Had he not been willing to agree to the eighty/twenty (80/20) split on termination, he could simply have refused to sign the document, negotiated something different, or if negotiations were unsuccessful, his choice was to leave his employment. [*8] ... [P] ... The Arbitrator excludes the Ringhof client from the eighty/twenty (80/20) split because that client was obtained at the twilight of Mr. Moncharsh's relationship with Heily & Blase, and an eighty/twenty (80/20) split with respect to that client would be unconscionable."

Moncharsh petitioned the superior court to vacate and modify the arbitration award. (*Code Civ. Proc., § 1286.2*; all subsequent statutory references are to this code unless otherwise stated.) Heily & Blase responded by petitioning the court to confirm the award. (§ 1285.) The court ruled that, "The arbitrator's findings on questions of both law and fact are conclusive. A court cannot set aside an arbitrator's error of law no matter how egregious." The court allowed an exception to this rule, however, "where the error appears on the face of the award." Finding no such error, the trial court denied Moncharsh's petition to vacate and granted Heily & Blase's petition to confirm the arbitrator's award.

On appeal, the Court of Appeal also recognized the rule, announced in previous cases, generally prohibiting review of the merits of the arbitrator's award. It noted, however, that an exception exists when "an error of law appears on the face of the ruling and then only if the error would result in substantial injustice." Although Moncharsh claimed paragraph X-C violated law, public policy, and the State Bar Rules of Professional Conduct, the appellate court disagreed and affirmed the trial court judgment.

We granted review and directed the parties to address the limited issue of whether, and under what conditions, a trial court may review an arbitrator's decision.

DISCUSSION

1. *The General Rule of Arbitral Finality*

The parties in this case submitted their dispute to an arbitrator pursuant to their written agreement. This case thus involves private, or nonjudicial, arbitration. (See *Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 401-402 & fn. 5 [212 Cal.Rptr. 151, 696 P.2d 645, 48 A.L.R.4th 109]* [discussing the differences between judicial and nonjudicial arbitration].) **(1)** [HN1] In cases involving private arbitration, "[t]he scope of arbitration is ... a matter of agreement between the parties" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal.3d 312, 323 [197 Cal.Rptr. 581, 673 P.2d 251]* [hereafter *Ericksen*]), and " '[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.' " (*O'Malley v. Petroleum Maintenance Co. (1957) 48 Cal.2d 107, 110 [308* [*9] *P.2d 9]* [hereafter *O'Malley*], quoting *Pac. Fire etc. Bureau v. Bookbinders' Union (1952) 115 Cal.App.2d 111, 114 [251 P.2d 694].)*

(2) [HN2] Title 9 of the Code of Civil Procedure, as enacted and periodically amended by the Legislature, represents a comprehensive statutory scheme regulating private arbitration in this state. (§ 1280 et seq.) Through this detailed statutory scheme, the Legislature has expressed a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Ericksen, supra, 35 Cal.3d at p. 322; Madden v. Kaiser Foundation Hospitals (1976) 17 Cal.3d 699, 706-707 [131 Cal.Rptr. 882, 552 P.2d*

1178]; Victoria v. Superior Court (1985) 40 Cal.3d 734, 750 [222 Cal.Rptr. 1, 710 P.2d 833] [dis. opn. of Lucas, J.]; *City of Oakland v. United Public Employees (1986) 179 Cal.App.3d 356, 363 [224 Cal.Rptr. 523]*; see also *Shearson/American Express Inc. v. McMahon (1987) 482 U.S. 220, 226 [96 L.Ed.2d 185, 193, 107 S.Ct. 2332]* [Federal Arbitration Act, *9 U.S.C. § 1* et seq., establishes federal policy in favor of arbitration].) Consequently, courts will " 'indulge every intendment to give effect to such proceedings.' " (*Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal.3d 180, 189 [151 Cal.Rptr. 837, 588 P.2d 1261]*, quoting *Pacific Inv. Co. v. Townsend (1976) 58 Cal.App.3d 1, 9 [129* [**903] [***187] *Cal.Rptr. 489].)* Indeed, more than 70 years ago this court explained: "The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." (*Utah Const. Co. v. Western Pac. Ry. Co. (1916) 174 Cal. 156, 159 [162 P. 631]* [hereafter *Utah Const.*].) "Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts." (*Blanton v. Womancare, Inc., supra, at p. 402, fn. 5.)*

The arbitration clause included in the employment agreement in this case specifically states that the arbitrator's decision would be both binding and final. The parties to this action thus clearly intended the arbitrator's decision would be final. (3) Even had there been no such expression of intent, however, it is the general rule that [HN3] parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final. n3 Indeed, "The very essence of the term 'arbitration' [in this context] connotes a binding award." (*Blanton v. Womancare, Inc., supra, 38 Cal.3d at p. 402*, citing Domke on Commercial Arbitration (rev. ed. 1984) p. 1 [hereafter [*10] Domke].) In the early years of this state, this court opined that, "When parties agree to leave their dispute to an arbitrator, they are presumed to know that his award will be final and conclusive ...." (*Montifiori v. Engels (1853) 3 Cal. 431, 434.)* One commentator explains, "Even in the absence of an explicit agreement, conclusiveness is expected; the essence of the arbitration process is that an arbitral award shall put the dispute to rest." (Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality (1976) 23 UCLA L.Rev. 948-949* [hereafter *Judicial Deference*].) It has thus been observed that, "The parties [to an arbitration] can take a measure of comfort in knowing that the arbitrator's award will almost certainly mean an end to the dispute." (Oehmke, Commercial Arbitration (1987) § 6:10, p. 140 [hereafter Oehmke].)

n3 We assume for this discussion of general principles that an enforceable arbitration agreement exists. We do not address here the situation where one party advances a legal theory that would vitiate the parties' voluntary agreement to submit to arbitration. (See § 1281.2 [court will not order arbitration if "[g]rounds exist for the revocation of the agreement"].)

This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one. The arbitrator's decision should be the end, not the beginning, of the dispute. (See Feldman, *Arbitration Modernized--The New California Arbitration Act (1961) 34 So.Cal.L.Rev. 413, 414, fn. 11.)* Expanding the availability of judicial review of such decisions "would tend to deprive the parties to the arbitration agreement of the very advantages the process is intended to produce." (*Victoria v. Superior Court, supra, 40 Cal.3d at p. 751* [dis. opn. of Lucas, J.]; see generally, *Judicial Deference, supra*, 23 UCLA L.Rev. at p. 949.)

Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized. (*City of Oakland v. United Public Employees, supra, 179 Cal.App.3d at p. 363; Lindholm v. Galvin (1979) 95 Cal.App.3d 443, 450- 451 [157 Cal.Rptr. 167].)* Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so*. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain. n4

n4 Professor Feldman suggests that, "Psychologically and economically, the parties having selected their own decider, they would, on the whole, be satisfied with his award, as the best which could be had under the circumstances." (Feldman, *Arbitration Law in California: Private Tribunals for Private Government (1957) 30 So.Cal.L.Rev. 375, 384* [discussing the arbitration scheme under the 1927 law].)

[**904] [***188] (4) Moreover, [HN4] "[a]rbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing

so may expressly or impliedly reject a claim [*11] that a party might successfully have asserted in a judicial action." (*Sapp v. Barenfeld (1949) 34 Cal.2d 515, 523 [212 P.2d 233];* see also *Morris v. Zuckerman (1968) 69 Cal.2d 686, 691 [72 Cal.Rptr. 880, 446 P.2d 1000]; Grunwald-Marx, Inc. v. L.A. Joint Board (1959) 52 Cal.2d 568, 589 [343 P.2d 23].)* As early as 1852, this court recognized that, "The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]." (*Muldrow v. Norris (1852) 2 Cal. 74, 77.)* "As a consequence, arbitration awards are generally immune from judicial review. 'Parties who stipulate in an agreement that controversies that may arise out of it shall be settled by arbitration, may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.' (*Case v. Alperson (1960) 181 Cal.App.2d 757, 759. ...)*" (*Nogueiro v. Kaiser Foundation Hospitals (1988) 203 Cal.App.3d 1192, 1195 [250 Cal.Rptr. 478].)*

(5) Thus, [HN5] both because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, "The merits of the controversy between the parties are not subject to judicial review." (*O'Malley, supra, 48 Cal.2d at p. 111; Griffith Co. v. San Diego Col. for Women (1955) 45 Cal.2d 501, 510 [289 P.2d 476, 47 A.L.R.2d 1349]; Pacific Vegetable Oil Corp. v. C.S.T. Ltd. (1946) 29 Cal.2d 228, 233 [174 P.2d 441]* [hereafter *Pacific Vegetable*].) More specifically, courts will not review the validity of the arbitrator's reasoning. (*Grunwald-Marx, Inc. v. L.A. Joint Board, supra, 52 Cal.2d at p. 589; Nogueiro v. Kaiser Foundation Hospitals, supra, 203 Cal.App.3d at p. 1195; Ray Wilson Co. v. Anaheim Memorial Hospital Assn. (1985) 166 Cal.App.3d 1081, 1091 [213 Cal.Rptr. 62]; American & Nat. etc. Baseball Clubs v. Major League Baseball Players Assn. (1976) 59 Cal.App.3d 493, 498 [130 Cal.Rptr. 626]* [hereafter *Baseball Players*].) Further, a court may not review the sufficiency of the evidence supporting an arbitrator's award. (*Morris v. Zuckerman, supra, 69 Cal.2d at 691; Pacific Vegetable, supra, 29 Cal.2d at p. 238; Nogueiro v. Kaiser Foundation Hospitals, supra, 203 Cal.App.3d at p. 1195;* see generally, 6 Cal.Jur.3d (rev.) Arbitration and Award, § 76, pp. 133-134.)

Thus, it is the general rule that, [HN6] with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law. In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable for two reasons. First, by voluntarily submitting to arbitration, the parties have agreed to bear that risk in return for a quick, inexpensive, and conclusive resolution to their dispute. [*12] (See *That Way Production Co. v. Directors Guild of America, Inc. (1979) 96 Cal.App.3d 960, 965 [158 Cal.Rptr. 475]* [hereafter *That Way*].) As one commentator explains, "the parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators and that this is a worthy 'trade-off' in order to obtain speedy decisions by experts in the field whose practical experience and worldly reasoning will be accepted as correct by other experts." (Sweeney, *Judicial Review of Arbitral Proceedings* (1981-1982) *5 Fordham Int'l L.J. 253, 254.)* "In other words, it is within the power of the arbitrator to make a mistake either legally or factually. When parties opt for the forum of arbitration they agree to be bound by the decision of that forum knowing that arbitrators, like judges, are fallible." [**905] [***189] (*That Way, supra, at p. 965.)*

Griffith Co. v. San Diego Col. for Women, supra, 45 Cal.2d 501, is illustrative. In that case, the plaintiff contracted to build certain buildings for the defendant college. When work was delayed, a dispute arose and the matter was submitted to arbitration. When a split arbitration panel ruled in the defendant's favor, the plaintiff moved the superior court to vacate the award, claiming, inter alia, that "the decision is arbitrary, harsh and inequitable; that it is contrary to law; and that it is not coextensive with the issues submitted." (at p. 510.) This court rejected these contentions, stating, " 'Even if the arbitrator decided [the] point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts.' " (at pp. 515-516, quoting *Crofoot v. Blair Holdings Corp. (1953) 119 Cal.App.2d 156, 189, [260 P.2d 156]* [*Crofoot* disapproved on other grounds, *Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 183 (14 Cal.Rptr. 297, 363 P.2d 313)].)*

A second reason why we tolerate the risk of an erroneous decision is because the Legislature has reduced the risk to the parties of such a decision by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process. As stated *ante*, private arbitration proceedings are governed by title 9 of the *Code of Civil Procedure, sections 1280- 1294.2.* [HN7] Section 1286.2 sets forth the grounds for vacation of an arbitrator's award. It states in pertinent part: "[T]he court shall vacate the award if the court determines that: [P] (a) The award was procured by corruption, fraud or other

undue means; [P] (b) There was corruption in any of the arbitrators; [P] (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator; [P] (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or [P] (e) The rights of such party were substantially prejudiced by the refusal of the [*13] arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title."

In addition, [HN8] section 1286.6 provides grounds for correction of an arbitration award. That section states in pertinent part: "[T]he court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected if the court determines that: [P] (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [P] (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or [P] (c) the award is imperfect in a matter of form, not affecting the merits of the controversy."

The Legislature has thus substantially reduced the possibility of certain forms of error infecting the arbitration process itself (§ 1286.2, subds. (a), (b), (c)), of an arbitrator exceeding the scope of his or her arbitral powers (§ 1286.2, subd. (d), 1286.6, subd. (b)), of some obvious and easily correctable mistake in the award (§ 1286.6, subd. (a)), of one party being unfairly deprived of a fair opportunity to present his or her side of the dispute (§ 1286.2, subd. (e)), or of some other technical problem with the award (§ 1286.6, subd. (c)). In light of these statutory provisions, the residual risk to the parties of an arbitrator's erroneous decision represents an acceptable cost--obtaining the expedience and financial savings that the arbitration process provides--as compared to the judicial process.

Although it is thus the general rule that an arbitrator's decision is not ordinarily reviewable for error by either the trial or appellate courts, Moncharsh contends three exceptions to the general rule apply to his case. First, he claims a court may review an arbitrator's decision if an error of law is [**906] [***190] apparent on the face of the award and that error causes substantial injustice. Second, he claims the arbitrator exceeded his powers. (§ 1286.2, subd. (d).) Third, he argues courts will not enforce arbitration decisions that are illegal or violate public policy. We discuss each point seriatim.

2. *Error on the Face of the Arbitration Decision*

A review of the pertinent authorities yields no shortage of proclamations that a court may vacate an arbitrator's decision when (i) an error of law appears on the face of the decision, and (ii) the error causes substantial injustice. (See, e.g., *Abbott v. California State Auto. Assn. (1977) 68 Cal.App.3d 763, 771 [137 Cal.Rptr. 580].)* Indeed, some cases hold the error [*14] need only appear on the face of the award, with no mention of resulting injustice. (See, e.g., *Park Plaza, Ltd. v. Pietz (1987) 193 Cal.App.3d 1414, 1420 [239 Cal.Rptr. 51].)* As previously noted, however, the Legislature has set forth grounds for vacation (§ 1286.2) and correction (§ 1286.6) of an arbitration award and "[a]n error of law is not one of the grounds." (*Nogueiro v. Kaiser Foundation Hospitals, supra, 203 Cal.App.3d at p. 1195,* and cases cited.) Because Moncharsh contends that an additional exception to the general rule for errors of law is authorized by both common law and statute, we next determine the genesis of that notion as well as its continuing validity.

a. *The Early Common Law Rule*

We begin with *Muldrow v. Norris, supra, 2 Cal. 74* [hereafter *Muldrow*], a case arising before the enactment of any arbitration statutes in this state. In *Muldrow*, a dispute arose between the parties and they agreed to submit the matter to a panel of three arbitrators, whose decision "should be final and conclusive." (*Ibid.*) The arbitrators reached a decision and Norris, the losing party, sought to vacate the award. This court ruled in his favor, and we quote the opinion at length because it exemplifies the contradictory rule of judicial review that has been repeated in modified form since those early days:

"The first point we propose to examine, is, as to the power of the Court below to inquire into the award now before us. It is a well settled principle that courts of equity, in the absence of statutes, will set aside awards for fraud, mistake, or accident, and it makes no difference whether the mistake be one of fact or law. It is true, under a general submission, arbitrators have power to decide upon the law and facts: and a mere mistake of law cannot be taken advantage of. The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono*. If, however, they mean to decide according to the law, and mistake the law, the courts will set their award aside. A distinction seems to have been taken in the books between general and special awards. In the case of a general finding, it appears to be well settled that courts will not inquire into mistakes by evidence *aliunde*: but where the arbitrators have made any point a matter of judicial inquiry by spreading it upon the record, and they mistake the law in a palpable and material point, their

award will be set aside. [Citation.] The mere act of setting forth their reasons must be considered for the purpose of enabling those dissatisfied to take advantage of them. [Citation.] In all cases where the arbitrators give the reasons of their finding, they are supposed to have intended to decide according to law, and to refer the point for the opinion of the Court. In such cases, if they mistake the law, the award must be set aside; [*15] for it is not the opinion they intended to give, the same having been made through mistake. [Citation.] In the case already cited, the Court says, 'these special awards are not to be commended, as arbitrators may often decide with perfect equity between parties, and not give good reasons for their decision; but when a special award is once before the Court, it must stand or fall by its own intrinsic correctness, tested by legal principles.' [Citations.]" *(2 Cal. at pp. 77-78.)*

The *Muldrow* court concluded: "In the case before us, the arbitrators have set forth the particular grounds upon which [**907] [***191] their finding was based: and it follows from the authorities already cited, that the correctness of the principles by which they must be supposed to have been governed is a proper subject for judicial inquiry." *(2 Cal. at p. 78.)*

Although *Muldrow, supra,* thus acknowledged that, at common law, an arbitrator need not follow the law in arriving at a decision, and that "a mere mistake of law cannot be taken advantage of" *(2 Cal. at p. 77),* the opinion qualified that statement and held that an award reached by an arbitrator may nevertheless be reversed if the error is "spread[] ... upon the record" and the mistake is on a "palpable and material point." (*Ibid.*) *Muldrow* also stated that when an arbitrator gives reasons to support his decision, the award was subject to full-blown judicial oversight, and "must stand and fall by its own intrinsic correctness, tested by legal principles." (at p. 78.) n5

n5 By ensuring some measure of judicial control over arbitral awards, *Muldrow, supra,* was typical of courts from that early era in exhibiting suspicion of private arbitration as a means of dispute resolution. Thus, for example, courts had held that a common law submission to arbitration was revocable at any time prior to the award. (See *California Academy of Sciences v. Fletcher (1893) 99 Cal. 207, 209 [33 P. 855];* 3 Cal.Jur., Arbitration and Award § 19, p. 55.) In addition, early courts held agreements to arbitrate future disputes were unenforceable, both at common law and under the early statutes. (*Blodgett Co. v. Bebe Co. (1923) 190 Cal. 665 [214 P. 38, 26 A.L.R. 1070];* Feldman, *Arbitration Law in California: Private Tribunals for Private Government, supra,* 30 So.Cal.L.Rev. at p. 382.) Even under the initial arbitration statutes, courts held invalid an agreement that the arbitrator's decision was final and that no appeal could be taken therefrom. (*Kreiss v. Hotaling (1892) 96 Cal. 617, 621 [31 P. 740]; In re Joshua Hendy Machine Works (1908) 9 Cal.App. 610, 611 [99 P. 1110].)*

Later that same term, this court again addressed the issue. In *Tyson v. Wells (1852) 2 Cal. 122,* the parties agreed to submit their commercial dispute to a referee, whose decision was to be final. When the losing party challenged the referee's ruling, this court concluded the finality accorded a referee's report pursuant to statute was the same as for an arbitrator's ruling at common law. (at p. 130.) This time avoiding any suggestion that an arbitrator's decision was subject to unqualified judicial review, we stated: "it may be regarded as the settled rule, that the Court will not disturb the award of an arbitrator ... unless the error which is complained of, whether it be of [*16] law or fact, appears on the face of the award." (at p. 131.) Although the court purported to be following *Muldrow, supra, 2 Cal. 74,* there was no qualification that the error must be on a "palpable and material point." (at p. 77.)

Six months later, we addressed the issue again. In *Headley v. Reed (1852) 2 Cal. 322,* another case involving a reference, we wrote, "According to the rule settled in [*Muldrow*], the decision of the referee can only be set aside on account of fraud or *gross error of law or fact apparent on its face.*" (at p. 325, italics added.) The *Headley* court thus injected a new factor into the *Muldrow* test--gross error--but did not repeat *Muldrow*'s assertion that an arbitrator's decision was subject to full-blown judicial review.

These three early cases--*Muldrow, Tyson, Headley* -- involved arbitration (or a reference, which was considered functionally equivalent to arbitration) at common law. From them, we can perceive the beginnings of the rule permitting judicial review of an arbitrator's ruling if error appeared on the face of the award.

b. *The Development of Statutory Law before 1927*

Around the time the aforementioned cases were decided, the Legislature enacted the Civil Practice Act of 1851 and established the rules governing statutory arbitration. In section 386 of that act, the Legislature specified the grounds on which a court could vacate an arbitrator's award. "The Court, on motion, may vacate the award upon either of the following grounds ...: [P] 1st. That it was procured by corruption or fraud: [P] 2d.

That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing [**908] [***192] to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced: [P] [3d.] That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed." (Stats. 1851, Second Sess., tit. X, ch. IV, § 386, pp. 112- 113, hereafter section 386 of the Civil Practice Act.) Significantly, there was no express provision permitting judicial review if there was a gross error on the face of the award. Nor was a court permitted to vacate an award if it concluded it lacked "intrinsic [legal] correctness," as suggested in *Muldrow, supra, 2 Cal. at pages 77-78.*

This court first considered section 386 of the Civil Practice Act in *Peachy et al. v. Ritchie (1854) 4 Cal. 205* (hereafter *Peachy*). In that case, the losing party to an arbitration moved to vacate the award, claiming among other [*17] things that "the arbitrators refused to hear pertinent evidence," and "the arbitrators exceeded their powers." (at p. 206.) The trial court "refused to entertain the motion" on procedural grounds. (at p. 207.) Although the grounds asserted in support of the motion to vacate seemed to fall within the then-existing statutory grounds for vacation, this court refused to examine the decision of the court below, finding the asserted grounds to vacate the award "wholly insufficient. [P] Our Statute is but a re- affirmance of the common law, and gives to the parties no higher rights than they might have asserted in a court of equity in case of mistake, fraud or accident. The misconduct, contemplated by the Statute, was intended to apply to improper conduct in fact, such as that of a witness or juror, as contra- distinguished from mere error of judgment. [P] The whole doctrine of Arbitration was fully reviewed by this Court in the case of *Muldrow v. Norris, 2 Cal. 74,* in which we decided that we would not disturb the general finding of arbitrators, and that an award could not be set aside except in the cases there mentioned." (*Peachy, supra, 4 Cal. at p. 207,* punctuation and capitalization in original.)

The *Peachy* opinion is noteworthy for two reasons. First, it failed to construe strictly the terms of the statute. Thus, although the appellant raised grounds for review that were apparently permitted under section 386 of the Civil Practice Act (i.e., claims that the arbitrator failed to hear pertinent evidence and exceeded his powers), the court declined to invoke those statutory provisions. Instead, it concluded that the new statute was merely an affirmation of the common law and that the statute granted disputants no greater rights than they would have had before its enactment. The court concluded that permitting a litigant to attack an award on the asserted statutory grounds would destroy this mode of adjusting private differences. (*Peachy, supra, 4 Cal. at p. 207.)*

Second, *Peachy* reaffirmed the availability of judicial review of arbitration awards as limited in *Muldrow, supra, 2 Cal. 74,* expressly mentioning mistake, fraud, and accident. Thus, despite the enactment of section 386 of the Civil Practice Act, the availability of judicial review of arbitration awards was still controlled by the common law principles established in earlier cases. (*Peachy, supra, 4 Cal. at p: 207.)*

The evolution away from an emphasis on the common law, first suggested by the enactment of the Civil Practice Act of 1851, continued in *Carsley v. Lindsay (1859) 14 Cal. 390.* In that case, partners in the Salamander Iron Works desired to dissolve their partnership and submitted their dispute to an arbitrator, who found in Carsley's favor. When Lindsay successfully moved the trial court to vacate the award, Carsley appealed. In support of the trial court's decision, Lindsay argued, inter alia, that the award was properly [*18] vacated because it was contrary to law and evidence. This court rejected that argument, reasoning, "we are not aware that an award of an Arbitrator can be impeached on this ground. ... An impeachment on this ground was not admissible at common law, and, if it were, our statute, (Practice Act, [§] 385 *et seq.*) prescribes *other* grounds, as those upon which *alone* the award can be [**909] [***193] vacated by the District Court upon motion." (*Carsley, supra, at p. 394,* first italics in original, second added, citing *Muldrow, supra, 2 Cal. 74; Peachy, supra, 4 Cal. 205.)* Although *Carsley* cited *Muldrow* and its progeny, it is clear the court had subtly shifted its position to place greater reliance on the statutory provisions as the exclusive grounds on which an arbitration award could be vacated.

This trend continued when, in 1872, section 386 of the Civil Practice Act was codified without change as Code of Civil Procedure former section 1287. We addressed the new statute in *In re Connor (1900) 128 Cal. 279 [60 P. 862].* In that case, Pratt and Connor had a dispute over a promissory note and submitted the controversy to an arbitrator, who found in Connor's favor. Pratt moved to modify the award, and to vacate a portion of it. When the trial court denied his motion, he appealed, claiming witnesses in the hearing below were not sworn. This court affirmed, reasoning, "Where controversies are voluntarily submitted to arbitrators who need not be, and frequently are not, learned in the law, it is not contemplated that their awards will be viewed in the light of that strict adherence to legal rules and procedure which is expected in purely judicial trials." (at pp. 281-282.) After quoting *Muldrow, supra, 2 Cal. 74,* the *Connor* court flatly stated: "*the only grounds for a*

motion to vacate or modify an award are specified in sections 1287 and 1288 of the code; and the grounds for vacating an award (*Code Civ. Proc., sec. 1287*) include only cases of fraud, corruption, misconduct, 'or gross error,' ... These grounds do not include mere ordinary errors nor even faults of judgment. They refer to things that are 'gross.' " (*In re Connor, supra at p. 282,* italics added.)

By the time of *In re Connor, supra,* then, this court had declined to perpetuate *Muldrow*'s suggestion that courts could indulge in unfettered review of the "intrinsic correctness" of an arbitrator's decision. Indeed, the opposite was true; courts following the legislative scheme concluded the grounds for vacating an award were exclusively those set forth by statute. The *Connor* court, however, retained an exception to this general rule. *Muldrow*'s holding, permitting judicial review of errors "spread upon the record" affecting a "palpable and material point" (*Muldrow, supra, 2 Cal. at p. 77),* was transmogrified in *In re Connor* into a rule permitting judicial review of an award if it contained a "gross" error, although former section 1287 did not specify that ground as a permissible reason to vacate an award. [*19] (*In re Connor, supra, 128 Cal. at p. 282.)* Thus, although emphasizing the exclusivity of the statutory grounds for vacating an arbitration award, the *Connor* court retained a vestige of the common law rule that provided more generous judicial oversight.

Sixteen years later, this court retreated somewhat from *In re Connor, supra, 128 Cal. 279,* and apparently returned to the rule developed in earlier cases (most notably *Muldrow, supra, 2 Cal. 74,* and especially *Peachy, supra, 4 Cal. 205),* that deemphasized the exclusivity of the statutory grounds for vacating an award. In *Utah Const., supra, 174 Cal. 156,* a dispute arose between a railroad and a construction company over whether a debt had been discharged. The parties submitted their dispute to an arbitrator, who ruled in the railroad's favor. The construction company moved to vacate the award and appealed when the trial court denied its motion. We affirmed the trial court's decision, citing *Muldrow, supra, 2 Cal. 74,* and its progeny. "The code provisions are in aid of the common-law remedy of arbitration, a reaffirmance thereof, and do not alter its principles. [Citations.] An award made upon an unqualified submission cannot be impeached on the ground that it is contrary to law, unless the error appears on its face and causes substantial injustice. (*Carsley v. Lindsay, [supra,] 14 Cal. 390;* Morse on Arbitration, 296.)" (*Utah Const., supra, 174 Cal. at pp. 160-161.)*

Although *Carsley v. Lindsay, supra, 14 Cal. 390,* was cited in support, the basis for this court's apparent resurrection of the common law dominated view of judicial review of arbitration awards is puzzling. As explained, *ante* , at pages 17- 18, *Carsley* held that an arbitrator's award cannot be "impeached" merely because it contained an error of law, and that even if it could, section 386 of the Civil Practice Act (then codified verbatim in former section 1287) set forth the exclusive grounds to vacate an award. (*Carsley v. Lindsay, supra at p. 394.)* Thus, close scrutiny reveals. *Carsley* does not support the proposition for which it was cited in the *Utah Const.* opinion.

Utah Const,'s citation to Morse, The Law of Arbitration and Award (1872), is similarly unavailing. That treatise states that when parties submit to an arbitrator under a general submission, "such award is conclusive as well of the law as the fact; and the court upon the return of such an award will not inquire whether the referees, thus authorized, have decided correctly upon principles of law or not." (at p. 296, fn. omitted.) As is clear, Morse does not provide support for the conclusion in *Utah Const., supra, 174 Cal. 156,* that a court can vacate an arbitration award for a legal error appearing on the face of the award causing substantial injustice.

By the time this court decided *Utah Const., supra, 174 Cal. 156,* the law governing judicial review of arbitration awards was in a state of flux. The [*20] initial common law view permitting unfettered review of an award's "intrinsic correctness," first set forth in *Muldrow, supra, 2 Cal. 74,* had fallen by the wayside. More importantly, an alternate rule permitting review of an error--or perhaps, a "gross" error--on the face of the award causing substantial injustice, also begun with *Muldrow,* waned with the advent of statutes (first in 1851, then in 1872) governing the area, and had also apparently fallen into disfavor (*Carsley v. Lindsay, supra, 14 Cal. 390),* although the notion was not completely abandoned. (*In re Connor, supra, 128 Cal. 279.)* By 1916, however, that notion had been revived in *Utah Const., supra, 174 Cal. 156.* Indeed, *Utah Const.* has been cited in appellate decisions in the last 10 years for this very proposition. (See, e.g., *Park Plaza, Ltd. v. Pietz, supra, 193 Cal.App.3d at p. 1420.)* After 1927, the limits of judicial review of arbitration awards would evolve still further, this time shaped by additional legislation.

c. *Development of the Law After 1927*

By 1926, the popularity of private arbitration as a viable alternate to resolving disputes outside court was in decline. "[W]idespread dissatisfaction with our laws respecting arbitration [had] been often expressed by chambers of commerce, mercantile associations and business men generally." (First Rep. of the Judicial Council of Cal. (1926) exhibit B, p. 57 [hereafter First Report].) In addition, there were indications that the

organized bar also opposed private arbitration. (See Proceedings of the Fifteenth Annual Meeting Cal. State Bar Assn. (1924) pp. 70-73, quoted in Feldman, *Arbitration Law in California: Private Tribunals for Private Government, supra*, 30 So.Cal.L.Rev. at p. 388, fn. 42.) In 1926, Los Angeles County reported its clerk filed only three submissions to arbitrate; Alameda County reported no petitions were filed that year. (First Report, *supra*, p. 57.)

The reason for the dearth of submissions to arbitration could be traced to two factors. First, private arbitration was no more efficient than regular judicial adjudication due to the statutory rule permitting a disputant to revoke his or her submission to arbitrate "at any time before the award is made." (Former § 1283; see also First Report, *supra*, p. 58.) Second, private arbitration was not viewed as a particularly valuable method of dispute resolution because courts would not enforce contractual provisions agreeing to submit *future* disputes to arbitration. (*Blodgett Co. v. Bebe Co., supra, 190 Cal. at p. 667.)*

These perceived flaws were remedied when, in 1927, the Legislature amended the statutes governing private arbitration. (Stats. 1927, ch. 225, p. 403 et seq.) We may infer that by amending the existing statutes in response [*21] to the report to the [**911] [***195] Judicial Council of California, the Legislature intended to encourage the use of private arbitration. The 1927 amendments thus represent a clear legislative expression of public policy in favor of private arbitration as an alternate method of dispute resolution.

In addition to those changes, former section 1287--setting forth the grounds for vacating an arbitration award--was recodified and renumbered as new section 1288. That section provided in pertinent part: "In either of the following cases the superior court of the county or city and county in which said arbitration was had must make an order vacating the award, upon the application of any party to the arbitration: [P] (*a*) Where the award was procured by corruption, fraud or undue means. [P] (*b*) Where there was corruption in the arbitrators, or either of them. [P] (*c*) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehaviors, by which the rights of any party have been prejudiced. [P] (*d*) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award, upon the subject matter submitted, was not made." (Stats. 1927, ch. 225, § 9, pp. 406-407.)

The major changes in the new statute were: (i) the addition in subdivision (a) permitting vacation when the award was procured by "undue means"; and (ii) the addition to subdivision (d) permitting vacation when the arbitrators "so imperfectly executed [their powers] that a mutual, final and definite award ... was not made." (Former § 1288, Stats. 1927, ch. 225, § 9, p. 407.)

The limits of judicial review of an arbitration award under the 1927 amendments were addressed in *Pacific Vegetable, supra, 29 Cal.2d 228.* In that case, the seller claimed its contract with a buyer to ship copra from the Fiji Islands to San Diego, California, was cancelled due to the outbreak of World War II. The matter was submitted to an arbitration panel, which found in favor of the seller. The buyer moved in superior court to vacate the award, claiming it was not given an adequate opportunity to address the seller's arguments.

The *Pacific Vegetable* court stated that, "The merits of the controversy between the parties are not subject to judicial review. By *section 1288 of the Code of Civil Procedure* the superior court has power to vacate an award [quoting the terms of section 1288]." (*Pacific Vegetable, supra, 29 Cal.2d at p. 233.)* Later, the court explained, "The form and sufficiency of the evidence, and the credibility and good faith of the parties, in the absence of [*22] corruption, fraud or undue means in obtaining an award, are not matters for judicial review." (at p. 238.) It is significant that the court twice emphasized the statutory grounds for vacating an award, but never reiterated the old common law based rule permitting review for an error on the face of the award that causes substantial injustice. In this way, the *Pacific Vegetable* court suggested that former section 1288--and not the common law--established the limits of judicial review of arbitration awards. n6

n6 Although *Pacific Vegetable, supra, 29 Cal.2d 228,* thus implied the statutory grounds were exclusive, its ultimate meaning was somewhat ambiguous, for it also noted that " 'The statutory provisions for a review thereof are manifestly for the sole purpose of preventing the misuse of the proceeding, where corruption, fraud, misconduct, *gross error, or mistake* has been carried into the award to the substantial prejudice of a party to the proceeding.' " (at p. 240, quoting *Utah Const., supra, 174 Cal. at p. 159,* italics added.) Because this quotation came in a paragraph discussing the requirement that a challenger must show prejudice flowing from the alleged error, however, it is doubtful the court meant to embrace the old rule permitting a court to vacate an award when error appeared on the face of the award causing substantial injustice.

A few years after *Pacific Vegetable, supra, 29 Cal.2d 228,* the murky issue of the scope of judicial review of arbitration awards gained some much-needed clarity. In *Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d 156* [***196] [**912] [hereafter *Crofoot*], Justice Raymond Peters, then the Presiding Justice of the Court of Appeal for the First Appellate District, Division One, confronted a case involving alleged fraud in a complex stock deal. After numerous lawsuits were filed in California and New York, the interested parties agreed to submit the entire matter to arbitration. Following presentation of evidence to the arbitrator, he rendered a five-page award accompanied by findings and opinions covering two hundred fifteen pages. The overall result was a judgment in favor of Blair Holdings Corporation (Blair) and against Crofoot. Blair successfully moved in superior court to correct and confirm the award, and Crofoot appealed.

At the outset, the Court of Appeal explained that after the 1927 amendments to the Code of Civil Procedure, written agreements to arbitrate were governed exclusively by statute and there was "no field for a common law arbitration to operate ...." (*Crofoot, supra, 119 Cal.App.2d at p. 181.)* The appellate court therefore rejected Crofoot's argument that the arbitrator lacked jurisdiction because Blair never secured a court order submitting the cases to arbitration. "Prior to [1927], it was undoubtedly the law that both common law and statutory arbitrations existed in this state, that in the absence of [a court] order of submission the arbitration was deemed to be a common law arbitration, and that in such common law arbitration the award could only be enforced by an independent action and could not be entered as a judgment. ... [P] Since 1927, however, these limitations on statutory [*23] arbitration no longer exist." (at pp. 180-181.) After noting some of the differences between common law and statutory arbitration, the appellate court concluded, "that by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished." (at p. 182.) n7

> n7 This conclusion was foreshadowed three years earlier by a scholarly article on which the *Crofoot* court relied. (see *Crofoot, supra, 119 Cal.App.2d at p. 182.)* The article noted that "The present statue, a detailed one contravenes common law principles almost point by point. Legislative purpose to abolish applicable common law might be found from this fact alone. The statute obliterates all guideposts under which the previous statutes permitted notice whether one was contracting for statutory or common law arbitration. It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law." (Kagel, *Labor and Commercial Arbitration Under the California Arbitration Statue (1950) 38 Cal.L.Rev. 799, 809.)*

On the question of arbitral finality, the *Crofoot* court was more circumspect, admitting "The law is not quite so clear as to a court's powers of review over questions of law. The earlier cases held that the court had the power to review errors of law, at least where they appeared upon the face of the award. n[8] (*In re Frick, 130 Cal.App. 290 [19 P.2d 836]; Utah Const. Co. v. Western Pac. Ry. Co., 174 Cal. 156 [162 P. 631].)* The later cases have gone much farther in granting finality to the award even as to questions of law. In *Pacific Vegetable Oil Corp. v. C.S.T., Ltd., [supra,] 29 Cal.2d 228, 233,* it was bluntly held that 'The merits of the controversy between the parties are not subject to judicial review.' " (*Crofoot, supra, 119 Cal.App.2d at p. 185.)* After surveying cases that note an arbitrator need not rule in conformity with the law, the *Crofoot* court made a dramatic conclusion: "Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, *may not be reviewed except as provided in the statute.*" (*Crofoot, supra, 119 Cal.App.2d at p. 186,* italics added.)

> n[8] At this point, the *Crofoot* court inserted a footnote and stated: "But even prior to 1927 it was held that only 'gross' errors of an arbitrator were reviewable-- *In re Connor, 128 Cal. 279 282 [60 P. 862].*"

This bold statement reflected the end result of many years of evolution in the [**913] [***197] law, from the common law roots of *Muldrow, supra, 2 Cal. 74,* through the growth of the rule permitting review of errors on the face of the award (*Utah Const., supra, 174 Cal. at pp. 160-161),* and through the important changes occasioned by the 1927 amendments as interpreted first by *Pacific Vegetable, supra, 29 Cal.2d 228,* and then definitively by *Crofoot, supra, 119 Cal.App.2d 156.* Later opinions of this court relied heavily on the reasoning and conclusion of the *Crofoot* opinion to declare that the sole grounds for [*24] vacating an arbitration award were those set forth by statute. (See

O'Malley, supra, 48 Cal.2d at pp. 111-112; Griffith Co. v. San Diego Col. for Women, supra, 45 Cal.2d at pp. 515-516.)

