

**MINUTES**

**COMMISSION ON STATE MANDATES**

State Capitol, Room 126  
Sacramento, California  
May 26, 2005

- Present: Chairperson Anne Sheehan  
Representative of the Director of the Department of Finance  
Member Nicholas Smith  
Representative of the State Controller  
Member Francisco Lujano  
Representative of the State Treasurer  
Member Jan Boel  
Representative of the Director of the Office of Planning and Research
- Vacant: Local Elected Officials (2)  
Public Member

**CALL TO ORDER AND ROLL CALL**

Chairperson Sheehan called the meeting to order at 9:31 a.m. She noted that the Commission would be considering the Butte County application for finding of significant financial distress at 1:30 p.m. Also, she noted that items 7 and 8 would be moved to the end of the morning portion of the hearing because the members received new correspondence that they would like to review.

Paula Higashi, Executive Director, introduced the Commission’s new student assistant, Alicia Estrada. She also congratulated two Commission employees who recently graduated from California State University, Sacramento – Victoria Soriano, who received her Bachelor’s degree; and Cathy Cruz, who received her Master’s Degree in Public Policy and Administration.

Paul Starkey, Chief Legal Counsel, also introduced the Commission’s summer law clerks: Todd Ratshin, Charlotte Martinez, Leslie Walker, and Cliff Tong.

**APPROVAL OF MINUTES**

Item 1a March 30, 2005

Upon motion by Member Smith and second by Member Boel, the minutes were unanimously adopted.

## PROPOSED CONSENT CALENDAR

### HEARING TO SET ASIDE AND MODIFY COMMISSION DECISIONS PURSUANT TO COURT ORDERS (Gov. Code, § 17559, subd. (b).) (action)

- Item 4      *Order to Partially Set Aside and Modify Statement of Decision*  
Test Claim Decision: *Pupil Expulsions*, CSM-4455  
San Diego Unified School District, Claimant  
Education Code Sections 48900, 48900.2, 48900.3, 48900.4, 48915, 48915.1, 48915.2, 48915.7, 48916, 48918, as added and amended by Statutes 1975, Chapter 1253 (AB 1770); Statutes 1977, Chapter 965 (AB 530); Statutes 1978, Chapter 668 (AB 2191); Statutes 1982, Chapter 318 (SB 1385); Statutes 1983, Chapter 498 (SB 813); Statutes 1984, Chapters 23, 536, and 622 (AB 1619, AB 3151, and SB 1685); Statutes 1985, Chapter 318 (AB 343); Statutes 1986, Chapter 1136 (AB 4085); Statutes 1987, Chapters 383 and 942 (AB 56 and AB 2590); Statutes 1989, Chapter 1306 (SB 142); Statutes 1990, Chapter 1231 (AB 3794); Statutes 1992, Chapter 909 (SB 1930); Statutes 1993, Chapters 1255, 1256, and 1257 (AB 342, SB 1198, and SB 1130); Statutes 1994, Chapters 146, 1017, and 1198 (AB 3601, AB 2752, AB 2543).
- (On Remand from the California Supreme Court, *San Diego Unified School District v. State of California* (2004) 33 Cal.4th 859); (Peremptory Writ of Mandamus from the Superior Court, *San Diego Unified School District v. Commission on State Mandates* (GIC 737638))
- Item 5      Order to Partially Set Aside Portion of Statements of Decision on Incorrect Reduction Claims (IRCs) and Order to Direct State Controller to Set Aside Reduction of Reimbursement Claims for Teacher Salaries, to Reevaluate the Reimbursement Claims in Light of the Court’s Ruling, and to Submit the Results of the Reevaluation to the Commission Within 60 Days
- A. *San Diego Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01401 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-03 [*Graduation Requirements IRC Decision*, 4435-I-01 and 4435-I-37, Adopted September 28, 2001]
  - B. *San Jose Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01569 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-05 [*Graduation Requirements IRC Decision*, 4435-I-04, Adopted May 24, 2001]
  - C. *Sweetwater Union High School District v. Commission on State Mandates, et al.*, Case Number 03CS01570 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-06 [*Graduation Requirements IRC Decision*, 4435-I-05, Adopted June 28, 2001]
  - D. *Castro Valley Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01568 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-04 [*Graduation Requirements IRC Decision*, 4435-I-13 and 4435-I-39, Adopted August 23, 2001]

- Item 6 Order to Partially Set Aside Part 2, Issue 3 of the Statements of Decision on Incorrect Reduction Claims (IRCs) and Order Directing the State Controller to Set Aside Reduction of Reimbursement Claims for Teacher Salary Costs, to Reevaluate the Reimbursement Claims in Light of the Court’s Ruling, and to Submit the Results of the Reevaluation to the Commission Within 60 Days
- A. *Clovis Unified School District v. Commission on State Mandates, et al.*, Case Number 03CS01702 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-09 [*Graduation Requirements IRC Decision*, 4435-I-35, Adopted January 24, 2002]
  - B. *Grossmont Union High School District v. Commission on State Mandates, et al.*, Case Number 04CS00028 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-10 [*Graduation Requirements IRC Decision*, 4435-I-06 and 4435-I-38, Adopted January 24, 2002]

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF ORDER TO SET ASIDE PARAMETERS AND GUIDELINES

- Item 15 *Regional Housing Needs Determination: Cities and Counties*  
Statutes 1980, Chapter 1143 (AB 2853)  
Directed by Statutes 2004, Chapter 227, Sections 109-110 (SB 1102)

ADOPTION OF ORDER TO INITIATE RULEMAKING PROCEEDING

- Item 17 Appeal of Executive Director Decisions  
Proposed Amendments to California Code of Regulations, Title 2,  
Chapter 2.5, Article 1. General, Section 1181

Member Boel moved for adoption of the consent calendar, which consisted of items 4, 5, 6, 15, and 17. With a second by Member Smith, the consent calendar was unanimously adopted.

**APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)**

- Item 3 Staff Report

There were no appeals.

**RECONSIDERATION OF PRIOR STATEMENTS OF DECISION AS DIRECTED BY THE LEGISLATURE IN STATUTES 2004, CHAPTERS 895, 227, and 493 (AB 2855, SB 1102 AND SB 1895)**

Ms. Higashi swore in the parties and witnesses intending to testify before the Commission.

Item 9      *Standardized Testing and Reporting (STAR)*, 04-RL-9723-01  
Education Code Sections 60607, subdivision (a), 60609, 60615,  
60630, 60640, 60641, and 60643, as amended by Statutes 1997,  
Chapter 828 (SB 376); Title 5, California Code of Regulations,  
Sections 850-874, 97-TC-23  
Directed by Statutes 2004, Chapter 895, Section 19 (AB 2855)

Eric Feller, Commission Counsel, introduced this item. Staff found that the prior Commission decision on the Standardized Testing and Reporting program, or STAR, was correct, except for the activities required under federal law, which Mr. Feller outlined as follows:

- Activities required under the Individuals with Disabilities Education Act.
  1. exemption from testing for pupils, if the pupil's individualized education program has an exemption provision;
  2. determination of the appropriate grade-level test for each pupil in a special education program; and
  3. provision of appropriate testing adaptation or accommodations to pupils in special education programs.
- Activity required under the Equal Education Opportunity Education Act.
  1. administering an additional test to limited-English proficiency pupils enrolled in grades 2 through 11.

Mr. Feller stated San Diego Unified School District's position that the additional test for limited-English proficiency pupils should continue to be reimbursable. He noted that the Legislative Analyst's Office and the Department of Finance disagreed because the STAR program implements a federal mandate known as the No Child Left Behind Act, and its predecessor, the Improving America's School Act.

According to Mr. Feller, the issue was whether these acts are federal mandates under California's mandate reimbursement laws. He indicated that the California Supreme Court has held that the existence of a federal mandate depends on various aspects of the federal program, such as the certainty and severity of penalties on the state for not participating in the program. Because of the lack of evidence as to the certainty or severity of the penalty in this case, staff found that the No Child Left Behind Act and the Improving America's School Act are not federal mandates.

Moreover, Mr. Feller stated that the Legislative Analyst's Office and the Department of Finance also argue that the reconsideration decisions should be retroactive. Staff found that there was no evidence in the record or in the reconsideration statutes to support retroactivity. He noted that the statute states that it implements the 2004-2005 budget. Therefore, staff found that the reconsideration should be effective July 1, 2004.

Mr. Feller indicated that in the event the Commission finds a reimbursable mandate, the Legislative Analyst's Office and the Department of Finance assert that federal Title 1 funds should be used to offset the costs of the mandate. However, staff found no legal requirement for school districts to use federal funds to offset costs. Staff agreed that any state funds for the program should be used to offset costs.

Staff recommended that the Commission adopt the staff analysis, which partially approved the prior Commission decision.

Parties were represented as follows: Art Palkowitz and Robert Raines, on behalf of San Diego City Schools; Gerry Shelton, with the Department of Education; Paul Warren, with the Legislative Analyst's Office; and Pete Cervinka and Lenin Del Castillo, with the Department of Finance.

Mr. Palkowitz disagreed with staff's conclusion related to the testing of English learners. He argued that the staff analysis failed to mention any federal statute requiring English learners to be tested. Without identifying such a statute, he disagreed with staff's basis for denying reimbursement, which is that federal law preempts California state law. He also disagreed with staff's reliance on the *Castaneda* case because he felt that at no point did the case hold that local education authorities of any local agency must test English learners. Mr. Palkowitz asserted that the Spanish Assessment of Basic Education should remain a reimbursable mandate.

Mr. Raines described some of the activities related to the Spanish Assessment of Basic Education because they were parallel to the activities required for the STAR program.

Mr. Shelton submitted that the issue before the Commission was whether the No Child Left Behind Act and its predecessors constitute a federal mandate that places requirements in the area of assessment and accountability, or whether the state has a choice in meeting the No Child Left Behind Act requirements. His answer was a resounding "no" because he felt that the state did not have a choice in whether or not to meet the requirements of the No Child Left Behind Act.

Mr. Shelton argued that as the STAR program evolved, additional activities and tests were added that resulted in additional costs to the locals. Speaking for the Superintendent and State Board of Education, Mr. Shelton felt that the testing system evolved to the point where the state was now effectively meeting the minimum requirements of the No Child Left Behind Act. Moreover, Mr. Shelton disagreed with staff's reference to the *Hayes* decision, where the court said that the test of whether or not a federal mandate was where the requirement was derived should be at the local level. He believed that the test should be at the level of the department responsible for administering and implementing the program.

Furthermore, Mr. Shelton explained that the state operated under an environment of compulsion and coercion from the federal government, and stated that recently, the Department of Education had discussions with the federal government over definitional issues related to categorizing schools as program-improvement schools under the No Child Left Behind Act. He said that the federal government threatened that if the department does not change the definition, it would lose 25 percent of the administrative funds received under the No Child Left Behind Act and could lose the entire federal grant, a total of about \$3 billion, or eight percent of the total educational funding in California. Mr. Shelton maintained that this was an unreasonable level of coercion and compulsion placed on the state, and because the state has no choice in the matter, the activities imposed on local education agencies derive from federal requirements. Thus, the costs are not reimbursable by the state.

Mr. Del Castillo stated his belief that the No Child Left Behind Act is a federal mandate, and that the STAR program allows California to implement and satisfy the federal assessment requirements in the No Child Left Behind Act. Without the program, he argued that the state's eligibility to receive federal funds would be jeopardized. Also, Mr. Del Castillo asserted that the Legislature intended to apply the reconsideration decision retroactively. He noted that the Legislature had not budgeted any funds for the mandate, meaning that they have never formally approved the

Commission's decision. Therefore, the Department of Finance believed that any changes to the findings of the STAR mandate should be applicable to all district claims regardless of timing.