In the years following *Crofoot, supra, 119 Cal.App.2d 156,* a large majority of appellate decisions also adopted the *Crofoot* conclusion that former section 1288 set forth the exclusive means for vacating an arbitration award. (*Cecil v. Bank of America (1956) 142 Cal.App.2d 249, 251 [298 P.2d 24]* ["the merits of the award ... may not be reviewed except as provided in the statute"]; *Downer Corp. v. Union Paving Co. (1956) 146 Cal.App.2d 708, 715 [304 P.2d 756]* [same]; *Wetsel v. Garibaldi (1958) 159 Cal.App.2d 4, 13 [323 P.2d 524],* disapproved on other grounds, *Posner v. Grunwald-Marx, Inc., supra, 56 Cal.2d at p. 183* [same]; *Ulene v. Murray Millman of California (1959) 175 Cal.App.2d 655, 660 [346 P.2d 494]* [same]; *Meat Cutters Local No. 439 v. Olson Bros. (1960) 186 Cal.App.2d 200, 203-204 [8 Cal.Rptr. 789]* [same]; *Government Employees Ins. Co. v. Brunner (1961) 191 Cal.App.2d 334, 340-341 [12 Cal.Rptr. 547]* [same]; but see, *U.S. Plywood Corp. v. Hudson Lumber Co. (1954) 124 Cal.App.2d 527, 532 [269 P.2d 93]* [reiterating the "error on face of award" standard].) Some cases did not expressly recognize the exclusiveness of the statutory grounds, but implied that point by flatly stating the merits of an arbitration award were not subject to judicial review. (*Atlas Floor Covering v. Crescent House & Garden, Inc. (1958) 166 Cal.App.2d 211, 216 [333 P.2d 194]; Gerard v. Salter (1956) 146 Cal.App.2d 840, 846 [304 P.2d 237].)*

In 1956, the Legislature authorized the California Law Revision Commission to study and determine whether the statutory arbitration scheme should be revised. (Assem. Conc. Res. No. 10, Stats. 1957 (1956 Reg. Sess.) res. ch. 42, Topic 14, p. 264.) The commission's report was transmitted to the Governor in December 1960. (Recommendation and Study Pertaining to Arbitration (Dec. 1960) 3 Cal. Law Revision Com. Rep. (1960) [hereafter Arbitration Study].) On the subject of the scope of judicial review, the report explained that, "Nothing in the California statute defines the permissible scope of review by the courts. Numerous court rulings have, however, developed the following basic principles which set the limits for any court review: [P] ... [P] (2) Merits of an arbitration award either on questions of fact or of law may not be reviewed *except as provided for in the statute* in the absence of some limiting clause in the arbitration agreement. [P] ... n[9] [P] (5) Statutory provisions for a review of arbitration proceedings are for the sole purpose of preventing misuse of the proceedings where corruption, [*25] fraud, misconduct, gross error or mistake n[10] has been carried into the award to the substantial prejudice of a party to the proceedings." (Arbitration Study, *supra*, pp. G-53 to G-54, italics added.)

> n[9] For this proposition, the report cited *O'Malley, supra, 48 Cal.2d 107,* and *Crofoot, supra, 119 Cal.App.2d 156,* among other cases.n[10] Although the inclusion of the phrase "gross error or mistake" may suggest the commission approved of (or at least recognized) the rule permitting judicial review of gross errors on the face of the award causing substantial injustice, the report later refutes this notion, stating, "Even a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation, unless the error amounts to actual or constructive fraud." (Arbitration Study, *supra*, p. G-55.)

The Arbitration Study emphasized that arbitration should be the end of the dispute and that "the ordinary concepts of judicial appeal and review are not applicable to [**914] [***198] arbitration awards. Settled case law is based on this assumption." (Arbitration Study, *supra*, p. G-54.) After surveying the state of the law, the report concluded that although the California statutes do not "attempt to express the exact limits of court review of arbitration awards, ... no good reason exists to codify into the California statute the case law as it presently exists." (*Ibid.*) Further, the report recommended that the "present grounds for vacating an award should be left substantially unchanged." (at p. G-57.) The report of the California Law Revision Commission thus concluded that the state of the law, as represented by *Crofoot, supra, 119 Cal.App.2d 156,* and its progeny, should not be altered by any statutory amendments.

The California Legislature thereafter enacted a revision of the arbitration statutes. (Stats. 1961, ch. 461, p. 1540 et seq.) Former section 1288, which had set forth the grounds on which an award could be vacated, was slightly altered and renumbered as new section 1286.2, and this section still controls today. n11 The new grounds are "substantially a restatement of the grounds set out in a bit more archaic form in the 1927 statute." (Feldman, *Arbitration Modernized--The New California Arbitration Act, supra*, 34 So.Cal.L.Rev. at p. 433.) It is significant that there is no mention of the rule permitting judicial review for errors apparent on the face of the arbitration award causing substantial injustice. (6a) We may infer from this omission that the Legislature intended to reject that rule, and instead adopt the position taken in case law and endorsed in the Arbitration Study, that is, "that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on

questions of fact or of law, may not be reviewed except as provided in the statute." (*Crofoot, supra, 119 Cal.App.2d at p. 186.)*

n11 The current version of section 1286.2 is quoted on pages 12-13,, *ante*.

The Legislature's intent is further revealed by an examination of other statutes. For example, in providing for arbitrating disputes arising from public construction contracts, section 1296 directs that "a court shall ... [*26] vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or that it is based on an error of law." **(7)** By specifically providing in that provision for judicial review and correction of error, but not in section 1286.2, we may infer that the Legislature did not intend to confer traditional judicial review in private arbitration cases. " ' "Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed." ' [Citation.]" (*People v. Drake (1977) 19 Cal.3d 749, 755 [139 Cal.Rptr. 720, 566 P.2d 622].)*

The law has thus evolved from its common law origins and moved towards a more clearly delineated scheme rooted in statute. **(6b)** [HN9] A majority of California appellate decisions have followed the modern rule, established by *Pacific Vegetable, supra, 29 Cal.2d 228,* and *Crofoot, supra, 119 Cal.App.2d 156,* and generally limit judicial review of private arbitration awards to those grounds specified in sections 1286.2 and 1286.6. (See, e.g., *Severtson v. Williams Construction Co. (1985) 173 Cal.App.3d 86, 92-93 [220 Cal.Rptr. 400]; Lindholm v. Galvin, supra, 95 Cal.App.3d at pp. 450-451; Baseball Players, supra, 59 Cal.App.3d at p. 498; Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332 (1974) 40 Cal.App.3d 431, 437 [114 Cal.Rptr. 909]; State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal.App.3d 397, 402 [104 Cal.Rptr. 683]; Jones v. Kvistad (1971) 19 Cal.App.3d 836, 840- 843 [97 Cal.Rptr. 100]; Allen v. Interinsurance Exchange (1969) 275 Cal.App.2d 636, 641 [80 Cal.Rptr. 247]; Durand v. Wilshire Ins. Co. (1969) 270 Cal.App.2d 58, 61 [75 Cal.Rptr. 415].)*

This view is consistent with a large majority of decisions in other states. Although [**915] [***199] California has not adopted the Uniform Arbitration Act, more than half the states have done so. (See 7 West's U. Laws Ann. (1985) U. Arbitration Act, 1991 Cum. Ann. Pocket Pt., p. 1.) The statutory grounds to vacate a private arbitration award set forth in the uniform law largely mirror those codified in section 1286.2, however, n12 and most states have concluded that these grounds are exclusive. (See, e.g., *Verdex Steel and Const. Co. v. Board of Supervisors (1973) 19 Ariz.App. 547 [509 P.2d 240]; Affiliated* [*27] *Marketing, Inc. v. Dyco Chem. & Coatings, Inc. (Fla.Dist.Ct.App. 1976) 340 So.2d 1240, 1242,* cert. den. (Fla. 1977) *353 So.2d 675; Morrison-Knudson v. Makahuena Corp. (1983) 66 Hawaii 663, 668 [675 P.2d 760]; Bingham County Com'n v. Interstate Elec. Co. (1983) 105 Idaho 36, 42 [665 P.2d 1046, 1052]; Konicki v. Oak Brook Racquet Club, Inc. (1982) 110 Ill.App.3d 217, 223 [441 N.E.2d 1333, 1337]; State, Dept. of Admin., Per. Div. v. Sightes (Ind.Ct.App. 1981) 416 N.E.2d 445, 450; City of Sulphur v. Southern Builders (La.Ct.App. 1991) 579 So.2d 1207, 1210,* cert. den. *587 So.2d 629; Plymouth-Carver School Dist. v. J. Farmer (1990) 407 Mass. 1006, 1007 [553 N.E.2d 1284, 1285]* [rescript opinion]; *AFSCME Council 96 v. Arrowhead Reg. Corr. Bd. (Minn. 1984) 356 N.W.2d 295, 299; Savage Educ. Ass'n v. Trustees of Richland Cty. (1984) 214 Mont. 289, 295-296 [692 P.2d 1237, 1240]; New Shy Clown Casino, Inc. v. Baldwin (1987) 103 Nev. 269, 271 [737 P.2d 524, 525]* [*per curiam*]; *Kearny PBA No. 21 v. Town of Kearny (1979) 81 N.J. 208, 220-221 [405 A.2d 393, 399]; Cyclone Roofing Co. v. David M. LaFave Co. (1984) 312 N.C. 224, 233-234 [321 S.E.2d 872, 879]; Aamot v. Eneboe (S.D. 1984) 352 N.W.2d 647, 649; Util. Trailer Sales of Salt Lake v. Fake (Utah 1987) 740 P.2d 1327, 1329; Milwaukee Police Ass'n v. City of Milwaukee (1979) 92 Wis.2d 175, 181-182 [285 N.W.2d 133, 136-137];* but see *Texas West Oil & Gas Corp. v. Fitzgerald (Wyo. 1986) 726 P.2d 1056, 1060-1061* [finding statutory grounds to vacate an arbitration award not exclusive].)

n12 Section 12 of the Uniform Arbitration Act states in pertinent part:

"(a) Upon application of a party, the court shall vacate an award where:

"(1) The award was procured by corruption, fraud or other undue means;

"(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

"(3) The arbitrators exceeded their powers;

"(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5,

as to prejudice substantially the rights of a party; or

"(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award." (7 West's U. Laws Ann. (1985) U. Arbitration Act, § 12, subd. (a).)

Although the matter would seem to have been put to rest, several California decisions rendered since the 1961 statutory amendments have inexplicably resurrected the view in *Utah Const., supra, 174 Cal. 156,* that an arbitration award may be vacated when an error appears on the face of the award and causes substantial injustice. (See, e.g., *Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal.App.3d 1311, 1317 [264 Cal.Rptr. 227]; Park Plaza, Ltd. v. Pietz, supra, 193 Cal.App.3d at p. 1420; Ray Wilson Co. v. Anaheim Memorial Hospital Assn., supra, 166 Cal.App.3d at p. 1091; Hirsch v. Ensign (1981) 122 Cal.App.3d 521, 529 [176 Cal.Rptr. 17]; Abbott v. California State Auto Assn., supra, 68 Cal.App.3d at p. 771; Campbell v. Farmer's Ins. Exch. (1968) 260 Cal.App.2d 105, 111-112 [67 Cal.Rptr. 175];* see generally, 6 Cal.Jur.3d, Arbitration and Award, § 83, pp. 145-147.)

In light of the development of decisional law embracing as exclusive the statutory grounds to vacate an arbitration award, as well as the apparent [*28] intent of the Legislature to generally exclude nonstatutory grounds to vacate an award, we adhere to the *Pacific Vegetable/Crofoot* line of cases that limit judicial review of private arbitration awards to those cases in which there [**916] [***200] exists a statutory ground to vacate or correct the award. Those decisions permitting review of an award where an error of law appears on the face of the award causing substantial injustice have perpetuated a point of view that is inconsistent with the modern view of private arbitration and are therefore disapproved.

3. *The Arbitrator Did Not Exceed His Powers*

Section 1286.2, subdivision (d), provides for vacation of an arbitration award when "The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (8) Moncharsh argues this statutory exception to the rule generally precluding judicial review of arbitration awards applies to his case. It is unclear, however, on what theory Moncharsh would have us conclude the arbitrator exceeded his powers. It is well settled that " [HN10] arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision." (*O'Malley, supra, 48 Cal.2d at p. 111; Hacienda Hotel v. Culinary Workers Union (1985) 175 Cal.App.3d 1127, 1133 [223 Cal.Rptr. 305].)* A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers. To the extent Moncharsh argues his case comes within section 1286.2, subdivision (d) merely because the arbitrator reached an erroneous decision, we reject the point.

Moreover, consistent with our arbitration statutes and subject to the limited exceptions discussed in section 4, *post,* [HN11] it is within the "powers" of the arbitrator to resolve the entire "merits" of the "controversy submitted" by the parties. (§ 1286.2, subd. (d); § 1286.6, subd. (b), (c).) Obviously, the "merits" include all the contested issues of law and fact submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement. Moncharsh does not argue that the arbitrator's award strayed beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate. The agreement to arbitrate encompassed "[a]ny dispute arising out of" the employment contract. The parties' dispute over the allocation of attorney's fees following termination of employment clearly arose out of the employment contract; the arbitrator's award does no more than resolve that dispute. Under these circumstances, the arbitrator was within his "powers" in resolving the questions of law presented to him. The award is not subject to vacation or correction based on any of the statutory grounds asserted by Moncharsh. [*29]

4. *Illegality of the Contract Permits Judicial Review*

Moncharsh next contends the arbitrator's award is subject to judicial review because paragraph X-C of the employment agreement is illegal and in violation of public policy. Focussing on the fee-splitting provision of the employment agreement, he contends that despite the limited scope of judicial review of arbitration awards, such review has historically been available when one party alleges the underlying contract, a portion thereof, or the resulting award, is illegal or in violation of public policy. Before addressing the merits of the claim, we first discuss whether Moncharsh adequately preserved the issue for appellate review.

a. *Waiver*

(9) Respondent Heily & Blase suggests Moncharsh waived the issue of illegality by failing to object to arbitration on this ground. We reject the claim

because, as we explain below, Moncharsh's allegation that paragraph X-C was illegal, even if true, does not render illegal either (i) the entire employment agreement, or (ii) the agreement to arbitrate itself. Accordingly, his illegality claim was an arbitrable one, and he did not waive the issue by failing to object to arbitration on this ground.

[HN12] Section 1281.2 states that when a written agreement to arbitrate exists, the court shall compel the parties to arbitrate their dispute "unless it determines that: [P] ... [P] (b) *Grounds exist for the revocation of* [**917] [***201] *the agreement.*" (Italics added.) Although this statute does not expressly state whether grounds must exist to revoke the entire contract, the arbitration agreement only, or some other provision of the contract, a fair reading of the statutory scheme reveals the Legislature must have meant revocation of the arbitration agreement.

For example, section 1281 states "A written agreement *to submit to arbitration* an existing controversy ... is valid ... save upon such grounds as exist for the revocation of any contract." (Italics added.) Section 1281.2 also speaks in terms of an "arbitration agreement" and a "written agreement to arbitrate." Thus, the plain meaning of section 1281.2 requires enforcement of the *arbitration* agreement unless there exist grounds for revocation of that agreement.

[HN13] If a contract includes an arbitration agreement, and grounds exist to revoke the entire contract, such grounds would also vitiate the arbitration agreement. Thus, if an otherwise enforceable arbitration agreement is contained in an illegal contract, a party may avoid arbitration altogether. (*California State Council of Carpenters v. Superior Court (1970) 11 Cal.App.3d 144, 157* [*30] *[89 Cal.Rptr. 625]* [hereafter *Carpenters*]; *Bianco v. Superior Court (1968) 265 Cal.App.2d 126 [71 Cal.Rptr. 322].)*

By contrast, [HN14] when--as here--the alleged illegality goes to only a portion of the contract (that does not include the arbitration agreement), the entire controversy, including the issue of illegality, remains arbitrable. (*Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal.App.3d 63, 71 [254 Cal.Rptr. 689]; Carpenters, supra, 11 Cal.App.3d at p. 157; Baseball Players, supra, 59 Cal.App.3d at p. 503* (dis. opn. of Brown (H.C.), J.) ["question of illegality is one which may be considered by the arbitrators"].) n13

n13 *Ericksen, supra, 35 Cal.3d 312,* does not compel a different result. In that case, we held that when one party to an arbitration agreement claimed fraud in the inducement of the contract, the entire controversy was nevertheless an arbitrable one, and the question of whether fraud existed was properly determined by the arbitrator, and not by a court of law: Although fraud in the inducement could result in "revocation of the agreement" (§ 1281.2), we distinguished that case from those in which a party claimed illegality of the underlying agreement. (*Ericksen, supra, at pp. 316-317, fn. 2.)* Moreover, we reasoned that requiring a party claiming fraud in the inducement to submit the claim to arbitration was justified because, "The difference between a breach of contract and such fraudulent inducement turns upon determination of a party's state of mind at the time the contract was entered into, and we ought not close our eyes to the practical consequences of a rule which would allow a party to avoid an arbitration commitment by relying upon that distinction." (at pp. 322-323.)

We apply this rule here. Moncharsh does not contend the alleged illegality constitutes grounds to revoke the entire employment contract. Nor does he contend the alleged illegality voids the arbitration clause of that contract. Accordingly, the legality of the fee-splitting provision was a question for the arbitrator in the first instance. Thus, Moncharsh was not required to first raise the issue of illegality in the trial court in order to preserve the issue for later judicial review.

The issue would have been waived, however, had Moncharsh failed to raise it *before the arbitrator.* Any other conclusion is inconsistent with the basic purpose of private arbitration, which is to finally decide a dispute between the parties. Moreover, we cannot permit a party to sit on his rights, content in the knowledge that should he suffer an adverse decision, he could then raise the illegality issue in a motion to vacate the arbitrator's award. A contrary rule would condone a level of "procedural gamesmanship" that we have condemned as "undermining the advantages of arbitration." (*Ericksen, supra, 35 Cal.3d at p. 323* [rejecting a rule permitting determination by courts of preliminary issues prior to submission to arbitration]; see also *Christensen v. Dewor Developments (1983) 33 Cal.3d 778, 783-784 [191 Cal.Rptr. 8, 661 P.2d 1088]* [condemning filing of pre-arbitration [**918] [***202] lawsuit in order to obtain pleadings that would reveal opponent's legal strategy].) Such a waste of arbitral and judicial time and resources should not be permitted. [*31]

(10) We thus hold that [HN15] unless a party is claiming (i) the entire contract is illegal, or (ii) the arbitration agreement itself is illegal, he or she need not raise the illegality question prior to participating in the

arbitration process, so long as the issue is raised before the arbitrator. Failure to raise the claim before the arbitrator, however, waives the claim for any future judicial review. Because Moncharsh raised the illegality issue before the arbitrator, the issue was thus properly preserved for our review.

b. *Judicial Review of Claims of Illegality*

(11) Although Moncharsh acknowledges the general rule that an arbitrator's legal, as well as factual, determinations are final and not subject to judicial review, he argues that judicial review of the arbitrator's decision is warranted on the facts of this case. In support, he claims that the fee-splitting provision of the contract that was interpreted and enforced by the arbitrator was "illegal" and violative of "public policy" as reflected in several provisions of the Rules of Professional Conduct. Such illegality, he claims, has been recognized as a ground for judicial review as stated in a line of cases emanating from this court's decision in *Loving & Evans v. Blick (1949) 33 Cal.2d 603 [204 P.2d 23]* [hereafter *Loving & Evans*].

Loving & Evans, supra, 33 Cal.2d 603, involved a dispute about money due on a construction contract for remodeling done on appellant Blick's premises. In his pleading before the arbitrator, Blick claimed as a "separate and special defense" that respondent contractors could not legally recover because they were unlicensed in violation of the Business and Professions Code. The arbitrator found in respondents' favor, and they moved to confirm the award. Blick objected to the award on grounds that one of the respondents was unlicensed in violation of the code. The trial court granted the motion to confirm, but that judgment was reversed by this court. Although we recognized the general rule that the merits of a dispute before an arbitrator are not subject to judicial review, " [HN16] the rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable *where the issue of illegality of the entire transaction* is raised in a proceeding for the enforcement of the arbitrator's award." (at p. 609, italics added.)

The Court of Appeal reached a similar result in *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal.App.3d 723 [259 Cal.Rptr. 780]* [hereafter *All Points Traders*]. In that case, Barrington Associates (hereafter Barrington), an investment banking firm, sought payment of a commission for its assistance in negotiating the transfer of all the corporate stock of appellant All Points Traders. The arbitrator found in Barrington's favor and [*32] the trial court confirmed the award. Nevertheless, the Court of Appeal reversed, finding the commission agreement between the parties was invalid and unenforceable in its entirety because Barrington did not hold a real estate broker's license as required by *Business and Professions Code section 10130* et seq. The appellate court reasoned that "[t]he Legislature selected the specific means to protect the public and has expressed its intention in section 10136 [prohibiting an unlicensed broker from bringing an action to collect a commission]," and that "[e]nforcement of *the contract* for a commission would be in direct contravention of the statute and against public policy." (*All Points Traders, supra, at p. 738* [italics added].)

Both *Loving & Evans, supra, 33 Cal.2d 603*, and *All Points Traders, supra, 211 Cal.App.3d 723*, permitted judicial review of an arbitrator's ruling where a party claimed the entire contract or transaction was illegal. By contrast, Moncharsh challenges but a single provision of the overall employment contract. Accordingly, neither *Loving &* [**919] [***203] *Evans, supra*, nor *All Points Traders, supra*, authorizes judicial review of his claim. n14

> n14 To the extent that *Webb v. West Side District Hospital (1983) 144 Cal.App.3d 946 [193 Cal.Rptr. 80]* suggests judicial review of an arbitrator's decision is routinely available where one party claims merely that a portion of a contract is illegal, we disapprove that suggestion.

We recognize that there may be some limited and exceptional circumstances justifying judicial review of an arbitrator's decision when a party claims illegality affects only a portion of the underlying contract. Such cases would include those in which granting finality to an arbitrator's decision would be inconsistent with the protection of a party's statutory rights. (Accord *Shearson/American Express Inc. v. McMahon (1987) 482 U.S. 220, 225-227 [96 L.Ed.2d 185, 192-194, 107 S.Ct. 2332]* [federal statutory claims are arbitrable under the Federal Arbitration Act unless party opposing arbitration demonstrates "that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue"].)

Without an explicit legislative expression of public policy, however, courts should be reluctant to invalidate an arbitrator's award on this ground. The reason is clear: the Legislature has already expressed its strong support for private arbitration and the finality of arbitral awards in title 9 of the Code of Civil Procedure. (§ 1280 et seq.) Absent a clear expression of illegality or public policy undermining this strong presumption in favor of private arbitration, an arbitral award should ordinarily stand immune from judicial scrutiny.

Moncharsh contends, as he did before the arbitrator, that paragraph X-C is illegal and violates public policy because, inter alia, it violates former rules [*33] 2-107 [prohibiting unconscionable fees], 2-108 [prohibiting certain types of fee splitting arrangements], and 2- 109 [prohibiting agreements restricting an attorney's right to practice], of the Rules of Professional Conduct of State Bar. n15 We perceive, however, nothing in the Rules of Professional Conduct at issue in this case that suggests resolution by an arbitrator of what is essentially an ordinary fee dispute would be inappropriate or would improperly protect the public interest. Accordingly, judicial review of the arbitrator's decision is unavailable.

n15 Rules of Professional Conduct former rules 2-107, 2-108, and 2-109, were recodified in substantially the same form in new rules 4-200, 2-200, and 1-500, respectively.

CONCLUSION

We conclude that an award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in sections 1286.2 (to vacate) and 1286.6 (for correction). Further, the existence of an error of law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.

Finally, the normal rule of limited judicial review may not be avoided by a claim that a provision of the contract, construed or applied by the arbitrator, is "illegal," except in rare cases when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right. We conclude that Moncharsh has demonstrated no reason why the strong presumption in favor of the finality of the arbitral award should not apply here.

The judgment of the Court of Appeal is affirmed.

Panelli, J., Arabian, J., Baxter, J., and George, J., concurred.

DISSENTBY: KENNARD, J.,

DISSENT:

Concurring and Dissenting.

The majority holds that when a trial court is presented with an arbitration award that is erroneous on its face and will cause substantial injustice, the court has no choice but to confirm it. (Maj. opn., *ante*, at pp. 6, 33.) Because an order confirming an arbitration award results in the entry of a judgment with the same force and effect as a judgment in a civil action (*Code Civ. Proc., § 1287.4*), the majority's holding requires our trial courts not only to [**920] [***204] tolerate substantial injustice, but to become its active agent.

I cannot join the majority opinion. I will not agree to a decision inflicting upon this state's trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially [*34] unjust. Nor can I accept the proposition, necessarily implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important than the judiciary's solemn obligation to do justice.

Nothing in this state's statutory or decisional law compels the rule the majority announces. On the contrary, the majority has misperceived legislative intent, misconstrued the relevant statute, and misunderstood the decisional law establishing the scope of review for arbitration decisions. Worst of all, the majority has forsaken the goal that has defined and legitimized the judiciary's role in society--to strive always for justice.

I

The object of government is justice. "Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit." (James Madison, *The Federalist*, No. 51.) As the preamble to the United States Constitution affirms, our country was founded to "establish justice."

Justice is a special obligation of the judiciary. Every court has the power and the duty to "amend and control its process and orders so as to make them conform to law and justice." (*Code Civ. Proc., § 128*, subd. (a)(8).) When they construe statutes, courts are enjoined to do so in a way that will promote justice. (E.g., *Civ. Code, § 4*; *Code Civ. Proc., § 4*; *Ed. Code, § 2*; *Pen. Code, § 4.*) And, because the very purpose of our legal system is to do justice between the parties (*Sand v. Concrete Service Co. (1959) 176 Cal.App.2d 169, 172 [1 Cal.Rptr. 257])*, the interests of justice are paramount in all legal proceedings (*Travis v. Southern Pacific Co. (1962) 210 Cal.App.2d 410, 425 [26 Cal.Rptr. 700])*. In short, justice is the "sole justification of our law and courts." (Gitelson & Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to be an Instrumentality of Justice (1966) 7 Santa Clara Law. 7, 8.)*

The majority never mentions the judiciary's paramount obligation to do justice, and the rule it announces--which requires trial courts to endorse decisions known to be substantially unjust--is its very antithesis. By filling its discussion with references to the expectations of the parties, the development of

decisional law over the course of a century, and legislative intent as evidenced in our statute, the majority implies both that these considerations support its holding and that they are more important than doing justice.

The majority is wrong on both counts. For the judiciary, nothing can be more important than justice. This proposition is so self-evident that no [*35] further elaboration is necessary. Moreover, as we shall see, respect for parties' freedom to contract, the development of decisional law, the relevant statute, and ascertainable legislative intent belie rather than support the majority's holding.

II

As a method of dispute resolution, arbitration is generally faster and cheaper than judicial proceedings, but it has fewer safeguards against error. For this reason, parties who agree to binding arbitration must be deemed to have accepted the increased risk of error inherent in their chosen system. The majority takes this proposition, unobjectionable in itself, and from it jumps to the conclusion that parties who agree to arbitration thereby agree also to be bound by an award that on its face is manifestly erroneous and results in substantial injustice. But the conclusion defies both logic and experience. Reasonable contracting parties would never assume a risk that is so unnecessary and self-destructive.

The majority goes astray when it equates substantial injustice with a mere mistake. The two are not the same. Mistakes commonly occur in the course of dispute resolution [**921] [***205] proceedings without producing substantial injustice. As our state Constitution recognizes, determining whether a mistake has been made, and determining whether an injustice has occurred, are separate and distinct inquiries. (Cal. Const., art. VI, § 13 [court cannot set aside a judgment for error unless the error resulted in a miscarriage of justice].)

Parties who agree to resolve their disputes by arbitration should not and do not expect busy trial courts to comb the records of arbitration proceedings to determine whether any error has occurred and, if so, the effect of the error. But they no doubt do expect, and ought to be able to expect, that if the award on its face is erroneous and results in substantial injustice, a court asked to confirm the award will not turn a blind eye to the consequences of its action, but will instead take the only course consistent with its fundamental mandate, and will vacate the award.

Moreover, even if the parties were to do what is virtually inconceivable by expressly agreeing that the arbitrator's award would be binding even if substantially unjust, the agreement would not bind the judiciary. The exercise of judicial power cannot be controlled or compelled by private agreement or stipulation. (See *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court (1990) 50 Cal.3d 658, 664 [268 Cal.Rptr. 284, 788 P.2d 1156]; Clarendon Ltd. v. Nu-West Industries, Inc. (3d Cir. 1991) 936 F.2d 127, 129* ["action by the court can be neither purchased nor parleyed by the [*36] parties"].) As the United States Supreme Court has remarked, a court should refuse to be "the abettor of iniquity." (*Precision Co. v. Automotive Co. (1945) 324 U.S. 806, 814 [89 L.Ed. 1381, 1386, 65 S.Ct. 993].)*

III

To support its holding radically curtailing judicial review of arbitration awards, the majority surveys the decisional law of California since 1850. Undeterred by the plain language of the decisions, which is almost uniformly contrary to the majority's holding, the majority attempts to penetrate the surface of the opinions in order to trace the ebb and flow of more than a century's dark currents of judicial thought. Thus, the majority relies on what it terms "subtle shifts" in the decisions, "transmogrification" of principles, and citations in one opinion that on "close scrutiny" are alleged to be at odds with a clear statement of law in the opinion's text. (Maj. opn., *ante*, at pp. 17-18, 18-19, 19.) As an exercise in divination or telepathy, the majority's discussion is fascinating. But as sober legal analysis, the majority's discussion is simply wrong. From the outset, this court has consistently--until now--acknowledged that courts should refuse to permit use of the judiciary's awesome coercive power to perpetrate a substantial injustice.

In the first decision cited by the majority, *Muldrow v. Norris (1852) 2 Cal. 74*, this court held that it would not enforce an erroneous arbitration award when the error was on a "palpable and material point." (at p. 77.) Although this court used a verbal formulation--"palpable and material point"--different from the term "substantial injustice" that became the standard expression in later cases (e.g., *Utah Const. Co. v. Western Pac. Ry. Co. (1916) 174 Cal. 156, 160-161 [162 P. 631])*, the concept is the same. To be on a "palpable and material point," an error must be of real importance or great consequence (Webster's Ninth New Collegiate Dict. (1988) p. 733), or, in other words, an error that causes substantial injustice.

Other early decisions used the term "gross error" to describe the very same ground for vacating an arbitration award. (E.g., *Headley v. Reed (1852) 2 Cal. 322, 325; In re Connor (1900) 128 Cal. 279, 282 [60 P. 862].)* An error is "gross" if it is glaringly noticeable "because of inexcusable badness or objectionableness." (Webster's Ninth New Collegiate Dict., *supra*, p. 538.) Thus, the

term "gross error," like the "palpable and material point" formulation, represents an early articulation of what has subsequently become known as error causing substantial injustice.

[**922] [***206] Fairly read, the decisions of this court, although varying semantically, uniformly and firmly support the proposition that the judiciary will not [*37] knowingly perpetuate and enforce an arbitration award that is substantially unjust. This court has adopted the same standard for determining when a court should decline to follow the rule known as law of the case. (See *People v. Shuey (1975) 13 Cal.3d 835, 846 [120 Cal.Rptr. 83, 533 P.2d 211]* ["a manifest misapplication of existing principles resulting in substantial injustice"]; accord, *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal.3d 1279, 1291 [265 Cal.Rptr. 162, 783 P.2d 749].)*

The Courts of Appeal have correctly interpreted our decisions. In case after case, they have reaffirmed the rule that a court will vacate an arbitration award when error appears on the face of the award and causes substantial injustice. (E.g., *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal.App.3d 518, 526 [265 Cal.Rptr. 868]; All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal.App.3d 723, 736 [259 Cal.Rptr. 780]; National Football League Players' Assn. v. National Football League Management Council (1986) 188 Cal.App.3d 192, 199 [233 Cal.Rptr. 147]; Ray Wilson Co. v. Anaheim Memorial Hospital Assn. (1985) 166 Cal.App.3d 1081, 1090 [213 Cal.Rptr. 62]; Abbott v. California State Auto. Assn. (1977) 68 Cal.App.3d 763, 771 [137 Cal.Rptr. 580]; Campbell v. Farmers Ins. Exch. (1968) 260 Cal.App.2d 105, 112 [67 Cal.Rptr. 175].)*

Searching for some departure from this prominent line of authority, the majority relies heavily on the Court of Appeal decision in *Crofoot v. Blair Holdings Corp. (1953) 119 Cal.App.2d 156 [260 P.2d 156]* (disapproved on another ground in *Posner v. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 183 [14 Cal.Rptr. 297, 363 P.2d 313])*, but its reliance is misplaced. *Crofoot* cites this court's opinion in *Pacific Vegetable Oil Corp. v. C.S.T., Ltd. (1946) 29 Cal.2d 228 [174 P.2d 441]* for the proposition that courts had recently narrowed somewhat the judicial review of arbitration awards for legal error. (*Crofoot, supra, at p. 185.)* But neither *Crofoot* nor *Pacific Vegetable* suggests that review had become so narrow that courts were obliged to confirm awards containing obvious error causing substantial injustice. Indeed, *Pacific Vegetable* affirms that courts review arbitration awards to prevent " 'misuse of the proceeding, where corruption, fraud, misconduct, *gross error*, or mistake has been carried into the award to the *substantial prejudice* of a party to the proceeding.' " (*Pacific Vegetable, supra, at p. 240,* quoting *Utah Const. Co. v. Western Pac. Ry. Co., supra, 174 Cal. 156, 159,* italics added.) Thus, legal error is a proper basis on which to challenge an arbitration award, provided that "the error appears on its face and causes substantial injustice." (*Utah Const. Co. v. Western Pac. Ry. Co., supra, at p. 161.)*

As the majority notes, the *Crofoot* opinion does state that the merits of an arbitration award may not be judicially reviewed except as provided in the [*38] statute. (*Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d 156, 186.)* Because the relevant statute, *Code of Civil Procedure section 1286.2*, does not say in so many words that an arbitration award may be challenged for obvious error causing substantial injustice, the majority concludes that a court may not vacate an award on this ground. But this conclusion is wrong. Our statute does not, by negative implication or otherwise, mandate injustice.

IV

Code of Civil Procedure section 1286.2 lists five grounds for vacating an arbitration award. This statutory list is reproduced in the margin. n1 Although the statute [**923] [***207] states only that a court "shall vacate the award" if any of these grounds is present, the majority construes the statute as precluding a court from vacating an arbitration award on any ground not specifically defined in the statute. In thus construing the statutory list, the majority ignores the statute's legislative history.

n1 "(a) The award was procured by corruption, fraud or other undue means; [P] (b) There was corruption in any of the arbitrators; [P] (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator; [P] (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or [P] (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title."

Code of Civil Procedure section 1286.2 is essentially unchanged from its 1927 predecessor (Stats. 1927, ch. 225, § 9, p. 406), and materially the same as the original provision enacted in 1851 (Stats. 1851, second sess., tit. X, ch. IV, § 386, pp. 112-113). (See

maj. opn., *ante*, at pp. 12, 16, 20-21.) The Legislature enacted section 1286.2 in its present form in 1961 (Stats. 1961, ch. 461, § 2, p. 1540) following a recommendation and study of the California Law Revision Commission. (Recommendation and Study Relating to Arbitration (Dec. 1960) 3 Cal. Law Revision Com. Rep. (1961), p. G-1 et seq.) In its report to the Legislature, the commission separately and expressly addressed the subject of judicial review of arbitration awards. Because the commission accurately stated California law on this subject, and because its statement belies the majority's reading of the statute, the commission's comment is worth quoting in some detail:

"*Nothing in the California statute defines the permissible scope of review by the courts.* Numerous court rulings have, however, developed the following basic principles which set the limits for any court review: ... [P] (5) Statutory provisions for a review of arbitration proceedings are for the sole [*39] purpose of preventing misuse of the proceedings where corruption, fraud, misconduct, gross error or mistake has been carried into the award to the substantial prejudice of a party to the proceedings. ... [P] Neither the Uniform Arbitration Act nor other state statutes attempt to express the exact limits of court review of arbitration awards. And no good reason exists to codify into the California statute the case law as it presently exists." (Recommendation and Study Relating to Arbitration, *supra*, 3 Cal. Law Revision Com. Rep., pp. G-53-G-54, fns. omitted, italics added.)

The commission, in other words, did not intend to either alter or codify the judicially established grounds for challenging an arbitration award. Contrary to the majority's view, *Code of Civil Procedure section 1286.2* was never meant to define the "permissible scope of review by the courts" or to "express the exact limits of court review of arbitration awards." Thus, the statute does not preclude a court from vacating an arbitration award on a ground well established by decisional law.

In words that closely track the language this court used in *Pacific Vegetable Oil Corp. v. C.S.T., Ltd., supra, 29 Cal.2d 228, 240,* the commission acknowledged that one purpose of judicial review is to prevent gross errors or mistakes from being carried into an award to the substantial prejudice of a party, that is, substantial injustice. (Recommendation and Study Relating to Arbitration, *supra*, 3 Cal. Law Revision Com. Rep. (1961), p. G-55.) *Code of Civil Procedure section 1286.2* may not be read as barring a court from vacating an arbitration award when these conditions are present.

The majority attempts to evade the obvious import of the commission's statement by referring to language in another part of the report that "[e]ven a gross error or mistake in an arbitrator's judgment is not sufficient grounds for vacation unless the error amounts to actual or constructive fraud." (Maj. opn., *ante*, at p. 25, fn. 10.) But this statement is not in the portion of the commission's report setting forth the basic principles governing judicial review. Moreover, it is derived from a federal district court case expressly recognizing that "Gross error or mistake prejudicing substantially the rights of a party [**924] [***208] " is a ground for vacating an arbitration award under California law. (*Lundblade v. Continential Ins. Co. (N.D.Cal. 1947) 74 F.Supp. 795, 797.)* Finally, the word "fraud" as used in the commission's statement includes a mistake that prevents the fair exercise of judgment (*California Sugar Etc. Agency v. Penoyar (1914) 167 Cal. 274, 279 [139 P. 671]),* and thus includes gross errors or mistakes that result in substantial injustice.

Even if one were to conclude, contrary to the report of the Law Revision Commission, that *Code of Civil Procedure section 1286.2* defines the permissible scope of review by the courts, it still would not follow that a court [*40] cannot vacate an award for error appearing on the award's face and resulting in substantial injustice. Under the statute, a court must vacate an award if it determines that "[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (*Code Civ. Proc., § 1286.2*, subd. (d).) As the Courts of Appeal have recognized time and again, arbitrators exceed their statutory powers when they make an award that is erroneous on its face and results in substantial injustice. (E.g., *Cobler v. Stanley, Barber, Southard, Brown & Associates, supra, 217 Cal.App.3d 518, 526; All Points Traders, Inc. v. Barrington Associates, supra, 211 Cal.App.3d 723, 736; Greenfield v. Mosley (1988) 201 Cal.App.3d 735, 744-745 [247 Cal.Rptr. 314]; Ray Wilson Co. v. Anaheim Memorial Hospital Assn., supra, 166 Cal.App.3d 1081, 1090; Abbott v. California State Auto. Assn., supra, 68 Cal.App.3d 763, 771;* see also *Times Mirror Co. v. Superior Court (1991) 53 Cal.3d 1325, 1333 [283 Cal.Rptr. 893, 813 P.2d 240]* [excess of jurisdiction not confined to subject-matter jurisdiction, but includes acts in excess of authority as defined in the Constitution, statutes, or judicial decisions]; *Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288 [109 P.2d 942, 132 A.L.R. 715]* [same].)

V

Despite my disagreement with the reasoning of the majority opinion, I agree with the result it reaches. This is not a case in which error appearing on the face of an arbitration award would cause a substantial injustice.

The agreement was negotiated between sophisticated parties; the disparity in bargaining power

between the parties was not substantial; there is no indication of harm to the clients or other third parties; and there is no basis in the arbitrator's award for finding that the fees were wholly disproportionate to the services rendered. Therefore, the award was not substantially unjust.

CONCLUSION

Although I concur in the result, I cannot join the majority to support judicially sanctioned and enforced substantial injustice. The majority's holding violates the most basic obligation of the judiciary, and is inconsistent with both our well-established decisional law and our statute.

Mosk, J., concurred.

Appellant's petition for a rehearing was denied September 24, 1992. Mosk, J., and Kennard, J., were of the opinion that the petition should be granted.

87 Cal. App. 4th 398, *; 104 Cal. Rptr. 2d 551, **;
2001 Cal. App. LEXIS 134, ***; 2001 Cal. Daily Op. Service 1661

SHELDON PRAISER, Plaintiff and Appellant, v. BIGGS UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.

No. C035358.

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

87 Cal. App. 4th 398; 104 Cal. Rptr. 2d 551; 2001 Cal. App. LEXIS 134; 2001 Cal. Daily Op. Service 1661; 2001 Daily Journal DAR 2159

February 28, 2001, Decided

SUBSEQUENT HISTORY: [***1]

Review Denied May 23, 2001, Reported at: *2001 Cal. LEXIS 3567.*

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Butte County. Super. Ct. No. 123818. Roger G. Gilbert, Judge.

DISPOSITION: The judgment is Reversed. The matter is remanded to the trial court to determine the appropriate remedies consistent with this opinion. Praiser is awarded his costs on appeal.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant filed a petition for writ of mandate, alleging that certain provisions of his collective bargaining agreement regarding insurance benefits violated *Cal. Educ. Code § 44922*. The Superior Court of Butte County (California) denied the claim, and appellant sought review.

OVERVIEW: Appellant, a full-time public school teacher, elected to change to part-time status at age 55, as allowed by *Cal. Educ. Code § 44922*. He took a corresponding prorated salary, and respondent school district paid for appellant's insurance benefits on a prorated basis, allowing appellant to pay the difference. Appellant filed a petition for a writ of mandate, alleging that the insurance payment violated § 44922. The trial court denied the writ, holding that *Cal. Gov't Code §§ 53201*, 53205 allowed proration of insurance benefits. The court of appeals reversed, holding that § 53201 was a general statute that simply authorized local agencies, counties, cities, school districts, etc., to offer health and welfare benefits to their employees, if they choose to do so; and § 53205 simply set forth how the cost of those benefits could be allocated as between the local agency and the employee. Those general provisions did not supercede the specific provisions of *Cal. Educ. Code § 44922(e)*, which provided for retention of "all other rights and benefits" to part-time teachers.

OUTCOME: Trial court judgment reversed. Because appellant did not have to make benefit payments as a full-time employee, he did not need to make them as a part-time employee under the statute allowing and encouraging teachers to change to part-time status at age 55.

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law > Collective Bargaining & Labor RelationsInsurance Law > Group Policies > Eligibility

[HN1] The court interprets *Cal. Educ. Code § 44922(e)* to mean that while a reduced workload employee is paid the prorated share of his full-time salary, he retains the insurance benefits accorded to full-time employees as long as he makes the benefit payments that would be required if he remained in full-time employment.

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN2] The appellate court determines questions of statutory interpretation independently.

Governments > Legislation > Interpretation

[HN3] The objective of statutory interpretation is to ascertain the legislature's intent to effectuate the law's purpose. In determining intent, the court looks first to the statute's words and gives them their usual and ordinary meaning.

Governments > Legislation > Interpretation

[HN4] When the language of a statute is unambiguous, there is no need for judicial construction. When the

language is susceptible of more than one reasonable interpretation, however, a court looks to a variety of extrinsic aids, including the statutory scheme of which the statute is a part, the legislative history, and the ostensible objects to be achieved.

Labor & Employment Law > Collective Bargaining & Labor RelationsInsurance Law > Group Policies > Eligibility
[HN5] See *Cal. Educ. Code § 44922.*

Insurance Law > Group Policies > EligibilityGovernments > State & Territorial Governments > Employees & Officials
[HN6] See *Cal. Gov't Code § 53201(a).*

Labor & Employment Law > Collective Bargaining & Labor RelationsGovernments > State & Territorial Governments > Employees & Officials
[HN7] *Cal. Educ. Code § 44924* provides in part that any contract or agreement, express or implied, made by any employee to waive the benefits of that chapter or any part thereof is null and void.

Labor & Employment Law > Collective Bargaining & Labor RelationsGovernments > State & Territorial Governments > Employees & Officials
[HN8] *Cal. Educ. Code § 44922* specifies that while adoption of a part-time program may initially be a matter of discretion with the school district, once such a plan is adopted, the official body has no discretion to alter regulations the statutes make mandatory.

Governments > Legislation > Interpretation
[HN9] A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.

COUNSEL: Wells, Small, Selke & Graham, Donald A. Selke, Jr., and Bartley S. Fleharty, for Plaintiff and Appellant.

Shepherd & Crabtree and Richard L. Crabtree for Defendants and Respondents.

JUDGES: Opinion by Davis, Acting P. J., with Nicholson and Callahan, JJ., concurring.

OPINIONBY: DAVIS

OPINION: [*400] [**551]

DAVIS, Acting P. J.

In this appeal we interpret *Education Code section 44922*, subdivision (e). n1 Section 44922 allows school districts to establish reduced workload programs (i.e., part-time schedules) for certificated employees who are at least 55 years old and who satisfy certain other conditions. [HN1] We read section 44922(e) to mean that while the reduced workload employee is [***2] paid the prorated share of his full-time salary, he retains the insurance benefits accorded to [**552] full-time employees as long as he makes the benefit payments that would be required if he remained in full-time employment (specifically at issue here are health insurance benefits). Consequently, we reverse the judgment denying plaintiff Sheldon Praiser's petition for writ of mandate, and remand for further proceedings.

n1 All further references to undesignated sections are to the Education Code; subdivisions of section 44922 will be referred to in the format "section 44922(e)."

BACKGROUND

Plaintiff Sheldon Praiser (Praiser) was a full-time, certificated teacher employed by defendant Biggs Unified School District (District or the District) for over 10 years. On February 11, 1999, Praiser requested reduced workload/part-time status pursuant to section 44922. Section 44922(d) states that "the option of [section 44922] part-time employment shall be exercised at the request of the employee . . [***3] . ." Under section 44922, Praiser became a part-time employee, with a corresponding prorated salary. Pursuant to article XIX of the collective bargaining agreement between District [*401] and its teachers (Article XIX), District paid for Praiser's insurance benefits on a prorated basis and allowed him to pay the difference.

In November 1999, Praiser filed a petition for writ of mandate. He alleged that Article XIX violates section 44922 because it requires him to pay a portion of the health insurance premiums he would not have to pay if he were a full-time employee. To avoid losing these insurance benefits, Praiser has continued to pay a portion of the health insurance premiums to keep those benefits in effect. Praiser requested a writ of mandate compelling District to pay the insurance premiums to the same extent as if he had remained in full-time employment, and to reimburse him for the premiums he has paid. Praiser also requested his attorney fees.

The trial court denied Praiser's petition for writ of mandate "in its entirety." The court found that section 44922(e) "permits [District] to provide part-time certificated employees, on a prorated basis, the same

health benefits [***4] provided to full-time employees." [HN2]

DISCUSSION

At the center of this dispute is the meaning of section 44922(e). This presents a question of statutory interpretation for us to determine independently. n2

n2 *Rudd v. California Casualty Gen. Ins. Co. (1990) 219 Cal. App. 3d 948, 951 [268 Cal. Rptr. 624].*

(1) [HN3] The objective of statutory interpretation is to ascertain the Legislature's intent to effectuate the law's purpose. n3 In determining intent, we look first to the statute's words and give them their usual and ordinary meaning. n4 [HN4] When the language is unambiguous, there is no need for judicial construction. n5 When the language is susceptible of more than one reasonable interpretation, however, we look to a variety [***5] of extrinsic aids, including the statutory scheme of which the statute is a part, the legislative history, and the ostensible objects to be achieved. n6

n3 *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 572 [88 Cal. Rptr. 2d 19, 981 P.2d 944] (White)*; *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal. App. 4th 1554, 1562 [11 Cal. Rptr. 2d 222] (Anderson-Cottonwood)*, quoting *People v. Woodhead (1987) 43 Cal. 3d 1002, 1007-1008 [239 Cal. Rptr. 656, 741 P.2d 154]*.n4 *White, supra, 21 Cal. 4th at page 572; Anderson-Cottonwood, supra, 8 Cal. App. 4th at page 1562*.n5 *Anderson-Cottonwood, supra, 8 Cal. App. 4th at page 1562*.n6 *Anderson-Cottonwood, supra, 8 Cal. App. 4th at page 1562.*

[HN5] Section 44922 provides in part:

"Notwithstanding [***6] any other provision, the governing board of a school district or a county superintendent of schools may establish regulations [*402] which allow their certificated employees to reduce their [**553] workload from full-time to part-time duties.

"The regulations shall include, but shall not be limited to, the following, if the employees wish to reduce their workload and maintain retirement benefits pursuant to Section 22724 of this code or *Section 20815 of the Government Code*:

"(a) The employee shall have reached the age of 55 prior to reduction in workload.

"(b) The employee shall have been employed full time in a position requiring certification for at least 10 years of which the immediately preceding five years were full-time employment.

"(c) During the period immediately preceding a request for a reduction in workload, the employee shall have been employed full time in a position requiring certification for a total of at least five years without a break in service. . . .

"(d) The option of part-time employment shall be exercised at the request of the employee and can be revoked only with the mutual consent of the employer and the employee. [***7]

"*(e) The employee shall be paid a salary which is the pro rata share of the salary he or she would be earning had he or she not elected to exercise the option of part-time employment but shall retain all other rights and benefits for which he or she makes the payments that would be required if he or she remained in full-time employment.*

"*The employee shall receive health benefits as provided in Section 53201 of the Government Code in the same manner as a full-time employee.*

"(f) The minimum part-time employment shall be the equivalent of one-half of the number of days of service required by the employee's contract of employment during his or her final year of service in a full-time position.

"(g) This option is limited in prekindergarten through grade 12 to certificated employees who do not hold positions with salaries above that of a school principal.

"(h) The period of this part-time employment shall include a period of time, as specified in the regulations, which shall be up to and include five [*403] years for employees subject to *Section 20815 of the Government Code* or 10 n7 years for employees subject to Section [***8] 22724 of this code. [P] . . . [P]"

n7 Section 44922, italics added.

(2) Under the part-time employment authorized by section 44922, the part-time employee is to be paid a prorated salary, but is to retain all other rights and benefits as long as he makes the payments for those rights and benefits that would be required if he were still a full-time employee. If he would not have to make any

payments for those rights and benefits as a full-time employee (i.e., if the employer pays in full for those rights and benefits), he does not have to make any payments as a part-time employee under section 44922.

(3a) The second paragraph of section 44922(e) states "The employee shall receive health benefits *as provided in Section 53201 of the Government Code* in the same manner as a full-time employee." (Italics added.) The italicized phrase provides the cornerstone of District's argument that Article XIX specifically governs here.

[HN6] [***9] Subdivision (a) of *Government Code section 53201* provides in relevant part that "The legislative body of a local agency [including a school district], *subject to conditions as may be established by it*, may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body . . ., who elect to accept the benefits and who authorize the local agency to deduct the premiums, dues, or other charges from their compensation, to the extent that the charges are not covered by payments from funds under the jurisdiction of the local agency as permitted [**554] by [*Government Code] Section 53205*." (Italics added.)

District notes in its brief that section 44922(e) requires the District to provide part-time employees with "health benefits as provided in *Section 53201 of the Government Code* in the same manner as a full[-]time employee." (Underscoring in District's brief.) District further notes that ". . . *Government Code [section] 53201(a)* permits the District, 'subject to conditions as may be established [***10] by it,' to 'provide for any health and welfare benefits for the benefit . . . of its officers [and] employees . . . who elect to accept the benefits and who authorize the local agency to deduct the premiums, dues or other charges from their compensation . . . .' " (Underscoring and boldface in District's brief.) From this District argues, ". . . *Government Code [section] 53201(a)* specifically allows the District to establish 'conditions' for the provision of health insurance benefits to its employees."

District claims that Article XIX establishes those "conditions" authorized by *Government Code section 53201*, subdivision (a) by specifying that a [*404] "certificated employee granted a reduced services employment contract [which encompasses section 44922] will be afforded on a prorated basis the same major medical, dental and vision plan provided regular employees of the District and shall have the right to pay the balance of the cost of insurance premiums not paid by the District . . . ."

District bolsters its argument by noting that *Government Code section 53205*, referenced in *Government Code* [***11] *section 53201*, subdivision (a), states in relevant part that "From funds under its jurisdiction, the legislative body [including the governing board of a school district] 'may authorize payment of all, or such portion as it may elect, of the premiums, dues, or other charges for health and welfare benefits of officers [and] employees . . .' subject to its jurisdiction." (Underscoring in District's brief.)

There is a fundamental flaw, however, in the District's reading of section 44922(e)'s reference to *Government Code section 53201*. *Government Code section 53201* is a general statute that simply authorizes local agencies (counties, cities, school districts, districts, municipal corporations, political subdivisions, public corporations or other public agencies of the state) to offer health and welfare benefits to their employees, if they choose to do so; *Government Code section 53205* is a general statute that simply sets forth how the cost of those benefits can be allocated as between the local agency and the employee. n8 Section 44922(e) states in part that the section 44922 part-time [***12] employee "shall retain all other rights and benefits for which he or she makes the payments that would be required if he or she remained in full-time employment," and "shall receive health benefits as provided in *Section 53201 of the Government Code* in the same manner as a full-time employee." Thus, *Government Code section 53201*'s relevance in the section 44922 scheme is simply that if a particular school district chooses to offer its employees health benefits, the section 44922 part-time employee in that district will receive health benefits in the same manner as a full-time employee as long as the part-time employee makes the health benefit payments that would be required of him if he had remained a full-time employee. If no such payments would be required of him as a full-time employee, no such payments are required of him as a section 44922 part-time employee. In this way, the section 44922 part-time employee receives health benefits in the same manner as a full-time employee, i.e., subject to the conditions established by the district for the receipt of full-time health benefits.

n8 See title 5, division 2, article 1 of the *Government Code, section 53200* et seq.

[***13]

District's reading of *Government Code section 53201*'s placement in section 44922(e) would leave section 44922(e) trumped by "conditions" set [*405] forth in a collective bargaining agreement. That [**555] cannot happen. A companion provision to section 44922, [HN7] section 44924, provides, with certain exceptions not applicable here, that "any contract or agreement,

express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void." Section 44924 was at issue in *United Teachers--L.A. v. Los Angeles Unified School Dist.*, where the court stated that since section 44924 specifies that employees may not waive the benefits of section 44922, the mandatory provisions of section 44922 granting employees additional benefits prevail over conflicting regulations in the parties' collective bargaining agreement. n9 *United Teachers* added: [HN8] "Section 44922 specifies that while adoption of a part-time program may initially be a matter [***14] of discretion with the district, once such a plan is adopted, the official body has no discretion to alter regulations the statutes make mandatory." n10

n9 *United Teachers--L.A. v. Los Angeles Unified School Dist. (1994) 24 Cal. App. 4th 1510, 1517-1520 [29 Cal. Rptr. 2d 897]* (*United Teachers*).n10 *United Teachers, supra, 24 Cal. App. 4th at page 1516.*

(4) Furthermore, District's reading of section 44922(e) and *Government Code section 53201* contravenes the settled principle of statutory interpretation that [HN9] a "'specific provision relating to a particular subject will govern in respect to that subject [i.e., section 44922(e)], as against a general provision [i.e., *Government Code section 53201*], although the latter, standing alone, would be broad enough to include the subject to which the more particular [***15] provision relates.' " n11

n11 *San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal. 4th 571, 577 [7 Cal. Rptr. 2d 245, 828 P.2d 147]*, quoting *Rose v. State of California (1942) 19 Cal. 2d 713, 724 [123 P.2d 505]*.

(3b) With its laser-like focus on the section 44922(e) phrase "as provided in *Section 53201 of the Government Code*," the District, in the end, reads out of section 44922(e) the critical phrases "shall retain all other rights and benefits for which he or she makes the payments that would be required if he or she remained in full-time employment" and "shall receive health benefits . . . in the same manner as a full-time employee." Our reading of *Government Code section 53201*'s placement in section 44922(e) allows all three of these phrases to function according to the purposes of these statutes.

District's argument that section 44922 part-time employees "earn, on [a] prorated basis, the same salary [***16] and benefits as full-time employees" is misplaced. Section 44922(e) does not apply proration to salary *and* benefits, which it could easily do; instead, the section expressly distinguishes between the payment of a prorated "salary," and the retention of "all other rights and benefits" as if the section 44922 part-time employee remained in full-time employment. And District's assertion, citing section 44922(e), that District [*406] "*provides* health benefits to part-time employees, on a prorated basis, 'in the same manner as a full-time employee' " is also misplaced. (Italics added to District's brief.) Section 44922(e) states that the section 44922 part-time employee "shall *receive* health benefits . . . in the same manner as a full-time employee." (Italics added.) It cannot be said that a section 44922 part-time employee who receives prorated health benefits "receive[s] health benefits . . . in the same manner as a full-time employee" whose health benefits are not prorated.

A look at the statutory scheme of which section 44922 is a part supports our interpretation as well. Section 44922 is part of a scheme that governs compensation and benefits for experienced teachers [***17] who are at least 55 years old and who wish to work part-time. Section 44922's introductory paragraphs state in relevant part that, "Notwithstanding any other provision, . . . a school district . . . may establish regulations which allow their certificated employees [**556] to reduce their workload from full-time to part-time duties. [P] The regulations shall include . . . the following, if the employees wish to reduce their workload and maintain retirement benefits pursuant to [former] Section 22724 of this code or [former] Section 20815 of the Government Code[.]"

Former section 22724 (now § 22713) allows school districts to establish a program whereby an experienced teacher who is at least 55 years old can reduce his workload from full-time to part-time, and still receive the retirement service credit he would have received if he had been employed full-time; in addition, he can have his retirement allowance, as well as other specified benefits, calculated pursuant to the salary he would have received if he had been employed full-time. This program requires the teacher and the employer to contribute to the retirement fund the amount that would [***18] have been contributed if the teacher had been employed full-time. Former Government Code section 20815 (now *Gov. Code, § 20900*) sets forth a similar program for academic employees of the California State University system, and includes certain certificated school district employees as well.

Thus, former section 22724 (now § 22713) and former Government Code section 20815 (now *Gov. Code, § 20900*) coordinate with section 44922 and support our interpretation of that section. The Legislature has offered an inducement under section 44922 to certificated employees to become part-time employees if they are at least 55 years old and otherwise qualify--they will be paid a prorated salary, but they will retain and receive full-time rights and benefits so long as they make the payments for those rights and benefits that would be required of them had they remained in full-time employment. [*407]

The legislative history supports our view of section 44922(e) too. n12 That history covers Assembly Bill No. 3339 (1973-1974 Reg. Sess.) and describes the substantively identical statute that preceded [***19] section 44922, n13 and the referenced former statute on retirement credit and allowance, n14 in the following pertinent terms: "Permits certificated employees of school districts and academic teaching employees of the CSUC to receive a full year of retirement credit for part-time teaching under specified conditions. *Such an employee would receive health benefits in the same manner as a full-time employee.* The governing body is empowered to establish regulations governing such a program. The regulations shall include, but are not limited to the following: [P] . . . [P] 4. The employee's salary must be a pro rata share of his salary had he elected to remain full-time. [P] 5. Employer and employee contributions are the same as if he were employed full-time. . . ." n15 That history also states that "AB 3339 would amend [the] Public Employees' Retirement Law, the State Teachers' Retirement Law, and the State Education Code to permit certain full-time employees to work on a part-time basis *and allow full retirement credit and benefits for such service.*" n16

n12 We deny Praiser's motion to take judicial notice of certain items in the legislative history. We have obtained our own copy of that history. [***20]

n13 Former section 13337.7, Statutes 1974, chapter 1367, section 1, page 2960.n14 Former section .14009, Statutes 1974, chapter 1367, section 2, pages 2960-2961.n15 Senate Committee on Education, Staff Analysis of Assembly Bill No. 3339 (1973-1974 Reg. Sess.) as amended August 8, 1974, pages 1-2, italics added.n16 Assembly Retirement Committee, Analysis of Assembly Bill No. 3339 (1973-1974 Reg. Sess.), as amended April 30, 1974, italics added.

Finally, our interpretation of section 44922(e) aligns with the ostensible objects to be achieved. Section 44922 envisions the gradual withdrawal of older, higher salaried, experienced teachers and the gradual introduction of younger, lower salaried, inexperienced teachers to take their [**557] place. n17 If the older teachers do not retain their full health benefits, at a time when those benefits become increasingly important, it would significantly diminish their incentive to gradually withdraw. District sees the "sky falling" from our interpretation, claiming that "if this Court were to hold that the District must [***21] pay health insurance benefits for part-time employees at the same rate as full-time employees, the financial consequences to the District could be devastating." There are at least three problems with this claim, however: first, section 44922 does not encompass all part-time employees, but only a narrow slice of them; second, the section 44922 program is optional with [*408] school districts; and third, the legislative history recognizes there could be cost *savings* premised on the salary factor. n18

n17 Department of Finance, Enrolled Bill Report on Assembly Bill No. 3339 (1973-1974 Reg. Sess.) September 12, 1974, pages 1-2; State Teachers' Retirement System, Department of Agriculture and Services Enrolled Bill Report on Assembly Bill No. 3339 (1973-1974 Reg. Sess.) September 5, 1974, pages 1-2.n18 See footnote 17, *ante*.

We conclude that under section 44922(e), Praiser is entitled to retain and receive the insurance benefits accorded to full-time employees as long as he makes the benefit [***22] payments that would be required of him if he were a full-time employee; if Praiser would not have to make benefit payments as a full-time employee, he need not make them as a section 44922 part-time employee.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to determine the appropriate remedies consistent with this opinion. Praiser is awarded his costs on appeal.

Nicholson, J., and Callahan, J., concurred.

Respondents' petition for review by the Supreme Court was denied May 23, 2001.

114 Cal. App. 4th 945, *; 8 Cal. Rptr. 3d 172, **;
2003 Cal. App. LEXIS 1953, ***; 2004 Cal. Daily Op. Service 33

STEPHANIE J. TAXARA, Plaintiff and Respondent, v. CHON GUTIERREZ, as Acting Director, etc., Defendant and Appellant.

C043125

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

114 Cal. App. 4th 945; 8 Cal. Rptr. 3d 172; 2003 Cal. App. LEXIS 1953; 2004 Cal. Daily Op. Service 33; 2004 Daily Journal DAR 31

December 30, 2003, Filed

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of Sacramento County, No. 01CS01847, Morrison C. England, Judge.

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: After a hearing, defendant department of motor vehicles (DMV) suspended the driver's license of plaintiff driver because she failed a breath test. The driver challenged the suspension by filing a petition for a writ of mandate. The Superior Court of Sacramento County (California) granted the petition on the ground that the officer who administered the breath test did not comply with *Cal. Code Regs. tit. 17, § 1219.3*. The DMV appealed.

OVERVIEW: During a traffic stop of the driver, the officer noticed that the driver appeared to be intoxicated. After the driver performed poorly on field sobriety tests, she was arrested for driving under the influence. The driver challenged the resulting suspension of her license by the DMV. The trial court granted her petition for an administrative writ of mandate under Cal. *Code Civ. Proc. § 1094.5*, finding that *Cal. Code Regs. tit. 17, § 1219.3* had not been complied with because the officer who administered the breath test had not observed the driver for 15 minutes before the test. On appeal, the court disagreed with the trial court's interpretation of § 1219.3 and held that the continuous observation requirement could be met when two or more observers split the continuous observation of a test subject. In the instant case, the arresting officer observed the driver for more than 15 minutes before she was transported to the location of the test by the officer who ultimately administered the test. The latter officer observed the driver for 10 minutes before administering the test. The court held that such met the continuous observation requirement of § 1219.3.

OUTCOME: The court reversed the judgment and remanded the case to the trial court for consideration of the driver's contentions in her petition. The parties were ordered to bear their own costs on appeal.

LexisNexis (TM) HEADNOTES - Core Concepts:

Criminal Law & Procedure > Evidence > Scientific Evidence > Blood Alcohol
[HN1] To ensure the presumptive reliability of breath test results, the administrator of a breath test must follow *Cal. Code Regs. tit. 17, § 1219.3*.

Criminal Law & Procedure > Evidence > Scientific Evidence > Blood Alcohol
[HN2] See *Cal. Code Regs. tit. 17, § 1219.3*.

Transportation Law > Private Motor Vehicles > Operator Licenses
[HN3] An administrative California Department of Motor Vehicles (DMV) hearing concerning the suspension of a driver's license does not require the full panoply of the California Evidence Code provisions used in criminal and civil trials. In this hearing, the DMV bears the burden of proving by a preponderance of the evidence certain facts, including that the driver was operating a vehicle with a blood-alcohol level of 0.08 percent or higher. The DMV may satisfy its burden via the presumption of *Cal. Evid. Code § 664*.

Criminal Law & Procedure > Evidence > Scientific Evidence > Blood Alcohol
[HN4] *Cal. Evid. Code § 664* creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines of Cal. Code Regs. tit. 17. The recorded

test results are presumptively valid and the California Department of Motor Vehicles is not required to present additional foundational evidence. With this presumption, an officer's sworn statement that the breath-testing device recorded a certain blood-alcohol level is sufficient to establish the foundation, even without testimony at the hearing establishing the reliability of the test.

Transportation Law > Private Motor Vehicles > Operator LicensesCriminal Law & Procedure > Evidence > Scientific Evidence > Blood Alcohol
[HN5] Once the California Department of Motor Vehicles (DMV) establishes its prima facie case by presenting documents contemplated in the statutory scheme regarding a driver's alleged operation of a motor vehicle with a blood-alcohol content of 0.08 percent or higher, the driver must produce affirmative evidence of the nonexistence of the presumed facts sufficient to shift the burden of proof back to the DMV. The licensee must show, through cross-examination of the officer or by the introduction of affirmative evidence, that official standards were in any respect not observed. Once such showing has been made, the burden shifts to the DMV to prove that the test was reliable despite the violation.

Civil Procedure > Remedies > Extraordinary WritsCivil Procedure > Appeals > Standards of Review > De Novo ReviewTransportation Law > Private Motor Vehicles > Operator LicensesCivil Procedure > Appeals > Standards of Review > Standards Generally
[HN6] In ruling on an application for a writ of mandate following an order of an driver's license suspension or revocation, a trial court is required to determine, based on its independent judgment, whether the weight of the evidence supported the administrative decision. On appeal, the appellate court's function is to determine whether the trial court's findings are supported by substantial evidence. Normally, the appellate court must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. But where the determinative question is one of statutory or regulatory interpretation, an issue of law, the appellate court may exercise its own independent judgment.

Administrative Law > Judicial Review > Standards of Review > Standards GenerallyAdministrative Law > Agency Rulemaking > Rule Application & Interpretation
[HN7] A court's foremost aim is to ascertain the intent of the agency issuing the regulation to effectuate the purpose of the law. When the agency's intent cannot be discerned directly from the language of the regulation, the court may look to a variety of extrinsic aids, including the purpose of the regulation, the legislative history, public policy, and the regulatory scheme of which the regulation is a part. Whenever possible, the court will interpret the regulation to make it workable and reasonable.

Criminal Law & Procedure > Evidence > Scientific Evidence > Blood Alcohol
[HN8] Regarding *Cal. Code Regs. tit. 17, § 1219.3*, the continuous observation requirement helps ensure the test's reliability. That purpose is served when the administrator of the breath test observes the subject for at least 15 minutes before the test. That purpose is also served, however, when two or more observers split the continuous observation of the test subject.

COUNSEL: Bill Lockyer, Attorney General, Jacob A. Appelsmith, Assistant Attorney General, Vincent J. Scally, Jr. and Steven Kaiser, Deputy Attorneys General, for Plaintiff and Appellant.

[*947] Mark H. Sollitt for Defendant and Respondent.

JUDGES: ROBIE, J.; Scotland, P. J., and Nicholson, J., concurred.

OPINIONBY: ROBIE

OPINION:

[**174] **ROBIE, J.**--After Stephanie J. Taxara failed a breath test, the Department of Motor Vehicles (DMV) suspended her driver's license. In this administrative mandate proceeding, the trial court directed the DMV to set aside the suspension because the administrator of the breath test had not continuously observed Taxara for 15 minutes before the test. On the DMV's appeal of that ruling, we conclude California Code of Regulations, title 17, section 1219.3, (hereafter regulation 1219.3) does not require a single person to observe the breath test subject for 15 minutes prior to the test. Therefore, we will reverse the judgment and remand the case to the trial court for further proceedings.

FACTUAL AND PROCEDURAL HISTORY [***2]

At around 9:38 p.m., on March 15, 2001, Sergeant Chris Reams stopped Taxara for failing to stop at a stop sign and speeding. Reams smelled alcohol on Taxara's breath and observed Taxara's unsteady gait, slurred speech, and red-watery eyes. Taxara performed poorly on a series of field sobriety tests. Accordingly, Reams arrested Taxara for driving under the influence of alcohol and transported her to the Auburn Police Station.

At the police station, Sergeant Reams filled out paperwork while Taxara sat across from him at his desk. Departmental policy required Reams to remain within

city limits because he was the most senior officer on duty. The only available breath test machine, however, was located outside the city at the Placer County jail. Thus, Reams asked Officer Victor Pecoraro to transport Taxara from the police station to the county jail to administer the test.

At 10:48 p.m., Officer Pecoraro drove Taxara to the jail. The printout, which records the breath test results and the [**175] times they were performed, shows Taxara gave the first of her breath samples at 10:58 p.m. Taxara's blood alcohol content measured 0.11 percent on two breath tests.

The DMV suspended Taxara's driver's [***3] license for driving with 0.08 percent or more of alcohol in her blood. (*Veh. Code, § 13353.2.*) After a hearing, the hearing officer reimposed the suspension. The hearing officer relied on the "Breath Test Machine Operator's Certification" Officer Pecoraro signed, which stated: "I certify under penalty of perjury under the laws of the State of California, that the above breath test sample results were obtained in the regular course of my duties. I further certify that I am qualified to operate [*948] this equipment and that the test was administered pursuant to the requirements of Title 17 of the California Code of Regulations."

[HN1] To ensure the presumptive reliability of the test results, the administrator of a breath test must follow regulation 1219.3, which provides: [HN2] "A breath sample shall be expired breath which is essentially alveolar in composition. The quantity of the breath sample shall be established by direct volumetric measurement. The breath sample shall be collected only after the subject has been under continuous observation for at least fifteen minutes prior to the collection of the breath sample, during which time the subject must not have ingested [***4] alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked."

The hearing officer rejected Taxara's argument that she was not continuously observed during the 15 minutes before her breath test because it was "based on a subjective interpretation of the evidence."

Taxara challenged the DMV's suspension by filing a petition for a writ of mandate. (*Veh. Code, § 13559*; *Code Civ. Proc., § 1094.5*; see also *Coombs v. Pierce (1991) 1 Cal.App.4th 568, 575 [2 Cal. Rptr. 2d 249].*) In her petition, Taxara made four contentions, only one of which is material to our decision. Specifically, she argued Officer Pecoraro did not continuously observe her for 15 minutes before her breath test.

The trial court granted Taxara's petition, finding that under regulation 1219.3 the officer who administers the Intoxilyzer 5000 test should have 15 minutes of continuous observation. The court reasoned: "Because Officer Pecoraro did not even arrive at the Auburn Police Station until just before he left the Station with Petitioner, not enough time transpired for Officer Pecoraro to have completed the requisite fifteen minute observation period. [***5] [Citation.] Although Sgt. Reams apparently had Petitioner in custody for more than fifteen minutes, his observation is immaterial because he did not administer the Intoxilyzer 5000 test, and because Title 17 requires that the fifteen minute period take place immediately before collection of the breath sample. [P] ... Having decided the matter based on the propriety of [Taxara's] testing alone, the Court declines to rule on the other alleged hearing improprieties ...." The DMV appeals.

DISCUSSION

The DMV contends the trial court erred when it interpreted regulation 1219.3 to require a single person to observe the test subject for 15 minutes before giving the breath test. We agree. [*949]

I

Driver's License Suspension Process

[HN3] An administrative DMV hearing concerning the suspension of a driver's license " 'does not require the full panoply of the Evidence Code provisions used in criminal and civil trials.' " (*Manriquez v.* [**176] *Gourley (2003) 105 Cal.App.4th 1227, 1232 [130 Cal. Rptr. 2d 209]* (*Manriquez*), quoting *Petricka v. Department of Motor Vehicles (2001) 89 Cal.App.4th 1341, 1348 [107 Cal. Rptr. 2d 909].*) "In this hearing, the DMV bears the burden of proving by a preponderance [***6] of the evidence certain facts, including that the driver was operating a vehicle with a blood-alcohol level of 0.08 percent or higher. [Citations.] The DMV may satisfy its burden via the presumption of *Evidence Code section 664*. [Citation.] 'Procedurally, it is a fairly simple matter for the DMV to introduce the necessary foundational evidence. *Evidence Code section 664* [HN4] creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines of title 17. [Citations.] ... The recorded test results are presumptively valid and the DMV is not required to present additional foundational evidence. [Citation.]' " (*Manriquez, at p. 1232*, quoting *Shannon v. Gourley (2002) 103 Cal.App.4th 60, 64-65 [126 Cal. Rptr. 2d 327].*) "With this presumption, the officer's sworn statement that the breath-testing device recorded a certain blood-alcohol level is sufficient to establish the foundation, even without testimony at the hearing establishing the reliability of the test." (*Manriquez, at p.*

1233, citing *Davenport v. Department of Motor Vehicles (1992) 6 Cal.App.4th 133, 140-141 [7 Cal. Rptr. 2d 818].*) [***7]

[HN5] "Once the DMV establishes its prima facie case by presenting documents contemplated in the statutory scheme, the driver must produce affirmative evidence of the nonexistence of the presumed facts sufficient to shift the burden of proof back to the DMV. [Citations.] 'The licensee must show, "through cross-examination of the officer or by the introduction of affirmative evidence, that official standards were in any respect not observed. ..." [Citation.] Once such showing has been made, the burden shifts to the DMV to prove that the test was reliable despite the violation.' [Citations.]" (*Manriquez, supra, 105 Cal.App.4th at p. 1233*, quoting *Baker v. Gourley (2000) 81 Cal.App.4th 1167, 1172-1173 [97 Cal. Rptr. 2d 451].*)

II

Standard of Review

[HN6] " 'In ruling on an application for a writ of mandate following an order of suspension or revocation, a trial court is required to determine, based on its [*950] independent judgment, " 'whether the weight of the evidence supported the administrative decision.' " ' " (*Manriquez, supra, 105 Cal.App.4th at p. 1233*, quoting *Lake v. Reed (1997) 16 Cal.4th 448, 456 [65 Cal. Rptr. 2d 860, 940 P.2d 311].*) "On appeal, our function is to determine whether [***8] the trial court's findings are supported by substantial evidence." (*Shannon v. Gourley, supra, 103 Cal.App.4th at p. 64*, citing *Lake v. Reed, supra, 16 Cal.4th at p. 457.*) Normally, " ' "[w]e must resolve all evidentiary conflicts and draw all legitimate and reasonable inferences in favor of the trial court's decision. [Citations.]" ' " (*Lake v. Reed, supra, 16 Cal.4th at p. 457.*) "But where, as here, the determinative question is one of statutory or regulatory interpretation, an issue of law, we may exercise our independent judgment. [Citations.]" (*Manriquez, at p. 1233.*)

III

Regulation 1219.3 does not require a Single Officer to Continuously Observe the Subject

With this in mind, we examine whether regulation 1219.3 requires a single [**177] officer to observe the subject or whether two or more officers can satisfy the 15-minute continuous observation requirement.

[HN7] "Our foremost aim is to ascertain the intent of the agency issuing the regulation to effectuate the purpose of the law. [Citations.] When the agency's intent cannot be discerned directly from the language of the regulation, we may look to [***9] a variety of extrinsic aids, including the purpose of the regulation, the legislative history, public policy, and the regulatory scheme of which the regulation is a part. [Citation.] Whenever possible, we will interpret the regulation to make it workable and reasonable. [Citation.]" (*Manriquez, supra, 105 Cal.App.4th at p. 1235.*)

We start with the language of the regulation. **(1)** Regulation 1219.3 provides that the subject of a breath test must have "been under continuous observation for at least fifteen minutes prior to the collection of the breath sample." As a practical matter, the administrator of the breath test must have observed the test subject for some part of the 15-minute period because the regulation requires the observation period to immediately precede the collection of the breath sample. However, there is nothing in the language of the regulation that requires the administrator of the breath test to conduct the *entire* observation. So long as the observation of the subject is "continuous" for at least 15 minutes, the regulation is satisfied. We see no reason why two or more observers who--much like runners in a relay race--observe the subject in succession [***10] over a period of at least 15 minutes preceding the breath test cannot be deemed to have conducted the "continuous observation" regulation 1219.3 requires.

[*951] Allowing successive observers to satisfy the continuous observation requirement does not defeat the purpose of the regulation. [HN8] The continuous observation requirement helps ensure the test's reliability. (*Manriquez, supra, 105 Cal.App.4th at p. 1236, fn. 3.*) That purpose is served when the administrator of the breath test observes the subject for at least 15 minutes before the test. That purpose is also served, however, when two or more observers split the continuous observation of the test subject. Two or more observers, acting in succession, can ensure the subject did not ingest food or drink, regurgitate, vomit, or smoke in the 15 minutes before the test, just as easily as a single observer. The trial court's conclusion to the contrary was erroneous.

Our interpretation of regulation 1219.3 is more workable in the real life of law enforcement. Sergeant Reams testified about unexpected delays and "real world crunches" that challenge peace officers. Here, Reams sat across from Taxara for more than 15 minutes. Because of [***11] departmental policies, however, he was unable to administer Taxara's breath test and had to rely on Officer Pecoraro's assistance. **(2)** We interpret regulation 1219.3 as permitting the administrator to rely on other observers when necessary.

Taxara argues the administrator of the breath test cannot validly certify that the test was administered

pursuant to title 17 if the administering officer is not present during the entire 15 minutes. We disagree. (3) Where two or more successive observers continuously observe the test subject, the administering officer can ascertain from the observers who preceded him whether their observations, combined with his own, satisfy the continuous observation requirement.

Here, Officer Pecoraro certified under penalty of perjury "the test was administered [**178] pursuant to the requirements of Title 17." Proof that Pecoraro observed Taxara for less than 15 minutes was, by itself, not sufficient to rebut the presumption arising from that certification that Pecoraro and Sergeant Reams together continuously observed Taxara for at least 15 minutes immediately preceding the test. On remand, the trial court must independently review the administrative record to determine [***12] whether any other evidence offered by Taxara rebutted the presumption that Pecoraro and Reams complied with title 17.