Mr. Del Castillo urged the Commission to consider offsetting funds, savings, and revenue if it disagreed that STAR is a federal mandate. He also concurred with the Legislative Analyst's comments.

Addressing Mr. Palkowitz's arguments, Mr. Feller quoted the federal statute, which effectively stated that educational agencies must take appropriate action to overcome language barriers that impede equal participation in instructional programs. He explained that the statute does not say "bilingual education," and for many years, the courts struggled to interpret the meaning of "appropriate action." He noted that the *Castaneda* court established a three-part test to determine the sufficiency of the appropriate action: 1) whether the program is based on an educational theory recognized as sound, 2) whether the program is reasonably calculated to implement that theory, and 3) whether the program produced satisfactory results after being used for a time sufficient to afford a legitimate trial. He stated that testing of pupils was the only way to determine whether appropriate action was taken and whether the three-part test was met. Therefore, he maintained that the *Castaneda* case interpreted the federal statute, which he believed controlled in this case.

Regarding the Department of Finance's issue regarding retroactivity of the reconsideration statute, Mr. Feller reiterated that there was no evidence to support retroactive application before fiscal year 2004-2005. Additionally, he stated that there was no legal requirement for school districts to offset the STAR test with federal funds.

With regard to the Department of Education's comments that the No Child Left Behind Act is a federal mandate, Mr. Feller maintained that there was insufficient evidence that the penalties for non-participation are certain and severe. He noted that the new testimony provided by Mr. Shelton is not reflected in the staff analysis before the Commission. Therefore, he recommended that the Commission continue the item so that the Department of Education could submit more evidence as to coercion from the U.S. Department of Education.

Chairperson Sheehan asked Mr. Shelton to submit comments in writing in terms of his testimony about the potential sanctions from the federal government under the No Child Left Behind Act. Mr. Shelton agreed.

Mr. Feller further disagreed with Mr. Shelton that the STAR program meets the minimum requirements under the No Child Left Behind Act. He noted that the STAR program goes beyond the federal requirements. Mr. Shelton responded that there were requirements in the federal No Child Left Behind Act related to the assessment system beyond testing requirements. Chairperson Sheehan commented that she saw two issues: 1) the grade levels required for testing, and 2) the actual substance of the assessments.

Mr. Palkowitz asked why Mr. Shelton's comments were not presented before the hearing. Mr. Shelton stated that the interaction with the federal government was fairly recent and he included it in his testimony in contemporaneous fashion.

Mr. Palkowitz also requested clarification of the issue, which Chairperson Sheehan and Mr. Shelton provided.

Chairperson Sheehan asked Mr. Shelton if he knew of federal penalties on other states. Mr. Shelton did not testify to the matter. Mr. Feller stated that he did not find any state that was sanctioned, but Utah came close.

Mr. Cervinka noted that the absence of any sanctions on other states was not relevant to the issue before the Commission. Mr. Shelton pointed out that the absence of sanctions could be taken as evidence of the power of coercion of the federal government.

Mr. Starkey reiterated that the record lacked supporting evidence that there were certain and severe penalties on states for non-participation. He stated that any evidence submitted must be of a nature that can be evaluated so that an effective legal recommendation could be made. Mr. Feller added that the evidence must be particular to the testing requirements. There was further discussion about the necessary evidence that should be submitted by the Department of Education.

Ms. Higashi noted that additional evidence submitted would be posted on the Commission's website to allow parties an opportunity to review and respond.

Mr. Cervinka stated his understanding that until the Legislature provides funding for a mandate, the Commission's decision is not considered approved. Mr. Feller responded that the California Supreme Court has found that "a statute may be applied retroactively only if it contains express language of retroactivity." He added that none of the committee analyses indicated the Legislature's intent for the decision to be retroactive. Mr. Feller maintained that many other mandates have not been funded, but it was not evidence of legislative intent. Mr. Palkowitz agreed with Mr. Feller while Mr. Cervinka continued to disagree.

Ms. Higashi confirmed that there was nothing in statute specifically stating that the Commission's decision is not approved until funding is provided in the Budget Act.

Chairperson Sheehan requested further discussion about the offsetting issue. Mr. Cervinka argued that federal funds provided under the No Child Left Behind Act are in some cases dedicated specifically for assessment and should be considered as offsetting revenue. Mr. Feller responded that given the provision in the Education Code that gives school districts broad authority to carry out activities determined by the school board to be necessary, there must be some intent on the part of the federal government or the Legislature to use federal funds to offset the costs of the STAR program. However, Mr. Feller stated that there was no legal requirement or evidence in the record indicating the amount specifically earmarked for testing that could be considered an offset.

Mr. Cervinka responded that the Department of Finance could work with the Department of Education to identify specific dollar amounts. Mr. Feller stated that clarification from the Department of Finance regarding evidence they had submitted into the record would be helpful.

Mr. Warren commented about the issue of offsetting revenues. He stated that there were two views: 1) the No Child Left Behind Act provides funding on a voluntary basis to school districts because nothing required school districts to participate, or 2) the act is a federal mandate because it requires the state to test all students in all schools in all public school districts to qualify for federal funding. In response to Chairperson Sheehan's question, Mr. Warren stated that federal funds should be used to implement activities required by federal law, and the cost of activities that go beyond federal requirements should be reimbursed by the state.

Mr. Feller stated that staff must follow the California Supreme Court's direction to look at all the gray areas between the two views to make a determination. Mr. Warren argued that it was an unreasonable position to expect the federal government to specify specific amounts to be put aside for local assessment.

Chairperson Sheehan asked about the offsetting evidence submitted by the Department of Finance for which staff needed clarification. Mr. Feller clarified the type of evidence staff needed and Mr. Del Castillo stated that the evidence could be provided.

Chairperson Sheehan clarified that in addition to the information that the Department of Education is submitting, the Department of Finance will also provide additional information about offsetting revenues. She noted that the comments would be posted on the Commission's website.

Regarding the issue of retroactivity, Mr. Warren provided comments supporting the Department of Finance's arguments. Chairperson Sheehan stated that it would have been beneficial if the Legislature were more explicit about what they wanted the Commission to do. Mr. Feller restated staff's position.

Member Smith asked about the timeline. Ms. Higashi responded that the next meeting was in July and suggested two weeks for submitting the additional comments.

Chairperson Sheehan stated that items 9 and 10 would be continued to the July hearing. Ms. Higashi noted that a revised notice and schedule would be issued.

Item 10      Proposed Statement of Decision  
                  *Standardized Testing and Reporting (STAR)*, 04-RL-9723-01  
                  See Above

Item 10 was postponed to the July 28, 2005 hearing.

[At this time, a short break was taken.]

Item 11      *Handicapped & Disabled Students*, 04-RL-4282-10  
                  Statutes 1984, Chapter 1747 (AB 3632); Statutes 1985, Chapter 1274  
                  (AB 1500); California Code of Regulations, Title 2, §§ 60000-60200  
                  (Emergency Regulations adopted July 12, 1986), CSM 4282  
                  Directed By Statutes 2004, Chapter 493, Section 7, (SB 1895)

Camille Shelton, Senior Commission Counsel, presented this item. She noted that the test claim legislation implements federal special education law that requires states to guarantee disabled students the right to receive a free and appropriate public education that includes special education and related services, such as mental health services designed to meet the students' unique educational needs. Before the test claim legislation, Ms. Shelton stated that local educational agencies were financially responsible for providing mental health services required by students' individualized education plans. In 1986, the test claim legislation shifted the responsibility and funding for providing mental health services to county mental health departments.

On reconsideration, staff found that the Commission's 1990 decision correctly determined that the test claim legislation imposes a reimbursable state-mandated program. Ms. Shelton noted that the Commission's finding is supported by three appellate court decisions, including *County of Santa Clara v. Commission on State Mandates*, *Hayes v. Commission on State Mandates*, and *TriCounty SELPA v. County of Tuolumne*. However, she indicated that the 1990 decision does not fully identify all of the activities expressly mandated by the test claim statutes and regulations, which were specifically pled by the original test claimant. She also indicated that the decision does not fully identify all of the offsetting revenue that must be identified and deducted from the program costs claimed.

Ms. Shelton noted that the staff analysis analyzes the intervening changes in the law relevant to the cost and funding of psychotherapy and residential care of seriously emotionally disturbed pupils. Staff recommended that the Commission adopt the staff analysis, which approves the test claim, with a reimbursement period beginning July 1, 2004.



Parties were represented as follows: Leonard Kaye and Paul McIver, with the County of Los Angeles; Pamela Stone and Linda Downs, with the County of Stanislaus; Patricia Ryan, with the California Mental Health Directors Association; John Polich, with the County of Ventura; and Jeannie Oropeza, Nicholas Schweitzer, and Dan Troy, with the Department of Finance.

Mr. Kaye concurred with the staff analysis and urged the Commission's adoption. He welcomed staff's suggestion for a pre-hearing conference to discuss the development of parameters and guidelines.

Mr. Kaye noted one point for clarification regarding staff's recommendation to reimburse 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility. Because the federal government may change the cost-sharing formula, he suggested that the language be modified to the effect that counties be reimbursed 100 percent of costs.

Mr. McIver commented that clarification was necessary with regard to participation in due-process hearings. He suggested that the language be modified to state participation in all dispute-resolution procedures, which is required of county mental health offices if named as a party in the dispute.

Mr. Polich urged the Commission to adopt the staff recommendation. He noted that a request to amend parameters and guidelines was filed in 2002 by the County of Los Angeles and the County of Stanislaus that involves the same concept and arguments as this matter because important activities were omitted from the adopted Statement of Decision. He stated that the Commission's decision would help clear up some of the existing uncertainty as to what activities are mandated and reimbursable under the program.

Ms. Stone requested one change for purposes of specificity with regard to Medi-Cal funds.

Ms. Downs clarified that the staff analysis identified specific offsets but left out the use of local revenue funds as a share of Medi-Cal. She recommended that the language be clarified to state, "Medi-Cal funds obtained for the purposes of this mandated program, in accordance with federal law, except for any local match requirements."

Ms. Ryan urged the Commission to adopt the staff recommendation in order to update mandate reimbursement rules with current law.

Mr. Troy believed this program to be a federal mandate, and thus, not reimbursable by the state. He stated that changes to the Individuals with Disabilities Education Act since the *Hayes* decision make it less clear that the state's choice triggers reimbursement pursuant to Article XIII B, section 6 because the most recent version of the law is clear that the state had broad discretion to designate responsibility for Individuals with Disabilities Education Act services to any public agency.

Ms. Oropeza noted that the state would be in jeopardy of losing \$1.2 billion if the services were not provided. Maintaining that the program is a federal mandate, she explained that the state chose to budget funds through school districts and allowed them to contract with counties to provide the services.

Ms. Shelton indicated that there was one Supreme Court case and one Third District Court of Appeal case that instructs the Commission to analyze federal mandate issues using a two-part test. She explained that the first test, addressed in the *City of Sacramento* case, is the issue of whether the federal legislation is a mandate on the state. In that case, the Individuals with Disabilities

Education Act is a federal mandate, as the *Hayes* court determined. She stated that the Commission is bound by that part of the decision. The second test, which she noted was lacking from the Department of Finance's argument, is whether the state freely chose to shift some responsibilities and funding to local agencies. She indicated that even if there was a federal mandate, it could still be a reimbursable state mandate on local agencies. Here, Ms. Shelton explained that the federal legislation does not require, but authorizes states to shift some services to non-educational agencies. Moreover, she stated that the *Hayes* case and the *TriCounty SELPA* case support the decision that the test claim legislation is a state-mandated program, and therefore, the program is a reimbursable state mandate.