Because the trial court's ruling was based solely on its erroneous interpretation of regulation 1219.3, and the trial court has not yet exercised its independent judgment with respect to Taxara's other contentions, we do not reach any other issues presented in this case. The trial court shall consider the parties' remaining arguments on remand. We express no opinion on the merits of Taxara's other claims. [*952]

DISPOSITION

The judgment is reversed and the case is remanded to the trial court for consideration of Taxara's contentions in her petition. The parties shall bear their own costs on appeal. (*Cal. Rules of Court, rule 27(a)(4).*)

Scotland, P. J., and Nicholson, J., concurred.

TOPANGA ASSOCIATION FOR A SCENIC COMMUNITY, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents; JAMES WARREN BASSLER et al., Real Parties in Interest and Respondents

L.A. No. 30139

Supreme Court of California

11 Cal. 3d 506; 522 P.2d 12; 113 Cal. Rptr. 836; 1974 Cal. LEXIS 313

May 17, 1974

PRIOR HISTORY: Superior Court of Los Angeles County, No. C-7268, Robert A. Wenke, Judge.

DISPOSITION:

We reverse the judgment and remand the cause to the superior court with directions to issue a writ of mandamus requiring the Los Angeles Board of Supervisors to vacate its order awarding a variance. We also direct the superior court to grant any further relief that should prove appropriate.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant community association sought review of a judgment of the Superior Court of Los Angeles County (California), which upheld the decisions of the county planning commission and the county board of supervisors that granted respondent property developer a zoning variance to establish a mobile home park.

OVERVIEW: Respondent property developer applied for and received a zoning variance to build a mobile home park. Appellant community association unsuccessfully challenged such variance. On appeal, the court reversed the judgment and held that the planning commission's fact summary regarding respondent's variance did not include sufficient data to satisfy the *Cal. Gov't Code § 65906* variance requirements. The court found that there was no data of comparative information about surrounding properties, as required in § 65906. The court noted that in the absence of unusual circumstances, respondent's large parcel could not have been sufficiently unrepresentative of the realty in that zone so as to merit special treatment. The court concluded that the information about the qualities of respondent's property and plans for the property lacked legal significance. The court held that because the § 65906 requirements had not been met, the question of whether the variance conformed with the criteria set forth in Los Angeles County, Ca., Zoning Ordinance 1494, § 522, was immaterial. The court held that the local agency was only entitled to the substantial evidence review standard.

OUTCOME: The court reversed and remanded the judgment that allowed respondent property developer a zoning variance, because the planning commission's summary of factual data did not establish that a variance was necessary to bring respondent into substantial parity with other parties holding property interests in the zone. The court concluded that the variance amounted to a prohibited "special privilege."

LexisNexis (TM) HEADNOTES - Core Concepts:

Administrative Law > Judicial Review > Standards of Review > Abuse of Discretion

[HN1] If the order or decision of a local administrative agency substantially affects a "fundamental vested right," a court to which a petition for a writ of mandamus has been addressed upon the ground that the evidence does not support the findings must exercise its independent judgment in reviewing the evidence and must find abuse of discretion if the weight of the evidence fails to support the findings.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & VariancesReal & Personal Property Law > Zoning & Land Use > Judicial ReviewAdministrative Law > Judicial Review > Standards of Review > Substantial Evidence Review

[HN2] An administrative grant of a variance must be accompanied by administrative findings. A court reviewing that grant must determine whether substantial evidence supports the findings and whether the findings

support the conclusion that all applicable legislative requirements for a variance have been satisfied.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN3] *Cal. Gov't Code § 65906* establishes criteria for the grant of variances. It provides that variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification. Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN4] A third paragraph added to *Cal. Gov't Code § 65906* declares that a variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. This paragraph serves to preclude "use" variances, but apparently does not prohibit so-called "bulk" variances, those which prescribe setbacks, building heights, and the like. The paragraph became effective on November 23, 1970.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN5] Los Angeles County, Ca., Zoning Ordinance 1494, § 522, provides that an exception variance may be granted where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, and in the granting of such exception the spirit of the ordinance will be observed, public safety secured, and substantial justice done. This section has been repealed but was in force when the zoning agencies rendered their decisions in the present case.

Governments > Local Governments > Ordinances & Regulations
[HN6] See Cal. Const. art. XI, § 11.

Real & Personal Property Law > Zoning & Land Use > Judicial Review
[HN7] In making the determination whether substantial evidence supports the variance board's findings, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

Civil Procedure > Remedies > Extraordinary WritsAdministrative Law > Judicial Review > Standards of Review > Abuse of DiscretionAdministrative Law > Judicial Review > Standards of Review > Substantial Evidence Review
[HN8] Cal. *Code Civ. Proc. § 1094.5(b)* prescribes that when petitioned for a writ of mandamus, a court's inquiry should extend, among other issues, to whether there was any prejudicial abuse of discretion. Cal. *Code Civ. Proc. § 1094.5(b)* then defines "abuse of discretion" to include instances in which the administrative order or decision is not supported by the findings, or the findings are not supported by the evidence. Cal. *Code Civ. Proc. § 1094.5(c)* declares that in all cases other than those in which the reviewing court is authorized by law to judge the evidence independently, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN9] Cal. *Code Civ. Proc. § 1094.5* makes administrative mandamus available for review of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer. *Cal. Gov't Code § 65901* satisfies these requisites with respect to variances granted by jurisdictions other than chartered cities.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN10] See *Cal. Gov't Code § 65901.*

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN11] Although a variance board's findings need not be stated with the formality required in judicial proceedings, they nevertheless must expose the board's mode of analysis.

Evidence > Procedural Considerations > Inferences & PresumptionsReal & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN12] The party seeking the variance must shoulder the burden of demonstrating before the zoning agency that the subject property satisfies the requirements therefor. Thus neither an administrative agency nor a reviewing court may assume without evidentiary basis that the

character of neighboring property is different from that of the land for which the variance is sought.

COUNSEL:

Amdur, Bryson, Caplan & Morton and David L. Caplan for Plaintiff and Appellant.

John D. Maharg, County Counsel, Joe Ben Hudgens, John W. Whitsett and David H. Breier, Deputy County Counsel, for Defendants and Respondents.

Arnold J. Provisor for Real Parties in Interest.

JUDGES:

In Bank. Opinion by Tobriner, J., expressing the unanimous view of the court. Wright, C. J., McComb, J., Mosk, J., Burke, J., Sullivan, J., and Clark, J., concurred.

OPINIONBY:

TOBRINER

OPINION:

[*509] [**13] [***837] We examine, in this case, aspects of the functions served by administrative agencies in the granting of zoning variances and of courts in reviewing these proceedings by means of administrative mandamus. We [*510] conclude that variance boards like the ones involved in the present case must render findings to support their ultimate rulings. We also conclude that when called upon to scrutinize a grant of a variance, a reviewing court must determine whether substantial evidence supports the findings of the [**14] administrative board and whether the findings support the board's action. n1 We determine [***838] in the present case that the last of these requisites has not been fulfilled.

n1 We recently held in *Strumsky v. San Diego County Employees Retirement Association (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29]*, that [HN1] if the order or decision of a local administrative agency substantially affects a "fundamental vested right," a court to which a petition for a writ of mandamus has been addressed upon the ground that the evidence does not support the findings must exercise its independent judgment in reviewing the evidence and must find abuse of discretion if the weight of the evidence fails to support the findings. Petitioner does not suggest, nor do we find, that the present case touches upon any fundamental vested right. (See generally *Bixby v. Pierno (1971) 4 Cal.3d 130, 144-147 [93 Cal.Rptr. 234, 481 P.2d 242]; Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 103 [280 P.2d 1].*)

The parties in this action dispute the future of approximately 28 acres in Topanga Canyon located in the Santa Barbara Mountains region of Los Angeles County. A county ordinance zones the property for light agriculture and single family residences; n2 it also prescribes a one-acre minimum lot size. Upon recommendation of its zoning board and despite the opposition of appellant-petitioner -- an incorporated nonprofit organization composed of taxpayers and owners of real property in the canyon -- the Los Angeles County Regional Planning Commission granted to the Topanga Canyon Investment Company a variance to establish a 93-space mobile home park on this acreage. n3 Petitioner appealed without success to the county board of supervisors, thereby exhausting its administrative remedies. Petitioner then sought relief by means of administrative mandamus, again unsuccessfully, in Los Angeles County Superior Court and the Court of Appeal for the Second District.

n2 Los Angeles County Zoning Ordinance No. 7276.

n3 Originally the real party in interest, the Topanga Canyon Investment Company has been replaced by a group of success oral real parties in interest. We focus our analysis on the building plans of the original real party in interest since it was upon the basis of these plans that the zoning authorities granted the variance challenged by petitioner.

In reviewing the denial of mandamus below, we first consider the proper role of agency and reviewing court with respect to the grant of variances. We then apply the proper standard of review to the facts of the case in order to determine whether we should sustain the action of the Los Angeles County Regional Planning Commission.

[*511] 1. *[HN2] An administrative grant of a variance must be accompanied by administrative findings. A court reviewing that grant must determine whether substantial evidence supports the findings and whether the findings support the conclusion that all applicable legislative requirements for a variance have been satisfied.*

A comprehensive zoning plan could affect owners of some parcels unfairly if no means were provided to permit flexibility. Accordingly, in an effort to achieve substantial parity and perhaps also in order to insulate zoning schemes from constitutional attack, n4 our Legislature laid a foundation for the granting of variances. Enacted in 1965, [HN3] *section 65906 of the Government Code* establishes criteria for these grants; it provides: "Variances from the terms of the zoning ordinance shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, [**15] the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification [para.] Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated." n5

n4 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint Committee on Open Space Land (1970) pages 94-95; Bowden, *Article XVIII -- Opening the Door to Open Space Control (1970) 1 Pacific L.J. 461, 506.* See *Metcalf v. County of Los Angeles (1944) 24 Cal.2d 267, 270-271 [148 P.2d 645];* Gaylord, *Zoning: Variances, Exceptions and Conditional Use Permits in California (1958) 5 U.C.L.A. L.Rev. 179;* Comment, *The General Welfare, Welfare Economics, and Zoning Variances (1965) 38 So.Cal.L.Rev. 548, 573.* See generally Note, *Administrative Discretion in Zoning (1969) 82 Harv.L.Rev. 668, 671.* The primary constitutional concern is that as applied to a particular land parcel, a zoning regulation might constitute a compensable "taking" of property.

n5 [HN4] A third paragraph added to section 65906 declares: "A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property." This paragraph serves to preclude "use" variances, but apparently does not prohibit so-called "bulk" variances, those which prescribe setbacks, building heights, and the like. The paragraph became effective on November 23, 1970, 19 days after the Los Angeles County Regional Planning Commission granted the variance here at issue. Petitioner does not contend that the paragraph is applicable to the present case.

[***839] Applicable to all zoning jurisdictions except chartered cities (*Gov. Code, § 65803*), section 65906 may be supplemented by harmonious local legislation. n6 We note that Los Angeles County has enacted an ordinance which, [*512] if harmonious with section 65906, would govern the Topanga Canyon property here under consideration. [HN5] Los Angeles County's Zoning Ordinance No. 1494, section 522, provides: n7 "An exception [variance] may . . . be granted where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance, and in the granting of such exception the spirit of the ordinance will be observed, public safety secured, and substantial justice done."

n6 *Government Code section 65800* declares that the code chapter of which section 65906 is a part is intended to provide minimum limitations within which counties and cities can exercise maximum control over local zoning matters. [HN6] Article XI, section 11 of the California Constitution declares that "[any] county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

n7 This section recently was repealed but was in force when the zoning agencies rendered their decisions in the present case. For purposes of more succinct presentation, we refer in text to the section in the present tense.

Both state and local laws thus were designed to establish requirements which had to be satisfied before the Topanga Canyon Investment Company should have been granted its variance. Although the cases have held that substantial evidence must support the award of a variance in order to insure that such legislative requirements have been satisfied n8 (see, e.g., *Siller v. Board of Supervisors (1962) 58 Cal.2d 479, 482 [25 Cal.Rptr. 73, 375 P.2d 41]; Bradbeer v. England (1951) 104 Cal. App.2d 704, 707 [232 P.2d 308]),* they have failed to clarify whether the administrative agency must always set forth findings and have not illuminated the proper relationship between the evidence, findings, and ultimate agency action. n9

n8 The rule stated finds its source in authorities holding that all adjudicatory determinations of local agencies are entitled to no more than substantial evidence review. As

indicated above (fn. 1, *ante*) those authorities no longer state the law with respect to adjudicatory determinations of such agencies which affect fundamental vested rights. Since no such right is involved in this case, however, the substantial evidence standard remains applicable. We note by way of caution, however, that merely because a case is said to involve a "variance" does not necessarily dictate a conclusion that no fundamental vested right is involved. The term "variance" is sometimes used, for example, to refer to permits for nonconforming uses which predate a zoning scheme. (See Hagman, Larson, & Martin, Cal. Zoning Practice (Cont. Ed. Bar) pp. 383-384.)

n9 For descriptions of the history of judicial action in this state with respect to zoning variance grants, see Bowden, *Article XVIII -- Opening the Door to Open Space Control (1970) 1 Pacific L.J. 461, 507-509;* 1 Appendix to Journal of the Senate (1970 Reg. Sess.) Final Report of the Joint Committee on Open Space Land (1970) pages 95-98; Hagman, Larson,& Martin, Cal. Zoning Practice, *supra*, pages 287-291.

One of the first decisions to emphasize the importance of judicial scrutiny of the record in order to determine whether substantial [**16] evidence supported administrative findings that the property in question met the legislative variance requirements was that penned by Justice Molinari in [*513] *Cow Hollow Improvement Club v. Board of Permit Appeals (1966) 245 Cal.App.2d 160 [53 Cal.Rptr. 610]*. Less than one year later, we followed the approach of that case in *Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal.2d 767 [59 Cal.Rptr. 146, 427 P.2d 810]*, and ordered that a zoning board's grant of a variance be set aside because the party seeking the variance had failed to adduce sufficient [***840] evidence to support administrative findings that the evidence satisfied the requisites for a variance set forth in the same San Francisco ordinance.

Understandably, however, the impact of these opinions remained uncertain. The San Francisco ordinance applicable in *Cow Hollow* and *Broadway* explicitly required the zoning board to specify its subsidiary findings and ultimate conclusions; this circumstance raised the question whether a court should require findings and examine their sufficiency in a case in which the applicable local legislation did not explicitly command the administrative body to set forth findings. Indeed language in *Broadway* intimated that such a case was distinguishable. (*Broadway, Laguna etc. Assn. v. Board of Permit Appeals, supra, at pp. 772-773.* See also *Stoddard v. Edelman (1970) 4 Cal.App.3d 544, 549 [84 Cal.Rptr. 443]*. Cf. *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 270 [104 Cal.Rptr. 761, 502 P.2d 1049].)* Further, neither *Cow Hollow* nor *Broadway* confronted *Government Code section 65906*; since both cases concerned a chartered city. n10 There thus also remained uncertainty with respect to cases involving zoning jurisdictions other than chartered cities.

n10 See page 511, *ante*.

Nevertheless, in an opinion subsequent to *Broadway; Hamilton v. Board of Supervisors (1969) 269 Cal.App.2d 64 [75 Cal.Rptr. 106]*, a Court of Appeal set aside the grant of a variance by a planning commission under circumstances different from those in *Broadway* and *Cow Hollow*. The zoning jurisdiction involved in that controversy was a county, not a chartered city, and the court's opinion did not suggest that any applicable ordinance required administrative findings. Deeming *Government Code section 65906* "concededly controlling," (*Hamilton v. Board of Supervisors, supra, at p. 67)*, the court undertook the task of squaring the findings announced by the commission with the commission's grant of the variance and concluded that the findings were insufficient to sustain the variance.

Consistent with the reasoning underlying these cases, we hold that [*514] regardless of whether the local ordinance commands that the variance board set forth findings, n11 that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. We hold further that a reviewing court, before sustaining the grant of a variance, must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings and whether these findings support the agency's decision. [HN7] In making these determinations, the reviewing court must resolve reasonable doubts in favor of the administrative findings and decision.

n11 We note the apparent applicability of section 639 of the Los Angeles County Zoning Ordinance which was in effect at the time respondent granted the variance. That section provided: "After a hearing by a zoning board the said zoning board shall report to the commission its findings and recommend the action which it concludes the commission should take." As explained in text, however, we rest our ruling upon *Code of Civil Procedure section 1094.5*.

[**17] Our analysis begins with consideration of *Code of Civil Procedure section 1094.5*, the state's administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Without doubt, this provision applies to the review of variances awarded by bodies such as the Los Angeles County zoning agencies that participated in the present [***841] case. n12 Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative [*515] agency's findings and whether the findings support the agency's decision. [HN8] Subdivision (b) of section 1094.5 prescribes that when petitioned for a writ of mandamus, a court's inquiry should extend, among other issues, to whether "there was any prejudicial abuse of discretion." Subdivision (b) then defines "abuse of discretion" to include instances in which the administrative order or decision "is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.) Subdivision (c) declares that "*in all . . . cases*" (italics added) other than those in which the reviewing court is authorized by law to judge the evidence independently, n13 "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." (See *Zakessian v. City of Sausalito (1972) 28 Cal.App.3d 794, 798 [105 Cal.Rptr. 105].)*

n12 *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal.App.2d 877, 882 [34 Cal.Rptr. 232]*. See also *Siller v. Board of Supervisors (1962) 58 Cal.2d 479, 481 [25 Cal.Rptr. 73, 375 P.2d 41]*. The California Judicial Council's report reflects a clear desire that section 1094.5 apply to all agencies, regardless of whether they are subject to the Administrative Procedure Act and regardless of their state or local character. (See Judicial Council of Cal., 10th Biennial Rep. (1944) pp. 26, 45. See also *Temescal Water Co. v. Dept. Public Works (1955) 44 Cal.2d 90, 101 [280 P.2d 1]*; Deering, Cal. Administrative Mandamus (1966) p. 7.) "In the absence of compelling language in [a] statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter v. Garrison (1947) 81 Cal.App.2d 384, 397 [184 P.2d 323].)*

[HN9] Section 1094.5 makes administrative mandamus available for review of "any final administrative order or decision made as the result of a proceeding in which *by law* a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer." (Italics added.) *Government Code section 65901* satisfies these requisites with respect to variances granted by jurisdictions other than chartered cities such as Los Angeles County's zoning agencies. [HN10] Section 65901 provides, in part: "The board of zoning adjustment or zoning administrator shall hear and decide applications for conditional uses or other permits when the zoning ordinance provides therefor and establishes criteria for determining such matters, and applications for variances from the terms of the zoning ordinance."

n13 See footnote 1, *supra*.

We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. If the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's action. By focusing, instead, upon the relationships between evidence and findings and between findings and ultimate action, the Legislature sought to direct the reviewing court's attention to the analytic route the administrative agency traveled from evidence to action. In so doing, we believe that the Legislature must have contemplated that the agency would reveal this route. Reference, in section 1094.5, to the reviewing court's duty to compare the evidence and ultimate decision to "*the* findings" (italics added) we believe leaves no room for the conclusion that the Legislature would have been content to have a reviewing court speculate as to the administrative agency's basis for decision.

Our ruling in this regard finds support in persuasive policy considerations. (See generally 2 Davis, Administrative Law [**18] Treatise (1958) § 16.05, pp. 444-449; Forkosch, A Treatise on Administrative Law (1956) § 253, pp. 458-464.) According to Professor Kenneth Culp Davis, the requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law (see, e.g., *Zieky v. Town Plan and* [***842] *Zon. Com'n of Town of Bloomfield (1963) 151 Conn. 265 [196 A.2d 758]; Stoll v. Gulf Oil Corp. (1958) 79 Ohio L.Abs. 145 [155 N.E.2d 83]*), and is "remarkably uniform in both federal and state [*516] courts." As stated by the United States Supreme Court, the "accepted ideal . . . is that 'the

orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.' (*S.E.C. v. Chenery Corp. (1943) 318 U.S. 80, 94.)*" (2 Davis, *supra*, § 16.01, pp. 435-436. See also *Saginaw Broadcasting Co. v. Federal C. Com'n (1938) 96 F.2d 554, 559 [68 App.D.C. 282].)*

Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. (See 2 Cooper, State Administrative Law (1965) pp. 467-468; Feller, *Prospectus for the Further Study of Federal Administrative Law (1938) 47 Yale L.J. 647, 666.* Cf. Comment, *Judicial Control Over Zoning Boards of Appeal: Suggestions for Reform (1965) 12 U.C.L.A. L.Rev. 937, 952.)* n14 In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. (See *California Motor Transport Co. v. Public Utilities Com. (1963) 59 Cal.2d 270, 274 [28 Cal.Rptr. 868, 379 P.2d 324]; Swars v. Council of City of Vallejo (1949) 33 Cal.2d 867, 871 [206 P.2d 355].)*

n14 Although at first blush, judicial enforcement of a findings requirement would appear to constrict the role of administrative agencies, in reality, the effect could be to the contrary. Because, notes Judge Bazelon, it provides a framework for principled decision-making, a findings requirement serves to "diminish the importance of judicial review by enhancing the integrity of the administrative process." (*Environmental Defense Fund, Inc. v. Ruckelshaus (D.C.Cir. 1971) 439 F.2d 584, 598.)* By exposing the administrative agency's mode of analysis, findings help to constrict and define the scope of the judicial function. "We must know what [an administrative] decision means," observed Mr. Justice Cardozo, "before the duty becomes ours to say whether it is right or wrong." (*United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co. (1935) 294 U.S. 499, 511 [79 L.Ed. 1023, 1032, 55 S.Ct. 462].)*

Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. n15 (See **fn. 16.**) Moreover, [*517] properly constituted findings n16 enable the parties to the agency proceeding to determine whether and on what basis they should seek review. (See *In re Sturm* (1974) *ante*, pp. 258, 267 [*113 Cal.Rptr. 361, 521 P.2d 97]; Swars v. Council of City of Vallejo, supra, at p. 871.)* [**19] They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable.

n15 "Given express findings, the court can determine whether the findings are supported by substantial evidence, and whether the findings warrant the decision of the board. If no findings are made, and if the court elects not to remand, its clumsy alternative is to read the record, speculate upon the portions which probably were believed by the board, guess at the conclusions drawn from credited portions, construct a basis for decision, and try to determine whether a decision thus arrived at should be sustained. In the process, the court is required to do much that is assigned to the board. . . ." (3 Anderson, American Law of Zoning (1968) § 16.41, p. 242.)

n16 [HN11] Although a variance board's findings "need not be stated with the formality required in judicial proceedings" (*Swars v. Council of City of Vallejo, supra, at p. 872),* they nevertheless must expose the board's mode of analysis to an extent sufficient to serve the purposes stated herein. We do not approve of the language in *Kappadahl v. Alcan Pacific Co. (1963) 222 Cal.App.2d 626, 639 [35 Cal.Rptr. 354],* and *Ames v. City of Pasadena (1959) 167 Cal.App.2d 510, 516 [334 P.2d 653],* which endorses the practice of setting forth findings solely in the language of the applicable legislation.

By setting forth a reasonable requirement for findings and clarifying the standard of judicial review, we believe we promote [***843] the achievement of the intended scheme of land use control. Vigorous and meaningful judicial review facilitates, among other factors, the intended division of decision-making labor. Whereas the adoption of zoning regulations is a legislative function (*Gov. Code, § 65850*), the granting of variances is a quasi-judicial, administrative one. (See *Johnston v. Board of Supervisors (1947) 31 Cal.2d 66, 74 [187 P.2d 686]; Kappadahl v. Alcan Pacific Co. (1963) 222 Cal.App.2d 626, 634 [35 Cal.Rptr. 354].)* If the judiciary were to review grants of variances

superficially, administrative boards could subvert this intended decision-making structure. (See 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) pp. 102-103.) They could "[amend] . . . the zoning code in the guise of a variance" (*Cow Hollow Improvement Club v. Board of Permit Appeals, supra, at p. 181),* and render meaningless, applicable state and local legislation prescribing variance requirements.

Moreover, courts must meaningfully review grants of variances in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. (See, e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 91; Bowden, *Article XXVIII -- Opening the Door to Open Space Control (1970) 1 Pacific L.J. 461, 501.)* If the interest of [*518] these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.

Abdication by the judiciary of its responsibility to examine variance board decision-making when called upon to do so could very well lead to such subversion. n17 Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual. (See Comment, *Judicial Control over Zoning Boards of Appeal: Suggestions for Reform (1965) 12 U.C.L.A. L.Rev. 937, 950.* Cf. *Bradbeer v. England (1951) 104 Cal. App.2d 704, 710 [232 P.2d 308].)* The availability of careful judicial review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further, although we emphasize that we have no reason to believe that such a circumstance exists in the case at bar, the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances. (See e.g., 1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 100.) Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.

n17 See generally Comment, *Zoning: Variance Administration in Alameda County (1962) 50 Cal.L.Rev. 101, 107* and footnote 42. See also Note, *Administrative Discretion in Zoning (1969) 82 Harv.L.Rev. 668, 672* and sources cited therein.

2. *The planning commission's summary of "factual data" -- its apparent "findings" -- does not include facts sufficient to satisfy the variance requirements of Government Code section 65906.*

As we have mentioned, at least two sets of legislative criteria appear applicable to the variance awarded: *Government Code section 65906* and Los Angeles County Zoning Ordinance No. 1494, section 522. The variance can be sustained only if *all* [**20] applicable legislative requirements have been satisfied. Since we conclude that the requirements of section 65906 have not been met, the question whether the variance conforms with the criteria set forth [***844] in Los Angeles County Zoning Ordinance No. 1494, section 522 becomes immaterial. n18

n18 We focus on the statewide requirements because they are of more general application. If we were to decide that the criteria of section 65906 had been satisfied, we would then be called upon to determine whether the requirements set forth in the county ordinance are consistent with those in section 65906 and, if so, whether these local criteria also had been satisfied.

The local criteria need be squared with the state criteria since the section 65906 requirements prevail over any inconsistent requirements in the county ordinance. The stated purpose of title 7, chapter 4, of the Government Code, which includes section 65906, is to provide limitations -- albeit minimal ones -- on the adoption and administration of zoning laws, ordinances, and regulations by counties and nonchartered cities. (See fn. 6, *ante.*) Section 65802 of the code declares that "[no] provisions of [the Government Code], other than the provisions of [chapter 4], and no provisions of any other code or statute shall restrict or limit the procedures provided in [chapter 4] by which the legislative body of any county or city enacts, amends, administers, or provides for the administration of any zoning law, ordinance, rule or regulation." The clear implication is that chapter 4 does restrict or limit these procedures. (See also Cal. Const., art. XI, § 11.)

If local ordinances were allowed to set a lesser standard for the grant of variances than those provided in section 65906, a county or city

could escape the prohibition against granting use variances added to section 65906 in 1970 (see fn. 5, *ante*) merely by enacting an ordinance which would permit the grant of use variances. Clearly the Legislature did not intend that cities and counties to which the provisions of chapter 4 apply should have such unfettered discretion.

[*519] We summarize the principal factual data contained in the Los Angeles County Regional Planning Commission's report, which data the commission apparently relied on to award the variance. n19 The acreage upon which the original real party in interest n20 sought to establish a mobile home park consists of 28 acres; it is a hilly and in places steep parcel of land. At the time the variance was granted, the property contained one single-family residence. Except for a contiguous area immediately to the southeast which included an old and flood-damaged subdivision and a few commercial structures, the surrounding properties were devoted exclusively to scattered single-family residences.

n19 We confine our analysis to the relationship between the commission's fact summary and its ultimate decision; we do not consider the testimonial evidence directly. To sustain the grant of the variance of course would require that we conclude that substantial evidence supports the findings and that the findings support the variance award. Since we decide below, however, that the commission's fact summary does not include sufficient data to satisfy the section 65906 requirements, we need not take the further step of comparing the transcript to the fact summary. Our basis for so proceeding lies in *Code of Civil Procedure section 1094.5*, which defines "abuse of discretion," one of several possible grounds for issuance of a writ of mandamus, to include instances in which "the order or decision [of the administrative agency] is not supported by the findings, *or* the findings are not supported by the evidence." (Italics added.)

n20 See footnote 3, *ante*.

The proposed mobile home park would leave 30 percent of the acreage in its natural state. An additional 25 percent would be landscaped and terraced to blend in with the natural surroundings. Save in places where a wall would be incompatible with the terrain, the plan contemplated enclosure of the park with a wall; it further called for rechanneling a portion of Topanga Canyon Creek and anticipated that the developers would be required to dedicate an 80-foot-wide strip of the property for a proposed realignment of Topanga Creek Boulevard.

[*520] The development apparently would partially satisfy a growing demand for new, low cost housing in the area. Additionally, the project might serve to attract further investment to the region and could provide a much needed fire break. Several data indicate that construction on the property of single-family residences in conformance with the zoning classification would generate significantly smaller profits than would [**21] development of the mobile home park. Single-family structures apparently would necessitate costly grading, and the proposed [***845] highway realignment would require a fill 78 feet high, thereby rendering the property unattractive for conventional residential development. Moreover, the acreage is said not to be considered attractive to parties interested in single-family residences due, in the words of the report's summary of the testimony, to "the nature of the inhabitants" in the vicinity and also because of local flood problems.

These data, we conclude, do not constitute a sufficient showing to satisfy the section 65906 variance requirements. That section permits variances "*only* when, because of *special* circumstances applicable to the property, . . . the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (Italics added.) This language emphasizes *disparities* between properties, not treatment of the subject property's characteristics in the abstract. (See *Minney v. City of Azusa (1958) 164 Cal. App.2d 12, 31 [330 P.2d 255]*; cf. *In re Michener's Appeal (1955) 382 Pa. 401 [115 A.2d 367, 371]*; *Beirn v. Morris (1954) 14 N.J. 529 [103 A.2d 361, 364]*; Note, *Administrative Discretion in Zoning (1969) 82 Harv. L.Rev. 668, 671-672.)* It also contemplates that at best, only a small fraction of any one zone can qualify for a variance. (See generally 3 Anderson, American Law of Zoning (1968) § 14.69, pp. 62-65.)

The data contained in the planning commission's report focus almost exclusively on the qualities of the property for which the variance was sought. In the absence of comparative information about surrounding properties, these data lack legal significance. Thus knowledge that the property has rugged features tells us nothing about whether the original real party in interest faced difficulties different from those confronted on neighboring land. n21 Its assurances that it would landscape and terrace parts of the property and leave others in their natural state are all well and good, but they bear not at all on the critical issue whether a variance [*521] was necessary to bring the original real party in interest into substantial parity with other parties

holding property interests in the zone. (See *Hamilton v. Board of Supervisors, supra, at p. 66.)*

n21 Indeed, the General Plan for Topanga Canyon suggests that the subject property is not uniquely surfaced; it states that the entire area is characterized by "mountainous terrain, steep slopes and deep canyons interspersed with limited areas of relatively flat or rolling land."

The claim that the development would probably serve various community needs may be highly desirable, but it too does not bear on the issue at hand. Likewise, without more, the data suggesting that development of the property in conformance with the general zoning classification could require substantial expenditures are not relevant to the issue whether the variance was properly granted. Even assuming for the sake of argument that if confined to the subject parcel and no more than a few others in the zone, such a burden could support a variance under section 65906, for all we know from the record, conforming development of other property in the area would entail a similar burden. Were that the case, a frontal attack on the present ordinance or a legislative proceeding to determine whether the area should be rezoned might be proper, but a variance would not. (1 Appendix to Sen. J. (1970 Reg. Sess.) Final Rep. of the Joint Committee on Open Space Land (1970) p. 95; Bowden, *Article XVIII -- Opening the Door to Open Space Control (1970) 1 Pacific L.J. 461, 506.)*

Although they dispute that section 65906 requires a showing that the characteristics of the subject property are exceptional, the current real parties in interest would nevertheless have us speculate that the property is unlike neighboring parcels. [**22] [***846] They point out that the plot has rugged terrain and three stream beds n22 and that the Topanga Creek Boulevard realignment would bisect the property. Speculation about neighboring land, however, will not support the award of a variance. [HN12] The party seeking the variance must shoulder the burden of demonstrating before the zoning agency that the subject property satisfies the requirements therefor. (*Tustin Heights Association v. Board of Supervisors (1959) 170 Cal.App.2d 619, 627 [339 P.2d 914].)* Thus neither an administrative agency nor a reviewing court may assume without evidentiary basis that the character of neighboring property is different from that of the land for which the variance is sought. n23

n22 Interestingly, since the witnesses who testified in favor of the variance never mentioned the stream beds, the original real party in interest apparently did not regard the beds as disadvantageous. Rather, a witness who opposed the variance offhandedly mentioned the beds as illustrative of the scenic beauty of the area. The trial court seized upon this testimony and used it in justifying the variance award.

n23 In fact, other parcels in the zone may well have the features that the successoral real parties in interest speculate are confined to the subject property. Rugged terrain apparently is ubiquitous in the area (see fn. 21, *ante*), and because the stream beds and highway must enter and exit the subject property somewhere, they may all traverse one or more neighboring parcels. Further, for all we know from the commission's findings, stream beds may traverse most parcels in the canyon.

[*522] Moreover, the grant of a variance for nonconforming development of a 28-acre parcel in the instant case is suspect. Although we do not categorically preclude a tract of that size from eligibility for a variance, we note that in the absence of unusual circumstances, so large a parcel may not be sufficiently unrepresentative of the realty in a zone to merit special treatment. By granting variances for tracts of this size, a variance board begins radically to alter the nature of the entire zone. Such change is a proper subject for legislation, not piecemeal administrative adjudication. (See *Sinclair Pipe Line Co. v. Village of Richton Park (1960) 19 Ill.2d 370 [167 N.E.2d 406]; Appeal of the Catholic Cemeteries Association (1954) 379 Pa. 516 [109 A.2d 537]; Civil City of Indianapolis v. Ostrom R. & Construction Co. (1931) 95 Ind.App. 376 [176 N.E. 246].)* Since there has been no affirmative showing that the subject property differs substantially and in relevant aspects from other parcels in the zone, we conclude that the variance granted amounts to the kind of "special privilege" explicitly prohibited by *Government Code section 65906.*

We submit, in summary, that this case illumines two important legal principles. First, by requiring that administrative findings must support a variance, we emphasize the need for orderly legal process and the desirability of forcing administrative agencies to express their grounds for decision so that reviewing courts can intelligently examine the validity of administrative action. Second, by abrogating an unsupported exception to a zoning plan, we conduce orderly and planned utilization of the environment.

We reverse the judgment and remand the cause to the superior court with directions to issue a writ of

mandamus requiring the Los Angeles Board of Supervisors to vacate its order awarding a variance. We also direct the superior court to grant any further relief that should prove appropriate.

21 Cal. App. 4th 330, *; 25 Cal. Rptr. 2d 842, **;
1993 Cal. App. LEXIS 1308, ***; 93 Cal. Daily Op. Service 9622

WILLIAM DESMOND et al., Plaintiffs and Appellants, v. COUNTY OF CONTRA COSTA, Defendant and Respondent.

No. A061677.

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE

21 Cal. App. 4th 330; 25 Cal. Rptr. 2d 842; 1993 Cal. App. LEXIS 1308; 93 Cal. Daily Op. Service 9622; 93 Daily Journal DAR 16402

December 23, 1993, Decided

PRIOR HISTORY: [***1] Superior Court of Contra Costa County, No. C92-04871, Ellen Sickles James, Judge.

DISPOSITION: The judgment is affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants sought review of a ruling from the Superior Court of Contra Costa County (California), which denied appellants' petition for writ of administrative mandate pursuant to *Cal. Civ. Proc. Code § 1094.5* in an action involving a land use permit.

OVERVIEW: Appellants sought and received issuance of a building permit to construct an addition to their single-family home. After the new unit was attached, appellants submitted an application for a land use permit for a residential second unit. Appellants commenced construction of the new unit before the issuance of the permit. Subsequently, appellants' application was approved by the zoning administrator, but was later denied by respondent county. Appellants sought review by respondent's board of supervisors (board), in which the board denied the application and appellants filed a petition for writ of mandamus pursuant to *Cal. Civ. Proc. Code § 1094.5*. The trial court denied appellants' petition. On appeal, the court affirmed. The court found that two of the board's findings were supported by substantial evidence in the administrative record. Because each of the findings was contrary to the requirements for issuance of a land use permit, the court found that either finding was sufficient to support the denial of appellants' application. Further, the court found that Contra Costa County, Cal., Ordinance Code § 82-24.1002 complied with *Cal. Gov't Code § 65852.2(a)*.

OUTCOME: The court affirmed the denial of appellants' petition for writ of administrative mandate because respondent's board of supervisors' findings were supported by substantial evidence and because county's second unit ordinance complied with statutory law.

LexisNexis (TM) HEADNOTES - Core Concepts:

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] Under *Cal. Civ. Proc. Code § 1094.5(b)*, abuse of discretion is established if a respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence Review

[HN2] The scope of an appellate court's review of an administrative agency action is identical with that of a superior court. The same substantial evidence standard applies, and the issue is whether the findings of a county board are based on substantial evidence in light of the entire administrative record. Moreover, because a trial court does not exercise its independent judgment in reviewing a board's decision, but instead applies the substantial evidence test, an appellate court must examine the findings made by the board itself to determine whether they are supported by substantial evidence, rather than limiting itself to a review of the findings made by the trial court.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence Review

[HN3] Under current interpretations of the substantial evidence test as applied in review of administrative agency action, an appellate court must examine all relevant evidence in the entire record, considering both

the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by substantial evidence. Substantial evidence has been defined in two ways. First, as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. Second, as relevant evidence that a reasonable mind may accept as adequate to support a conclusion.

Evidence > Procedural Considerations > Inferences & PresumptionsAdministrative Law > Judicial Review > Standards of Review > Substantial Evidence Review

[HN4] At a trial court level, a petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision is invalid and shall be set aside. When the standard of review is the substantial evidence test, it is presumed that the findings and actions of the administrative agency are supported by substantial evidence. Thus, because the same standard of review applies on appeal as it applies in a trial court, the burden is on an appellant to show there is no substantial evidence whatsoever.

Governments > Local Governments > Administrative Boards

[HN5] Under Contra Costa County, Cal., Ordinance Code § 82-24.1002, a county planning agency division shall make certain findings before granting a land use permit for a residential second unit.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances

[HN6] Contra Costa County, Cal., Ordinance Code § 82-24.1002 requires that an agency must make findings in accordance with the separate ordinance dealing with variance, conditional use and special permits found at Contra Costa County, Cal., Ordinance Code § 26-2.20. The findings that must be made prior to granting a conditional use permit include that the proposed land use shall not adversely affect the preservation of property values; shall not create a nuisance and/or enforcement problem within the neighborhood; and shall not encourage marginal development within the neighborhood.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances

[HN7] Failure to make any one of the findings under Contra Costa County, Cal., Ordinance Code § § 26-2.2008 and 82-24.1002 must result in denial of an application for a land use permit.

Real & Personal Property Law > Zoning & Land Use > Land Use Planning

[HN8] Contra Costa County, Cal., Ordinance Code § § 82-24-1002 and 26.2008 give a county and its planning agencies the authority to consider the effect of proposed projects on the character of the surrounding neighborhood. The concept of public welfare encompasses a broad range of factors, including aesthetic values as well as monetary and physical ones, and that a concern for aesthetics and character is a legitimate governmental objective. Other concerns that fall well within the domain of the public interest and welfare include parking, traffic and visual impact.

Real & Personal Property Law > Zoning & Land Use > Conditional Use Permits & Variances

[HN9] Contra Costa County, Cal., Ordinance Code § 26.2.2008 specifically requires a consideration of the effect of a proposed use on neighboring property values.

Real & Personal Property Law > Zoning & Land Use > Land Use Planning

[HN10] *Cal. Gov't Code § 65852.2* sets up a three-option approach under which a local government may choose to ban all residential second units on condition of making certain findings that such units will have specific adverse impacts on public health, safety and welfare; adopt its own ordinance providing for the creation of second units and establishing various criteria for approving them; or do neither and follow a state-prescribed procedure for approving or disapproving applications for creation of second units.

Real & Personal Property Law > Zoning & Land Use > Land Use Planning

[HN11] Under *Cal. Gov't Code § 65852.2(a)*, any local agency may adopt an ordinance providing for the creation of second units, consistent with a list of six provisions, which are phrased in permissive terms stating that local standards for second units may include, but are not limited to various criteria. In contrast, under *Cal. Gov't Code § 65852.2(b)*, every local agency which fails to adopt an ordinance governing second units in accordance with subdivisions (a) or (c) shall grant a special use or a conditional use permit for the creation of a second unit if the second unit complies with an enumerated list of nine specific requirements. Unlike the provisions in § 65852.2(a), those contained in § 65852.2(b) do not use permissive or discretionary terms, but are mandatory.

Real & Personal Property Law > Zoning & Land Use > Land Use PlanningGovernments > Local Governments > Ordinances & Regulations

[HN12] See *Cal. Gov't Code § 65852.2(b)*.

Real & Personal Property Law > Zoning & Land Use > Land Use PlanningGovernments > Local Governments > Ordinances & Regulations
[HN13] See *Cal. Gov't Code § 65852.2(a)(3).*

Real & Personal Property Law > Zoning & Land Use > Land Use PlanningGovernments > Local Governments > Ordinances & Regulations
[HN14] See *Cal. Gov't Code § 65852.2(a)(4).*

COUNSEL:

William G. Segesta for Plaintiffs and Appellants.

Victor J. Westman, County Counsel, and Diana J. Silver, Deputy County Counsel, for Defendant and Respondent.

JUDGES: Opinion by Merrill, J., with White P. J., and Werdegar, J., concurring.

OPINIONBY: MERRILL, J.

OPINION: [*332] [**843]

William and Tanya Desmond appeal from a judgment denying their petition for writ of administrative mandate. That petition sought to set aside the decision of the Board of Supervisors (Board) of the County of Contra Costa (County) denying their application for a land use permit. Appellants contend that the administrative findings of the Board are not supported by substantial evidence, and that the standards imposed by the applicable County ordinances exceed the maximum standards set by *Government Code section 65852.2* for second units in residential zones. We disagree and therefore affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The subject property, which is located at 8 Golden Hill Court in Walnut Creek, is zoned R-15, single-family residential district. Appellants sought and received issuance of a [***2] building permit to construct an addition to their single-family home. The addition consisted of a new two-car garage and second-level bedroom addition with a separate foundation detached from the principal structure. The new unit was attached to the existing single-family home by means of second-story decking. The building permit contained a provision that no kitchen facilities could be included in the new unit unless appellants first obtained a land use permit to allow construction of a residential second unit at that location. Appellants then submitted an application for a land use permit for a residential second unit.

Relying on alleged statements by unnamed County employees that issuance of a use permit would be "pro forma," appellants did not wait to obtain [*333] the permit before commencing construction of the new unit. When a hearing was held on appellants' application [**844] for a permit to establish a residential second unit the County zoning administrator approved it. Thereafter, a group of neighbors filed an appeal to the County Planning Commission from the zoning administrator's approval of the issuance of the land use permit. County staff recommended that the planning [***3] commission uphold the decision of the zoning administrator, but following a public hearing and review of the matter, the planning commission voted unanimously to uphold the neighbors' appeal and deny the application, on the grounds that the proposed second residential unit was not architecturally compatible with the overall character of the neighborhood, and that development of the second unit would present a threat to public health, safety and welfare.

Appellants appealed the decision of the planning commission to the County Board, which held a public hearing on the matter. At the close of the hearing, the Board declared its intent to deny the appeal and the application, and directed the staff to prepare findings to support its decision. By a vote of three to two, the Board affirmed its earlier expressed intent, denied the appeal and the application, and adopted the staff findings.

In its findings, the Board stated that the property was currently designated in the County general plan as single-family residential, low density. The Board found that the proposed residential second unit was "architecturally incompatible with the overall neighborhood character and the primary residence [***4] in terms of scale, colors, materials and designs for trims, windows, roof, roof pitch and other exterior physical features" (finding No. 7); that development of the second unit would "present a threat to the public health, safety and welfare in that the second unit would result in excessive neighborhood noise and would create traffic and parking problems" (finding No. 8); that "[s]pecial conditions or unique characteristics of the subject property and its location or surroundings are not established" (finding No. 9); and that "[a] second unit is not suitable in this location, is out of character with the surrounding neighborhood and would be an intrusion into the neighborhood" (finding No. 10). In support of these findings, the Board cited the administrative record on appellants' application for a land use permit, County Ordinance Code sections 82-24.1002 and 26-2.2008, and the "on-site observations and comments" by a member of the Board at the public hearing.

Appellants filed a petition for writ of administrative mandamus pursuant to *Code of Civil Procedure section*

1094.5, asking the court for a writ of mandate and injunctive relief ordering the County and the Board to vacate the [***5] decision denying appellants' application and to issue a land use permit for the residential second unit. The trial court denied appellants' petition on [*334] the ground that appellants had failed to establish either that finding No. 10 was not supported by substantial evidence in the record, or that that finding was legally irrelevant to the denial of the request for a land use permit.

In its decision, the trial court stated: "Specifically, [appellants] do not point to evidence that a [residential] second unit is not out of character with the surrounding neighborhood. There is substantial evidence in the record that the second residential unit would be out of character because the surrounding streets at the moment contain only single-family dwellings.

"[Appellants'] argument that Finding No. 10 is irrelavant [*sic*] is not raised in the petition and is not supported by any authority.

"Finding No. 10 supports Finding No. 8: development of the second unit will present a threat to public health, safety, and welfare contrary to one of the requirements for a land use permit (C.C.C. Ord. Code § 82-24.1002(13)). It was within the discretion of the [Board and the County] to take [***6] the concerns of the neighbors into account and to decide that the public welfare would be served by denying the permit; that . . . Finding No. 10 . . . is sufficient to support the denial of [appellants'] application for a land use permit."

[**845] On this basis, the trial court denied appellant's petition for writ of mandate and entered judgment for the County. This appeal followed.

II. STANDARD OF REVIEW

In bringing their petition for writ of administrative mandamus, appellants argued that the County Board prejudicially abused its discretion. [HN1] Under *Code of Civil Procedure section 1094.5*, subdivision (b), "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Both in the trial court and on appeal, appellants have conceded that this is not a case in which the trial court is authorized by law to exercise its independent judgment on the evidence, and thus that abuse of discretion is established only upon a determination that the findings of the administrative body were not supported by substantial evidence in the light of the [***7] whole record. (*Code Civ. Proc., § 1094.5*, subd. (c); *Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 32 [112 Cal.Rptr. 805, 520 P.2d 29]* [substantial evidence standard used when no fundamental vested right involved].)

[HN2] The scope of our review of the subject administrative agency action in this case is identical with that of the superior court. The same substantial [*335] evidence standard applies, and the issue is whether the findings of the County Board were based on substantial evidence in light of the entire administrative record. (*Bixby v. Pierno (1971) 4 Cal.3d 130, 149, fn. 22 [93 Cal.Rptr. 234, 481 P.2d 242]; Zuniga v. County of San Mateo Dept. of Health Services (1990) 218 Cal.App.3d 1521, 1530-1531 [267 Cal.Rptr. 755]; County of San Diego v. Assessment Appeals Bd. No. 2 (1983) 148 Cal.App.3d 548, 554-555 [195 Cal.Rptr. 895].)* Moreover, because the trial court did not exercise its independent judgment in reviewing the Board decision, [***8] but instead applied the substantial evidence test, we must examine the findings made by the Board itself to determine whether they were supported by substantial evidence, rather than limiting ourselves to a review of the findings made by the trial court. (*Stearns v. Fair Employment Practice Com. (1971) 6 Cal.3d 205, 211 [98 Cal.Rptr. 467, 490 P.2d 1155]; Bixby v. Pierno, supra, 4 Cal.3d at pp. 143-144, fn. 10;* Cal. Administrative Mandamus (Cont.Ed.Bar 1989) § 4.162-4.163, 14.27, pp. 205-207, 463-464.)

(1) [HN3] Under current interpretations of the substantial evidence test as applied in review of administrative agency action, we must examine all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it, in order to determine whether or not the agency decision is supported by "substantial evidence." (*Universal Camera Corp. v. Labor Bd. (1951) 340 U.S. 474, 488-490 [95 L.Ed. 456, 467-468, 71 S.Ct. 456]; Bixby v. Pierno, supra, 4 Cal.3d at p. 149, fn. 22;* [***9] *LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal.3d 627, 635-639, fn. 22 [83 Cal.Rptr. 208, 463 P.2d 432]; Zuniga v. County of San Mateo Dept. of Health Services, supra, 218 Cal.App.3d at pp. 1530-1531; County of San Diego v. Assessment Appeals Bd. No. 2, supra, 148 Cal.App.3d at pp. 554-555.)* For this purpose, ". . . substantial evidence has been defined in two ways: first, as evidence of ' " 'ponderable legal significance . . . reasonable in nature, credible, and of solid value' " ' (*Ofsevit v. Trustees of Cal. State University & Colleges (1978) 21 Cal.3d 763, 773, fn. 9 [148 Cal.Rptr. 1, 582 P.2d 88]);* and second, as ' "relevant evidence that a reasonable mind might accept as adequate to support a conclusion" ' (*Hosford v. State Personnel Bd. (1977) 74 Cal.App.3d 302, 307 [141 Cal.Rptr. 354]).*" (*County of San Diego v. Assessment Appeals Bd. No. 2, supra, 148 Cal.App.3d at p. 555.)* [***10]

[HN4] At the trial court level, the petitioner in an administrative mandamus proceeding has the burden of proving that the [**846] agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty. When the standard of review is the substantial evidence test, as it is here, it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. (*Caveness v.* [*336] *State Personnel Bd. (1980) 113 Cal.App.3d 617, 630 [170 Cal.Rptr. 54]; Barnes v. Personnel Department (1978) 87 Cal.App.3d 502, 505 [151 Cal.Rptr. 94].)* Thus, since the same standard of review applies now on appeal as did in the trial court, the burden is on appellant to show there is no substantial evidence whatsoever to support the findings of the Board. (*Pescosolido v. Smith (1983) 142 Cal.App.3d 964, 970 [191 Cal.Rptr. 415].)*

III. SUFFICIENCY OF THE EVIDENCE TO SUPPORT FINDINGS

(2) Applying this standard of review to the decision of the County Board in this case, we are of [***11] the opinion that the administrative record does contain substantial evidence to support the Board's affirmance of the denial of appellant's application for a land use permit for the purpose of establishing a second residential unit.

[HN5] Under the applicable County ordinances, of which we take judicial notice (*Evid. Code, § 452*, subd. (b), *459*; *Longshore v. County of Ventura (1979) 25 Cal.3d 14, 24 [157 Cal.Rptr. 706, 598 P.2d 866])*, the County planning agency division "shall make" certain findings before granting a land use permit for a residential second unit. (Contra Costa County [hereafter C.C.C.] Ord. Code, § 82-24.1002.) Among these findings are that "[t]he second unit is architecturally compatible with overall neighborhood character and the primary residence in terms of scale, colors, materials and design for trim, windows, roof, roof pitch and other exterior physical features"; "[t]he second unit does not result in excessive neighborhood noise, traffic, or parking problems"; and "[d]evelopment of the second unit does not present a threat to public health, safety or welfare." (C.C.C. Ord. Code, § 82-24.1002, subds. (8), [***12] (11), (13).)

In addition, the provision on granting land use permits for residential second units specifically requires that [HN6] the agency must make findings in accordance with the separate ordinance dealing with variance, conditional use and special permits found at article 26-2.20 of the County Ordinance Codes. The findings that must be made prior to granting a conditional use permit include that the proposed land use "shall not adversely affect the preservation of property values"; "shall not create a nuisance and/or enforcement problem within the neighborhood"; and "shall not encourage marginal development within the neighborhood." (C.C.C. Ord. Code, § 26-2.2008, subds. (3), (5), (6); 82-24.1002.)

[HN7] Failure to make any one of these findings must result in denial of the application for a land use permit. (C.C.C. Ord. Code, § 26-2.2008, 82-24.1002.) Because we are reviewing a *denial* of a requested land use permit, [*337] it is not necessary to determine that *each* finding by the Board was supported by substantial evidence. As long as the Board made a finding that any one of the necessary elements enumerated in the ordinances was lacking, and this finding was itself supported [***13] by substantial evidence, the Board's denial of appellant's application must be upheld.

Finding No. 8, stating that the development of a residential second unit would present a threat to public health, safety and welfare by resulting in excessive neighborhood noise, traffic and parking problems, negates two of the necessary elements for granting a land use permit for a second unit, as enumerated in County Ordinance Code section 82-24.1002, subdivisions (11) and (13). Neighbors of the proposed second residential unit gave ample testimony that because of the nature of the cul-de-sac on which the primary residence is located, an additional living unit on the street would create traffic, parking, safety, noise and nuisance problems. Contrary to appellants' position, expert testimony on these issues is not necessary. It is appropriate and even necessary for the County to consider the interests of neighboring [**847] property owners in reaching a decision whether to grant or deny a land use entitlement, and the opinions of neighbors may constitute substantial evidence on this issue. (*Smith v. County of Los Angeles (1989) 211 Cal.App.3d 188, 201-204 [259 Cal.Rptr. 231];* [***14] *Nelson v. City of Selma (9th Cir. 1989) 881 F.2d 836, 840.)*

Finding No. 10, stating that "[a] second unit is not suitable in this location, is out of character with the surrounding neighborhood and would be an intrusion into the neighborhood," is related to several of the enumerated requirements for issuance of a residential second unit land use permit. Provisions in the County ordinances relevant to this finding include that the second unit be "architecturally compatible with overall neighborhood character" (C.C.C. Ord. Code, § 82-24.1002, subd. (9)); that it not "adversely affect the preservation of property values" (C.C.C. Ord. Code, § 26-2.2008, subd. (3)); that it not create "a nuisance and/or enforcement problem within the neighborhood or community" (C.C.C. Ord. Code, § 26-2.2008, subd. (5)); that it not "encourage marginal development within the neighborhood" (C.C.C. Ord. Code, § 26-2.2008, subd.

(6)); and, generally, that it not be detrimental to health, safety and general welfare (C.C.C. Ord. Code, § 26-2.2008, subd. (1); 82-24.1002, subd. (13)).

[HN8] These provisions in the County Ordinance Code give the County and its planning agencies the authority [***15] to consider the effect of proposed projects on the character of the surrounding neighborhood. It is well established that the concept of public welfare encompasses a broad range of factors, including aesthetic values as well as monetary and physical ones, and that a concern [*338] for aesthetics and "character" is a legitimate governmental objective. (*Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 502 [69 L.Ed.2d 800, 811-812, 101 S.Ct. 2882]; Berman v. Parker (1954) 348 U.S. 26, 33 [99 L.Ed. 27, 37-38, 75 S.Ct. 98]; Guinnane v. San Francisco City Planning Com. (1989) 209 Cal.App.3d 732, 741 [257 Cal.Rptr. 742]; Novi v. City of Pacifica (1985) 169 Cal.App.3d 678, 682 [215 Cal.Rptr. 439].)* Other "concerns that fall well within the domain of the public interest and welfare" include parking, traffic and visual impact. (*Guinnane v. San Francisco City Planning Com., supra, 209 Cal.App.3d at p. 743.)*

Thus, although finding [***16] No. 10 does not expressly restate any particular one of the several relevant ordinance requirements, it is actually a summation of several of them. It articulates various significant elements necessarily included in the general concept of public welfare but not expressly enumerated in the County Ordinance Code. It is therefore directly related to finding No. 8, stating that the development of the proposed second residential unit would present a threat to public health, safety and welfare. This finding of unsuitability to the character of the surrounding neighborhood is sufficient by itself to support the denial of appellants' application for a land use permit. (*Guinnane v. San Francisco City Planning Com., supra, 209 Cal.App.3d at pp. 740-743* [local agency denied permit on basis of finding that large size of house was "not in character" with surrounding neighborhood even though in technical compliance with zoning and building codes; upheld].)

Contrary to appellants' position, the fact that their proposed second unit would be the first such unit in the neighborhood does not render finding No. 10 irrelevant as a matter of law. There [***17] are many reasons why a residential second unit might be unsuitable for a particular location and "out of character" with a neighborhood, aside from the fact that it is the first such unit in that location. Such a unit might be perfectly suitable in a different neighborhood with different conditions, even though it was the first such unit in that neighborhood. The kinds of houses in this neighborhood, the street configurations (mostly cul-de-sacs), the traffic patterns, and the lot sizes, are all significant factors to be considered in making this determination. It is clear from the record that these considerations were taken into account by the Board in this case.

Moreover, [HN9] the County Ordinance Code specifically *requires* a consideration of the [**848] effect of a proposed use on neighboring property values. The fact that a second unit would be the first such development in a given neighborhood may well be relevant to a determination of the effect of the unit on local property values. [*339]

Finding No. 10 is supported by substantial evidence in the administrative record. In the first place, the same evidence supporting finding No. 8 also supports finding No. 10. To the [***18] extent the proposed residential second unit would result in excessive neighborhood noise, traffic, or parking problems, it would clearly be "an intrusion into the neighborhood" and "not suitable to this location."

There was ample evidence of community concern with the impact of a residential second rental unit on the general aesthetic character of the neighborhood, as well as on traffic, safety, and protection of property values. These concerns were repeatedly expressed by neighbors opposing the application. In addition, one member of the Board testified to his personal observations of the proposed residential second unit and the surrounding neighborhood, and stated his opinion that it was not in character with the area. The Board properly took these opinions into account in making its determination, and they constitute substantial evidence to support the discretionary finding that the proposed second residential unit was intrusive and not suitable to the character of the surrounding neighborhood. (*Smith v. County of Los Angeles, supra, 211 Cal.App.3d at pp. 201-204.)*

Thus, at least two of the Board's findings (findings No. 8 and [***19] 10) were supported by substantial evidence in the administrative record. Each of these findings was contrary to the requirements for issuance of a land use permit; either one was sufficient to support the denial of appellants' application.

IV. LEGAL RELEVANCE OF THE BOARD'S FINDINGS

(3) Much of appellants' argument on appeal concerns their position that the Board's findings were impermissible under the maximum standards for residential second units purportedly set by *Government Code section 65852.2.* n1 This contention is without merit.

n1 Unless otherwise indicated, all further statutory references are to the Government Code.

Section 65852.2 was adopted to encourage local governments to enact their own ordinances allowing and regulating so-called "granny flat" residential second units in single-family and multi-family zones where they would otherwise be prohibited. (*Wilson v. City of Laguna Beach (1992) 6 Cal.App.4th 543, 545-546 [7 Cal.Rptr.2d 848].)* [HN10] The statute sets [***20] up a three-option approach under which a local government may choose to ban all residential second units on condition of making certain findings that such units would have specific adverse impacts on public health, safety and welfare (§ 65852.2, subd. (c)); adopt its own ordinance providing for the creation of second units and establishing various criteria for approving them [*340] (§ 65852.2, subd. (a)); or do neither and follow a state-prescribed procedure for approving or disapproving applications for creation of second units (§ 65852.2, subd. (b)). (*Wilson v. City of Laguna Beach, supra, 6 Cal.App.4th at p. 553.)*

[HN11] Under section 65852.2, subdivision (a), any local agency may adopt an ordinance providing for the creation of second units, consistent with a list of six provisions. These provisions are phrased in permissive terms stating that local standards for second units "may include, but are not limited to" various criteria. In contrast, under section 65852.2, subdivision (b), every local agency which *fails* to adopt an ordinance governing second units in accordance with subdivisions (a) or (c) "*shall* grant a special use [***21] or a conditional use permit for the creation of a second unit if the second unit complies" with an enumerated list of nine specific requirements. (Italics added.) Unlike the provisions in subdivision (a), those contained in subdivision (b) do not use permissive or discretionary terms, but are mandatory.

[**849] At the end of this list of requirements, subdivision (b) states: " [HN12] No other local ordinance, policy, or regulation shall be the basis for the denial of a building permit or a use permit under this subdivision.

"This subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units on lots zoned for residential use which contain an existing single-family dwelling. No additional standards, other than those provided in this subdivision or subdivision (a), shall be utilized or imposed, except that a local agency may require an applicant for a permit issued pursuant to this subdivision to be an owner-occupant.

"This section does not limit the authority of local agencies to adopt less restrictive requirements for the creation of second units." (§ 65852.2, subd. (b).)

Appellants concede that because the County has adopted an ordinance [***22] regulating the creation of residential second units, it is governed by section 65852.2, subdivision (a). However, they contend that the language in subdivision (b) stating that "[t]his subdivision establishes the maximum standards that local agencies shall use to evaluate proposed second units" applies equally to an ordinance drafted under subdivision (a), and thus, an ordinance enacted pursuant to subdivision (a) may not impose standards which exceed those enumerated in subdivision (b). In support of this contention, appellants argue that the intent of the statute is to encourage the creation of residential second units by barring undue local restrictions on their creation.

This argument ignores the broadly permissive language contained in section 65852.2, subdivision (a), giving local agencies discretion in the [*341] specific criteria they may adopt for approving second units. For example, subdivision (a)(1) states that "[a]reas *may* be designated within the jurisdiction of the local agency where second units *may* be permitted." (Italics added.) The necessary implication of this provision is that a local agency may forbid the creation of second units in other areas. Subdivision [***23] (a)(3) states: " [HN13] Standards *may* be imposed on second units which *include, but are not limited to*, parking, height, setback, lot coverage, architectural review, and maximum size of a unit." (Italics added.) This language clearly contemplates that local agencies may impose *additional* standards on the creation of residential second units. Similarly, subdivision (a)(4) states that [HN14] a local agency "*may* find that second units do not exceed the allowable density for the lot upon which the second unit is located, and that second units are a residential use that is consistent with the existing general plan and zoning designation for the lot." (Italics added.) The implication of this language is that a local agency may also decline to make such a determination, in its discretion.

In short, section 65852.2, subdivision (a), which applies to local agencies that have adopted ordinances providing for the creation of second units, contains broadly permissive language on the standards that a local government may impose on applications for such units. The "maximum standards" set forth in subdivision (b), by their own terms, apply only to *that* subdivision, and are not relevant when [***24] a local government has adopted an appropriate ordinance governing second units.

The County's second unit ordinance complies with section 65852.2, subdivision (a). There is nothing in the standards and criteria set forth in the County's ordinance that conflicts with anything in subdivision (a), or with the legislative intent of that statute. To the contrary, the provisions of the ordinance are consistent with the

suggested standards set forth in subdivision (a), and are in accord with the kinds of land use regulations that have been consistently upheld in this state. (*Guinnane v. San Francisco City Planning Com., supra, 209 Cal.App.3d at pp. 736-743.)*

The judgment is affirmed.

White, P. J., and Werdegar, J., concurred.

Title 5. EDUCATION

Division 1. State Department of Education

Chapter 2. Pupils

Subchapter 6. California High School Exit Examination

Article 1. General

§ 1200. Definitions.

For the purposes of the high school exit examination, the following definitions shall apply:

(a) "Section," "portion," and "part(s)" of the examination shall refer to either the English/language arts section of the high school exit examination or the mathematics section of the high school exit examination.

(b) An "administration" means an eligible pupil's or eligible adult student's taking both the English/language arts and mathematics sections of the high school exit examination or either section during a test cycle.

(c) "Test cycle" means one of the opportunities provided each year by the Superintendent of Public Instruction for an eligible pupil or eligible adult student to take the high school exit examination.

(d) "Grade level" for the purposes of the high school exit examination means the grade assigned to the pupil by the school district.

(e) "Eligible pupil" means one who is enrolled in a California public school in any of grades ~~9,~~ 10, 11, or 12 who has not passed either the English/language arts section or the mathematics section of the high school exit examination.

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

(g) "Test administrator" means a certificated employee of a school district or a person assigned by a nonpublic school to implement a student's Individualized Education Program (IEP) who has received training in the administration of the high school exit examination from the high school exit examination district or test site coordinator.

(h) "Test proctor" is an employee of a school district who has received training specifically designed to prepare him or her to assist the test administrator in administration of the high school exit

examination.

(i) "School districts" includes school districts, county offices of education, and any charter school that does not elect to be part of the school district or county office of education that granted the charter.

NOTE: Authority Cited: Section 33031, Education Code. Reference: Sections 52504, 60850 and 60851, Education Code.

Article 2. Administration

§ 1204. Grade 10 Census.

~~Each pupil in grade 10 shall take the high school exit exam only at the spring administration.~~ Each school district must first offer the exam to each pupil in grade 10 only at the spring administration (March or May). If a pupil is absent at the spring administration, the school district must offer a make-up test at the next test date designated by the Superintendent of Public Instruction or on the next designated test date selected by the school district.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(b)~~, Education Code.

§ 1209. High School Exit Examination District Coordinator.

(a) On or before July 1 of each school year, the superintendent of each school district shall designate from among the employees of the school district a high school exit examination district coordinator. The superintendent shall notify the publisher of the high school exit examination of the identity and contact information for the high school exit examination district coordinator. The high school exit examination district coordinator, or the school district superintendent or his or her designee, shall be available throughout the year and shall serve as the liaison between the school district and the California Department of Education for all matters related to the high school exit examination.

(b) The high school exit examination district coordinator's responsibilities shall include, but not be limited to, the following:

(1) Responding to correspondence and inquiries from the publisher in a timely manner and as provided in the publisher's instructions.

(2) Determining school district and individual school examination and test material needs in conjunction with the test publisher.

(3) Overseeing the acquisition and distribution of examinations and test materials to individual

schools and sites.

(4) Maintaining security over the high school exit examination and test data using the procedure set forth in Section 1211. The high school exit examination district coordinator shall sign the Test Security Agreement set forth in Section 1211 prior to receipt of the test materials.

(5) Overseeing the administration of the high school exit examination to eligible pupils or adult students, in accordance with the manuals or other instructions provided by the test publisher for administering and returning the test.

(6) Overseeing the collection and return of all test materials and test data to the publisher within any required time periods.

(7) Assisting the test publisher in the resolution of any discrepancies in the test information and materials.

(8) Ensuring that all examinations and test materials are received from school test sites within the school district no later than the close of the school day on the school day following administration of the high school exit examination.

(9) Ensuring that all examinations and test materials received from school test sites within the school district have been placed in a secure school district location by the end of the day following the administration of those tests.

(10) Ensuring that all test materials are inventoried, packaged, and labeled in accordance with instructions from the publisher. The test materials shall be ready for pick-up by the publisher at a designated location in the school district no more than five (5) working days following administration of the English/language arts or the mathematics section in the school district.

(11) Ensuring that the high school exit examinations and test materials are retained in a secure, locked location, in the unopened boxes in which they were received from the test publisher, from the time they are received in the school district until the time they are delivered to the test sites.

(c) Within seven (7) working days of completion of school district testing, the superintendent and the high school exit examination district coordinator shall certify to the California Department of Education that the school district has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the high school exit examination in the manner and as otherwise required by the publisher.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(c)~~, Education

Code.

§ 1211. Test Security.

(a) High school exit examination test site coordinators shall ensure that strict supervision is maintained over each pupil or adult student who is being administered the high school exit examination both while the pupil or adult student is in the room in which the test is being administered and during any period in which the pupil or adult student is, for any purpose, granted a break from testing.

(b) Access to the high school exit examination materials is limited to pupils taking the examination for the purpose of graduation from high school and adult students taking the examination for the purpose of obtaining a diploma of graduation, ~~and~~ employees of a school district directly responsible for administration of the examination, and persons assigned by a nonpublic school to implement students' IEPs.

(c) All high school exit examination district and test site coordinators shall sign the California High School Exit Examination Test Security Agreement set forth in subdivision (d).

(d) The California High School Exit Examination Test Security Agreement shall be as follows:

CALIFORNIA HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AGREEMENT

(1) The coordinator will take all necessary precautions to safeguard all tests and test materials by limiting access to persons within the school district with a responsible, professional interest in the test's security.

(2) The coordinator will keep on file the names of persons having access to examinations and test materials. All persons having access to the materials shall be required by the coordinator to sign the California High School Exit Examination Test Security Affidavit that will be kept on file in the school district office.

(3) The coordinator will keep the tests and test materials in a secure, locked location, limiting access to only those persons responsible for test security, except on actual testing dates as provided in California Code of Regulations, Title 5, Division 1, Chapter 2, Subchapter 6.

By signing my name to this document, I am assuring that I, and anyone having access to the test materials will abide by the above conditions.

By: _____

Title: _____

School District: _____

Date: _____

(e) Each high school exit examination test site coordinator shall deliver the examinations and test materials only to those persons actually administering the high school exit examination on the date of testing and only upon execution of the California High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(f) All persons having access to the California High School Exit Examination, including but not limited to the high school exit examination test site coordinator, test administrators, ~~and~~ test proctors, and persons assigned by a nonpublic school to implement students' IEPs, shall acknowledge the limited purpose of their access to the test by signing the California High School Exit Examination Test Security Affidavit set forth in subdivision (g).

(g) The California High School Exit Examination Test Security Affidavit shall be as follows: ~~completed by each test administrator and test proctor:~~

CALIFORNIA HIGH SCHOOL EXIT EXAMINATION

TEST SECURITY AFFIDAVIT

I acknowledge that I will have access to the high school exit examination for the purpose of administering the test. I understand that these materials are highly secure, and it is my professional responsibility to protect their security as follows:

(1) I will not divulge the contents of the test to any other person.

(2) I will not copy any part of the test or test materials.

(3) I will keep the test secure until the test is actually distributed to pupils.

(4) I will limit access to the test and test materials by test examinees to the actual testing periods.

(5) I will not permit pupils or adult students to remove test materials from the room where testing takes place.

(6) I will not disclose, or allow to be disclosed, the contents of, or the scoring keys to, the test instrument.

(7) I will return all test materials to the designated high school exit examination test site coordinator upon completion of the test.

(8) I will not interfere with the independent work of any pupil or adult student taking the examination and I will not compromise the security of the test by means including, but not limited to:

(A) Providing eligible pupils or adult students with access to test questions prior to testing.

(B) Copying, reproducing, transmitting, distributing or using in any manner inconsistent with test security all or any portion of any secure high school exit examination test booklet or document.

(C) Coaching eligible pupils or adult students during testing or altering or interfering with the pupil's or adult student's responses in any way.

(D) Making answer keys available to pupils or adult students.

(E) Failing to follow security rules for distribution and return of secure tests as directed, or failing to account for all secure test materials before, during, and after testing.

(F) Failing to follow test administration directions specified in test administration manuals.

(G) Participating in, directing, aiding, counseling, assisting in, or encouraging any of the acts prohibited in this section.

Signed: _____

Print Name: _____

Position: _____

School: _____

School District: _____

Date: _____

(h) To maintain the security of the high school exit examination, all high school exit examination district and test site coordinators are responsible for inventory control and shall use appropriate inventory control forms to monitor and track test inventory.

(i) The security of the test materials that have been duly delivered to the school district is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher.

(j) Once materials have been duly delivered to the school district, ~~S~~secure transportation of the test materials within a school district (including to non-public schools, (for students placed through the IEP process), court and community schools, and home and hospital care) is the responsibility of the school district. ~~once materials have been duly delivered to the school district.~~

(k) No test may be administered in a private home or location except by a test administrator as defined in section 1200 (g) who signs a security affidavit. No test shall be administered to a pupil by the parent or guardian of that pupil. This subdivision does not prevent classroom aides from assisting in the administration of the test under the supervision of a credentialed school district employee provided that the classroom aide does not assist his or her own child and that the classroom aide signs

a security affidavit.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850 and 60851~~(e)~~, Education Code.

§ 1212. Test Site Delivery.

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

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(e)~~, Education Code.

Article 3. Accommodations/Modifications

§ 1215. Timing/Scheduling.

All pupils and adult students may have additional time to complete the examination, within the limits imposed by test security as provided in Section 1211.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(e)~~, Education Code.

§ 1216. Allowable Accommodations for Pupils or Adult Students with Disabilities, or for English Learners.

The purpose of the high school exit examination is to assure that pupils and adult students who graduate from high school have demonstrated in English the skills, knowledge and abilities embodied in the state standards in English language arts and mathematics selected for the high school exit examination. To assure that the high school exit examination is a valid measure of each pupil's or adult student's skills, knowledge and abilities in relationship to these standards, accommodations will be allowed that are necessary and appropriate to afford access to the test, consistent with federal law, so long as the accommodations do not fundamentally alter what the examination is designed to measure.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(g)~~, Education Code.

§ 1217. ~~Pupils or Adult Students with Disabilities.~~ Accommodations and Modifications

(a) Where necessary to access the test, pupils or adult students with disabilities shall take the high school exit examination with those accommodations that are necessary and appropriate to address the pupil's or adult student's identified disability(ies) and that have been approved by their individualized education program teams or 504 plan teams, including but not limited to those accommodations that the pupil or adult student has regularly used during instruction and classroom assessments, provided that such accommodations do not fundamentally alter what the test measures. Approved accommodations for the high school exit examination must be reflected in the pupil's or adult student's individualized education program or 504 plan.

(b) Accommodations that do not fundamentally alter what the test measures include, but may not be limited to:

(1) Presentation accommodations: Large print versions; test items enlarged through mechanical or electronic means; Braille transcriptions provided by the test publisher or a designee; markers, masks, or other means to maintain visual attention to the test or test items; reduced numbers of items per page; audio presentation on the math portion of the test, provided that an audio presentation is the pupil's or adult student's only means of accessing written material.

(2) Response accommodations:

(A) Verbal, written, or signed responses; responses made with mechanical or electronic assistance as long as the mechanical or electronic device is used solely to record the pupil's or adult student's response. If a person is required to transcribe the pupil's or adult student's responses to the format required by the examination, the transcriber shall be an employee of the school district who has signed the Test Security Affidavit.

(B) Assistive devices and technologies that are regularly used during testing provided that no technology or assistive device may be used that fundamentally alters what the test measures.

(3) Scheduling accommodations: More frequent breaks during the regularly scheduled test session; multiple sessions, provided that a pupil or adult student does not have access to test items that will be presented in a future session or sessions.

(4) Setting accommodations: Special or adaptive furniture; special lighting or acoustics; an individual carrel or study enclosure; a separate room provided that the pupil or adult student is directly supervised by school personnel who have signed the Test Security Affidavit.

(c) The following are modifications ~~accommodations are not allowed~~ because they ~~have been determined to~~ fundamentally alter what the test measures:

(1) Calculators on the math portion of the test.

(2) Audio or oral presentation of the English/language arts portion of the test.

(d) If the pupil's or adult student's individualized education program team or 504 plan team proposes an accommodation for use on the high school exit examination that is not included subdivision (b), the school district may submit a request for accommodation pursuant to Section 1218.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(g)~~, Education Code.

§ 1217.5. English Learners.

English learners must read and pass the high school exit examination in English. School districts must evaluate pupils to determine if they possess sufficient English language skills at the time of the examination to be assessed with the test. If the pupil does not possess sufficient English language skills to be assessed, the school district, in addition to the instruction in reading, writing, and comprehension in the English language specified in Education Code section 60852, may provide additional time as provided in Section 1215.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(e)(2)~~, Education Code.

§ 1218.5. Use of Modifications.

(a) If the pupil's IEP or Section 504 Plan indicates that it is appropriate and necessary for a pupil to take the test with a modification(s) as defined in Education Code section 60850, or as specified in Section 1217(c), or determined pursuant to Section 1218, the school district must then administer the test to the pupil with these modifications.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 60850 and 60851, Education Code; and 34 CFR Section 300.138(a).

§ 1219. Independent Work of the Pupil or Adult Student.

In implementing accommodations pursuant to Section 1216 or 1217, school districts shall ensure that all test responses are the independent work of the pupil. School districts and school district personnel are prohibited from assisting any pupil in determining how the pupil or adult student will

respond to each question, and are prohibited from leading or directing the pupil or adult student to a particular response.

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60850~~(g)~~, Education Code.

§ 1219.5. Invalidation of Test Scores.

If a school district allows a pupil or adult student to take the high school exit examination with one or more accommodations that are determined by the California Department of Education to fundamentally alter what the test measures, that pupil's or adult student's test score or scores will be invalidated.

NOTE: Authority cited: Section 33031, Education Code. Reference: Sections 60850~~(g)~~, Education Code.

Article 4. Cheating

§ 1220. Cheating.

(a) Any pupil or adult student found to have cheated or assisted others in cheating, or to have compromised the security of the high school exit examination shall have his or her test marked as "invalid" and the pupil or adult student shall not receive a score from that test administration.

(b) The school district shall notify each eligible pupil or adult student prior to each administration of the high school exit examination of the provisions of subdivision (a).

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(b) and (c)~~, Education Code.

Article 5. Apportionment

§ 1225. Apportionment.

(a) For each test cycle, each school district shall report to the California Department of Education the number of examinations administered.

(b) The superintendent of each school district shall certify the accuracy of all information submitted. The report required by subdivision (a) shall be filed with the State Superintendent of Public Instruction within ten (10) working days of completion of each test cycle in the school district.

(c) The amount of funding to be apportioned to the school district for the high school exit examination shall be equal to the product of the amount per administration established by the State Board of Education to enable school districts to meet the requirements of subdivisions (a), (b) and (c) of Education Code section 60851 times the number of tests administered to pupils and adult students

in the school district as determined by the certification of the school district superintendent pursuant to subdivision (b).

NOTE: Authority cited: Section 33031, Education Code. Reference: Section 60851~~(a)~~, Education Code.