Regarding Mr. Kaye's suggestion about the cost-sharing formula, Ms. Shelton stated that the problem was that the formula is provided by statute. In the event the statute changes, she stated that a new test claim would have to be filed. As to Mr. McIver's comments related to due-process hearings, she stated that the Education Code describes various activities, including mediation, all of which were included in the staff analysis. With regard to the Mr. Polich's comments about the pending parameters and guidelines amendment, she noted that the item may be before the Commission at the September hearing. Finally, with regard to the Medi-Cal issue raised by Ms. Stone and Ms. Downs, Ms. Shelton stated her belief that the concern was addressed in the staff recommendation.

Ms. Oropeza requested Ms. Shelton to restate her comments about the two-part test, which Ms. Shelton did. Ms. Oropeza continued to argue that federal law permits the state to choose who would provide the service, and thus, the state did not make the choice without authority; the choice is still within the federal mandate. Ms. Shelton noted that the state shifted the funding and activities to counties before the federal law was amended to authorize states to make the choice. She maintained that the law only authorizes; it does not require, and therefore, following the plain holding of the *Hayes* case, the state is left with true discretion, the policy choice of what entity would carry out the activities.

Ms. Oropeza raised the argument that the Laird bill says that it does not matter whether state law or federal law came first. Ms. Shelton responded that under the Laird bill, there still has to be a finding that a federal mandate on local agencies exists. In this case, she stated that there is no finding and no evidence to show that there is in fact a federal mandate on the counties.

In response to Ms. Oropeza's argument, Mr. Kaye submitted that based on Ms. Shelton's response to his earlier recommendation, the Commission cannot base its findings on a future law that takes effect July 1, 2005.

Mr. Troy responded that the argument may not apply to prior years. However, he did not believe that it was inappropriate for the Commission to consider the issue. He added that he did not see much of a distinction between schools and county offices of mental health being responsible for the activities.

Ms. Shelton explained that under the federal law, schools have requirements under the Individuals with Disabilities Education Act, whereas counties do not have requirements. She stated that there is a brand new program on counties that was shifted by the state through a policy decision.

Chairperson Sheehan asked questions to clarify the arguments, which Ms. Oropeza and Ms. Shelton responded.

Mr. Kaye noted that no one was disputing the state's unfettered discretion to assign the mandate to counties. However, he contended that for doing so, the *Hayes* case requires that counties be reimbursed under Article XIII B, section 6.

Ms. Oropeza submitted that counties were entitled to reimbursement through federal funds because they were implementing a federal mandate. Ms. Shelton responded that federal funds that are ultimately appropriated to counties must be identified and deducted from claims.

Regarding the Medi-Cal funds issue, Ms. Stone argued that the language should be more specific to avoid incorrect reduction claims. Ms. Shelton maintained that the issue was addressed.

Ms. Oropeza commented that the activities in staff's recommendation were overly broad. Ms. Shelton noted that the language came straight out of the statute and regulations before the Commission, but stated that there could be more discussion about them in the parameters and guidelines phase.

After further discussion about the issues, Member Smith made a motion to adopt the staff recommendation, which was seconded by Member Boel. The motion carried unanimously.

- Item 12 Proposed Statement of Decision  
*Handicapped & Disabled Students*, 04-RL-4282-10  
See Above

Camille Shelton, Senior Commission Counsel, presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision. Staff recommended that the Commission adopt the proposed Statement of Decision. Ms. Shelton indicated that she would make changes to reflect the witnesses' hearing testimony.

Member Smith made a motion to adopt the proposed Statement of Decision, which was seconded by Member Boel. The motion carried unanimously.

#### **HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)**

- Item 13 *Handicapped & Disabled Students II*, 02-TC-40/02-TC-49  
Counties of Stanislaus and Los Angeles, Claimants  
Government Code Sections 7570, 7571, 7572, 7572.5, 7572.55, 7573, 7576, 7579, 7582, 7584, 7585, 7586, 7586.6, 7586.7, 7587, 7588  
Statutes 1984, Chapter 1747 (AB 3632); Statutes 1985, Chapter 107 (AB 1304); Statutes 1985, Chapter 759 (AB 1255); Statutes 1985, Chapter 1274 (AB 1500); Statutes 1986, Chapter 1133 (AB 3012); Statutes 1992, Chapter 759 (AB 1248); Statutes 1994, Chapter 1128 (AB 1892); Statutes 1996, Chapter 654 (AB 2726); Statutes 1998, Chapter 691 (SB 1686); Statutes 2001, Chapter 745 (SB 1191); Statutes 2002, Chapter 585 (SB 2012); and Statutes 2002, Chapter 1167 (AB 2781)  
California Code of Regulations, Title 2, Sections 60000-60610

Camille Shelton, Senior Commission Counsel, presented this item. She stated that pursuant to the court's ruling in *Hayes v. Commission on State Mandates* and *TriCounty SELPA v. County of Tuolumne*, staff found that the test claim legislation mandates a new program or higher level of service and imposes costs mandated by the state on counties for specific activities listed in the staff analysis, with a reimbursement period beginning July 1, 2004.

Staff recommended that the Commission adopt the staff analysis, which approves the test claim.

Parties were represented as follows: Leonard Kaye and Paul McIver, with the County of Los Angeles; Pamela Stone and Linda Downs, with the County of Stanislaus; and Nicholas Schweitzer and Jody McCoy, with the Department of Finance.

Mr. Kaye concurred with the staff analysis and recommendations.

Mr. McIver reiterated his concern from the previous item about the dispute resolution language. He added that the staff analysis only describes participation in due-process hearings, and based on experience with the State Controller's auditors, he just wanted to make sure that the language specifies that participation in all aspects of dispute resolution is also included.

Ms. Stone pointed out one issue for clarification. Staff allowed the one-time activity of revising the interagency agreement to include the new procedures, with a footnote stating that revisions could occur every three years in conjunction with the reconsideration decision. She stated her concern that an auditor may misinterpret the language and disallow reimbursement. Therefore, she just wanted to clarify that claimants would also be reimbursed for the new elements of the agreement when the revisions occur.

Ms. Downs raised the Medi-Cal issue discussed in the previous item. She clarified that the local funds received at one point come from the state as part of a realignment allocation, but once they become county local funds, she asserted that they are not subject to the offsetting provisions.

Mr. Schweitzer believed that the new activities identified by the claimant – the residential placement plan, authorization of payments for out-of-home care, and the medication monitoring – are not new activities.

Ms. Shelton explained that this test claim was filed on all the subsequent amendments to the *Handicapped and Disabled Students* program; therefore, the activities reflect a higher level of service rather than a new program. Regarding the dispute resolution and due process issues raised by Mr. McIver, staff found that there is no increase in the level of service on counties for purposes of this test claim. She stated that while the law requires counties to still participate in the hearings, the activity is included in a different set of parameters and guidelines. As for the interagency agreement issue raised by Ms. Stone, Ms. Shelton noted that for purposes of this analysis, the ongoing activity of revising the agreement does not constitute a new program or increase in the level of service. With regard to Ms. Downs comments related to the Medi-Cal issue, Ms. Shelton suggested that more discussions about specificity should take place during the parameters and guidelines phase.

Addressing the Department of Finance's allegations, Ms. Shelton explained that the test claim legislation increased the level of service for the individualized education plan team for which the county now participates. She noted that this was not required under prior law. Regarding the comments made about payments for out-of-home care, she stated that the regulations did change and that the Department of Finance's contentions were not supported by any legal document or declaration signed under penalty of perjury. She maintained that the regulations for medication monitoring also changed and that under the rules of statutory construction, it is presumed that when an administrative agency materially alters the language, they intended to change the law. She added that the regulations increased the level of service by requiring new activities.

Ms. McCoy stated her belief that there was no meaningful difference in what the counties were required to do.

Member Boel made a motion to adopt the staff analysis, which was seconded by Member Smith. The motion carried unanimously.

- Item 14 Proposed Statement of Decision  
*Handicapped & Disabled Students II*, 02-TC-40/02-TC-49  
See Above

Camille Shelton, Senior Commission Counsel, presented this item. She stated that the sole issue before the Commission was whether the proposed Statement of Decision accurately reflected the Commission's decision. Ms. Shelton indicated that she would modify the witness list.

Member Boel made a motion to adopt the proposed Statement of Decision, which was seconded by Member Smith. The motion carried unanimously.

**RECONSIDERATION OF PRIOR STATEMENTS OF DECISION AS DIRECTED BY THE LEGISLATURE IN STATUTES 2004, CHAPTERS 895, 227, and 493 (AB 2855, SB 1102 AND SB 1895)**

- Item 7 *School Accountability Report Cards I*, 04-RL-9721-11  
Education Code Sections 33126, 35356, 35256.1, 35258, 41409 and 41409.3,  
Statutes 1989, Chapter 1463 (SB 280); Statutes 1992, Chapter 759 (AB 1248);  
Statutes 1993, Chapter 1031 (AB 198), Statutes 1994, Chapter 824 (SB 1665);  
Statutes 1997, Chapter 918 (AB 568), 97-TC-21  
Directed by Statutes 2004, Chapter 895, Section 18 (AB 2855)

Katherine Tokarski, Commission Counsel, presented this item. She noted that the Commission approved the test claim on April 23, 1998. She also noted that while AB 2855 directs the Commission to reconsider the prior final decision, Statutes 1997, chapter 912 was not explicitly named in AB 2855. Therefore, staff found that the Commission does not have the authority to rehear that portion of the original decision.

Ms. Tokarski explained that in enacting Proposition 98, the voters amended the state Constitution to provide public schools with state-funding guarantees. The measure also requires schools to undergo an annual audit and to issue an annual school accountability report card. She indicated that the test claim was filed on statutory amendments to the Proposition 98 requirements for the school accountability report card. Staff found that the state has not shifted the burdens of state government to school districts by requiring new data elements and a new method for publicizing and distributing the existing school accountability report card. She explained that the directive could be complied with by a minimal reallocation of resources as described in the 2003 decision in the *County of Los Angeles v. Commission on State Mandates* case. Therefore, staff did not find that a new program or higher level of service was imposed.

As a second and independent ground for denying reimbursement, staff found that there were also no costs mandated by the state. Ms. Tokarski stated that the California Supreme Court found in the *Department of Finance v. Commission on State Mandates* case that the availability of state program funds precludes a finding of a reimbursable state mandate. Thus, because there is a unique relationship between the voter-enacted school accountability report card requirement and the Proposition 98 funding guarantee, she indicated that the funds received under Proposition 98 can be used to complete the annual school accountability report card.

Ms. Tokarski noted that no briefs were received on the issues under reconsideration. Written comments regarding the draft staff analysis were received from the Sweetwater Union High

School District in complete opposition to staff's findings, and the Department of Finance in support of the staff analysis. She also noted that the Education Management Group submitted a late filing the day before asserting that staff's analysis on costs mandated by the state was based on a new legal theory that requires school districts to prove that reimbursable state-mandated costs are paid from a property tax source. The Education Management Group argues that this would make it impossible for school districts to prove any past or future mandate claims due to an accounting burden that schools cannot meet.

Staff finds that these allegations take the property tax argument out of context. Ms. Tokarski indicated that districts receive over \$31 billion a year through Proposition 98. Thus, staff found that districts have the burden to prove that they are required to exceed Proposition 98 funding in order to provide annual school accountability report cards. Ms. Tokarski explained that the argument that the decision in this matter would affect future claims is incorrect because each of the Commission's decisions is limited to the claim presented. Moreover, decisions are not precedential and must be supported by constitutional, statutory, and case law.

Ms. Tokarski noted that staff's analysis does not present a novel theory of law as the exact issue was presented and approved by the Commission in March 2004 on *School Accountability Report Cards II* and *III*. Staff recommended that the Commission adopt the staff analysis to deny the reconsidered portions of the original test claim decision.