04/24/03

Item		Amount
6110-112-0890—For local assistance, Department of Education, Program 20.60.036-Public Charter Schools, payable from the Federal Trust Fund.....		31,222,000
Provisions:		
1. Of the funds appropriated in this item, an amount of up to $422,000 may be transferred to Item 6110-001-0890 to be used for state operations purposes relating to federal charter school grants.		
6110-113-0001—For local assistance, Department of Education (Proposition 98), for purposes of California's pupil testing program.....		85,860,000
Schedule:		
(2) 20.70.030.005-Assessment Review and Reporting.....	3,913,000	
(3) 20.70.030.006-STAR Program.....	60,836,000	
(4) 20.70.030.007-English Language Development Assessment.....	11,437,000	
(5) 20.70.030.008-High School Exit Examination.....	18,267,000	
(6) 20.70.030.016-Test Development: STAR Exam.....	1,407,000	
(7) 20.70.030.015-California High School Proficiency Exam.....	750,000	
(7.5) 97.20.001.000-Unallocated Reduction.....	-10,000,000	
(8) Reimbursements.....	-750,000	
Provisions:		
1. The funds appropriated in this item shall be for the pupil testing programs authorized by Chapter 5 (commencing with Section 60600), Chapter 7 (commencing with Section 60810), and Chapter 8 (commencing with Section 60850) of Part 33 of the Education Code.		
2. The funds appropriated in Schedule (3) include funds for primary language tests administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 of the Education Code.		
3. The funds appropriated in Schedule (4) shall be available for administration of an English language development test meeting the requirements of Chapter 7 (commencing with Section 60810) of Part 33 of the Education Code.		
4. The funds appropriated in Schedule (5) include funds for the administration of the HSEE pursuant to Chapter 8 (commencing with Section 60850) of Part 33 of the Education Code.		

Item		Amount
5. The funds appropriated in Schedule (6) shall be available for test item development for the STAR program during the 2003–04 fiscal year. The test items developed with these funds shall make progress in aligning this exam with the State Board of Education-approved academic content standards and in ensuring that this exam is valid and reliable as measured by industry standards.		
6. It is the intent of the Legislature that the State Department of Education develop a plan to streamline existing programs to eliminate duplicative tests and minimize the instructional time lost to test administration. The State Department of Education shall ensure that all statewide tests meet industry standards for validity and reliability.		
7. The State Board of Education shall annually establish the amount of funding to be apportioned to school districts for the English Language Development Assessment and the High School Exit Examination. The amount of funding to be apportioned per test shall not be valid without the approval of the Department of Finance.		
6110-113-0890—For local assistance, Department of Education-Title VI Flexibility and Accountability, payable from the Federal Trust Fund		45,428,000
Schedule:		
(1) 20.60.030.030-Alternative Schools Accountability Model	775,000	
(2) 20.70.030.006-STAR Program	5,119,000	
(3) 20.70.030.008-High School Exit Examination	1,100,000	
(5) 20.70.030.017-NCLB Longitudinal Database	6,880,000	
(6) 20.70.030.018-Incentive Funding—CELDT	7,100,000	
(7) 20.70.030.022-High School Exit Examination Workbooks	1,800,000	
(8) 20.70.030.021-California Alternate Performance Assessment—Local Apportionment	500,000	
(9) 20.70.030.023-Title VI—Unallocated	16,154,000	
(11) 20.70.030.025-Pupils With Disabilities—Standards and Assessments	600,000	
(11.5) 20.70.030.026-Primary Language Test Development	3,000,000	

Item		Amount
6110-112-0890—For local assistance, Department of Education, Program 20.60.036-Public Charter Schools, payable from the Federal Trust Fund		22,853,000
6110-113-0001—For local assistance, Department of Education (Proposition 98), for purposes of California's pupil testing program		65,958,000
Schedule:		
(1) 20.70.030.001-Golden State Examination	15,443,000	
(2) 20.70.030.004-Career Technical Assessment	871,000	
(3) 20.70.030.005-Assessment Review and Reporting	3,913,000	
(4) 20.70.030.006-STAR Program	~~15,827,000~~ *15,027,000*	
(5) 20.70.030.007-English Language Development Assessment	4,437,000	
(6) 20.70.030.008-High School Exit Examination	18,267,000	
(7) 20.70.030. ~~009~~ 016 -Test Development: STAR Exam	8,000,000	
(8.5) 20.70.030.015-California High School Proficiency Exam	750,000	
(9) Reimbursements	-750,000	
Provisions:		
1. The funds appropriated in this item shall be for the pupil testing programs authorized by Chapter 5 (commencing with Section 60600), Chapter 7 (commencing with Section 60810), and Chapter 8 (commencing with Section 60850) of Part 33 of the Education Code.		
2. The funds appropriated in Schedule (4) include funds for primary language tests administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 of the Education Code.		
3. The funds appropriated in Schedule (5) shall be available for administration of an English language development test meeting the requirements of Chapter 7 (commencing with Section 60810) of Part 33 of the Education Code.		
4. The funds appropriated in Schedule (6) include funds for the administration of the HSEE pursuant to Chapter 8 (commencing with Section 60850) of Part 33 of the Education Code.		
5. Of the funds appropriated in this item, $268,000 is for the purpose of providing an adjustment for in-		

Item		Amount
	creases in enrollment at a rate of 1.37 percent and $608,000 is for the purpose of providing a cost-of-living adjustment at a rate of 2.00 percent.	
	6. The funds appropriated in Schedule (7) shall be available for test item development for the STAR program during the 2002–03 fiscal year. The test items developed with these funds shall make progress in aligning this exam with the State Board of Education-approved academic content standards and in ensuring that this exam is valid and reliable as measured by industry standards.	
	8. It is the intent of the Legislature that the State Department of Education develop a plan to streamline existing programs to eliminate duplicative tests and minimize the instructional time lost to test administration. The State Department of Education shall ensure that all statewide tests meet industry standards for validity and reliability.	
	9. The State Board of Education shall annually establish the amount of funding to be apportioned to school districts for the English Language Development Assessment and the High School Exit Examination. The amount of funding to be apportioned per test shall not be valid without the approval of the Department of Finance.	
6110-113-0890—For local assistance, Department of Education-Title VI Flexibility and Accountability, payable from the Federal Trust Fund.....		28,794,000
Provisions:		
	1. Of the funds appropriated in this item, $1,445,000 is available for the continued development of the Alternative Schools Accountability Model to include alternative schools within the state's system of accountability. Of the total, $670,000 is provided on a one-time basis.	
	2. Of the funds appropriated in this item, $500,000 is available on a one-time basis to develop training materials and provide technical assistance to schools regarding statewide standards and assessments for pupils with disabilities.	
	5. Of the funds appropriated in this item, $2,000,000 is available on a one-time basis for the English Language Development Test.	
	6. Of the funds appropriated in this item, $300,000 is provided to develop assessment data collection	

Item		Amount
	funds. Additionally, $18,889,000 is for the purpose of providing a cost-of-living adjustment at a rate of 3.87 percent.	
6110-112-0001—For local assistance, Department of Education (Proposition 98), for transfer by the Controller to Section A of the State School Fund, Program 20.60.017-Instructional Time and Staff Development Reform Program		224,157,000
Provisions:		
1. The funds appropriated in this item are available for the purposes of the Instructional Time and Staff Development Reform Program established by Article 7.5 (commencing with Section 44579) of Chapter 3 of Part 25 of the Education Code.		
2. Of the funds appropriated in this item, $12,333,000 is for the purpose of providing a cost-of-living adjustment at a rate of 3.87 percent for the Instructional Time and Staff Development Reform Program, in lieu of the amount that would otherwise be provided pursuant to statute, resulting in a daily rate of $293.42 for teachers and $152.14 for classified paraprofessionals.		
3. It is the intent of the Legislature to fund deficiencies that may result in this program during the 2001–02 fiscal year.		
6110-112-0890—For local assistance, Department of Education, Program 20.60.036-Public Charter Schools, payable from the Federal Trust Fund		12,632,000
6110-113-0001—For local assistance, Department of Education (Proposition 98), for purposes of California's pupil testing program		126,477,000
Schedule:		
(1) 20.70.030.001-Golden State Examination	14,937,000	
(2) 20.70.030.004-Career Technical Assessment	843,000	
(3) 20.70.030.005-Assessment Review and Reporting	3,781,000	
(4) 20.70.030.006-STAR Program	65,643,000	
(5) 20.70.030.007-English Language Development Assessment	14,474,000	
(6) 20.70.030.008-High School Exit Examination	14,799,000	
(7) 20.70.030.009-Test Development: STAR and High School Exit Exam	12,000,000	

Item Amount

Provisions:

1. The funds appropriated in this item shall be for the pupil testing programs authorized by Chapter 5 (commencing with Section 60600), Chapter 7 (commencing with Section 60810), and Chapter 8 (commencing with Section 60850) of Part 33 of the Education Code.
2. The funds appropriated in Schedule (4) include funds for primary language tests administered pursuant to Article 4 (commencing with Section 60640) of Chapter 5 of Part 33 of the Education Code.
3. The funds appropriated in Schedule (5) shall be available for administration of an English language development test meeting the requirements of Chapter 7 (commencing with Section 60810) of Part 33 of the Education Code.
4. The funds appropriated in Schedule (6) include funds for the administration of the HSEE pursuant to Chapter 8 (commencing with Section 60850) of Part 33 of the Education Code.
5. Of the funds appropriated in this item, $1,132,000 is for the purpose of providing an adjustment for increases in enrollment at a rate of 1.40 percent and $3,797,000 is for the purpose of providing a cost-of-living adjustment at a rate of 3.87 percent.
6. The funds appropriated in Schedule (7) shall be available for test item development for the STAR and High School Exit Examination programs during the 2001–02 fiscal year. The test items developed with these funds shall make progress in aligning these exams with the State Board of Education-approved academic content standards and in ensuring that these exams are valid and reliable as measured by industry standards.
9. It is the intent of the Legislature that the State Department of Education develop a plan to streamline existing programs to eliminate duplicative tests and minimize the instructional time lost to test administration. The State Department of Education shall ensure that all statewide tests meet industry standards for validity and reliability.
10. The State Board of Education shall annually establish the amount of funding to be apportioned to school districts for the English Language Development Assessment and the High School Exit Examination. The amount of funding to be ap-

Item	Amount
portioned per test shall not be valid without the approval of the Department of Finance.	
6110-116-0001—For local assistance, Department of Education (Proposition 98), for transfer to Section A of the State School Fund, Program 20.60.030-School Improvement Programs, pursuant to Chapter 6 (commencing with Section 52000) of Part 28 of the Education Code	418,471,000
Schedule:	
(1) 20.60.030.010-For the purposes of making allowances for kindergarten and grades 1 to 6, inclusive	348,129,000
(2) 20.60.030.020-For the purpose of making allowances for grades 7 to 12, inclusive	70,342,000
Provisions:	
1. From the funds appropriated in Schedule (2), the State Department of Education shall allocate $31.71 per unit of average daily attendance (ADA) generated by pupils enrolled in grades 7 and 8 to those school districts that received School Improvement Grants in the 1989–90 fiscal year at a rate of $30 per unit of ADA generated by pupils enrolled in grades 7 and 8.	
2. Of the funds appropriated in Schedule (1) of this item, $687,000 is for the purpose of providing an adjustment for increases in average daily attendance at a rate of 0.21 percent. If growth funds are insufficient, the State Department of Education may adjust the per-pupil growth rates to conform to available funds. Additionally, $12,971,000 is for the purpose of providing a cost-of-living adjustment at a rate of 3.87 percent.	
3. Of the funds appropriated in Schedule (2) of this item, $1,468,000 is for the purpose of providing an adjustment for increases in average daily attendance at a rate of 2.22 percent. If growth funds are insufficient, the State Department of Education may adjust the per-pupil growth rates to conform to available funds. Additionally, $2,621,000 is for the purpose of providing a cost-of-living adjustment at a rate of 3.87 percent.	
6110-117-0001—For local assistance, State Department of Education, Program 10.70-Vocational Education, in lieu of the amount that otherwise would be appropriated pursuant to subdivision (b) of Section 19632 of the Business and Professions Code	562,000

*** THIS DOCUMENT IS CURRENT THROUGH THE 2004 SUPPLEMENT ***
INCLUDING URGENCY LEGISLATION THROUGH 2004 REG. SESS. CH.14, 2/11/04
2003-04 3RD EXTRA. SESS., CH.1 AND 5TH EXTRA. SESS., CH.2

EVIDENCE CODE
DIVISION 5. Burden of Proof; Burden of Producing Evidence; Presumptions and Inferences
CHAPTER 3. Presumptions and Inferences
ARTICLE 1. General

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Evid Code § 606 (2004)

§ 606. Effect of presumption affecting burden of proof

The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

HISTORY: Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

NOTES:
HISTORICAL DERIVATION:
Former CCP § 1826, as enacted 1872.

OFFICIAL COMMENT:

LAW REVISION COMMISSION COMMENTS:
1965--Section 606 describes the manner in which a presumption affecting the burden of proof operates. In the ordinary case, the party against whom it is invoked will have the burden of proving the nonexistence of the presumed fact by a preponderance of the evidence. Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof. When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof and will be required to persuade the trier of fact of the nonexistence of the presumed fact by proof " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " *Sheehan v Sullivan, 126 Cal 189, 193, 58 Pac 543, 544 (1899).*

If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given. See *Speck v Sarver, 20 Cal 2d 585, 590, 128 P2d 16, 19 (1942)* (dissenting opinion by Traynor, J.); Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, *47 Harv L Rev 59, 69 (1933).* If the evidence is not sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence. See the Comment to Section 604.

EVIDENCE CODE
DIVISION 5. Burden of Proof; Burden of Producing Evidence; Presumptions and Inferences
CHAPTER 3. Presumptions and Inferences
ARTICLE 4. Presumptions Affecting the Burden of Proof

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Evid Code § 664 (2004)

§ 664. Official duty regularly performed

It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

HISTORY: Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

NOTES:
HISTORICAL DERIVATION:
Former CCP § § 1826, 1963 subd (15), as enacted 1872.

OFFICIAL COMMENT:

LAW REVISION COMMISSION COMMENTS:
1965--The first sentence of Section 664 restates and supersedes subdivision 15 of *Code of Civil Procedure Section 1963*.

Under existing law, there is a common law presumption that an arrest made without a warrant is unlawful. *People v Agnew, 16 Cal 2d 655, 107 P2d 601 (1940)*. Under this common law presumption, if a person arrests another without the color of legality provided by a warrant, the person making the arrest must prove the circumstances that justified the arrest without a warrant. *Badillo v Superior Court, 46 Cal 2d 269, 294 P2d 23 (1956); Dragna v White, 45 Cal 2d 469, 471, 289 P2d 428, 430 (1955)* ("Upon proof of[arrest without process] the burden is on the defendants to prove justification for the arrest."). The second sentence of Section 664 makes it clear that the presumption of regular performance of official duty is inapplicable whenever facts have been established that give rise to the common law presumption regarding the illegality of an arrest made without a warrant. (As amended in the Legislature.)

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION
CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES
GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 1400 (d) (2004)

§ 1400. Short title; table of contents; findings; purposes

(d) Purposes. The purposes of this title [*20 USCS §§ 1400* et seq.] are--

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

HISTORY: (April 13, 1970, P.L. 91-230, Title VI, Part A, § 601, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Subsection (b), which has been omitted, contained the table of contents for Title VI of Act April 13, 1970, P.L. 91-230.

A prior § 1400 (Act April 13, 1970, P.L. 91-230, Title VI, Part A, § 601, 84 Stat. 175; Nov. 29, 1975, P.L. 94-142, § 3(a), 89 Stat. 774; Oct. 30, 1990, P.L. 101-476, Title IX, § 901(a)(1), (b)(1)-(9), 104 Stat. 1141, 1142; Oct. 7, 1991, P.L. 102-119, § 25(b), 105 Stat. 607) was omitted in the general amendment of Title VI of Act April 13, 1970, P.L. 91-230, by Act June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37. Such section contained a short title and set out congressional findings and purposes.

Effective date of section:

This section took effect upon enactment, pursuant to § 201(a) of Act June 4, 1997, P.L. 105-17, which appears as a note to this section.

Short titles:

Act Aug. 21, 1974, P.L. 93-380, Title VI, Part B, § 611, 88 Stat. 579, provides: "This title may be cited as the 'Education of the Handicapped Amendments of 1974'.". For full classification of such Title, consult USCS Tables volumes.

Act Nov. 29, 1975, P.L. 94-142, § 1, 89 Stat. 773, provided "This Act may be cited as the 'Education for All Handicapped Children Act of 1975'.". For full classification of such Act, consult USCS Tables volumes.

Act June 17, 1977, P.L. 95-49, § 1, 91 Stat. 230, provided "This Act may be cited as the 'Education of the Handicapped Amendments of 1977'.". For full classification of such Act, consult USCS Tables volumes.

Act Dec. 2, 1983, P.L. 98-199, § 1, 97 Stat. 1357, (effective upon enactment on Dec. 2, 1983, except as provided by § 18(b) of such Act, which appears as *20 USCS § 1401* note), provides: "This Act [generally amending *20 USCS § § 1401* et seq.; for full classification, consult USCS Tables volume] may be cited as the 'Education of the Handicapped Act Amendments of 1983'.".

Act Aug. 5, 1986, P.L. 99-372, § 1, 100 Stat. 796, provides: "This Act may be cited as the 'Handicapped Children's Protection Act of 1986'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 8, 1986, P.L. 99-457, § 1(a), 100 Stat. 1145, provides: "This Act may be cited as the 'Education of the Handicapped Act Amendments of 1986'.".

Act Nov. 7, 1988, P.L. 100-630, § 1, 102 Stat. 3289, provides: "This Act may be cited as the 'Handicapped Programs Technical Amendments Act of 1988'.".

Act Oct. 30, 1990. P.L. 101-476, § 1, 104 Stat. 1103, provides: "This Act may be cited as the 'Education of the Handicapped Act Amendments of 1990'.". For full classification of such Act, consult USCS Tables volumes.

Act Oct. 7, 1991, P.L. 102-119, § 1, 105 Stat. 587, provides: "This Act may be cited as the 'Individuals with Disabilities Education Act Amendments of 1991'.". For full classification of such Act, consult USCS Tables volumes.

Act June 4, 1997, P.L. 105-17, § 1, 111 Stat. 37, provides: "This Act [generally amending *20 USCS § § 1400* et seq.; for full classification, consult USCS Tables volume] may be cited as the 'Individuals with Disabilities Education Act Amendments of 1997'.".

Other provisions:

Substitution of "Individuals with Disabilities Education Act" for "Education of the Handicapped Act". Act Oct. 30, 1990, P.L. 101-476, Title IX, § 901(a)(2), (3), 104 Stat. 1142 (effective 10/1/90, as provided by § 1001 of such Act, which appears as *20 USCS § 238* note), provided:

"(2) The following Acts are each amended by striking 'Education of the Handicapped Act' each place it occurs and inserting in lieu thereof 'Individuals with Disabilities Education Act': Carl D. Perkins Vocational Education and Applied Technology Act; Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988; Department of Education Organization Act; Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987; Education for All Handicapped Children Act of 1975; Education of the Deaf Act of 1986; Elementary and Secondary Education Act of 1965; Medicare Catastrophic Coverage Act of 1988; Omnibus Trade and Competitiveness Act of 1988; Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978; and Technology-Related Assistance for Individuals With Disabilities Act of 1988.

"(3) Any other Act and any regulation which refers to the Education of the Handicapped Act shall be considered to refer to the Individuals with Disabilities Education Act.".

Effective dates of Parts A and B of Title VI of Act April 13, 1970, as amended June 4, 1997. Act June 4, 1997, P.L. 105-17, Title II, § 201(a), 111 Stat. 156, provides:

"(1) In general. Except as provided in paragraph (2), parts A and B of the Individuals with Disabilities Education Act [*20 USCS § § 1400* et seq., 1411 et seq.], as amended by title I, shall take effect upon the enactment of this Act.

"(2) Exceptions.

(A) In general. Sections 612(a)(4), 612(a)(14), 612(a)(16), 614(d) (except for paragraph (6)), and 618 of the Individuals with Disabilities Education Act [*20 USCS § § 1412*(a)(4), (14), (16), 1414(d) (except for para. (6)), and 1418], as amended by title I, shall take effect on July 1, 1998.

"(B) Section 617. Section 617 of the Individuals with Disabilities Education Act [*20 USCS § 1417*], as amended by title I, shall take effect on October 1, 1997.

"(C) Individualized education programs and comprehensive system of personnel development. Section 618 of the Individuals with Disabilities Education Act [*20 USCS § 1418*], as in effect on the day before the date of the enactment of this Act, and the provisions of parts A and B of the Individuals with Disabilities Education Act [*20 USCS § § 1400* et seq., 1411 et seq.] relating to individualized education programs and the State's comprehensive system of personnel development, as so in effect, shall remain in effect until July 1, 1998.

"(D) Sections 611 and 619. Sections 611 and 619 [*20 USCS § § 1411*, 1419], as amended by title I, shall take effect beginning with funds appropriated for fiscal year 1998.".

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES

ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 1411 (2004)

§ 1411. Authorization; allotment; use of funds; authorization of appropriations

(a) Grants to States.

(1) Purpose of grants. The Secretary shall make grants to States and the outlying areas, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this part [*20 USCS § § 1411* et seq.].

(2) Maximum amounts. The maximum amount of the grant a State may receive under this section for any fiscal year is--

(A) the number of children with disabilities in the State who are receiving special education and related services--

(i) aged 3 through 5 if the State is eligible for a grant under section 619 [*20 USCS § 1419];* and

(ii) aged 6 through 21; multiplied by

(B) 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

(b) Outlying areas and freely associated States.

(1) Funds reserved. From the amount appropriated for any fiscal year under subsection (j), the Secretary shall reserve not more than one percent, which shall be used--

(A) to provide assistance to the outlying areas in accordance with their respective populations of individuals aged 3 through 21; and

(B) for fiscal years 1998 through 2001, to carry out the competition described in paragraph (2), except that the amount reserved to carry out that competition shall not exceed the amount reserved for fiscal year 1996 for the competition under part B of this Act [*20 USCS § § 1411* et seq.] described under the heading "SPECIAL EDUCATION" in Public Law 104-134.

(2) Limitation for freely associated States.

(A) Competitive grants. The Secretary shall use funds described in paragraph (1)(B) to award grants, on a competitive basis, to Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated States to carry out the purposes of this part [*20 USCS § § 1411* et seq.].

(B) Award basis. The Secretary shall award grants under subparagraph (A) on a competitive basis, pursuant to the recommendations of the Pacific Region Educational Laboratory in Honolulu, Hawaii. Those recommendations shall be made by experts in the field of special education and related services.

(C) Assistance requirements. Any freely associated State that wishes to receive funds under this part [*20 USCS § § 1411* et seq.] shall include, in its application for assistance--

(i) information demonstrating that it will meet all conditions that apply to States under this part [*20 USCS § § 1411* et seq.];

(ii) an assurance that, notwithstanding any other provision of this part [*20 USCS § § 1411* et seq.], it will use those funds only for the direct provision of special education and related services to children with disabilities and to enhance its capacity to make a free appropriate public education available to all children with disabilities;

(iii) the identity of the source and amount of funds, in addition to funds under this part [*20 USCS § § 1411* et seq.], that it will make available to ensure that a free appropriate public education is available to all children with disabilities within its jurisdiction; and

(iv) such other information and assurances as the Secretary may require.

(D) Termination of eligibility. Notwithstanding any other provision of law, the freely associated States shall not receive any funds under this part [*20 USCS § § 1411* et seq.] for any program year that begins after September 30, 2001.

(E) Administrative costs. The Secretary may provide not more than five percent of the amount reserved for grants under this paragraph to pay the administrative costs of the Pacific Region Educational Laboratory under subparagraph (B).

(3) Limitation. An outlying area is not eligible for a competitive award under paragraph (2) unless it receives assistance under paragraph (1)(A).

(4) Special rule. The provisions of Public Law 95-134, permitting the consolidation of grants by the outlying areas, shall not apply to funds provided to those areas or to the freely associated States under this section.

(5) Eligibility for discretionary programs. The freely associated States shall be eligible to receive assistance under subpart 2 of part D of this Act [*20 USCS § 1461]* until September 30, 2001.

(6) Definition. As used in this subsection, the term "freely associated States" means the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.

(c) Secretary of the Interior. From the amount appropriated for any fiscal year under subsection (j), the Secretary shall reserve 1.226 percent to provide assistance to the Secretary of the Interior in accordance with subsection (i).

(d) Allocations to States.

(1) In general. After reserving funds for studies and evaluations under section 674(e) [*20 USCS § 1474*(e)], and for payments to the outlying areas and the Secretary of the Interior under subsections (b) and (c), the Secretary shall allocate the remaining amount among the States in accordance with paragraph (2) or subsection (e), as the case may be.

(2) Interim formula. Except as provided in subsection (e), the Secretary shall allocate the amount described in paragraph (1) among the States in accordance with section 611(a)(3), (4), and (5) and (b)(1), (2), and (3) of this Act, as in effect prior to the enactment of the Individuals with Disabilities Education Act Amendments of 1997 [former subsecs. (a)(3)-(5) and (b)(1)-(3) of this section], except that the determination of the number of children with disabilities receiving special education and related services under such section 611(a)(3) may, at the State's discretion, be calculated as of the last Friday in October or as of December 1 of the fiscal year for which the funds are appropriated.

(e) Permanent formula.

(1) Establishment of base year. The Secretary shall allocate the amount described in subsection (d)(1) among the States in accordance with this subsection for each fiscal year beginning with the first fiscal year for which the amount appropriated under subsection (j) is more than $ 4,924,672,200.

(2) Use of base year.

(A) Definition. As used in this subsection, the term "base year" means the fiscal year preceding the first fiscal year in which this subsection applies.

(B) Special rule for use of base year amount. If a State received any funds under this section for the base year on the basis of children aged 3 through 5, but does not make a free appropriate public education available to all children with disabilities aged 3 through 5 in the State in any subsequent fiscal year, the Secretary shall compute the State's base year amount, solely for the purpose of calculating the State's allocation in that subsequent year under paragraph (3) or (4), by subtracting the amount allocated to the State for the base year on the basis of those children.

(3) Increase in funds. If the amount available for allocations to States under paragraph (1) is equal to or greater than the amount allocated to the States under this paragraph for the preceding fiscal year, those allocations shall be calculated as follows:

(A) (i) Except as provided in subparagraph (B), the Secretary shall--

(I) allocate to each State the amount it received for the base year;

(II) allocate 85 percent of any remaining funds to States on the basis of their relative populations of children aged 3 through 21 who are of the same age as children with disabilities for whom the State ensures the availability of a free appropriate public education under this part [*20 USCS § § 1411* et seq.]; and

(III) allocate 15 percent of those remaining funds to States on the basis of their relative populations of children described in subclause (II) who are living in poverty.

(ii) For the purpose of making grants under this paragraph, the Secretary shall use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary.

(B) Notwithstanding subparagraph (A), allocations under this paragraph shall be subject to the following:

(i) No State's allocation shall be less than its allocation for the preceding fiscal year.

(ii) No State's allocation shall be less than the greatest of--

(I) the sum of--

(aa) the amount it received for the base year; and

(bb) one third of one percent of the amount by which the amount appropriated under subsection (j) exceeds the amount appropriated under this section for the base year;

(II) the sum of--

(aa) the amount it received for the preceding fiscal year; and

(bb) that amount multiplied by the percentage by which the increase in the funds appropriated from the preceding fiscal year exceeds 1.5 percent; or

(III) the sum of--

(aa) the amount it received for the preceding fiscal year; and

(bb) that amount multiplied by 90 percent of the percentage increase in the amount appropriated from the preceding fiscal year.

(iii) Notwithstanding clause (ii), no State's allocation under this paragraph shall exceed the sum of--

(I) the amount it received for the preceding fiscal year; and

(II) that amount multiplied by the sum of 1.5 percent and the percentage increase in the amount appropriated.

(C) If the amount available for allocations under this paragraph is insufficient to pay those allocations in full, those allocations shall be ratably reduced, subject to subparagraph (B)(i).

(4) Decrease in funds. If the amount available for allocations to States under paragraph (1) is less than the amount allocated to the States under this section for the preceding fiscal year, those allocations shall be calculated as follows:

(A) If the amount available for allocations is greater than the amount allocated to the States for the base year, each State shall be allocated the sum of--

(i) the amount it received for the base year; and

(ii) an amount that bears the same relation to any remaining funds as the increase the State received for the preceding fiscal year over the base year bears to the total of all such increases for all States.

(B) (i) If the amount available for allocations is equal to or less than the amount allocated to the States for the base year, each State shall be allocated the amount it received for the base year.

(ii) If the amount available is insufficient to make the allocations described in clause (i), those allocations shall be ratably reduced.

(f) State-level activities.

(1) General.

(A) Each State may retain not more than the amount described in subparagraph (B) for administration and other State-level activities in accordance with paragraphs (2) and (3).

(B) For each fiscal year, the Secretary shall determine and report to the State educational agency an amount that is 25 percent of the amount the State received under this section for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of--

(i) the percentage increase, if any, from the preceding fiscal year in the State's allocation under this section; or

(ii) the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(C) A State may use funds it retains under subparagraph (A) without regard to--

(i) the prohibition on commingling of funds in section 612(a)(18)(B) [*20 USCS § 1412*(a)(18)(B)]; and

(ii) the prohibition on supplanting other funds in section 612(a)(18)(C) [*20 USCS § 1412*(a)(18)(C)].

(2) State administration.

(A) For the purpose of administering this part [*20 USCS § § 1411* et seq.], including section 619 [*20 USCS § 1419*] (including the coordination of activities under this part [*20 USCS § § 1411* et seq.] with, and providing technical assistance to, other programs that provide services to children with disabilities)--

(i) each State may use not more than twenty percent of the maximum amount it may retain under paragraph (1)(A) for any fiscal year or $ 500,000 (adjusted by the cumulative rate of inflation since fiscal year 1998, as measured by the percentage increase, if any, in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), whichever is greater; and

(ii) each outlying area may use up to five percent of the amount it receives under this section for any fiscal year or $ 35,000, whichever is greater.

(B) Funds described in subparagraph (A) may also be used for the administration of part C of this Act [*20 USCS § § 1431* et seq.], if the State educational agency is the lead agency for the State under that part.

(3) Other State-level activities. Each State shall use any funds it retains under paragraph (1) and does not use for administration under paragraph (2) for any of the following:

(A) Support and direct services, including technical assistance and personnel development and training.

(B) Administrative costs of monitoring and complaint investigation, but only to the extent that those costs exceed the costs incurred for those activities during fiscal year 1985.

(C) To establish and implement the mediation process required by section 615(e) [*20 USCS § 1415*(e)], including providing for the costs of mediators and support personnel.

(D) To assist local educational agencies in meeting personnel shortages.

(E) To develop a State Improvement Plan under subpart 1 of part D [*20 USCS § § 1451* et seq.].

(F) Activities at the State and local levels to meet the performance goals established by the State under section 612(a)(16) [*20 USCS § 1412*(a)(16)] and to support implementation of the State Improvement Plan under subpart 1 of part D [*20 USCS § § 1451* et seq.] if the State receives funds under that subpart.

(G) To supplement other amounts used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under this section. This system shall be coordinated with and, to the extent appropriate, build on the system of coordinated services developed by the State under part C of this Act [*20 USCS § § 1431* et seq.].

(H) For subgrants to local educational agencies for the purposes described in paragraph (4)(A).

(4) (A) Subgrants to local educational agencies for capacity-building and improvement. In any fiscal year in which the percentage increase in the State's allocation under this section exceeds the rate of inflation (as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), each State shall reserve, from its allocation under this section, the amount described in subparagraph (B) to make subgrants to local educational agencies, unless that amount is less than $ 100,000, to assist them in providing direct services and in making systemic change to improve results for children with disabilities through one or more of the following:

(i) Direct services, including alternative programming for children who have been expelled from school, and services for children in correctional facilities, children enrolled in State-operated or State-supported schools, and children in charter schools.

(ii) Addressing needs or carrying out improvement strategies identified in the State's Improvement Plan under subpart 1 of part D [*20 USCS § § 1451* et seq.].

(iii) Adopting promising practices, materials, and technology, based on knowledge derived from education research and other sources.

(iv) Establishing, expanding, or implementing interagency agreements and arrangements between local educational agencies and other agencies or organizations concerning the provision of services to children with disabilities and their families.

(v) Increasing cooperative problem-solving between parents and school personnel and promoting the use of alternative dispute resolution.

(B) Maximum subgrant. For each fiscal year, the amount referred to in subparagraph (A) is--

(i) the maximum amount the State was allowed to retain under paragraph (1)(A) for the prior fiscal year, or for fiscal year 1998, 25 percent of the State's allocation for fiscal year 1997 under this section; multiplied by

(ii) the difference between the percentage increase in the State's allocation under this section and the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(5) Report on use of funds. As part of the information required to be submitted to the Secretary under section 612 [*20 USCS § 1412*], each State shall annually describe--

(A) how amounts retained under paragraph (1) will be used to meet the requirements of this part [*20 USCS §§ 1411* et seq.];

(B) how those amounts will be allocated among the activities described in paragraphs (2) and (3) to meet State priorities based on input from local educational agencies; and

(C) the percentage of those amounts, if any, that will be distributed to local educational agencies by formula.

(g) Subgrants to local educational agencies.

(1) Subgrants required. Each State that receives a grant under this section for any fiscal year shall distribute any funds it does not retain under subsection (f) (at least 75 percent of the grant funds) to local educational agencies in the State that have established their eligibility under section 613 [*20 USCS § 1413*], and to State agencies that received funds under section 614A(a) of this Act for fiscal year 1997, as then in effect [former *20 USCS § 1414a*(a)], and have established their eligibility under section 613 [*20 USCS § 1413*], for use in accordance with this part [*20 USCS §§ 1411* et seq.].

(2) Allocations to local educational agencies.

(A) Interim procedure. For each fiscal year for which funds are allocated to States under subsection (d)(2), each State shall allocate funds under paragraph (1) in accordance with section 611(d) of this Act, as in effect prior to the enactment of the Individuals with Disabilities Education Act Amendments of 1997 [former subsec. (d) of this section].

(B) Permanent procedure. For each fiscal year for which funds are allocated to States under subsection (e), each State shall allocate funds under paragraph (1) as follows:

(i) Base payments. The State shall first award each agency described in paragraph (1) the amount that agency would have received under this section for the base year, as defined in subsection (e)(2)(A), if the State had distributed 75 percent of its grant for that year under section 611(d), as then in effect.

(ii) Allocation of remaining funds. After making allocations under clause (i), the State shall--

(I) allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools within the agency's jurisdiction; and

(II) allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the State educational agency.

(3) Former chapter 1 State agencies.

(A) To the extent necessary, the State--

(i) shall use funds that are available under subsection (f)(1)(A) to ensure that each State agency that received fiscal year 1994 funds under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965 receives, from the combination of funds under subsection (f)(1)(A) and funds provided under paragraph (1) of this subsection, an amount equal to--

(I) the number of children with disabilities, aged 6 through 21, to whom the agency was providing special education and related services on December 1 of the fiscal year for which the funds were appropriated, subject to the limitation in subparagraph (B); multiplied by

(II) the per-child amount provided under such subpart for fiscal year 1994; and

(ii) may use those funds to ensure that each local educational agency that received fiscal year 1994 funds under that subpart for children who had transferred from a State-operated or State-supported school or program assisted under that subpart receives, from the combination of funds available under subsection (f)(1)(A) and funds provided under paragraph (1) of this subsection, an amount for each such child, aged 3 through 21 to whom the agency was providing special education and related services on December 1 of the fiscal year for which the funds were appropriated, equal to the per-child amount the agency received under that subpart for fiscal year 1994.

(B) The number of children counted under subparagraph (A)(i)(I) shall not exceed the number of children aged 3 through 21 for whom the agency received fiscal year 1994 funds under subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965.

(4) Reallocation of funds. If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by that agency with State and local funds, the State educational agency may reallocate any portion of the funds under this part [*20 USCS §§ 1411* et seq.] that are not needed by that local agency to provide a free appropriate public education to other local educational agencies in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas they serve.

(h) Definitions. For the purpose of this section--

(1) the term "average per-pupil expenditure in public elementary and secondary schools in the United States" means--

(A) without regard to the source of funds--

(i) the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the determination is made (or, if satisfactory data for that year are not available, during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the 50 States and the District of Columbia); plus

(ii) any direct expenditures by the State for the operation of those agencies; divided by

(B) the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year; and

(2) the term "State" means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(i) Use of amounts by Secretary of the Interior.

(1) Provision of amounts for assistance.

(A) In general. The Secretary of Education shall provide amounts to the Secretary of the Interior to meet the need for assistance for the education of children with disabilities on reservations aged 5 to 21, inclusive, enrolled in elementary and secondary schools for Indian children operated or funded by the Secretary of the Interior. The amount of such payment for any fiscal year shall be equal to 80 percent of the amount allotted under subsection (c) for that fiscal year.

(B) Calculation of number of children. In the case of Indian students aged 3 to 5, inclusive, who are enrolled in programs affiliated with the Bureau of Indian Affairs (hereafter in this subsection referred to as "BIA") schools and that are required by the States in which such schools are located to attain or maintain State accreditation, and which schools have such accreditation prior to the date of enactment of the Individuals with Disabilities Education Act Amendments of 1991 [enacted Oct. 7, 1991], the school shall be allowed to count those children for the purpose of distribution of the funds provided under this paragraph to the Secretary of the Interior. The Secretary of the Interior shall be responsible for meeting all of the requirements of this part [*20 USCS § § 1411* et seq.] for these children, in accordance with paragraph (2).

(C) Additional requirement. With respect to all other children aged 3 to 21, inclusive, on reservations, the State educational agency shall be responsible for ensuring that all of the requirements of this part [*20 USCS § § 1411* et seq.] are implemented.

(2) Submission of information. The Secretary of Education may provide the Secretary of the Interior amounts under paragraph (1) for a fiscal year only if the Secretary of the Interior submits to the Secretary of Education information that--

(A) demonstrates that the Department of the Interior meets the appropriate requirements, as determined by the Secretary of Education, of sections 612 [*20 USCS § 1412]* (including monitoring and evaluation activities) and 613 [*20 USCS § 1413];*

(B) includes a description of how the Secretary of the Interior will coordinate the provision of services under this part [*20 USCS § § 1411* et seq.] with local educational agencies, tribes and tribal organizations, and other private and Federal service providers;

(C) includes an assurance that there are public hearings, adequate notice of such hearings, and an opportunity for comment afforded to members of tribes, tribal governing bodies, and affected local school boards before the adoption of the policies, programs, and procedures described in subparagraph (A);

(D) includes an assurance that the Secretary of the Interior will provide such information as the Secretary of Education may require to comply with section 618 [*20 USCS § 1418];*

(E) includes an assurance that the Secretary of the Interior and the Secretary of Health and Human Services have entered into a memorandum of agreement, to be provided to the Secretary of Education, for the coordination of services, resources, and personnel between their respective Federal, State, and local offices and with State and local educational agencies and other entities to facilitate the provision of services to Indian children with disabilities residing on or near reservations (such agreement shall provide for the apportionment of responsibilities and costs including, but not limited to, child find, evaluation, diagnosis, remediation or therapeutic measures, and (where appropriate) equipment and medical or personal supplies as needed for a child to remain in school or a program); and

(F) includes an assurance that the Department of the Interior will cooperate with the Department of Education in its exercise of monitoring and oversight of this application, and any agreements entered into between the Secretary of the Interior and other entities under this part [*20 USCS § § 1411* et seq.], and will fulfill its duties under this part [*20 USCS § § 1411* et seq.].

Section 616(a) [*20 USCS § 1416*(a)] shall apply to the information described in this paragraph.

(3) Payments for education and services for Indian children with disabilities aged 3 through 5.

(A) In general. With funds appropriated under subsection (j), the Secretary of Education shall make payments to the Secretary of the Interior to be distributed to tribes or tribal organizations (as defined under section 4 of the Indian Self-Determination and Education Assistance Act [*25 USCS § 450b*]) or consortia of the above to provide for the coordination of assistance for special education and related services for children with disabilities aged 3 through 5 on reservations served by elementary and secondary schools for Indian children operated or funded by the Department of the Interior. The amount of such payments under subparagraph (B) for any fiscal year shall be equal to 20 percent of the amount allotted under subsection (c).

(B) Distribution of funds. The Secretary of the Interior shall distribute the total amount of the payment under subparagraph (A) by allocating to each tribe or tribal organization an amount based on the number of children with disabilities ages 3 through 5 residing on reservations as reported annually, divided by the total of those children served by all tribes or tribal organizations.

(C) Submission of information. To receive a payment under this paragraph, the tribe or tribal organization shall submit such figures to the Secretary of the Interior as required to determine the amounts to be allocated under subparagraph (B). This information shall be compiled and submitted to the Secretary of Education.

(D) Use of funds. The funds received by a tribe or tribal organization shall be used to assist in child find, screening, and other procedures for the early identification of children aged 3 through 5, parent training, and the provision of direct services. These activities may be carried out directly or through contracts or cooperative agreements with the BIA, local educational agencies, and other public or private nonprofit organizations. The tribe or tribal organization is encouraged to involve Indian parents in the development and implementation of these activities. The above entities shall, as appropriate, make referrals to local, State, or Federal entities for the provision of services or further diagnosis.

(E) Biennial report. To be eligible to receive a grant pursuant to subparagraph (A), the tribe or tribal organization shall provide to the Secretary of the Interior a biennial report of activities undertaken under this paragraph, including the number of contracts and cooperative agreements entered into, the number of children contacted and receiving services for each year, and the estimated number of children needing services during the 2 years following the one in which the report is made. The Secretary of the Interior shall include a summary of this information on a biennial basis in the report to the Secretary of Education required under this subsection. The Secretary of Education may require any additional information from the Secretary of the Interior.

(F) Prohibitions. None of the funds allocated under this paragraph may be used by the Secretary of the Interior for administrative purposes, including child count and the provision of technical assistance.

(4) Plan for coordination of services. The Secretary of the Interior shall develop and implement a plan for the coordination of services for all Indian children with disabilities residing on reservations covered under this Act [*20 USCS § § 1400* et seq.]. Such plan shall provide for the coordination of services benefiting these children from whatever source, including tribes, the Indian Health Service, other BIA divisions, and other Federal agencies. In developing the plan, the Secretary of the Interior shall consult with all interested and involved parties. It shall be based on the needs of the children and the system best suited for meeting those needs, and may involve the establishment of cooperative agreements between the BIA, other Federal agencies, and other entities. The plan shall also be distributed upon request to States, State and local educational agencies, and other agencies providing services to infants, toddlers, and children with disabilities, to tribes, and to other interested parties.

(5) Establishment of advisory board. To meet the requirements of section 612(a)(21) [*20 USCS § 1412*(a)(21)], the Secretary of the Interior shall establish, not later than 6 months after the date of the enactment of the Individuals with Disabilities Education Act Amendments of 1997 [enacted June 4, 1997], under the BIA, an advisory board composed of individuals involved in or concerned with the education and provision of services to Indian infants, toddlers, children, and youth with disabilities, including Indians with disabilities, Indian parents or guardians of such children, teachers, service providers, State and local educational officials, representatives of tribes or tribal organizations, representatives from State Interagency Coordinating Councils under section 641 [*20 USCS § 1441*] in States having reservations, and other members representing the various divisions and entities of the BIA. The chairperson shall be selected by the Secretary of the Interior. The advisory board shall--

(A) assist in the coordination of services within the BIA and with other local, State, and Federal agencies in the provision of education for infants, toddlers, and children with disabilities;

(B) advise and assist the Secretary of the Interior in the performance of the Secretary's responsibilities described in this subsection;

(C) develop and recommend policies concerning effective inter- and intra-agency collaboration, including modifications to regulations, and the elimination of barriers to inter- and intra-agency programs and activities;

(D) provide assistance and disseminate information on best practices, effective program coordination strategies, and recommendations for improved educational programming for Indian infants, toddlers, and children with disabilities; and

(E) provide assistance in the preparation of information required under paragraph (2)(D).

(6) Annual reports.

(A) In general. The advisory board established under paragraph (5) shall prepare and submit to the Secretary of the Interior and to the Congress an annual report containing a description of the activities of the advisory board for the preceding year.

(B) Availability. The Secretary of the Interior shall make available to the Secretary of Education the report described in subparagraph (A).

(j) Authorization of appropriations. For the purpose of carrying out this part [*20 USCS § § 1411* et seq.], other than section 619 [*20 USCS § 1419*], there are authorized to be appropriated such sums as may be necessary.

HISTORY: (April 13, 1970, P.L. 91-230, Title VI, Part B, § 611, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 49.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "Individuals with Disabilities Education Act Amendments of 1997", referred to in this section, is Act June 4, 1997, P.L. 105-17, 111 Stat. 37, which is classified generally to *20 USCS § § 1400* et seq. For full classification of such Act, consult USCS Tables volumes.

"Public Law 95-134", referred to in this section, is Act Oct. 15, 1977, P.L. 95-134, 91 Stat. 1159. For full classification of such Act, consult USCS Tables volumes.

"Public Law 104-134", referred to in this section, is Act April 26, 1996, P.L. 104-134, 110 Stat. 1321. For full classification of such Act, consult USCS Tables volumes.

"Subpart 2 of part D of chapter 1 of title I of the Elementary and Secondary Education Act of 1965", referred to in this section, was subpart 2 of part D of chapter 1 of title 1 of Act April 11, 1965, P.L. 89-10, which appeared as *20 USCS § § 2791* et seq. prior to the general revision of such Act by Act Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3519. The revised Act appears as *20 USCS § § 6301* et seq.

Explanatory notes:

A prior § 1411 (Act April 13, 1970, P.L. 91-230, Title VI, Part B, § 611, 84 Stat. 178; Aug. 21, 1974, P.L. 93-380, Title VI, Part B, § 614(a), (e)(1), (2), 88 Stat. 580, 582; Nov. 29, 1975, P.L. 94-142, § § 2(a)(1)-(3), 5(a), (c), 89 Stat. 773, 776, 794; Nov. 1, 1978, P.L. 95-561, Title XIII, Part D, § 1341(a), 92 Stat. 2364; June 14, 1980, P.L. 96-270, § 13, 94 Stat. 498; Dec. 2, 1983, P.L. 98-199, § § 3(b) in part, 15, 97 Stat. 1358, 1374; Nov. 22, 1985, P.L. 99-159, Title VI, § 601, 99 Stat. 904; July 9, 1986, P.L. 99-362, § 2, 100 Stat. 769; Oct. 8, 1986, P.L. 99-457, Title II, § 201(b), Title IV, § § 403, 404, 100 Stat. 1158, 1173; Nov. 7, 1988, P.L. 100-630, Title I, § 102(a), 102 Stat. 3291; Oct. 30, 1990, P.L. 101-476, Title II, § 201, Title IX, § 901 (b)(25)-(32), 104 Stat. 1111, 1143; July 25, 1991, P.L. 102-73, Title III, § 802(d)(2), (3), 105 Stat. 361; Oct. 7, 1991, P.L. 102-119, § § 4, 25 (a)(4), (19), (b), 105 Stat. 587, 606, 607; Oct. 20, 1994, P.L. 103-382, Title III, Part A, § 311, 108 Stat. 3931) was omitted in the general amendment of Title VI of Act April 13, 1970, P.L. 91-230, by Act June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37. Such section related to entitlements and allocations.

Effective date of section:

This section takes effect beginning with funds appropriated for fiscal year 1998, pursuant to § 201(a)(2)(D) of June 4, 1997, P.L. 105-17, which appears as *20 USCS § 1400* note.

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION
CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES
ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 1412 (2004)

§ 1412. State eligibility

(a) In general. A State is eligible for assistance under this part [*20 USCS § § 1411* et seq.] for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education.

(A) In general. A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation. The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this part [*20 USCS § § 1411* et seq.] be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:

(I) were not actually identified as being a child with a disability under section 602(3) of this Act [*20 USCS § 1401*(3)]; or

(II) did not have an individualized education program under this part [*20 USCS § § 1411* et seq.].

(2) Full educational opportunity goal. The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

(3) Child find.

(A) In general. All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction. Nothing in this Act [*20 USCS § § 1400* et seq.] requires that children be classified by their disability so long as each child who has a disability listed in section 602 [*20 USCS § 1401*] and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part [*20 USCS § § 1411* et seq.].

(4) Individualized education program. An individualized education program, or an individualized family service plan that meets the requirements of section 636(d) [*20 USCS § 1436*(d)], is developed, reviewed, and revised for each child with a disability in accordance with section 614(d) [*20 USCS § 1414*(d)].

(5) Least restrictive environment.

(A) In general. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate

schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(B) Additional requirement.

(i) In general. If the State uses a funding mechanism by which the State distributes State funds on the basis of the type of setting in which a child is served, the funding mechanism does not result in placements that violate the requirements of subparagraph (A).

(ii) Assurance. If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that it will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

(6) Procedural safeguards.

(A) In general. Children with disabilities and their parents are afforded the procedural safeguards required by section 615 [*20 USCS § 1415*].

(B) Additional procedural safeguards. Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(7) Evaluation. Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 614 [*20 USCS § 1414*].

(8) Confidentiality. Agencies in the State comply with section 617(c) [*20 USCS § 1417*(c)] (relating to the confidentiality of records and information).

(9) Transition from part C to preschool programs. Children participating in early-intervention programs assisted under part C [*20 USCS § § 1431* et seq.], and who will participate in preschool programs assisted under this part [*20 USCS § § 1411* et seq.], experience a smooth and effective transition to those preschool programs in a manner consistent with section 637(a)(8) [*20 USCS § 1437*(a)(8)]. By the third birthday of such a child, an individualized education program or, if consistent with sections 614(d)(2)(B) and 636(d) [*20 USCS § § 1414*(d)(2)(B), 1436(d)], an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 637(a)(8) [*20 USCS § 1437*(a)(8)].

(10) Children in private schools.

(A) Children enrolled in private schools by their parents.

(i) In general. To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part [*20 USCS § § 1411* et seq.] by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part [*20 USCS § § 1411* et seq.].

(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.

(ii) Child-find requirement. The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.

(B) Children placed in, or referred to, private schools by public agencies.

(i) In general. Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part [*20 USCS § § 1411* et seq.] or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards. In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency.

(i) In general. Subject to subparagraph (A), this part [*20 USCS § § 1411* et seq.] does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement. The cost of reimbursement described in clause (ii) may be reduced or denied--

(I) if--

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in division (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 615(b)(7) [*20 USCS § 1415*(b)(7)], of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception. Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement may not be reduced or denied for failure to provide such notice if--

(I) the parent is illiterate and cannot write in English;

(II) compliance with clause (iii)(I) would likely result in physical or serious emotional harm to the child;

(III) the school prevented the parent from providing such notice; or

(IV) the parents had not received notice, pursuant to section 615 [*20 USCS § 1415*], of the notice requirement in clause (iii)(I).

(11) State educational agency responsible for general supervision.

(A) In general. The State educational agency is responsible for ensuring that--

(i) the requirements of this part [*20 USCS § § 1411* et seq.] are met; and

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency--

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency.

(B) Limitation. Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

(C) Exception. Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this part [*20 USCS § § 1411* et seq.] are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

(12) Obligations related to and methods of ensuring services.

(A) Establishing responsibility for services. The Chief Executive Officer or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility. An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to

children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State Medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

(ii) Conditions and terms of reimbursement. The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

(iii) Interagency disputes. Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other agencies or otherwise implement the provisions of the agreement or mechanism.

(iv) Coordination of services procedures. Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

(B) Obligation of public agency.

(i) In general. If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy or pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in sections 602(1) [*20 USCS § 1401*(1)] relating to assistive technology devices, 602(2) [*20 USCS § 1401*(2)] relating to assistive technology services, 602(22) [*20 USCS § 1401*(22)] relating to related services, 602(29) [*20 USCS § 1401*(29)] relating to supplementary aids and services, and 602(30) [*20 USCS § 1401*(30)] relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement.

(ii) Reimbursement for services by public agency. If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency may then claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

(C) Special rule. The requirements of subparagraph (A) may be met through--

(i) state statute or regulation;

(ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or

(iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer.

(13) Procedural requirements relating to local educational agency eligibility. The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this part [*20 USCS § § 1411* et seq.] without first affording that agency reasonable notice and an opportunity for a hearing.

(14) Comprehensive system of personnel development. The State has in effect, consistent with the purposes of this Act [*20 USCS § § 1400* et seq.] and with section 635(a)(8) [*20 USCS § 1435*(a)(8)], a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of section 653 [*20 USCS § 1453*(b)(2)(B), (c)(3)(D)].

(15) Personnel standards.

(A) In general. The State educational agency has established and maintains standards to ensure that personnel necessary to carry out this part [*20 USCS § § 1411* et seq.] are appropriately and adequately prepared and trained.

(B) Standards described. Such standards shall--

(i) be consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;

(ii) to the extent the standards described in subparagraph (A) are not based on the highest requirements in the State applicable to a specific profession or discipline, the State is taking steps to require retraining or hiring of personnel that meet appropriate professional requirements in the State; and

(iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulations, or written policy, in meeting the requirements of this part [*20 USCS § § 1411* et seq.] to be used to assist in the provision of special education and related services to children with disabilities under this part [*20 USCS § § 1411* et seq.].

(C) Policy. In implementing this paragraph, a State may adopt a policy that includes a requirement that local educational agencies in the State make an ongoing good-faith effort to recruit and hire appropriately and adequately trained personnel to provide special education and related services to children with disabilities, including, in a geographic area of the State where there is a shortage of such personnel, the most qualified individuals available who are making satisfactory progress toward completing applicable course work necessary to meet the standards described in subparagraph (B)(i), consistent with State law, and the steps described in subparagraph (B)(ii) within three years.

(16) Performance goals and indicators. The State--

(A) has established goals for the performance of children with disabilities in the State that--

(i) will promote the purposes of this Act [*20 USCS § § 1400* et seq.], as stated in section 601(d) [*20 USCS § 1400*(d)]; and

(ii) are consistent, to the maximum extent appropriate, with other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving those goals that, at a minimum, address the performance of children with disabilities on assessments, drop-out rates, and graduation rates;

(C) will, every two years, report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A); and

(D) based on its assessment of that progress, will revise its State improvement plan under subpart 1 of part D [*20 USCS § § 1451* et seq.] as may be needed to improve its performance, if the State receives assistance under that subpart.

(17) Participation in assessments.

(A) In general. Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the State or local educational agency--

(i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and

(ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments.

(B) Reports. The State educational agency makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments.

(ii) The number of those children participating in alternate assessments.

(iii) (I) The performance of those children on regular assessments (beginning not later than July 1, 1998) and on alternate assessments (not later than July 1, 2000), if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children.

(II) Data relating to the performance of children described under subclause (I) shall be disaggregated--

(aa) for assessments conducted after July 1, 1998; and

(bb) for assessments conducted before July 1, 1998, if the State is required to disaggregate such data prior to July 1, 1998.

(18) Supplementation of State, local, and other Federal funds.

(A) Expenditures. Funds paid to a State under this part [*20 USCS § § 1411* et seq.] will be expended in accordance with all the provisions of this part [*20 USCS § § 1411* et seq.].

(B) Prohibition against commingling. Funds paid to a State under this part [*20 USCS § § 1411* et seq.] will not be commingled with State funds.

(C) Prohibition against supplantation and conditions for waiver by Secretary. Except as provided in section 613 [*20 USCS § 1413*], funds paid to a State under this part [*20 USCS § § 1411* et seq.] will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this part [*20 USCS § § 1411* et seq.] and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

(19) Maintenance of State financial support.

(A) In general: The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

(B) Reduction of funds for failure to maintain support. The Secretary shall reduce the allocation of funds under section 611 [*20 USCS § 1411*] for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

(C) Waivers for exceptional or uncontrollable circumstances. The Secretary may waive the requirement of subparagraph (A) for a State, for one fiscal year at a time, if the Secretary determines that--

(i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or

(ii) the State meets the standard in paragraph (18)(C) of this section for a waiver of the requirement to supplement, and not to supplant, funds received under this part [*20 USCS § § 1411* et seq.].

(D) Subsequent years. If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

(E) Regulations.

(i) The Secretary shall, by regulation, establish procedures (including objective criteria and consideration of the results of compliance reviews of the State conducted by the Secretary) for determining whether to grant a waiver under subparagraph (C)(ii).

(ii) The Secretary shall publish proposed regulations under clause (i) not later than 6 months after the date of the enactment of the Individuals with Disabilities Education Act Amendments of 1997 [enacted June 4, 1997], and shall issue final regulations under clause (i) not later than 1 year after such date of enactment.

(20) Public participation. Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

(21) State advisory panel.

(A) In general. The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

(B) Membership. Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, that is representative of the State population and that is composed of individuals involved in, or concerned with, the education of children with disabilities, including--

(i) parents of children with disabilities;

(ii) individuals with disabilities;

(iii) teachers;

(iv) representatives of institutions of higher education that prepare special education and related services personnel;

(v) State and local education officials;

(vi) administrators of programs for children with disabilities;

(vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;

(viii) representatives of private schools and public charter schools;

(ix) at least one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities; and

(x) representatives from the State juvenile and adult corrections agencies.

(C) Special rule. A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities.

(D) Duties. The advisory panel shall--

(i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;

(ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;

(iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 618 [*20 USCS § 1418*];

(iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this part [*20 USCS § § 1411* et seq.]; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

(22) Suspension and expulsion rates.

(A) In general. The State educational agency examines data to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities--

(i) among local educational agencies in the State; or

(ii) compared to such rates for nondisabled children within such agencies.

(B) Review and revision of policies. If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of behavioral interventions, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this Act [*20 USCS § § 1400* et seq.].

(b) State educational agency as provider of free appropriate public education or direct services. If the State educational agency provides free appropriate public education to children with disabilities, or provides direct services to such children, such agency--

(1) shall comply with any additional requirements of section 613(a) [*20 USCS § 1413*(a)], as if such agency were a local educational agency; and

(2) may use amounts that are otherwise available to such agency under this part [*20 USCS § § 1411* et seq.] to serve those children without regard to section 613(a)(2)(A)(i) [*20 USCS § 1413*(a)(2)(A)(i)] (relating to excess costs).

(c) Exception for prior State plans.

(1) In general. If a State has on file with the Secretary policies and procedures that demonstrate that such State meets any requirement of subsection (a), including any policies and procedures filed under this part [former *20 USCS § § 1411* et seq.] as in effect before the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the Secretary shall consider such State to have met such requirement for purposes of receiving a grant under this part [*20 USCS § § 1411* et seq.].

(2) Modifications made by State. Subject to paragraph (3), an application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State deems necessary. This section shall apply to a modification to an application to the same extent and in the same manner as this section applies to the original plan.

(3) Modifications required by the Secretary. If, after the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the provisions of this Act [*20 USCS § § 1400* et seq.] are amended (or the regulations developed to carry out this Act [*20 USCS § § 1400* et seq.] are amended), or there is a new interpretation of this Act [*20 USCS § § 1400* et seq.] by a Federal court or a State's highest court, or there is an official finding of noncompliance with Federal law or regulations, the Secretary may require a State to modify its application only to the extent necessary to ensure the State's compliance with this part [*20 USCS § § 1411* et seq.].

(d) Approval by the Secretary.

(1) In general. If the Secretary determines that a State is eligible to receive a grant under this part [*20 USCS § § 1411* et seq.], the Secretary shall notify the State of that determination.

(2) Notice and hearing. The Secretary shall not make a final determination that a State is not eligible to receive a grant under this part [*20 USCS § § 1411* et seq.] until after providing the State--

(A) with reasonable notice; and

(B) with an opportunity for a hearing.

(e) Assistance under other Federal programs. Nothing in this title [*20 USCS § § 1400* et seq.] permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act [*42 USCS § § 701* et seq. and 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities in the State.

(f) By-pass for children in private schools.

(1) In general. If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983 [enacted Dec. 2, 1983], a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private elementary and secondary schools as required by subsection (a)(10)(A),

the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements which shall be subject to the requirements of such subsection.

(2) Payments.

(A) Determination of amounts. If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child that does not exceed the amount determined by dividing--

(i) the total amount received by the State under this part [*20 USCS § § 1411* et seq.] for such fiscal year; by

(ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 618 [*20 USCS § 1418*].

(B) Withholding of certain amounts. Pending final resolution of any investigation or complaint that could result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates would be necessary to pay the cost of services described in subparagraph (A).

(C) Period of payments. The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A).

(3) Notice and hearing.

(A) In general. The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for at least 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

(B) Review of action. If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of title 28, United States Code.

(C) Review of findings of fact. The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(D) Jurisdiction of court of appeals; review by United States Supreme Court. Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

HISTORY: (April 13, 1970, P.L. 91-230, Title VI, Part B, § 612, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 60.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

As to the "effective date of the Individuals with Disabilities Education Act Amendments of 1997", referred to in this section, see § 201(a), (b), and (c) of Act June 4, 1997, P.L. 105-17, which appear as notes to *20 USCS § § 1400*, 1431 and 1451, respectively.

Explanatory notes:

A prior § 1412 (Act April 13, 1970, P.L. 91-230, Title VI, Part B, § 612, 84 Stat. 178; June 23, 1972, P.L. 92-318, Title IV, Part B, § 421(b)(1)(C), 86 Stat. 341; Aug. 21, 1974, P.L. 93-380, Title VI, Part B, § § 614(b), (f)(1), 615(a), Title VIII, Part D, § 843(b), 88 Stat. 581, 582, 611; Nov. 29, 1975, P.L. 94-142, § § 2(a)(4), (c), (d), 5(a), 89 Stat. 773, 774, 780; Dec. 2, 1983, P.L. 98-199, § 3(b), 97 Stat. 1358; Oct. 8, 1986, P.L. 99-457, Title II, § 203(a), 100 Stat. 1158; Nov. 7, 1988, P.L. 100-630, Title I, § 102(b), 102 Stat. 3291; Oct. 30, 1990, P.L. 101-476, Title IX, § 901(b) (33)-(46), (c), 104 Stat. 1143, 1144, 1151; Oct. 7, 1991, P.L. 102-119, § 25(a)(5), (b), 105 Stat. 606, 607) was omitted in the general amendment of Title VI of Act April 13, 1970, P.L. 91-230, by Act June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37. Such section set out eligibility requirements for assistance.

Effective date of section:

This section takes effect upon enactment, except for paras. (4), (14), and (16) of subsec. (a) which take effect on July 1, 1998, pursuant to § 201(a) of Act June 4, 1997, P.L. 105-17, which appears as *20 USCS § 1400* note.

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES

ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 1413 (2004)

§ 1413. Local educational agency eligibility

(a) In general. A local educational agency is eligible for assistance under this part [*20 USCS § § 1411* et seq.] for a fiscal year if such agency demonstrates to the satisfaction of the State educational agency that it meets each of the following conditions:

(1) Consistency with State policies. The local educational agency, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 612 [*20 USCS § 1412*].

(2) Use of amounts.

(A) In general. Amounts provided to the local educational agency under this part [*20 USCS § § 1411* et seq.] shall be expended in accordance with the applicable provisions of this part [*20 USCS § § 1411* et seq.] and--

(i) shall be used only to pay the excess costs of providing special education and related services to children with disabilities;

(ii) shall be used to supplement State, local, and other Federal funds and not to supplant such funds; and

(iii) shall not be used, except as provided in subparagraphs (B) and (C), to reduce the level of expenditures for the education of children with disabilities made by the local educational agency from local funds below the level of those expenditures for the preceding fiscal year.

(B) Exception. Notwithstanding the restriction in subparagraph (A)(iii), a local educational agency may reduce the level of expenditures where such reduction is attributable to--

(i) the voluntary departure, by retirement or otherwise, or departure for just cause, of special education personnel;

(ii) a decrease in the enrollment of children with disabilities;

(iii) the termination of the obligation of the agency, consistent with this part [*20 USCS § § 1411* et seq.], to provide a program of special education to a particular child with a disability that is an exceptionally costly program, as determined by the State educational agency, because the child--

(I) has left the jurisdiction of the agency;

(II) has reached the age at which the obligation of the agency to provide a free appropriate public education to the child has terminated; or

(III) no longer needs such program of special education; or

(iv) the termination of costly expenditures for long-term purchases, such as the acquisition of equipment or the construction of school facilities.

(C) Treatment of Federal funds in certain fiscal years.

(i) Notwithstanding clauses (ii) and (iii) of subparagraph (A), for any fiscal year for which amounts appropriated to carry out section 611 [*20 USCS § 1411*] exceeds $ 4,100,000,000, a local educational agency may treat as local funds, for the purpose of such clauses, up to 20 percent of the amount of funds it receives under this part [*20 USCS § § 1411* et seq.] that exceeds the amount it received under this part [*20 USCS § § 1411* et seq.] for the previous fiscal year.

(ii) Notwithstanding clause (i), if a State educational agency determines that a local educational agency is not meeting the requirements of this part [*20 USCS § § 1411* et seq.], the State educational agency may prohibit the local educational agency from treating funds received under this part [*20 USCS § § 1411* et seq.] as local funds under clause (i) for any fiscal year, only if it is authorized to do so by the State constitution or a State statute.

(D) Schoolwide programs under title I of the ESEA. Notwithstanding subparagraph (A) or any other provision of this part [*20 USCS § § 1411* et seq.], a local educational agency may use funds received under this part [*20 USCS § § 1411* et seq.] for any fiscal year to carry out a schoolwide program under section 1114 of the Elementary and Secondary Education Act of 1965 [*20 USCS § 6314*], except that the amount so used in any such program shall not exceed--

(i) the number of children with disabilities participating in the schoolwide program; multiplied by

(ii) (I) the amount received by the local educational agency under this part [*20 USCS § § 1411* et seq.] for that fiscal year; divided by

(II) the number of children with disabilities in the jurisdiction of that agency.

(3) Personnel development. The local educational agency--

(A) shall ensure that all personnel necessary to carry out this part [*20 USCS § § 1411* et seq.] are appropriately and adequately prepared, consistent with the requirements of section 653(c)(3)(D) [*20 USCS § 1453*(c)(3)(D)]; and

(B) to the extent such agency determines appropriate, shall contribute to and use the comprehensive system of personnel development of the State established under section 612(a)(14) [*20 USCS § 1412*(a)(14)].

(4) Permissive use of funds. Notwithstanding paragraph (2)(A) or section 612(a)(18)(B) [*20 USCS § 1412*(a)(18)(B)] (relating to commingled funds), funds provided to the local educational agency under this part [*20 USCS § § 1411* et seq.] may be used for the following activities:

(A) Services and aids that also benefit nondisabled children. For the costs of special education and related services and supplementary aids and services provided in a regular class or other education-related setting to a child with a disability in accordance with the individualized education program of the child, even if one or more nondisabled children benefit from such services.

(B) Integrated and coordinated services system. To develop and implement a fully integrated and coordinated services system in accordance with subsection (f).

(5) Treatment of charter schools and their students. In carrying out this part [*20 USCS § § 1411* et seq.] with respect to charter schools that are public schools of the local educational agency, the local educational agency--

(A) serves children with disabilities attending those schools in the same manner as it serves children with disabilities in its other schools; and

(B) provides funds under this part [*20 USCS § § 1411* et seq.] to those schools in the same manner as it provides those funds to its other schools.

(6) Information for State educational agency. The local educational agency shall provide the State educational agency with information necessary to enable the State educational agency to carry out its duties under this part [*20 USCS § § 1411* et seq.], including, with respect to paragraphs (16) and (17) of section 612(a) [*20 USCS § 1412*(a)(16), (17)], information relating to the performance of children with disabilities participating in programs carried out under this part [*20 USCS § § 1411* et seq.].

(7) Public information. The local educational agency shall make available to parents of children with disabilities and to the general public all documents relating to the eligibility of such agency under this part [*20 USCS § § 1411* et seq.].

(b) Exception for prior local plans.

(1) In general. If a local educational agency or State agency has on file with the State educational agency policies and procedures that demonstrate that such local educational agency, or such State agency, as the case may be, meets any requirement of subsection (a), including any policies and procedures filed under this part as in effect before the effective date of the Individuals with Disabilities Education Act Amendments of 1997 [former *20 USCS § § 1411* et seq.], the State educational agency shall consider such local educational agency or State agency, as the case may be, to have met such requirement for purposes of receiving assistance under this part [*20 USCS § § 1411* et seq.].

(2) Modification made by local educational agency. Subject to paragraph (3), an application submitted by a local educational agency in accordance with this section shall remain in effect until it submits to the State educational agency such modifications as the local educational agency deems necessary.

(3) Modifications required by State educational agency. If, after the effective date of the Individuals with Disabilities Education Act Amendments of 1997, the provisions of this Act [*20 USCS § § 1400* et seq.] are amended (or the regulations developed to carry out this Act [*20 USCS § § 1400* et seq.] are amended), or there is a new interpretation of this Act [*20 USCS § § 1400* et seq.] by Federal or State courts, or there is an official finding of noncompliance with Federal or State law or regulations, the State educational agency may require a local educational agency to modify its

application only to the extent necessary to ensure the local educational agency's compliance with this part [*20 USCS § § 1411* et seq.] or State law.

(c) Notification of local educational agency or State agency in case of ineligibility. If the State educational agency determines that a local educational agency or State agency is not eligible under this section, the State educational agency shall notify the local educational agency or State agency, as the case may be, of that determination and shall provide such local educational agency or State agency with reasonable notice and an opportunity for a hearing.

(d) Local educational agency compliance.

(1) In general. If the State educational agency, after reasonable notice and an opportunity for a hearing, finds that a local educational agency or State agency that has been determined to be eligible under this section is failing to comply with any requirement described in subsection (a), the State educational agency shall reduce or shall not provide any further payments to the local educational agency or State agency until the State educational agency is satisfied that the local educational agency or State agency, as the case may be, is complying with that requirement.

(2) Additional requirement. Any State agency or local educational agency in receipt of a notice described in paragraph (1) shall, by means of public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency.

(3) Consideration. In carrying out its responsibilities under paragraph (1), the State educational agency shall consider any decision made in a hearing held under section 615 [*20 USCS § 1415*] that is adverse to the local educational agency or State agency involved in that decision.

(e) Joint establishment of eligibility.

(1) Joint establishment.

(A) In general. A State educational agency may require a local educational agency to establish its eligibility jointly with another local educational agency if the State educational agency determines that the local educational agency would be ineligible under this section because the local educational agency would not be able to establish and maintain programs of sufficient size and scope to effectively meet the needs of children with disabilities.

(B) Charter school exception. A State educational agency may not require a charter school that is a local educational agency to jointly establish its eligibility under subparagraph (A) unless it is explicitly permitted to do so under the State's charter school statute.

(2) Amount of payments. If a State educational agency requires the joint establishment of eligibility under paragraph (1), the total amount of funds made available to the affected local educational agencies shall be equal to the sum of the payments that each such local educational agency would have received under section 611(g) [*20 USCS § 1411*(g)] if such agencies were eligible for such payments.

(3) Requirements. Local educational agencies that establish joint eligibility under this subsection shall--

(A) adopt policies and procedures that are consistent with the State's policies and procedures under section 612(a) [*20 USCS § 1412*(a)]; and

(B) be jointly responsible for implementing programs that receive assistance under this part [*20 USCS § § 1411* et seq.].

(4) Requirements for educational service agencies.

(A) In general. If an educational service agency is required by State law to carry out programs under this part [*20 USCS § § 1411* et seq.], the joint responsibilities given to local educational agencies under this subsection shall--

(i) not apply to the administration and disbursement of any payments received by that educational service agency; and

(ii) be carried out only by that educational service agency.

(B) Additional requirement. Notwithstanding any other provision of this subsection, an educational service agency shall provide for the education of children with disabilities in the least restrictive environment, as required by section 612(a)(5) [*20 USCS § 1412*(a)(5)].

(f) Coordinated services system.

(1) In general. A local educational agency may not use more than 5 percent of the amount such agency receives under this part [*20 USCS § § 1411* et seq.] for any fiscal year, in combination with other amounts (which shall include amounts other than education funds), to develop and implement a coordinated services system designed to improve results for children and families, including children with disabilities and their families.

(2) Activities. In implementing a coordinated services system under this subsection, a local educational agency may carry out activities that include--

(A) improving the effectiveness and efficiency of service delivery, including developing strategies that promote accountability for results;

(B) service coordination and case management that facilitates the linkage of individualized education programs under this part [*20 USCS § § 1411* et seq.] and individualized family service plans under part C [*20 USCS § § 1431* et seq.] with individualized service plans under multiple Federal and State programs, such as title I of the Rehabilitation Act of 1973 [*29 USCS § § 720* et seq.] (vocational rehabilitation), title XIX of the Social Security Act [*42 USCS § § 1396* et seq.] (Medicaid), and title XVI of the Social Security Act [*42 USCS § § 1381* et seq.] (supplemental security income);

(C) developing and implementing interagency financing strategies for the provision of education, health, mental health, and social services, including transition services and related services under this Act [*20 USCS § § 1400* et seq.]; and

(D) interagency personnel development for individuals working on coordinated services.

(3) [Deleted]

(g) School-based improvement plan.

(1) In general. Each local educational agency may, in accordance with paragraph (2), use funds made available under this part [*20 USCS § § 1411* et seq.] to permit a public school within the jurisdiction of the local educational agency to design, implement, and evaluate a school-based improvement plan that is consistent with the purposes described in section 651(b) [*20 USCS § 1451*(b)] and that is designed to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with subparagraphs (A) and (B) of subsection (a)(4) in that public school.

(2) Authority.

(A) In general. A State educational agency may grant authority to a local educational agency to permit a public school described in paragraph (1) (through a school-based standing panel established under paragraph (4)(B)) to design, implement, and evaluate a school-based improvement plan described in paragraph (1) for a period not to exceed 3 years.

(B) Responsibility of local educational agency. If a State educational agency grants the authority described in subparagraph (A), a local educational agency that is granted such authority shall have the sole responsibility of oversight of all activities relating to the design, implementation, and evaluation of any school-based improvement plan that a public school is permitted to design under this subsection.

(3) Plan requirements. A school-based improvement plan described in paragraph (1) shall--

(A) be designed to be consistent with the purposes described in section 651(b) [*20 USCS § 1451*(b)] and to improve educational and transitional results for all children with disabilities and, as appropriate, for other children consistent with subparagraphs (A) and (B) of subsection (a)(4), who attend the school for which the plan is designed and implemented;

(B) be designed, evaluated, and, as appropriate, implemented by a school-based standing panel established in accordance with paragraph (4)(B);

(C) include goals and measurable indicators to assess the progress of the public school in meeting such goals; and

(D) ensure that all children with disabilities receive the services described in the individualized education programs of such children.

(4) Responsibilities of the local educational agency. A local educational agency that is granted authority under paragraph (2) to permit a public school to design, implement, and evaluate a school-based improvement plan shall--

(A) select each school under the jurisdiction of such agency that is eligible to design, implement, and evaluate such a plan;

(B) require each school selected under subparagraph (A), in accordance with criteria established by such local educational agency under subparagraph (C), to establish a school-based standing panel to carry out the duties described in paragraph (3)(B);

(C) establish--

(i) criteria that shall be used by such local educational agency in the selection of an eligible school under subparagraph (A);

(ii) criteria that shall be used by a public school selected under subparagraph (A) in the establishment of a school-based standing panel to carry out the duties described in paragraph (3)(B) and that shall ensure that the membership of such panel reflects the diversity of the community in which the public school is located and includes, at a minimum--

(I) parents of children with disabilities who attend such public school, including parents of children with disabilities from unserved and underserved populations, as appropriate;

(II) special education and general education teachers of such public school;

(III) special education and general education administrators, or the designee of such administrators, of such public school; and

(IV) related services providers who are responsible for providing services to the children with disabilities who attend such public school; and

(iii) criteria that shall be used by such local educational agency with respect to the distribution of funds under this part [*20 USCS § § 1411* et seq.] to carry out this subsection;

(D) disseminate the criteria established under subparagraph (C) to local school district personnel and local parent organizations within the jurisdiction of such local educational agency;

(E) require a public school that desires to design, implement, and evaluate a school-based improvement plan to submit an application at such time, in such manner, and accompanied by such information as such local educational agency shall reasonably require; and

(F) establish procedures for approval by such local educational agency of a school-based improvement plan designed under this subsection.

(5) Limitation. A school-based improvement plan described in paragraph (1) may be submitted to a local educational agency for approval only if a consensus with respect to any matter relating to the design, implementation, or evaluation of the goals of such plan is reached by the school-based standing panel that designed such plan.

(6) Additional requirements.

(A) Parental involvement. In carrying out the requirements of this subsection, a local educational agency shall ensure that the parents of children with disabilities are involved in the design, evaluation, and, where appropriate, implementation of school-based improvement plans in accordance with this subsection.

(B) Plan approval. A local educational agency may approve a school-based improvement plan of a public school within the jurisdiction of such agency for a period of 3 years, if--

(i) the approval is consistent with the policies, procedures, and practices established by such local educational agency and in accordance with this subsection; and

(ii) a majority of parents of children who are members of the school-based standing panel, and a majority of other members of the school-based standing panel, that designed such plan agree in writing to such plan.

(7) Extension of plan. If a public school within the jurisdiction of a local educational agency meets the applicable requirements and criteria described in paragraphs (3) and (4) at the expiration of the 3-year approval period described in paragraph (6)(B), such agency may approve a school-based improvement plan of such school for an additional 3-year period.

(h) Direct services by the State educational agency.

(1) In general. A State educational agency shall use the payments that would otherwise have been available to a local educational agency or to a State agency to provide special education and related services directly to children with disabilities residing in the area served by that local agency, or for whom that State agency is responsible, if the State educational agency determines that the local education agency or State agency, as the case may be--

(A) has not provided the information needed to establish the eligibility of such agency under this section;

(B) is unable to establish and maintain programs of free appropriate public education that meet the requirements of subsection (a);

(C) is unable or unwilling to be consolidated with one or more local educational agencies in order to establish and maintain such programs; or

(D) has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of such children.

(2) Manner and location of education and services. The State educational agency may provide special education and related services under paragraph (1) in such manner and at such locations (including regional or State centers) as the State agency considers appropriate. Such education and services shall be provided in accordance with this part [*20 USCS § § 1411* et seq.].

(i) State agency eligibility. Any State agency that desires to receive a subgrant for any fiscal year under section 611(g) [*20 USCS § 1411*(g)] shall demonstrate to the satisfaction of the State educational agency that--

(1) all children with disabilities who are participating in programs and projects funded under this part [*20 USCS § § 1411* et seq.] receive a free appropriate public education, and that those children and their parents are provided all the rights and procedural safeguards described in this part [*20 USCS § § 1411* et seq.]; and

(2) the agency meets such other conditions of this section as the Secretary determines to be appropriate.

(j) Disciplinary information. The State may require that a local educational agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit such statement to the same extent that such disciplinary information is included in, and transmitted with, the student records of nondisabled children. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child. If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current individualized education program and any such statement of current or previous disciplinary action that has been taken against the child.