Parties were represented as follows: Abe Hajela, with School Innovations and Advocacy; Jai Sookprasert, with the California School Employees Association; Robert Miyashiro, with the Education Mandated Cost Network; Brent McFadden, with the Education Coalition and the Association of California School Administrators; Richard Hamilton, with the California School Boards Association; Sandra Thornton, with the California Teachers Association; and Lenin Del Castillo and Pete Cervinka, with the Department of Finance.

Mr. Hajela outlined two issues: 1) whether school districts must prove that they use property tax revenues, and 2) whether the new requirements of the school accountability report card are a higher level of service. Regarding the first issue, he argued that school districts cannot prove that local property tax revenues are used to comply with specific mandates because the funds are commingled with other funds received through Proposition 98. He added that school district accounting procedures are largely regulated by the state, and the state does not require that funds be segregated. Unlike the case cited in staff's analysis, he contended that in this case, there is no specific appropriation or funding stream for the program. He maintained that nothing new happened for the Commission to believe that a new interpretation of the law is necessary.

With regard to the second issue and staff's position that the new requirements are minimal, he asserted that there needs to be a dollar amount or percentage standard that provides guidance because the program could be further amended in the future.

Mr. Sookprasert associated himself with Mr. Hajela's comments. He disputed the argument that changes are minimal if school districts must break funds down to property tax revenues.

Mr. Miyashiro addressed the de minimis nature of the claim. He argued that while staff believes that incidental duties do not require reimbursement, staff did not establish a minimum dollar amount. He noted that the law specifies a thousand-dollar threshold for filing a reimbursement claim and that the Commission adopted a statewide cost estimate of \$1.7 million for this program. He added that this estimate was the thirteenth largest of the 30 estimates adopted in 2002-2003.

Mr. Miyashiro clarified that Proposition 98 does not appropriate money for any program. Rather, it establishes a minimum funding guarantee level for which the Legislature then makes appropriations to specific programs. Thus, he asserted that it is not sufficient to reference the Proposition 98 guarantee and conclude that the minimum requirements fund a particular program because an appropriation must be made to fund the program. He argued that the language of Proposition 98 is not specifically intended for the *School Accountability Report Card* program and concluded that the staff analysis has not overcome the original findings of the Commission. He strongly urged the Commission to reject the staff analysis and to let the 1998 decision stand.

Mr. McFadden associated himself with the remarks made by the previous speakers.

Ms. Thornton agreed with all the previous comments. She also urged the Commission to oppose any recommendation that would affect the funding source or perpetuate the under funding of California's schools.

Mr. Hamilton concurred with the previous comments. He noted that the staff analysis does not address Government Code section 17556, subdivision (f), which speaks of imposing duties that are expressly included in a ballot measure.

Mr. Cervinka disagreed with the prior comments. He argued that Government Code section 17556, subdivision (f), specifically states that ballot measures adopted by the voters on a statewide initiative do not impose reimbursable mandates for duties expressly included in the ballot measure. He explained that the school accountability report card is not limited to the provisions originally set out in the Education Code because the electorate recognized that the details of the model report card are subject to change and districts are required to comply with those changes. Therefore, he asserted that this program is not reimbursable as it was a statewide ballot measure.

Mr. Hajela submitted that no one was claiming the voter-enacted portions as reimbursable. Mr. Cervinka responded that the proposition included the phrase "including but not limited to" and thus, required periodic updates to reflect changes made in the legislation. Mr. Hajela continued to disagree.

Regarding the property tax issue, Chairperson Sheehan commented that she did not feel that it was the justification for staff's recommendation. She noted that she was surprised by the comments in the late filing.

Ms. Tokarski indicated that when paying claims, the State Controller's Office does not require claimants to prove that the money came from their property tax source because it was sufficient to prove that they did not have the funds available from another source. However, she stated that there was no evidence that the \$31 billion from the state was unavailable. She added that using the analysis in the *Kern School District* case, she could not find costs mandated by the state where districts had to go beyond the funds received under Proposition 98 to complete the additional requirements of the *School Accountability Report Card* program.

Member Lujano asked for clarification as to whether school districts have to prove that local property taxes received were used to comply with the mandated program. Mr. Starkey stated that the Proposition 98 funding is a quid pro quo: funding for accountability. He explained that case law has said that if there is a notion of a de minimis cost in a state mandate, the courts look at the imposition of taxes. Further, he stated that Article XIII B, section 6, is a tax limitation protection so that the state does not impose financial burdens on local governments. But the Legislature cannot frustrate the intent of the voters. Regarding the cases staff relied upon to

support its position, Mr. Starkey noted that they cannot be distinguished away just because they are not school district cases.

Mr. Starkey maintained his position that there is a de minimis element to mandates law, Proposition 98, and the *School Accountability Report Card* program. The policy rationale is that counties or local governments are not burdened within the meaning of a cost shift to the local governments.

Mr. Hajela requested clarification, which Mr. Starkey provided, as to what cases were being relied upon.

There was further discussion about the de minimis argument. Mr. Hajela expressed confusion about the need for the argument. Member Smith was also troubled by the argument. Mr. Miyashiro stated that staff had not sufficiently provided the linkage between a court finding and its assertion that the additional requirements were in fact de minimis.

Chairperson Sheehan clarified the issue before the Commission.

Mr. Cervinka restated his position.

Mr. Hamilton stated that his trouble with the analysis is that there is a court case about de minimis requirements that was just being applied without quantification.

Ms. Higashi clarified that the statewide cost estimate numbers referenced by Mr. Miyashiro can be attributed to the State Controller's most recent deficiency letter. However, there was no detail in terms of what percentage of those costs or the exact amount that could be attributed to the activities that derive from statutes that are the subject of this test claim.

Mr. Miyashiro noted that the Department of Finance intends to seek legislation that would apply this decision to all of the *School Accountability Report Cards* programs. Thus, he felt it was relevant to recognize the cost of the entire mandate. Mr. Cervinka maintained his position.

Member Boel made a motion to adopt the staff analysis.

Member Lujano indicated that the Treasurer was concerned about this item. He stated his understanding that staff's position was that Proposition 98 actually funds this program.

Ms. Tokarski responded that the Proposition 98 funds should be used to pay for the costs of providing the school accountability report card.

Member Lujano stated that because Proposition 98 has been under funded for the past two years by about \$3.1 billion, the Treasurer will be voting no.

Member Boel's motion to adopt the staff analysis was seconded by Chairperson Sheehan. The motion failed 2-2, with Member Smith and Member Lujano voting "No."

Ms. Higashi noted that the matter would be rescheduled after the Commission membership changes and at that time, the analysis will be updated to reflect the hearing testimony.

Item 8      Proposed Statement of Decision  
                  *School Accountability Report Cards I*, 04-RL-9721-11  
                  See Above

The Commission did not vote on this item.

[At 12:58 p.m., a midday recess was taken.]



**INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)**

**ADOPTION OF ORDER TO SET ASIDE PARAMETERS AND GUIDELINES**

- Item 16     *Regional Housing Needs Determination: Councils of Governments, Statutes 1980, Chapter 1143 (AB 2853)*  
                  Directed by Statutes 2004, Chapter 227, Sections 109-110 (SB 1102)

Item 16 was postponed to the June 10, 2005 hearing.

**SPECIAL ORDER OF BUSINESS – 1:30 P.M.**

Chairperson Anne Sheehan reconvened the meeting at 1:36 p.m.

**APPROVAL OF MINUTES**

- Item 1b     May 12, 2005

Upon motion by Member Smith and second by Member Lujano, the minutes were adopted. Member Boel abstained.

**HEARING AND DECISION PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 6.5 (action)**

- Item 20     Adoption of Proposed Preliminary Decision: Butte County Application for Finding of Significant Financial Distress, Welfare & Institutions Code Section 17000.6

Shirley Opie, Project Manager, introduced this item. She explained that the county board of supervisors may adopt a general assistance standard of aid below the level established in Welfare and Institutions Code section 17000.5 if the Commission finds that meeting the general assistance standard of aid results in significant financial distress. On May 12, 2005, the Commission conducted a fact-finding hearing in Oroville to hear testimony from the County officials. No action was taken at that hearing.

Ms. Opie said that, based on the evidence and the testimony provided, staff recommends that the Commission find that the County's fiscal year 2004-2005 final budget totals \$320.9 million, with a General Fund contingency appropriation of \$5.6 million. While this represents increased financing requirements of approximately \$2 million from the prior year, the General Fund contingency is expected to decrease by \$400,000. The County's discretionary expenditure flexibility is constrained both by fund restrictions and by state and federal mandates, leaving \$70.4 million of the \$320.9 million in the final budget appropriations, as theoretically available for discretionary use. The full \$70.4 million cannot be considered truly discretionary inasmuch as 35 percent, or \$24.7 million, is directed towards state-mandated costs and state-established required maintenance of efforts. The County's total available discretionary resource for fiscal year 2004-2005 is projected to decline by \$4 million, from \$74.4 million in fiscal year 2004-2005. The County's unmet needs in basic county services, including public safety, total \$17,459,947. The County has total resource flexibility of \$8,290,839, comprised of revenue and reserves, including appropriation of contingency of \$5,616,078. Therefore, the County's unmet needs, offset by its resource flexibility, leaves the County with a net county cost of identified basic county services unmet need of \$9,169,108. Ms. Opie also noted that demands outside of the County's growth, programs, and services, such as the increased cost of health care premiums for employees and California Department of Forestry contract costs, have increased.

Staff recommended that the Commission determine that Butte County has made a compelling case that meeting the general assistance standard of aid established in Welfare and Institutions Code section 17000.5 will result in significant financial distress to the County, and that absent this finding, basic county services, including public safety, cannot be maintained. Staff also recommended that the Commission make a finding of significant financial distress for a period of 12 months.

Parties were represented as follows: Paul McIntosh, Cathi Grams, Shari McCracken, Sean Farrell, and Greg Iturria, on behalf of Butte County; and Michael Herald, with the Western Center on Law and Poverty.

Mr. McIntosh thanked the Commission and staff for the time and resources invested in this process and endorsed the findings, with the exception of the 12-month finding. He asked the Commission to reconsider its decision and grant the finding for 36 months, as it did in 1996 and 1999. He submitted that, based upon the five-year fiscal forecast that was presented in the Application, the County's financial situation will not be improving anytime in the near future. Projections showed that the fund balance for 2008-2009 will drop to \$283,704, nowhere near what is needed to begin meeting the \$17.5 million in unmet needs. He said that any funds received from the state's repayment of the VLF gap will be one-time in nature, and will be used by the County as such. Upon receipt of any VLF gap loan repayment, his office will recommend to the Board of Supervisors that those funds be used to refund the Fire and Sheriff's Departments' Equipment Replacement Fund and that any remaining VLF gap loan repayment be used for other one-time costs that have been deferred over the past years, such as maintenance of existing capital assets. He said that what is key is that no one knows what the adopted State Budget will or will not include.

Mr. McIntosh pointed out that in the Commission's 1999 finding, it relied on the *Goff* case where the court agreed that the Commission must consider alternative revenue enhancements and expenditure reductions when determining if a county is in significant financial distress; but the alternatives must be viable and practical, not speculative. He said that the Commission also said in the 1999 finding that the court stated that alternatives are relevant only to the extent that they can cover the financial shortfall giving rise to the claim of significant financial distress.

Mr. McIntosh emphasized the speculative nature of these funds by noting that the Legislative Analyst's Office projections of revenues available to fund the 2005-2006 State Budget is about \$600 million less than those used by the Governor's May Revision.

Also, Mr. McIntosh pointed out that the Governor's May Revision proposal to restore funding for the Small and Rural Sheriffs Program (\$500,000 for Butte County) is also speculative, and is not large enough to impact the unmet needs of the Sheriff's Office. If the County does receive the funding, it will cover 6.9 percent of the \$7.2 million of unmet needs in the Sheriff's Office. Therefore, he asserted that the recommendation for a 12-month finding does not meet the materiality of the *Goff* decision.