HISTORY: (April 13, 1970, P.L. 91-230, Title VI, Part B, § 613, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 73.)

(As amended Jan. 8, 2002, P.L. 107-110, Title X, Part G, § 1076(i), 115 Stat. 2091.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

As to the "effective date of the Individuals with Disabilities Education Act Amendments of 1997", referred to in this section, see § 201(a), (b), and (c) of Act June 4, 1997, P.L. 105-17, which appear as notes to *20 USCS § § 1400,* 1431 and 1451, respectively.

Explanatory notes:

A prior § 1413 (Act April 13, 1970. P.L. 91-230, Title VI, Part B, § 613, 84 Stat. 179; Aug. 21, 1974, P.L. 93-380, Title VI, Part B, § § 614(c), (d), 615(b), (c), Title VIII, Part D, § 843(b)(2), 88 Stat. 581, 583, 611; Nov. 29, 1975, P.L. 94-142, § 5(a), 89 Stat. 782; Dec. 2, 1983, P.L. 98-199, § § 3(b), 7, 97 Stat. 1358, 1359; Oct. 8, 1986, P.L. 99-457, Title II, § 203(b), Title IV, § 405, 100 Stat. 1159, 1174; Nov. 7, 1988, P.L. 100-630, Title I, § 102(c), 102 Stat. 3291; Oct. 30, 1990, P.L. 101-476, Title II, § 202, Title IX, § 901(b)(47)-(58), 104 Stat. 1111, 1144; Oct. 7, 1991, P.L. 102-119, § § 5, 25(a)(6), (b), 105 Stat. 591, 606, 607; Oct. 20, 1994, P.L. 103-382, Title III, Part I, § 391(f)(2), 108 Stat. 4023) was omitted in the general amendment of Title VI of Act April 13, 1970, P.L. 91-230, by Act June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37. Such section provided for requisite features of State plans, notice and hearing prior to disapproval of a plan, and participation of children in private schools, and prohibited reduction of assistance by States.

Effective date of section:

This section took effect upon enactment, pursuant to § 201(a) of Act June 4, 1997, P.L. 105-17, which appears as *20 USCS § 1400* note.

Amendments:

2002. Act Jan. 8, 2002 (effective 1/8/2002, subject to certain exceptions, as provided by § 5 of such Act, which appears as *20 USCS § 6301* note), in subsec. (f), deleted para. (3) which read: "(3) Coordination with certain projects under Elementary and Secondary Education Act of 1965. If a local educational agency is carrying out a coordinated services project under title XI of the Elementary and Secondary Education Act of 1965 and a coordinated services project under this part in the same schools, such agency shall use amounts under this subsection in accordance with the requirements of that title.".

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 33. EDUCATION OF INDIVIDUALS WITH DISABILITIES

ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 1414 (d) (2004)

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(d) Individualized education programs.

(1) Definitions. As used in this title [*20 USCS § § 1400* et seq.]:

(A) Individualized education program. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(i) a statement of the child's present levels of educational performance, including--

(I) how the child's disability affects the child's involvement and progress in the general curriculum; or

(II) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;

(ii) a statement of measurable annual goals, including benchmarks or short-term objectives, related to--

(I) meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum; and

(II) meeting each of the child's other educational needs that result from the child's disability;

(iii) a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child--

(I) to advance appropriately toward attaining the annual goals;

(II) to be involved and progress in the general curriculum in accordance with clause (i) and to participate in extracurricular and other nonacademic activities; and

(III) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this paragraph;

(iv) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in clause (iii);

(v) (I) a statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular State or districtwide assessment of student achievement (or part of such an assessment), a statement of--

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed;

(vi) the projected date for the beginning of the services and modifications described in clause (iii), and the anticipated frequency, location, and duration of those services and modifications;

(vii) (I) beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);

(II) beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages; and

(III) beginning at least one year before the child reaches the age of majority under State law, a statement that the child has been informed of his or her rights under this title [*20 USCS § § 1400* et seq.], if any, that will transfer to the child on reaching the age of majority under section 615(m) [*20 USCS § 1415*(m)]; and

(viii) a statement of--

(I) how the child's progress toward the annual goals described in clause (ii) will be measured; and

(II) how the child's parents will be regularly informed (by such means as periodic report cards), at least as often as parents are informed of their nondisabled children's progress, of--

(aa) their child's progress toward the annual goals described in clause (ii); and

(bb) the extent to which that progress is sufficient to enable the child to achieve the goals by the end of the year.

(B) Individualized education program team. The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

(i) the parents of a child with a disability;

(ii) at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) at least one special education teacher, or where appropriate, at least one special education provider of such child;

(iv) a representative of the local educational agency who--

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(2) Requirement that program be in effect.

(A) In general. At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in its jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5. In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2 year-old child with a disability who will turn age 3 during the school year), an individualized family service plan that contains the material described in section 636, and that is developed in accordance with this section, may serve as the IEP of the child if using that plan as the IEP is--

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(3) Development of IEP.

(A) In general. In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider--

(i) the strengths of the child and the concerns of the parents for enhancing the education of their child; and

(ii) the results of the initial evaluation or most recent evaluation of the child.

(B) Consideration of special factors. The IEP Team shall--

(i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate

reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child requires assistive technology devices and services.

(C) Requirement with respect to regular education teacher. The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(iii).

(4) Review and revision of IEP.

(A) In general. The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--

(i) reviews the child's IEP periodically, but not less than annually to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address--

(I) any lack of expected progress toward the annual goals and in the general curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher. The regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the review and revision of the IEP of the child.

(5) Failure to meet transition objectives. If a participating 0agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(vii), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program.

(6) Children with disabilities in adult prisons.

(A) In general. The following requirements do not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

(i) The requirements contained in section 612(a)(17) [*20 USCS § 1412*(a)(17)] and paragraph (1)(A)(v) of this subsection (relating to participation of children with disabilities in general assessments).

(ii) The requirements of subclauses (I) and (II) of paragraph (1)(A)(vii) of this subsection (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this part [*20 USCS § § 1411* et seq.] will end, because of their age, before they will be released from prison.

(B) Additional requirement. If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections 612(a)(5)(A) and 614(d)(1)(A) [*20 USCS § § 1412*(a)(5)(A), 1414(d)(1)(A)] if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

HISTORY: (April 13, 1970, P.L. 91-230, Title VI, Part B, § 614, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 81.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A prior § 1414 (Act April 13, 1970, P.L. 91-230, Title VI, Part B, § 614, 84 Stat. 181; Nov. 29, 1975, P.L. 94-142, § 5(a), 89 Stat. 784; Dec. 2, 1983, P.L. 98-199, § 3(b), 97 Stat. 1358; Nov. 7, 1988, P.L. 100-630, Title I, § 102(d), 102 Stat. 3293; Oct. 30, 1990. P.L. 101-476, Title IX, § 901(b)(59)-(70), 104 Stat. 1144, 1145; Oct. 7, 1991, P.L. 102-119, § § 6, 25(b), 105 Stat. 591, 607) was omitted in the general amendment of Title VI of Act April 13, 1970, P.L. 91-230, by Act June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37. Such section provided for submission of applications by local educational agencies or intermediate educational units.

Effective date of section:

This section takes effect upon enactment, except for paras. (1)-(5) of subsec. (d) which take effect on July 1, 1998, pursuant to § 201(a) of Act June 4, 1997, P.L. 105-17, which appears as *20 USCS § 1400* note.

Other provisions:

Maintenance of effort. Act Oct. 21, 1986, P.L. 99-506, Title X, § 1005, 100 Stat. 1845, provides:

"(a) General provision. Notwithstanding any other provision of the Education of the Handicapped Act, the Secretary and the State educational agency, in the case of section 614(a)(2)(B)(ii) of that Act [subsec. (a)(2)(B)(ii) of this section], shall not include expenditures made from an accrued fund reserve surplus after July 1, 1983, and prior to October 1, 1985, which are used for services for handicapped children.

"(b) Effective date. The amendment made by subsection (a) shall take effect with respect to fiscal years beginning after September 30, 1983."

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS

IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

BASIC PROGRAM REQUIREMENTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 6311(b)(3)(A) (2004)

§ 6311. State plans
(b) Academic standards, academic assessments, and accountability.
(3) Academic assessments.

(A) In general. Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part [*20 USCS § § 6311* et seq.] relating to science assessments until the beginning of the 2007-2008 school year.

HISTORY: (April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Jan. 8, 2002, P.L. 107-110, Title I, § 101, 115 Stat. 1444.)
(As amended Nov. 5, 2002, P.L. 107-279, Title IV, § 404(d)(1), 116 Stat. 1985.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
The "Adult Education and Family Literacy Act", referred to in this section, is Title II of Act Aug. 7, 1998, P.L. 105-220, which appears generally as *20 USCS § § 9201* et seq. For full classification of such Act, consult USCS Tables volumes.
The "Education Flexibility Partnership Act of 1999", referred to in this section, is Act April 29, 1999, P.L. 106-25, which appears generally as *20 USCS § § 5891a* et seq. For full classification of such Act, consult USCS Tables volumes.
The "Improving America's Schools Act of 1994", referred to in this section, is Act Oct. 20, 1994, P.L. 103-382, which generally amended the Elementary and Secondary Education Act of 1965 *(20 USCS § § 6301* et seq.). For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:
A prior § 6311 (Act April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3523; April 26, 1996, P.L. 104-134, Title I [Title VII, § 703(b)(1)], 110 Stat. 1321-254;

May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763 (enacting into law § 1603 of Title XVI of Division B of H.R. 5666 (114 Stat. 2763A-328), as introduced on Dec. 15, 2000)) was replaced in the general revision of Title I of Act April 11, 1965, P.L. 89-10, by § 101 of Act Jan. 8, 2002, P.L. 107-110. Such section related to State plans. For similar provisions, see this section.

Effective date of section:

This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, P.L. 107-110, which appears as *20 USCS § 6301* note.

Amendments:

2002. Act Nov. 5, 2002, in subsec. (c)(2), substituted "section 303(b)(2) of the National Assessment of Educational Progress Authorization Act" for "section 411(b)(2) of the National Education Statistics Act of 1994".

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS

IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

BASIC PROGRAM REQUIREMENTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 6311(b)(7) (2004)

§ 6311. State plans
(b) Academic standards, academic assessments, and accountability.
(7) Academic assessments of english language proficiency. Each State plan shall demonstrate that local educational agencies in the State will, beginning not later than school year 2002-2003, provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of this paragraph by that deadline and that the State will complete implementation within the additional 1-year period.

HISTORY: (April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Jan. 8, 2002, P.L. 107-110, Title I, § 101, 115 Stat. 1444.)
(As amended Nov. 5, 2002, P.L. 107-279, Title IV, § 404(d)(1), 116 Stat. 1985.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
The "Adult Education and Family Literacy Act", referred to in this section, is Title II of Act Aug. 7, 1998, P.L. 105-220, which appears generally as *20 USCS § § 9201* et seq. For full classification of such Act, consult USCS Tables volumes.
The "Education Flexibility Partnership Act of 1999", referred to in this section, is Act April 29, 1999, P.L. 106-25, which appears generally as *20 USCS § § 5891a* et seq. For full classification of such Act, consult USCS Tables volumes.
The "Improving America's Schools Act of 1994", referred to in this section, is Act Oct. 20, 1994, P.L. 103-382, which generally amended the Elementary and Secondary Education Act of 1965 *(20 USCS § § 6301* et seq.). For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:
A prior § 6311 (Act April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3523; April 26, 1996, P.L. 104-134, Title I [Title VII, § 703(b)(1)], 110 Stat. 1321-254; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763 (enacting

into law § 1603 of Title XVI of Division B of H.R. 5666 (114 Stat. 2763A-328), as introduced on Dec. 15, 2000)) was replaced in the general revision of Title I of Act April 11, 1965, P.L. 89-10, by § 101 of Act Jan. 8, 2002, P.L. 107-110. Such section related to State plans. For similar provisions, see this section.

Effective date of section:

This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, P.L. 107-110, which appears as *20 USCS § 6301* note.

Amendments:

2002. Act Nov. 5, 2002, in subsec. (c)(2), substituted "section 303(b)(2) of the National Assessment of Educational Progress Authorization Act" for "section 411(b)(2) of the National Education Statistics Act of 1994".

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS

IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

BASIC PROGRAM REQUIREMENTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 6311(a)(1) (2004)

§ 6311. State plans

(a) Plans required.

(1) In general. For any State desiring to receive a grant under this part [*20 USCS § § 6311* et seq.], the State educational agency shall submit to the Secretary a plan, developed by the State educational agency, in consultation with local educational agencies, teachers, principals, pupil services personnel, administrators (including administrators of programs described in other parts of this title [*20 USCS § § 6301* et seq.]), other staff, and parents, that satisfies the requirements of this section and that is coordinated with other programs under this Act [*20 USCS § § 6301* et seq.], the Individuals with Disabilities Education Act [*20 USCS § § 1400* et seq.], the Carl D. Perkins Vocational and Technical Education Act of 1998 [*20 USCS § § 2301* et seq.], the Head Start Act [*42 USCS § § 9831* et seq.], the Adult Education and Family Literacy Act, and the McKinney-Vento Homeless Assistance Act [*42 USCS § § 11301* et seq.].

HISTORY: (April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Jan. 8, 2002, P.L. 107-110, Title I, § 101, 115 Stat. 1444.)
(As amended Nov. 5, 2002, P.L. 107-279, Title IV, § 404(d)(1), 116 Stat. 1985.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "Adult Education and Family Literacy Act", referred to in this section, is Title II of Act Aug. 7, 1998, P.L. 105-220, which appears generally as *20 USCS § § 9201* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Education Flexibility Partnership Act of 1999", referred to in this section, is Act April 29, 1999, P.L. 106-25, which appears generally as *20 USCS § § 5891a* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Improving America's Schools Act of 1994", referred to in this section, is Act Oct. 20, 1994, P.L. 103-382, which generally amended the Elementary and Secondary Education Act of 1965 *(20 USCS § § 6301* et seq.). For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

A prior § 6311 (Act April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3523; April 26, 1996, P.L. 104-134, Title I [Title VII, § 703(b)(1)], 110 Stat. 1321-254; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763 (enacting into law § 1603 of Title XVI of Division B of H.R. 5666 (114 Stat. 2763A-328), as introduced on Dec. 15, 2000)) was replaced in the general revision of Title I of Act April 11, 1965, P.L. 89-10, by § 101 of Act Jan. 8, 2002, P.L. 107-110. Such section related to State plans. For similar provisions, see this section.

Effective date of section:

This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, P.L. 107-110, which appears as *20 USCS § 6301* note.

Amendments:

2002. Act Nov. 5, 2002, in subsec. (c)(2), substituted "section 303(b)(2) of the National Assessment of Educational Progress Authorization Act" for "section 411(b)(2) of the National Education Statistics Act of 1994".

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS

IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

BASIC PROGRAM REQUIREMENTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 6311(b)(3) (2004)

§ 6311. State plans

(b) Academic standards, academic assessments, and accountability.

(3) Academic assessments.

(A) In general. Each State plan shall demonstrate that the State educational agency, in consultation with local educational agencies, has implemented a set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part [*20 USCS § § 6311* et seq.] relating to science assessments until the beginning of the 2007-2008 school year.

(B) Use of assessments. Each State educational agency may incorporate the data from the assessments under this paragraph into a State-developed longitudinal data system that links student test scores, length of enrollment, and graduation records over time.

(C) Requirements. Such assessments shall--

(i) be the same academic assessments used to measure the achievement of all children;

(ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards;

(iii) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards;

(iv) be used only if the State educational agency provides to the Secretary evidence from the test publisher or other relevant sources that the assessments used are of adequate technical quality for each purpose required under this Act [*20 USCS § § 6301* et seq.] and are consistent with the requirements of this section, and such evidence is made public by the Secretary upon request;

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

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

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

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

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

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

(viii) at the discretion of the State, measure the proficiency of students in academic subjects not described in clauses (v), (vi), (vii) in which the State has adopted challenging academic content and academic achievement standards;

(ix) provide for--

(I) the participation in such assessments of all students;

(II) the reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act [*20 USCS § 1401*(3)]) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards; and

(III) the inclusion of limited English proficient students, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7);

(x) notwithstanding subclause (III), the academic assessment (using tests written in English) of reading or language arts of any student who has attended school in the United States (not including Puerto Rico) for three or more consecutive school years, except that if the local educational agency determines, on a case-by-case individual basis, that academic assessments in another language or form would likely yield more accurate and reliable information on what such student knows and can do, the local educational agency may make a determination to assess such student in the appropriate language other than English for a period that does not exceed two additional consecutive years, provided that such student has not yet reached a level of English language proficiency sufficient to yield valid and reliable information on what such student knows and can do on tests (written in English) of reading or language arts;

(xi) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, except that the performance of students who have attended more than 1 school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency;

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

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

(xiv) be consistent with widely accepted professional testing standards, objectively measure academic achievement, knowledge, and skills, and be tests that do not evaluate or assess personal or family beliefs and attitudes, or publicly disclose personally identifiable information; and

(xv) enable itemized score analyses to be produced and reported, consistent with clause (iii), to local educational agencies and schools, so that parents, teachers, principals, and administrators can interpret and address the specific academic needs of students as indicated by the students' achievement on assessment items.

(D) Deferral. A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to the date of enactment of the No Child Left

Behind Act of 2001 [enacted Jan. 8, 2002], for 1 year for each year for which the amount appropriated for grants under section 6113(a)(2) [*20 USCS § 7301b*(a)(2)] is less than--

(i) $ 370,000,000 for fiscal year 2002;

(ii) $ 380,000,000 for fiscal year 2003;

(iii) $ 390,000,000 for fiscal year 2004; and

(iv) $ 400,000,000 for fiscal years 2005 through 2007.

HISTORY: (April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Jan. 8, 2002, P.L. 107-110, Title I, § 101, 115 Stat. 1444.)

(As amended Nov. 5, 2002, P.L. 107-279, Title IV, § 404(d)(1), 116 Stat. 1985.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

The "Adult Education and Family Literacy Act", referred to in this section, is Title II of Act Aug. 7, 1998, P.L. 105-220, which appears generally as *20 USCS § § 9201* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Education Flexibility Partnership Act of 1999", referred to in this section, is Act April 29, 1999, P.L. 106-25, which appears generally as *20 USCS § § 5891a* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Improving America's Schools Act of 1994", referred to in this section, is Act Oct. 20, 1994, P.L. 103-382, which generally amended the Elementary and Secondary Education Act of 1965 *(20 USCS § § 6301* et seq.). For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

A prior § 6311 (Act April 11, 1965, P.L. 89-10, Title I, Part A, Subpart 1, § 1111, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3523; April 26, 1996, P.L. 104-134, Title I [Title VII, § 703(b)(1)], 110 Stat. 1321-254; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327; Dec. 21, 2000, P.L. 106-554, § 1(a)(4), 114 Stat. 2763 (enacting into law § 1603 of Title XVI of Division B of H.R. 5666 (114 Stat. 2763A-328), as introduced on Dec. 15, 2000)) was replaced in the general revision of Title I of Act April 11, 1965, P.L. 89-10, by § 101 of Act Jan. 8, 2002, P.L. 107-110. Such section related to State plans. For similar provisions, see this section.

Effective date of section:

This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, P.L. 107-110, which appears as *20 USCS § 6301* note.

Amendments:

2002. Act Nov. 5, 2002, in subsec. (c)(2), substituted "section 303(b)(2) of the National Assessment of Educational Progress Authorization Act" for "section 411(b)(2) of the National Education Statistics Act of 1994".

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS

IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED

GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 6575 (2004)

§ 6575. Prohibition against Federal mandates, direction, or control

Nothing in this title [*20 USCS § § 6301* et seq.] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction.

HISTORY: (April 11, 1965, P.L. 89-10, Title I, Part I, § 1905, as added Jan. 8, 2002, P.L. 107-110, Title I, § 101, 115 Stat. 1619.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:
This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, P.L. 107-110, which appears as *20 USCS § 6301* note.

*** CURRENT THROUGH P.L. 108-200, APPROVED 2/13/04 ***
*** WITH A GAP OF 108-199 ***

TITLE 20. EDUCATION

CHAPTER 70. STRENGTHENING AND IMPROVEMENT OF ELEMENTARY AND SECONDARY SCHOOLS

FLEXIBILITY AND ACCOUNTABILITY

GENERAL PROVISIONS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

20 USCS § 7371 (2004)

§ 7371. Prohibition against Federal mandates, direction, or control

Nothing in this title [*20 USCS § § 7301* et seq.] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction, as a condition of eligibility to receive funds under this Act [*20 USCS § § 6301* et seq.].

HISTORY: (April 11, 1965, P.L. 89-10, Title VI, Part C, § 6301, as added Jan. 8, 2002, P.L. 107-110, Title VI, § 601, 115 Stat. 1897.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

A prior § 7371 (Act April 11, 1965, P.L. 89-10, Title VI, § 6401, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3712), relating to innovative education program strategies, was replaced in the general revision of Title VI of Act April 11, 1965, P.L. 89-10, by § 601 of Act Jan. 8, 2002, P.L. 107-110. Such section related to maintenance of effort, and the use of Federal funds only as a supplement. For similar provisions, see *20 USCS § § 7217*, 7217c.

A prior § 6301 of Title VI of Act April 11, 1965, P.L. 89-10, appeared as *20 USCS § 7351* prior to the general revision of Title VI of such Act by Act Jan. 8, 2002, P.L. 107-110.

Effective date of section:

This section took effect on January 8, 2002, subject to certain exceptions, pursuant to § 5 of Act Jan. 8, 2002, P.L. 107-110, which appears as *20 USCS § 6301* note.

*** THIS SECTION IS CURRENT THROUGH THE FEBRUARY 19, 2004 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 34 -- EDUCATION
SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER III -- OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, DEPARTMENT OF EDUCATION
PART 300 -- ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES
SUBPART B -- STATE AND LOCAL ELIGIBILITY
STATE ELIGIBILITY -- GENERAL

34 CFR 300.110

§ 300.110 Condition of assistance.

(a) A State is eligible for assistance under Part B of the Act for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets the conditions in § § 300.121 -- 300.156.

(b) To meet the requirement of paragraph (a) of this section, the State must have on file with the Secretary --

(1) The information specified in § § 300.121 -- 300.156 that the State uses to implement the requirements of this part; and

(2) Copies of all applicable State statutes, regulations, and other State documents that show the basis of that information.

HISTORY: [*57 FR 44798*, Sept. 29, 1992, as amended at *58 FR 13528*, Mar. 11, 1993; *64 FR 12406, 12425*, Mar. 12, 1999]

AUTHORITY: *(20 U.S.C. 1412*(a))

NOTES: [PUBLISHER'S NOTE: *64 FR 12406, 12425*, Mar. 12, 1999, revised Part 300, effective May 11, 1999. "However, compliance with these regulations will not be required until the date the State receives FY 1999 funding (expected to be available for obligation to States on July 1, 1999) under the program or October 1, 1999, whichever is earlier." Furthermore, affected parties do not have to comply with the information collection requirements contained in this section, which will not become effective until the Office of Management and Budget approves them. A document will be published in the Federal Register once approval has been obtained. For the convenience of the user, the superceded text is as follows:
"In order to receive funds under Part B of the Act for any fiscal year, a State must submit a State plan to the Secretary through its SEA, which plan shall be effective for a period of 3 fiscal years.
(Approved by the Office of Management and Budget under control number 1820-0030)
(20 U.S.C. 1231g, 1412, 1413)"]

*** THIS SECTION IS CURRENT THROUGH THE FEBRUARY 19, 2004 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 34 -- EDUCATION
SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER III -- OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES, DEPARTMENT OF EDUCATION
PART 300 -- ASSISTANCE TO STATES FOR THE EDUCATION OF CHILDREN WITH DISABILITIES
SUBPART B -- STATE AND LOCAL ELIGIBILITY
STATE ELIGIBILITY -- SPECIFIC CONDITIONS

34 CFR 300.138

§ 300.138 Participation in assessments.

The State must have on file with the Secretary information to demonstrate that --

(a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary;

(b) As appropriate, the State or LEA --

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs;

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than, July 1, 2000, conducts the alternate assessments described in paragraph (b)(2) of this section.

HISTORY: [*57 FR 44798*, Sept. 29, 1992, as amended at *58 FR 13528*, Mar. 11, 1993; *64 FR 12406, 12429*, Mar. 12, 1999]

AUTHORITY: *(20 U.S.C. 1412*(a)(17)(A))

NOTES: [EFFECTIVE DATE NOTE: *64 FR 12406, 12429*, Mar. 12, 1999, revised Part 300, effective May 11, 1999. "However, compliance with these regulations will not be required until the date the State receives FY 1999 funding (expected to be available for obligation to States on July 1, 1999) under the program or October 1, 1999, whichever is earlier."]

TITLE 34 -- EDUCATION
SUBTITLE B -- REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER II -- OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, DEPARTMENT OF EDUCATION
PART 200 -- TITLE I -- IMPROVING THE ACADEMIC ACHIEVEMENT OF THE DISADVANTAGED
SUBPART A -- IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES
STANDARDS AND ASSESSMENTS

34 CFR 200.2(a)

§ 200.2 State responsibilities for assessment.

(a)(1) Each State, in consultation with its LEAs, must implement a system of high-quality, yearly student academic assessments that includes, at a minimum, academic assessments in mathematics, reading/language arts and, beginning in the 2007-08 school year, science.

(2)(i) The State may also measure the achievement of students in other academic subjects in which the State has adopted challenging academic content and student academic achievement standards.

(ii) If a State has developed assessments in other subjects for all students, the State must include students participating under subpart A of this part in those assessments.

(b) The assessment system required under this section must meet the following requirements:

(1) Be the same assessment system used to measure the achievement of all students in accordance with § 200.3 or § 200.4.

(2) Be designed to be valid and accessible for use by the widest possible range of students, including students with disabilities and students with limited English proficiency.

(3)(i) Be aligned with the State's challenging academic content and student academic achievement standards; and

(ii) Provide coherent information about student attainment of those standards.

(4)(i) Be valid and reliable for the purposes for which the assessment system is used; and

(ii) Be consistent with relevant, nationally recognized professional and technical standards.

(5) Be supported by evidence (which the Secretary will provide, upon request, consistent with applicable federal laws governing the disclosure of information) from test publishers or other relevant sources that the assessment system is --

(i) Of adequate technical quality for each purpose required under the Act; and

(ii) Consistent with the requirements of this section.

(6) Be administered in accordance with the timeline in § 200.5.

(7) Involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding of challenging content.

(8) Objectively measure academic achievement, knowledge, and skills without evaluating or assessing personal or family beliefs and attitudes, except that this provision does not preclude the use of items --

(i) Such as constructed-response, short answer, or essay questions; or

(ii) That require a student to analyze a passage of text or to express opinions.

(9) Provide for participation in the assessment system of all students in the grades being assessed consistent with §

HISTORY: [*54 FR 21756*, May 19, 1989; *60 FR 34800, 34803*, July 3, 1995; *67 FR 45038, 45040*, July 5, 2002]

AUTHORITY: *(20 U.S.C. 6311*(b)(3))

NOTES: [EFFECTIVE DATE NOTE: *67 FR 45038, 45040*, July 5, 2002, revised this section, effective Aug. 5, 2002.]

NOTES APPLICABLE TO ENTIRE SUBPART:
[PUBLISHER'S NOTE: *67 FR 71710, 71720*, Dec. 2, 2002, transferred § § 200.30 through 200.69 to Subpart A, effective Jan. 2, 2003.]

PL 103-382, October 20, 1994, 108 Stat 3518

UNITED STATES PUBLIC LAWS

103rd Congress - Second Session

Convening January 25, 1994

Additions and Deletions are not identified in this document.

For Legislative History of Act, see LH database or Report for this Public Law in U.S.C.C. & A.N. Legislative History section.

PL 103-382 (HR 6)

October 20, 1994

IMPROVING AMERICA'S SCHOOLS ACT OF 1994

"PART A--IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

"Subpart 1--Basic Program Requirements

<< 20 USCA § 6311 >>

"SEC. 1111. STATE PLANS.

"(a) PLANS REQUIRED.--
"(1) IN GENERAL.--Any State desiring to receive a grant under this part shall submit to the Secretary a plan, developed in consultation with local educational agencies, teachers, pupil services personnel, administrators, other staff, and parents, that satisfies the requirements of this section and that is coordinated with other programs under this Act, the Goals 2000: Educate America Act, and other Acts, as appropriate, consistent with section 14306.
"(2) CONSOLIDATION PLAN.--A State plan submitted under paragraph (1) may be submitted as part of a consolidation plan under section 14302.
"(b) STANDARDS AND ASSESSMENTS.--
"(1) CHALLENGING STANDARDS.--(A) Each State plan shall demonstrate that the State has developed or adopted challenging content standards and challenging student performance standards that will be used by the State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.
"(B) If a State has State content standards or State student performance standards developed under title III of the Goals 2000: Educate America Act and an aligned set of assessments for all students developed under such title, or, if not developed under such title, adopted under another process, the State shall use such standards and assessments, modified, if necessary, to conform with the requirements of subparagraphs (A) and (D) of this paragraph, and paragraphs (2) and (3).
"(C) If a State has not adopted State content standards and State student performance standards for all students, the State plan shall include a strategy and schedule for developing State content standards and State student performance standards for elementary and secondary school children served under this part in subjects as

determined by the State, but including at least mathematics and reading or language arts by the end of the one-year period described in paragraph (6), which standards shall include the same knowledge, skills, and levels of performance expected of all children.
"(D) Standards under this paragraph shall include--
"(i) challenging content standards in academic subjects that--
"(I) specify what children are expected to know and be able to do;
"(II) contain coherent and rigorous content; and
"(III) encourage the teaching of advanced skills;
"(ii) challenging student performance standards that--
"(I) are aligned with the State's content standards;
"(II) describe two levels of high performance, proficient and advanced, that determine how well children are mastering the material in the State content standards; and
"(III) describe a third level of performance, partially proficient, to provide complete information about the progress of the lower performing children toward achieving to the proficient and advanced levels of performance.
"(E) For the subjects in which students will be served under this part, but for which a State is not required by subparagraphs (A), (B), and (C) to develop, and has not otherwise developed such standards, the State plan shall describe a strategy for ensuring that such students are taught the same knowledge and skills and held to the same expectations as are all children.
"(2) YEARLY PROGRESS.--
"(A) Each State plan shall demonstrate, based on assessments described under paragraph (3), what constitutes adequate yearly progress of--
"(i) any school served under this part toward enabling children to meet the State's student performance standards; and
"(ii) any local educational agency that received funds under this part toward enabling children in schools receiving assistance under this part to meet the State's student performance standards.
"(B) Adequate yearly progress shall be defined in a manner--
"(i) that is consistent with guidelines established by the Secretary that result in continuous and substantial yearly improvement of each local educational agency and school sufficient to achieve the goal of all children served under this part meeting the State's proficient and advanced levels of performance, particularly economically disadvantaged and limited English proficient children; and
"(ii) that links progress primarily to performance on the assessments carried out under this section while permitting progress to be established in part through the use of other measures.
"(3) ASSESSMENTS.--Each State plan shall demonstrate that the State has developed or adopted a set of high-quality, yearly student assessments, including assessments in at least mathematics and reading or language arts, that will be used as the primary means of determining the yearly performance of each local educational agency and school served under this part in enabling all children served under this part to meet the State's student performance standards. Such assessments shall--
"(A) be the same assessments used to measure the performance of all children, if the State measures the performance of all children;
"(B) be aligned with the State's challenging content and student performance standards and provide coherent information about student attainment of such standards;
"(C) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards for such assessments;
"(D) measure the proficiency of students in the academic subjects in which a State has adopted challenging content and student performance standards and be administered at some time during--
"(i) grades 3 through 5;
"(ii) grades 6 through 9; and
"(iii) grades 10 through 12;

"(E) involve multiple up-to-date measures of student performance, including measures that assess higher order thinking skills and understanding;
"(F) provide for--
"(i) the participation in such assessments of all students;
"(ii) the reasonable adaptations and accommodations for students with diverse learning needs, necessary to measure the achievement of such students relative to State content standards; and
"(iii) the inclusion of limited English proficient students who shall be assessed, to the extent practicable, in the language and form most likely to yield accurate and reliable information on what such students know and can do, to determine such students' mastery of skills in subjects other than English;
"(G) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, however the performance of students who have attended more than one school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency;
"(H) provide individual student interpretive and descriptive reports, which shall include scores, or other information on the attainment of student performance standards; and
"(I) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged.
"(4) SPECIAL RULE.--Assessment measures that do not meet the requirements of paragraph (3)(C) may be included as one of the multiple measures, if a State includes in the State plan information regarding the State's efforts to validate such measures.
"(5) LANGUAGE ASSESSMENTS.--Each State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate assessment measures in the needed languages through the Office of Bilingual Education and Minority Languages Affairs.
"(6) STANDARD AND ASSESSMENT DEVELOPMENT.--(A) A State that does not have challenging State content standards and challenging State student performance standards, in at least mathematics and reading or language arts, shall develop such standards within one year of receiving funds under this part after the first fiscal year for which such State receives such funds after the date of enactment of the Improving America's Schools Act of 1994.
"(B) A State that does not have assessments that meet the requirements of paragraph (3) in at least mathematics and reading or language arts shall develop and test such assessments within four years (one year of which shall be used for field testing such assessment), of receiving funds under this part after the first fiscal year for which such State receives such funds after the date of enactment of the Improving America's Schools Act of 1994 and shall develop benchmarks of progress toward the development of such assessments that meet the requirements of paragraph (3), including periodic updates.
"(C) The Secretary may extend for one additional year the time for testing new assessments under subparagraph (B) upon the request of the State and the submission of a strategy to correct problems identified in the field testing of such new assessments.
"(D) If, after the one-year period described in subparagraph (A), a State does not have challenging State content and challenging student performance standards in at least mathematics and reading or language arts, a State shall adopt a set of standards in these subjects such as the standards and assessments contained in other State plans the Secretary has approved.
"(E) If, after the four-year period described in subparagraph (B), a State does not have

assessments, in at least mathematics and reading or language arts, that meet the requirement of paragraph (3), and is denied an extension under subparagraph (C), a State shall adopt an assessment that meets the requirement of paragraph (3) such as one contained in other State plans the Secretary has approved.
"(7) TRANSITIONAL ASSESSMENTS.--(A) If a State does not have assessments that meet the requirements of paragraph (3) and proposes to develop such assessments under paragraph (6)(B), the State may propose to use a transitional set of yearly statewide assessments that will assess the performance of complex skills and challenging subject matter.
"(B) For any year in which a State uses transitional assessments, the State shall devise a procedure for identifying local educational agencies under paragraphs (3) and (7) of section 1116(d), and schools under paragraphs (1) and (7) of section 1116(c), that rely on accurate information about the academic progress of each such local educational agency and school.
"(8) REQUIREMENT.--Each State plan shall describe--
"(A) how the State educational agency will help each local educational agency and school affected by the State plan develop the capacity to comply with each of the requirements of sections 1112(c)(1)(D), 1114(b), and 1115(c) that is applicable to such agency or school; and
"(B) such other factors the State deems appropriate (which may include opportunity-to-learn standards or strategies developed under the Goals 2000: Educate America Act) to provide students an opportunity to achieve the knowledge and skills described in the challenging content standards adopted by the State.
"(c) OTHER PROVISIONS TO SUPPORT TEACHING AND LEARNING.--Each State plan shall contain assurances that--
"(1)(A) the State educational agency will implement a system of school support teams under section 1117(c), including provision of necessary professional development for those teams;
"(B) the State educational agency will work with other agencies, including educational service agencies or other local consortia, and institutions to provide technical assistance to local educational agencies and schools to carry out the State educational agency's responsibilities under this part, including technical assistance in providing professional development under section 1119 and technical assistance under section 1117; and
"(C)(i) where educational service agencies exist, the State educational agency will consider providing professional development and technical assistance through such agencies; and
"(ii) where educational service agencies do not exist, the State educational agency will consider providing professional development and technical assistance through other cooperative agreements such as through a consortium of local educational agencies;
"(2) the State educational agency will notify local educational agencies and the public of the standards and assessments developed under this section, and of the authority to operate schoolwide programs, and will fulfill the State educational agency's responsibilities regarding local educational agency improvement and school improvement under section 1116, including such corrective actions as are necessary;
"(3) the State educational agency will provide the least restrictive and burdensome regulations for local educational agencies and individual schools participating in a program assisted under this part;
"(4) the State educational agency will encourage the use of funds from other Federal, State, and local sources for schoolwide reform in schoolwide programs under section 1114;
"(5) the Committee of Practitioners established under section 1603(b) will be substantially involved in the development of the plan and will continue to be involved in monitoring the plan's implementation by the State; and
"(6) the State will coordinate activities funded under this part with school- to-work, vocational education, cooperative education and mentoring programs, and apprenticeship programs involving business, labor, and industry, as appropriate.

"(d) PEER REVIEW AND SECRETARIAL APPROVAL.--
"(1) IN GENERAL.--The Secretary shall--
"(A) establish a peer review process to assist in the review and recommendations for revision of State plans;
"(B) appoint individuals to the peer review process who are representative of State educational agencies, local educational agencies, teachers, and parents;
"(C) following an initial peer review, approve a State plan the Secretary determines meets the requirements of subsections (a), (b), and (c);
"(D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c), immediately notify the State of such determination and the reasons for such determination;
"(E) not decline to approve a State's plan before--
"(i) offering the State an opportunity to revise its plan;
"(ii) providing technical assistance in order to assist the State to meet the requirements under subsections (a), (b), and (c); and
"(iii) providing a hearing; and
"(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more specific elements of the State's content standards or to use specific assessment instruments or items.
"(2) WITHHOLDING.--The Secretary may withhold funds for State administration and activities under section 1117 until the Secretary determines that the State plan meets the requirements of this section.
"(e) DURATION OF THE PLAN.--
"(1) IN GENERAL.--Each State plan shall--
"(A) remain in effect for the duration of the State's participation under this part; and
"(B) be periodically reviewed and revised by the State, as necessary, to reflect changes in the State's strategies and programs under this part.
"(2) ADDITIONAL INFORMATION.--If the State makes significant changes in its plan, such as the adoption of new State content standards and State student performance standards, new assessments, or a new definition of adequate progress, the State shall submit such information to the Secretary.
"(f) LIMITATION ON CONDITIONS.--Nothing in this part shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content or student performance standards and assessments, opportunity-to-learn standards or strategies, curriculum, or program of instruction, as a condition of eligibility to receive funds under this part.
"(g) PROHIBITION.--Nothing in this Act shall be construed to require any State educational agency, local educational agency, or school, to implement opportunity-to-learn standards or strategies developed by such State under the Goals 2000: Educate America Act.
"(h) SPECIAL RULE.--If the aggregate State expenditure by a State educational agency for the operation of elementary and secondary education programs in the State is less than such agency's aggregate Federal expenditure for the State operation of all Federal elementary and secondary education programs, then the State plan shall include assurances and specific provisions that such State will provide State expenditures for the operation of elementary and secondary education programs equal to or exceeding the level of Federal expenditures for such operation by October 1, 1998.