Moreover, Mr. McIntosh stated that Proposition 63 funds are for planning and future expansion of behavioral health services. Proposition 63 funds may only be used for new or expanded programs, not to supplant existing programs. Since the Commission did not recommend any of the unmet needs identified in the Behavioral Health Department, the County is unclear how Proposition 63 funds will help fund the unmet needs approved by the Commission.

To support a finding for 36 months, Mr. McIntosh referred to the Matrix A hand-out. He said that the Commission has consistently found that Butte County has a \$17 million unmet need on an ongoing basis. In 1996, the Commission found Butte County had \$17.6 million in unmet basic county services, and resource flexibility in the range of \$5.4 to \$6.8 million, netting to unmet needs in the range of \$10.8 to \$12.2 million. By 1999, the County had \$17.3 million in the basic service unmet needs, and resource flexibility of \$9.6 million, netting to unmet needs of \$7.8 million. He argued that these findings reflect a decrease in County unmet needs and an increase in resource flexibility, and the Commission granted a 36-month finding. Now, the preliminary findings are that Butte County has a \$17.5 million basic unmet need in county services, and \$8.3 million in resource flexibility, netting to unmet needs of \$9.2 million. Therefore, he argued that unmet needs have increased and resource flexibility has decreased since the 1999 decision.

Mr. McIntosh then referred to the Matrix B handout. Using public safety as an example, Butte County had and will have the same unmet needs over time. Since 1996, the District Attorney's Office has needed and will continue to need five attorneys. He indicated that the Sheriff's office had been understaffed for the past ten years.

Mr. McIntosh said that the five-year financial forecast for Butte County is based on current levels of service, does not restore the County's resources to previous levels, and does not meet the unmet needs identified by the Commission. It does take into account any increases in revenues that the County would anticipate from the passage of Proposition 1A.

Additionally, Mr. McIntosh contended that a 12-month finding would mean the County will be filing annual reapplications. Senate Bill 1033 was amended by the Legislature in light of the extreme administrative burden of gathering, producing and presenting the evidence necessary to convince the Commission of the County's significant financial distress. He stated that the fiscal reality is that the process only works to save the taxpayers money if a 36-month finding is made.

In summary, Mr. McIntosh said that Butte County must, again, request the Commission grant the finding of significant financial distress for a period of 36 months.

Member Boel asked Mr. McIntosh about the County's plans to spend the VLF gap loan repayment. She noted that the County previously indicated plans to spend it on a solar system. Mr. McIntosh replied that their first recommendation would be to restore the vehicle replacement funds that were stripped out in 2004-2005. If they get all \$4 million, one option is to invest that one-time revenue source into a second phase of solar, which would then produce an ongoing General Fund savings of about \$320,000 to \$325,000 a year. In response to Member Boel's question, Mr. McIntosh said that the Board of Supervisors had not yet acted. However, the County awarded a contract for Phase 2 of the solar project contingent upon receiving about \$4.2 million in grant funds from PG&E, and then requesting Board approval for financing of the second half of the project.

Member Boel requested confirmation of the number of people on general assistance and the amount of savings the County will realize with a finding of significant financial distress. Mr. McIntosh confirmed that there are about 300 people on assistance and the net annual savings would be about \$176,000 to \$180,000 a year.

Member Boel also asked Mr. McIntosh what the costs were to the County for presenting its case to the Commission. Mr. McIntosh replied that their actual out-of-pocket cost was virtually zero because the application was completed by salaried employees. They estimated that that cost well

exceeds \$100,000. He noted that it is “an opportunity cost as opposed to a real cost.”

Member Boel questioned staff about whether a finding or savings of about \$200,000 is enough to impact public safety. Paul Starkey, Chief Legal Counsel, responded that under the statute, if the County cannot pay general assistance and still meet its basic needs, then the Legislature has made a policy decision that the County can, if they get the finding from the Commission, make the political decision about whether or not they should reduce general assistance. Under the Commission’s regulations, basic county services means those services that are fundamental or essential. Such services shall include, but are not limited to, those services required by state or federal law, and may vary from county to county. The question about whether it is a good form of relief or whether it makes a lot of sense does not go into the equation.

Chairperson Sheehan commented that the relief under the statute is somewhat limited. The Commission only has the ability to make that finding. And, the Commission cannot opine on the wisdom of the net effect and the amount of savings, although it is difficult not to, having gone through the process.

Member Smith said that the problem the Controller has with this item is about the potential savings. A study shows that because people do not retire with adequate benefits, the costs resurface elsewhere, which has some net effect to the state. Similarly here, reducing a significant portion of the poorest of the poor’s income means that the costs are going to resurface.

Mr. McIntosh responded that it was recognized at the May 12<sup>th</sup> hearing that the monetary savings provided in the statute is minimal. There may even be additional costs associated with achieving those savings. But the financially distressed designation offers the County other opportunities, such as grants. He cited to Opinion 5766 issued by the Attorney General on May 20 to support his arguments.

Ms. Opie responded that the staff analysis explains the reasoning for the 12-month finding. Part of the difficulty is the fact that the County provided information for the current year budget, rather than information for the proposed 2005-2006 budget. In addition, the County is carrying over into the next fiscal year \$1,107,000 more in revenues than they carried over last year. Ms. Opie noted that the last application expired in 2002, leaving a period of time when the County did not apply for a finding, and theoretically had the same needs.

Mr. McIntosh reiterated many of his previous arguments, and explained that the reason the County did not file in 2002 was because they thought they were pulling themselves up by the boot straps. They were faced with a 42 percent increase in the firefighters’ salary and benefit package, a five or six million dollar increase in their CDF contract, and having to put additional funds in social service programs because realignment revenues were insufficient. He recalled that there was about \$43 million over a three-year period of State Budget impacts on Butte County. He argued that it will take four to six years to recover from that, and thus, asked that the Commission grant a 36-month finding.

Paula Higashi, Executive Director, pointed out that in the last application process, Commission staff recommended a 12-month duration. She stated that it was the Commission itself that decided during the hearing, based on the evidence, to make the 36-month finding.

Mr. Herald disagreed with the staff recommendation, contending that Butte County failed to make a compelling case by clear and convincing evidence that they are in significant financial distress. Mr. Herald took issue that the staff analysis did not have more discussion about the impact of property tax revenue, in terms of the County's flexibility funding going forward. He

asserted that there was an increase in property taxes from \$15 million to \$24 million, and that resale home values in two proximate counties went up by 30 percent and 32 percent from 2003-2004 to 2004-2005, that will give Butte County more fiscal flexibility than the staff analysis suggested.

Mr. Herald agreed with Member Smith's comments about the increased costs due to the reduction taken for general-assistance recipients. As a prior staff member for Governor Davis' Homeless Task Force, he helped produce a series of reports that outlined the substantial state costs for allowing people to become homeless. There are many increased costs, including the use of 911 systems, mental health facilities, and public health systems. Allowing people to become homeless is counterproductive, and will cost the county more money than it will save. He said that the Institute on Law and Public Planning recently found that there is over-prosecution of minor offenses in Butte County. More money goes into public safety programs than what they see in other counties. For example, Butte County has three times the number of investigators as a comparable county, like Merced. Mr. Herald also said that the District Attorney's Office is using CalWORKS eligibility funds for fraud investigations, which are leading to increased convictions and increased costs for the county.

Chairperson Sheehan clarified that the Commission is not deciding to reduce general assistance and Mr. Herald agreed that it is the County's decision to do that.

Regarding property tax revenues, Chairperson Sheehan asked staff to provide the Commission's authority under current law, and asked Butte County representatives to provide estimates from the property tax assessor. Ms. Opie replied that staff's property tax analysis shows the actual and the estimate for 2004-2005. The estimate for 2004-2005 shows a significant increase over the prior years.

Mr. McIntosh confirmed that the information came from the County. He said that Mr. Herald failed to recognize the "triple-flip" funding mechanism that occurred. Property taxes increased from \$16 million to \$25 million, sales taxes dropped from \$4 million to \$3 million, and vehicle license fees dropped from \$11 million to \$5 million, with a net result in growth of \$2 million. The change in the property tax revenue was taken into account in their five-year fiscal forecast.

Regarding other points that Mr. Herald made, Mr. McIntosh agreed that this is the wrong forum for discussion on what the impact of this decision is on low-income individuals, as it was before the Board of Supervisors. Regarding the Institute on Law and Public Planning finding, in their proposed budget, they recommended eliminating 9.5 investigators from the District Attorney's Welfare Fraud Program. He reiterated his May 12 testimony and again requested that the Commission make a 36-month finding.

Mr. Starkey emphasized that the statutory charge is to make the best possible decision. Regarding the three-year finding, the statute provides the Commission with the authority to make a three-year finding; it does not require it. At every stage, the Commission members have to keep in mind that this is a compelling case that has to be made for the first 12 months, the second 12 months and the third 12 months.

Chairperson Sheehan asked if there is a difference between a "reapplication" and a "new application." Mr. Starkey replied that there are additional factors required in the reapplication. Mr. Starkey stated that based on the regulations, the Commission has to be convinced that for the next three years, this is going to be the situation.

Ms. Higashi said that the Commission's next step is to adopt a preliminary decision. Once the Commission adopts that decision, the proposed Statement of Decision will be before the Commission for adoption on June 10th.

Member Boel made a motion to approve the application for Butte County with a finding of significant financial distress for 12 months.

In response to Chairperson Sheehan's question about when the 12 months would begin, Ms. Higashi replied that the County provides the actual date they want the finding to be effective. Mr. McIntosh requested an effective date of September 1, 2005.

Member Smith seconded Member Boel's motion. The motion carried unanimously.

#### **STAFF REPORTS**

Item 18 Chief Legal Counsel's Report (info)  
Recent Decisions, Litigation Calendar

No report was made on item 18.

Item 19 Executive Director's Report (info/action)  
Budget, Workload, Legislation, Next Hearing

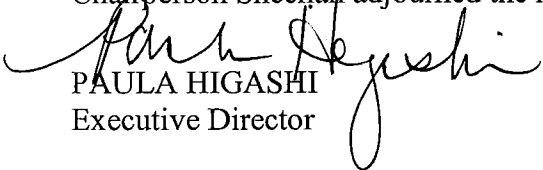
Ms. Higashi reported that both subcommittees approved the Commission's budget. There is a conference item that is part of the Commission's budget item that relates to the test claim decision on the mandate reimbursement process. There is interest in both houses for the Commission to reconsider that decision. There are still open issues regarding which mandates are suspended, which ones are deferred, and which ones might be fully funded because of Proposition 1A.

#### **CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.**

Ms. Higashi indicated that there would be no closed session meeting.

#### **ADJOURNMENT**

Chairperson Sheehan adjourned the meeting at 2:39 p.m.

  
PAULA HIGASHI  
Executive Director



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**PUBLIC HEARING**

**COMMISSION ON STATE MANDATES**

--oOo--

**TIME:** 9:31 a.m.

**DATE:** Thursday, May 26, 2005

**PLACE:** State Capitol, Room 126  
Sacramento, California

--oOo--

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

--oOo--

**ORIGINAL**

**Daniel P. Feldhaus**

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A P P E A R A N C E S

COMMISSIONERS PRESENT

ANNE SHEEHAN  
(Commission Chair)  
Representative for TOM CAMPBELL  
Director  
Department of Finance

JAN BOEL  
Acting Director  
State Office of Planning and Research

FRANCISCO LUJANO  
Representative for PHILIP ANGELIDES  
State Treasurer

NICHOLAS SMITH  
Representative for STEVE WESTLY  
State Controller

--o0o--

COMMISSION STAFF PRESENT

PAULA HIGASHI  
Executive Director

PAUL M. STARKEY  
Chief Legal Counsel

CATHY CRUZ  
Program Analyst

ALICIA ESTRADA  
Student Assistant

ERIC FELLER  
Commission Counsel

CHARLOTTE MARTINEZ  
Law Clerk



A P P E A R A N C E S

COMMISSION STAFF PRESENT

*continued*

NANCY PATTON  
Assistant Executive Director

TODD RATSHIN  
Senior Law Clerk

CAMILLE SHELTON  
Senior Commission Counsel

VICTORIA SORIANO  
Management Services Technician

KATHERINE TOKARSKI  
Commission Counsel

CLIFF TONG  
Law Clerk

LESLIE WALKER  
Law Clerk

--oOo--

PUBLIC TESTIMONY

Appearing re Item 7:

ABE HAJELA  
School Innovations and Advocacy

For California School Employees Association:

JAI SOOKPRASERT  
Government Relations  
California School Employees Association

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing re Item 7: *continued*

For Education Mandated Cost Network:

ROBERT MIYASHIRO  
Education Mandated Cost Network

For Education Coalition and Association of California  
School Administrators:

BRENT McFADDEN  
Assistant Executive Director  
Association of California School Administrators

For California School Boards Association:

RICHARD HAMILTON  
Director, Education Legal Alliance  
California School Boards Association

For the California Teachers Association:

SANDRA THORNTON

For the Department of Finance:

PETE CERVINKA  
Department of Finance  
915 L Street  
Sacramento, CA 95814

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

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing re Item 9:**

For San Diego Unified School District:

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

ROBERT B. RAINES  
Testing Program Manager  
Office of the Superintendent  
San Diego City Schools Finance Division  
4100 Normal Street, Room 3209  
San Diego, CA 92103-2682

For State Superintendent and for the State Board of  
Education:

GERALD C. SHELTON  
Director of Fiscal and Administrative Services  
California Department of Education  
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Sacramento, CA 95814

For the Department of Finance:

PETE CERVINKA  
Department of Finance  
915 L Street  
Sacramento, CA 95814

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

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing re Item 9: *continued*

For the Legislative Analyst's Office:

Paul Warren  
Legislative Analyst's Office  
925 L Street, Suite 1000  
Sacramento, CA 95814

Appearing re Item 11:

For the County of Los Angeles:

LEONARD KAYE, Esq.  
Certified Public Accountant  
Department of Auditor-Controller  
County of Los Angeles  
500 West Temple Street, Suite 603  
Los Angeles, CA 90012

PAUL McIVER  
Clinical Chief  
Department of Mental Health  
County of Los Angeles

For the County of Stanislaus:

PAMELA A. STONE  
Maximus  
4320 Auburn Boulevard, Suite 2000  
Sacramento, CA 95841

LINDA DOWNS  
Assistant Director of Administrative Services  
Behavioral Health and Recovery Services  
County of Stanislaus  
800 Scenic Drive  
Modesto, CA 95350

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing re Item 11: *continued*

For the California Mental Health Directors Association:

PATRICIA RYAN  
California Mental Health Directors Association  
2125 Nineteenth Street, Second Floor  
Sacramento, CA 95818

For the County of Ventura:

JOHN E. POLICH  
Assistant County Counsel  
Office of the County Counsel  
County Government Center  
Ventura, CA 93009

For the Department of Finance:

JEANNIE OROPEZA  
Department of Finance  
915 L Street  
Sacramento, CA 95814

NICHOLAS SCHWEITZER  
Department of Finance  
915 L Street  
Sacramento, CA 95814

DAN TROY  
Principal Program Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing re Item 13:

For the County of Los Angeles:

LEONARD KAYE, Esq.  
Certified Public Accountant  
Department of Auditor-Controller  
County of Los Angeles  
500 West Temple Street, Suite 603  
Los Angeles, CA 90012

PAUL McIVER  
Clinical Chief  
Department of Mental Health  
County of Los Angeles

For the County of Stanislaus:

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LINDA DOWNS  
Assistant Director of Administrative Services  
Behavioral Health and Recovery Services  
County of Stanislaus  
800 Scenic Drive  
Modesto, CA 95350

For the Department of Finance:

JODY McCOY  
Department of Finance  
915 L Street  
Sacramento, CA 95814

NICHOLAS SCHWEITZER  
Department of Finance  
915 L Street  
Sacramento, CA 95814

A P P E A R A N C E S

PUBLIC TESTIMONY

**Appearing re Item 20:**

For the County of Butte:

PAUL McINTOSH  
Chief Administrative Officer  
Administrative Center  
County of Butte  
25 County Center Drive  
Oroville, CA 95965

SEAN B. FARRELL  
Deputy Administrative Officer  
Administrative Center  
County of Butte  
25 County Center Drive  
Oroville, CA 95965

CATHI GRAMS  
Director/Public Guardian/Public Administrator  
Department of Employment and Social Services  
County of Butte  
202 Mira Loma Drive  
Oroville, CA 95965

GREG ITURRIA  
Deputy County Administrative Officer and  
Budget Director  
County of Butte

SHARI McCracken  
Deputy Administrative Officer  
Administrative Center  
County of Butte  
25 County Center Drive  
Oroville, CA 95965

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 20: *continued*

For the Department of Finance:

DAN TROY  
Principal Program Budget Analyst  
Department of Finance  
915 L Street  
Sacramento, CA 95814

CHIKAKO TAKAGI-GALAMBA  
Auditor/Evaluator  
Department of Finance  
915 L Street  
Sacramento, CA 95814

For Western Center on Law and Poverty:

MICHAEL HERALD  
Western Center on Law and Poverty  
1107 Ninth Street, Suite 802  
Sacramento, CA 95814

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ERRATA SHEET

<u>Page</u>	<u>Line</u>	<u>Correction</u>
<u>182</u>	<u>1</u>	<u>CHANGE "1966" TO "1996"</u>
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60 Days

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Commission on State Mandates - May 26, 2005

1 BE IT REMEMBERED that on Thursday, May 26, 2005,  
2 commencing at the hour of 9:31 a.m., thereof, at the  
3 State Capitol, Room 126, Sacramento, California, before  
4 me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the  
5 following proceedings were held:

6 --oOo--

7 CHAIR SHEEHAN: The meeting of the Commission on  
8 State Mandates will come to order.

9 We will have our regular minutes agenda this  
10 morning, although we have a couple of things we're going  
11 to move around. And then at 1:30, the Commission will  
12 consider the Butte County application for finding of  
13 significant financial distress. So any of the issues  
14 related to Butte County will come in the afternoon. And  
15 we are scheduled to convene at 1:30 for that.

16 Why don't we call the roll, and then I'll go through  
17 some of the other stuff?

18 MS. HIGASHI: Okay.

19 Ms. Boel?

20 MEMBER BOEL: Here.

21 MS. HIGASHI: Mr. Lujano?

22 MEMBER LUJANO: Here.

23 MS. HIGASHI: Mr. Smith?

24 MEMBER SMITH: Here.

25 MS. HIGASHI: Ms. Sheehan?



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1 CHAIR SHEEHAN: Here.

2 MS. HIGASHI: Thank you.

3 CHAIR SHEEHAN: We will be moving Item 7 and Item 8  
4 to the last discussion in the morning. So those who are  
5 here to testify, we've gotten some new correspondence  
6 that the members would like to go through, before we have  
7 that hearing. So those two items we will put at the end  
8 of the morning agenda to take up, and then just move up  
9 the rest of the items for discussion today.

10 Staff had some other matters?

11 MS. HIGASHI: Yes. We need to switch seats with our  
12 staff for a presentation. But what I would like to do  
13 first is just I wanted to go through some introductions  
14 of our staff.

15 CHAIR SHEEHAN: Yes, absolutely.

16 MS. HIGASHI: We have a new student assistant in our  
17 office, and I'd like to introduce her. Alicia Estrada.

18 And I'd also like to congratulate two of our  
19 employees. Victoria Soriano, as many of you know, she is  
20 very much involved in the agenda, every item on the  
21 agenda, and everything we do in our office. And she just  
22 received her bachelor's degree from Sac State last  
23 weekend.

24 *(Applause)*

25 CHAIR SHEEHAN: And Cathy Cruz, who just walked in,

Commission on State Mandates - May 26, 2005

1 on cue. Cathy has been with us for several years now,  
2 and she is also a full-time employee. And she just  
3 completed her master's degree in public policy. This  
4 weekend she received her degree; and her thesis is on the  
5 mandates problem in California.

6 (Applause)

7 CHAIR SHEEHAN: Congratulations to both of you.

8 MS. HIGASHI: And Paul has some introductions he  
9 needs to make as well.

10 MR. STARKEY: Good morning. Just very quickly, it's  
11 my pleasure to introduce the law clerks that we have  
12 joining us for this summer.

13 If you would all stand. That way, you'll have  
14 strength in numbers.

15 To my immediate right is Todd Ratshin. And Todd has  
16 been with the Commission now for a year and returns as  
17 the senior law clerk for this summer. So we're glad to  
18 have him back.

19 And then to his right is Charlotte Martinez, who is  
20 joining us on a part-time basis as a clinic student.

21 And then Leslie Walker and Cliff Tong. And they're  
22 going to help us this summer get moving on some of those  
23 cases we've been hoping to get to.

24 CHAIR SHEEHAN: That's great. Welcome. Nice to  
25 have you with us.

Commission on State Mandates - May 26, 2005

1 All right, Item 1?

2 MS. HIGASHI: Item 1, the minutes of March 30.

3 MEMBER SMITH: I move approval.

4 MEMBER BOEL: I second.

5 CHAIR SHEEHAN: All right. We have a motion and a  
6 second on the March 30th minutes.

7 All those in favor, signify by saying "aye."

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

9 CHAIR SHEEHAN: Any opposed?

10 *(No audible response was heard.)*

11 CHAIR SHEEHAN: It passes.

12 And then we'll do the May 12th minutes this  
13 afternoon, along with the Butte County matter.

14 MS. HIGASHI: That's correct.

15 This brings us to the *Proposed Consent Calendar*.  
16 And you should have a green sheet before you. I will  
17 just quickly read the item numbers: Items 4, 5, 6, 15  
18 and 17.

19 CHAIR SHEEHAN: Okay. Are there any objections to  
20 the proposed Consent Calendar?

21 *(No audible response was heard.)*

22 CHAIR SHEEHAN: If not, we'll entertain a motion.

23 MEMBER BOEL: I move that we adopt the Consent  
24 Calendar.

25 MEMBER SMITH: I second.

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

2 All those in favor, signify by saying "aye."

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

4 CHAIR SHEEHAN: Any opposed?

5 *(No audible response was heard.)*

6 CHAIR SHEEHAN: No abstentions?

7 *(No audible response was heard.)*

8 CHAIR SHEEHAN: That carries.

9 The next item?

10 MS. HIGASHI: This brings us to the hearing portion  
11 of our meeting. And for all of you who are new to our  
12 hearings, what we do is, we have a mass swearing-in of  
13 all of the witnesses and parties who will be coming  
14 forward to testify today.

15 And so at this time I would like to ask all of you  
16 in the audience who plan to participate in today's  
17 hearing, to please stand for the swearing in of witnesses  
18 and parties.

19 Please raise your hand -- one of your hands.

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

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

24 MS. HIGASHI: Thank you very much.

25 CHAIR SHEEHAN: Great.

1           So as I announced before, the first item for hearing  
2           that we will get to is Item 9 and Item 10, *Standardized*  
3           *Testing and Reporting*, the STAR test. Okay.

4           MS. HIGASHI: Item 9 will be presented by Commission  
5           Counsel, Eric Feller.

6           MR. FELLER: Good morning. As you mentioned, this  
7           is the reconsideration of the *Standardized Testing and*  
8           *Reporting* test claim, or "STAR," we call it.

9           The reconsideration of Commission Decision 97-TC-23  
10          was requested by the Legislature in SB 1108, as well as  
11          in AB 2855. Staff finds that the prior Commission  
12          decision on STAR was correct, except for activities  
13          required under federal law. For example, three  
14          activities are required under the federal Individuals  
15          with Disabilities Education Act. Those are exemption  
16          from testing for pupils, if the pupil's individualized  
17          education program has an exemption provision,  
18          determination of the appropriate grade-level test for  
19          each pupil in a special education program, and third,  
20          provision of appropriate testing adaptation or  
21          accommodations to pupils in special education programs.

22          Staff also finds that the activity of administering  
23          an additional test to limited-English proficiency pupils  
24          enrolled in grades 2 through 11, or, in other words, the  
25          SABE/2 test, is required under the federal Equal

1 Education Opportunity Education Act, as interpreted by  
2 federal case law.

3 The San Diego Unified School District has taken the  
4 position that this language test in STAR should continue  
5 to be reimbursable.

6 The Legislative Analyst's office and the Department  
7 of Finance submitted comments that STAR was implemented  
8 to enact a federal mandate, the No Child Left Behind Act  
9 or NCLB, and its predecessor, the Improving America's  
10 Schools Act, or IASA, therefore, should not be  
11 reimbursable.

12 Although these federal programs are thought of by  
13 many as a federal mandate, the issue is whether they're  
14 federal mandates under California's mandate reimbursement  
15 laws.

16 As indicated in the analysis, the California Supreme  
17 Court has held that the existence of a federal mandate  
18 depends on various aspects of the federal program,  
19 including whether the penalties for non-participation in  
20 the program are certain and severe on the state. Lacking  
21 evidence as to the certainty or severity of the penalty,  
22 staff finds that NCLB and IASA are not federal mandates.

23 Leg. Analyst and Finance have also argued that the  
24 reconsideration decisions should be retroactive so as to  
25 affect past reimbursement claims. However, staff found

1 no evidence in the record or the reconsideration statutes  
2 to support retroactivity, other than to implement the  
3 2004-2005 budget.

4 So staff finds that the reconsideration should be  
5 effective July 1, 2004.

6 Leg. Analyst and Finance also assert that if the  
7 Commission finds a reimbursable mandate, that federal  
8 Title 1 funds should be used to offset the mandate.

9 Staff could not find a legal requirement for school  
10 districts to use federal funds to offset the mandate, so  
11 we did not include this requirement in the Statement of  
12 Decision before you.

13 Staff does agree with LAO and Finance that any state  
14 budget funds for STAR should be used to offset the STAR  
15 costs.

16 In sum, staff recommends that the Commission adopt  
17 this analysis and partially approve the prior Commission  
18 decision, as outlined in the analysis.

19 Would the parties and witnesses please state your  
20 names for the record?

21 MR. PALKOWITZ: Good morning. Art Palkowitz on  
22 behalf of San Diego City Schools.

23 MR. RAINES: Robert Raines, program manager,  
24 Testing, San Diego City Schools.

25 MR. SHELTON: Jerry Shelton, California Department

1 of Education.

2 MR. CERVINKA: Pete Cervinka, Department of Finance.

3 MR. DEL CASTILLO: Lenin Del Castillo, Department of  
4 Finance.

5 CHAIR SHEEHAN: Okay, Mr. Palkowitz, do you want to  
6 start?

7 MR. PALKOWITZ: Yes, thank you.

8 Good morning. I wanted to thank the staff for their  
9 analysis and the 39-page report.

10 In that report, we have an issue of one item, and  
11 that relates to the testing of English learners. It's  
12 their number 3 conclusion on page 2.

13 STAR, when it was passed in 1998, and this  
14 Commission decided that we were entitled to reimbursement  
15 for the additional testing of pupils of limited English  
16 proficiency who were enrolled in grades 2 through 11, we  
17 feel that this should be part of the reimbursement as the  
18 rest of the testing of STAR, as mentioned in this Staff  
19 Analysis. Spanish Assessment of Basic Education, SABE,  
20 is still one of the four components of STAR.

21 As the Staff Analysis points out, NCLB, itself, is  
22 not a federal mandate. STAR goes beyond NCLB. And,  
23 therefore, it would seem appropriate that SABE also be  
24 reimbursed as the other components of the STAR program.

25 The analysis by staff is that there is a federal



1 statute referred to as "Equal Educational Opportunities  
2 Act." And that is a statute that basically states that  
3 students should receive a similar education and should  
4 not be discriminated against, based on their sex,  
5 national origin, race.

6 Staff has concluded that since there is such a broad  
7 statute from the federal law, that, therefore, that  
8 statute also means that you cannot discriminate against  
9 English learners; and as a result, that testing that we  
10 do at the state of California is really required by the  
11 federal government.

12 However, in staff's analysis, there is no mention of  
13 any federal statute that says English learners need to be  
14 tested. The basis of denying this reimbursement is that  
15 federal law preempts California state law and, therefore,  
16 should not be a mandate.

17 I think it's reasonable that the claimants and the  
18 Commission ask or make an inquiry, where is this federal  
19 statute that states you are required to do testing of  
20 English-proficiency students? Without identifying such a  
21 statute, it seems to me to take a broad statute that says  
22 you should not discriminate against students based on  
23 their race, origin, or national origin, is, therefore,  
24 stretching it to say that any testing of English learners  
25 is now required by the federal government.

1           Staff also mentions the Castaneda case infers that  
2 there should be testing, and that that testing,  
3 therefore, is required by the federal government.

4           Briefly, Castaneda was a class action that basically  
5 said you're discriminating against certain races in the  
6 state of California. At no point, did that case hold the  
7 LEAs of any local agency required to do testing of  
8 English learners. Nor was the case of any language that  
9 required that. And it even went the other way, and said  
10 that LEAs may adopt their own particular programs to  
11 adhere to any type of discrimination that might be taking  
12 place.

13           Therefore, in conclusion, without a showing of a  
14 federal statute that clearly says testing is required of  
15 English learners, we feel that it's inappropriate to make  
16 an analysis that it is preempted by federal statute and,  
17 therefore, SABE should remain as a reimbursable mandate.

18           Bob Raines from our Testing Department, he is the  
19 manager of the Testing Department, San Diego City  
20 Schools, is here to testify and also answer any questions  
21 that you might have.

22           MR. RAINES: Should I go ahead?

23           MR. PALKOWITZ: Yes.

24           MR. RAINES: Good morning.

25           Many of the activities that relate to SABE, they are

1 very parallel to the ones that we do for the STAR -- the  
2 rest of the STAR program, although it's a different time  
3 frame.

4 We're required to notify parents of the assessment,  
5 of the upcoming assessment. We have to order materials.  
6 We've got to train test site coordinators, pretty much in  
7 a trainer's model, so that those people can train the  
8 examiners at each site. And then those examiners are  
9 required to be familiar with the directions for  
10 administration, which they usually have to familiarize  
11 themselves with in off-duty hours.

12 We coordinate the delivery of the materials to all  
13 of our 185 sites.

14 The test, of course, is administered; and we're  
15 monitoring that process. We collect the materials,  
16 process them before they go in for scanning and scoring  
17 in our processing center. We receive the school results,  
18 disseminate those to the schools, disseminate the  
19 individual student results to parents via U.S. mail,  
20 along with explanatory materials. And then we work with  
21 sites on an interpretation of those school and student  
22 results, as needed.

23 Thank you.

24 CHAIR SHEEHAN: Mr. Shelton?

25 MR. SHELTON: Thank you, Madam Chair.

1           Jerry Shelton. I'm the Director of Fiscal and  
2           Administrative Services at the California Department of  
3           Education. And I'm here primarily to address one issue  
4           that's brought forward in the Staff Analysis, and that  
5           really is, I think, the crux of what is before you today.  
6           And that question is: Does NCLB or its predecessors,  
7           ESEA or IASA, as it was referred to in the Staff  
8           Analysis, do those constitute a federal mandate that  
9           places requirements in the area of assessment and  
10          accountability? In other words, does the state have a  
11          choice in whether or not it meets the requirements of  
12          NCLB?

13           And our answer is a resounding no, we do not feel  
14          that we have a choice in terms of whether or not we meet  
15          the requirements of NCLB.

16           STAR has evolved over a number of years now, from  
17          the late nineteen nineties. And it evolved from a system  
18          that was set up initially to meet the requirements of  
19          IASA or ESEA. Those requirements were not as stringent  
20          as the requirements are now under NCLB. So, in fact,  
21          there have been additional activities, additional tests,  
22          at additional grade levels, additional full tests added  
23          to the testing system, as the system has evolved.

24           I think there's no question that that has imposed  
25          additional costs on the locals, or additional activities

1 to support the testing system.

2 You know, the question really is: Did we have a  
3 choice in terms of evolving that system?

4 The Department and the State Board of Education, who  
5 could not be represented here -- and, in fact, I'm  
6 speaking both for the Superintendent and for the State  
7 Board of Education -- feel that we have evolved the  
8 testing system to the point where we're meeting,  
9 effectively, the minimum requirements of NCLB.

10 Your Staff Analysis made reference to the Hayes  
11 decision, where the Court effectively said that the test  
12 of whether or not a federal mandate was where the  
13 requirement was derived, really should be at the local  
14 level. I think we would argue that that's not true;  
15 that, really, the test of whether a federal requirement  
16 presents a mandate to the state is basically at my level,  
17 or at least at the level of the department that's  
18 responsible for administering and implementing those  
19 programs.

20 We operate under an environment of compulsion and  
21 coercion from the federal government. I think that was  
22 most recently evident in discussions that we had with the  
23 federal government over a fairly minor definitional issue  
24 related to categorizing schools as program-improvement  
25 schools under NCLB. This was a definitional issue. The

1 feds came to us and said, "If you don't change this  
2 definition, you will lose, initially, 25 percent -- up to  
3 25 percent of your administrative funds under NCLB, and  
4 you will be at risk of losing the entire federal grant."

5 The federal grants under NCLB total in excess of  
6 \$3 billion. That's close to 8 percent of the total  
7 educational funding in the state of California. And I  
8 think that's a substantial loss, and I think that's a  
9 reasonable level of coercion -- let me restate that.  
10 That I think that's an unreasonable level of coercion and  
11 compulsion being placed on us by the feds. I think it's  
12 fairly significant.

13 In closing, I just think that it's fairly clear to  
14 us, kind of on the front lines of this program, that we  
15 don't have a choice, in terms of how we operate. And  
16 following through on the logic -- and I'll leave that to  
17 you, and I think to your staff as well -- I mean, the  
18 logic to us is, if we don't have a choice, then the  
19 activities that we impose on local education agencies  
20 derive from those federal requirements and, thus, get us  
21 to the point where those mandated costs would not, in  
22 fact, be -- or would not be reimbursable.

23 Thank you.

24 CHAIR SHEEHAN: Thanks.

25 MR. DEL CASTILLO: Yes, to follow-up on

1 Mr. Shelton's comments and to reiterate some of the  
2 points that we submitted as part of our public comments.  
3 Yes, we do believe the federal No Child Left Behind Act  
4 is a mandate. It requires each state to develop a system  
5 of assessments, and assess the performance of students  
6 based on those assessments as a condition of receiving  
7 federal funding. As Mr. Shelton pointed out, in the  
8 current year, California is receiving over \$3 billion,  
9 and is expected to increase next year.

10 Given the magnitude of this amount, the state has no  
11 other choice than to participate in NCLB.

12 The STAR program in California allows California to  
13 implement and satisfy the federal assessment requirements  
14 in NCLB. We've spent considerable resources revising the  
15 STAR program to conform to federal standards. And  
16 without the program, as Mr. Shelton pointed out, we could  
17 jeopardize our eligibility to receive these federal  
18 funds.

19 Regarding the reimbursement period for this claim,  
20 we do believe the Legislature intended to apply its  
21 reconsideration decision retroactively, and thus have the  
22 Commission revisit its original decision.

23 You'll note that the Legislature has never budgeted  
24 any funds for claims submitted under this mandate,  
25 meaning, they have never formally approved the

1 Commission's decision on this mandate. Therefore, we  
2 believe that any changes to the findings of this mandate  
3 should be applicable to all district claims, regardless  
4 of timing.

5 Should you disagree that STAR is federally-mandated,  
6 we would respectfully urge you to consider offsetting  
7 funds, savings and revenues.

8 You'll note that the districts do receive  
9 apportionment amounts to administer the test.

10 And lastly, we'll note that the Laird bill from last  
11 year, AB 2855, specifically asks that the Commission  
12 identify any funds used for these purposes, and require  
13 that they be used to offset the districts' costs for  
14 administering the exam. These funds are dedicated, and  
15 can only be used for specific purposes. So they should  
16 appropriately be used to offset the costs for  
17 administering the tests.

18 And we'd also like to note that we concur with the  
19 comments submitted by the Legislative Analyst's Office.

20 CHAIR SHEEHAN: Great.

21 Before we go on to questions, I will ask staff to  
22 address some of the issues. There were a couple other  
23 people -- anybody from L.A. Unified that wanted to  
24 testify on this? We had heard possibly they wanted to,  
25 also. I just wanted to make sure.



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1 Eric, do you want to address any of these?

2 Do we have questions from the members?

3 MEMBER SMITH: No.

4 CHAIR SHEEHAN: Okay, all right. Start with --

5 MR. FELLER: Starting with the San Diego Unified  
6 arguments?

7 CHAIR SHEEHAN: Yes.

8 MR. FELLER: Mr. Palkowitz is correct in what he  
9 says about the federal statute, that --

10 MR. PALKOWITZ: No further comments.

11 MR. FELLER: Let me finish.

12 On the top of page 38, the federal statute is quoted  
13 as, "*No state shall deny equal educational opportunity to*  
14 *an individual on account of his or her race, color, sex*  
15 *or national origin by,*" skipping down a few paragraphs,  
16 "*the failure by an educational agency to take appropriate*  
17 *action to overcome language barriers that impede equal*  
18 *participation by its students and in its instructional*  
19 *programs.*"

20 For many years, the courts have struggled to figure  
21 out what that means, "appropriate action." It doesn't  
22 say "bilingual education." And some courts have pointed  
23 that out.

24 The Castaneda court -- it is a very influential case  
25 on this area of the law -- came up with a three-part test

1 to determine the sufficiency of the appropriate action,  
2 and that's on page 39, the fourth paragraph.

3 The first is whether the program is based on an  
4 educational theory recognized as sound or at least as a  
5 legitimate experimental strategy by some of the experts  
6 in the field.

7 Second, whether the program is reasonably calculated  
8 to implement that theory.

9 And third, after being used for a time sufficient to  
10 afford a legitimate trial, has the program produced  
11 satisfactory results?

12 The only way that you can determine whether  
13 appropriate action has been taken and whether these three  
14 tests have been met, is through testing of pupils. And  
15 I believe that's why the Castaneda court called testing  
16 essential. And I quoted that on page 38, in the last  
17 full paragraph.

18 *"Valid testing of students' progress in*  
19 *these areas is, we believe, essential to*  
20 *measure the adequacy of a language remediation*  
21 *program. The progress of limited*  
22 *English-speaking students in these other areas*  
23 *of the curriculum must be measured by means of*  
24 *a standardized test in their own language*  
25 *because no other device is adequate to*

1           *determine their progress, vis-a-vis that of*  
2           *their English-speaking counterparts."*

3           So it was this case, as well as the Keyes case, that  
4           interpreted the federal statute that we believe controls  
5           in this case.

6           This is -- and the Equal Education Opportunities Act  
7           is a little bit different than No Child Left Behind  
8           because it is based on constitutional principles of equal  
9           protection. So more akin to mandatory, as we say.

10          Let me address the Department of Finance's  
11          arguments, before I get to the Department of Education.

12          As far as retroactivity goes, there just isn't  
13          anything in the statute to indicate that it was  
14          retroactive before the fiscal year 2004-2005. And  
15          according to the rules of statutory interpretation, there  
16          needs to be, to interpret it that way. So if it were  
17          going to be retroactive, the Legislature would have  
18          needed to tell us that in the statute, and they did not.

19          As far as offsetting provisions, again, we don't  
20          find any legal requirements. And the Education Code  
21          actually speaks of fairly broad authority for spending  
22          education dollars on the part of school districts. So if  
23          they were going to be -- if school districts were to be  
24          required to offset the STAR program with federal funds,  
25          it should say that somewhere in the law. We just didn't

1 find that it anywhere. We don't find any federal  
2 requirement for that to happen.

3 Now, as far as the Department of Education and No  
4 Child Left Behind issue, as a federal mandate, the  
5 finding in this Statement of Decision is that there was  
6 insufficient evidence. The evidence has to be certain  
7 and severe. The penalties have to be certain and severe.  
8 And based on what we had in the record up until today,  
9 we couldn't find the certainty or the severity of the  
10 penalties. Nobody can tell us, other than the 3 billion  
11 dollar figure, how much California would lose. We're  
12 told that we're at risk of losing \$3 billion. That's not  
13 certain, that California is at risk.

14 There is new testimony presented in the record  
15 today, as Mr. Shelton has indicated, if California  
16 specifically has been threatened with a loss of  
17 25 percent of administration funds, that is new evidence  
18 in the record today that's not reflected in this  
19 analysis. And that would weigh in as a factor if we knew  
20 what that amount was, the 20 percent of administration  
21 funds, that could weigh in as a factor on this analysis.

22 So because we've received new testimony today,  
23 I don't necessarily recommend that we go forward with the  
24 Statement of Decision today, but that we --

25 CHAIR SHEEHAN: Have the opportunity to look at

1 that?

2 MR. FELLER: Yes. And what would be helpful is if  
3 we had more specifics from the Department of Education as  
4 to what the federal Department of Education has told them  
5 the amounts, as far as the loss of administration funds.

6 CHAIR SHEEHAN: Okay. Could we get something in  
7 writing, Jerry, in terms of your testimony and some of  
8 those issues on the potential sanctions from the feds  
9 under the No Child Left Behind?

10 MR. SHELTON: I think we should at least be able to  
11 provide you, Madam Chair, with the information that came  
12 to us in the discussions over the issue that I mentioned.

13 CHAIR SHEEHAN: Right.

14 MR. SHELTON: And I just want to underline that the  
15 issue that we went through with the feds, and received  
16 that threat, was basically a small definitional issue.  
17 It wasn't something like --

18 CHAIR SHEEHAN: Policy?

19 MR. SHELTON: -- "Stop doing testing" or of that  
20 magnitude.

21 CHAIR SHEEHAN: Right.

22 MR. SHELTON: So I can go back and see what written  
23 communications we had.

24 I know a lot of the discussions were via telephone  
25 and things. But I think that there probably is some

1 written discussion.

2 CHAIR SHEEHAN: Okay.

3 MR. FELLER: If I may. Anything in writing from the  
4 Department should be certified under penalty of perjury.  
5 That would be helpful, if we got that.

6 MR. SHELTON: We understand the service  
7 requirements.

8 MR. FELLER: All right. The other -- there is one  
9 other issue that Mr. Shelton said that staff does  
10 disagree with, that STAR meets the minimum requirements  
11 under No Child Left Behind.

12 STAR actually goes beyond the federal requirements,  
13 in that it tests second graders statewide, which is not  
14 required under No Child Left Behind, which requires  
15 testing third through eighth graders, as well as testing  
16 high schoolers -- all high school students, as opposed to  
17 just once during the high school years, under No Child  
18 Left Behind. So I wanted the record to reflect that.

19 MR. SHELTON: If I may respond.

20 I think that staff should also take into  
21 consideration that there are requirements in NCLB related  
22 to the assessment system, beyond simply the testing  
23 requirements themselves. We have a large number of  
24 accountability requirements, including the calculation of  
25 adequate yearly progress and other things, that require

1 the testing system to do more than what is obvious in  
2 terms of just a simple examination of the testing  
3 requirements themselves.

4 CHAIR SHEEHAN: Well, the way I see it, there's sort  
5 of two issues. One, what grades are required. And there  
6 definitely is a difference in the two. And then the  
7 substance of the assessment itself, if I understand you  
8 correctly, in terms of the difference on those two  
9 issues.

10 MR. STARKEY: Madam Chair, I wonder if there is any  
11 testimony from Mr. Palkowitz, at this point.

12 CHAIR SHEEHAN: I'm sorry, please state it again.

13 MR. STARKEY: I wonder if Mr. Palkowitz has any  
14 testimony he wants to give, and then I have a comment I  
15 want to make about the evidence.

16 MR. PALKOWITZ: Just so I think I understand where  
17 we're going, is that you're leaning to continue this, to  
18 give Mr. Shelton an opportunity to respond in writing.

19 I would like it to be clear on the record what he is  
20 asked to respond to. And then I would like to know, when  
21 did this come about, and why wasn't this presented for  
22 this hearing? So those are my questions so far.

23 CHAIR SHEEHAN: Mr. Shelton, do you want to address  
24 the issue as to why we didn't see this presented before  
25 today? And it came about this spring, as I recall.

1 MR. SHELTON: Yes, this is a fairly recent  
2 interaction between us and the feds, over the last couple  
3 of months. And also I included it as part of my  
4 testimony and in contemporaneous fashion. I mean, this  
5 is an ongoing discussion with the feds. It's only  
6 recently been resolved at the last State Board of  
7 Education meeting. And I'm here to testify to the  
8 Commission on that issue.

9 MR. PALKOWITZ: If I may ask, what is the issue? It  
10 is not clear to me what the issue is that they've been  
11 discussing for the past several months.

12 CHAIR SHEEHAN: Well, as I understand, the issue is  
13 the penalties to the state -- the potential penalties to  
14 the state for not complying with one of the requirements  
15 under NCLB.

16 MR. PALKOWITZ: Which requirement is that?

17 CHAIR SHEEHAN: I believe it -- well, I'll let  
18 Mr. Shelton respond -- but I think the issue goes to  
19 the -- you know, the legal test of the coercion --

20 MR. PALKOWITZ: No, I understand that. I'm not sure  
21 what --

22 CHAIR SHEEHAN: -- by the feds to the state of what  
23 the requirement --

24 MR. PALKOWITZ: -- what the allegation is that the  
25 state hasn't done, that could result in the state losing



1 the funding.

2 MR. SHELTON: The context of the discussion with the  
3 feds, was over conditions that were used to categorize  
4 schools as program-improvement schools under NCLB. There  
5 was a difference in opinion in terms of how the state was  
6 proceeding with categorizing schools in that way relative  
7 to what the Feds chose to require on us. They placed a  
8 requirement on us that was much more onerous, much more  
9 rigorous than the definition that we were going in with.

10 But I think that the real issue, as far as this  
11 particular case in question is, that, in fact, the  
12 federal government came back to us and threatened  
13 sanctions if, in fact, we did not act according to their  
14 interpretation of NCLB.

15 I think that goes to the issue of what would happen  
16 to the state and what would happen to the grants that we  
17 receive under NCLB if, in fact, we chose not to meet the  
18 testing requirements of NCLB. And I think that's germane  
19 to the case that the Commission is considering.

20 CHAIR SHEEHAN: Let me ask another question in that  
21 regard, and I don't know if it's appropriate to include  
22 it in the record. But the other activities that have  
23 gone on with NCLB, with other states, in terms of  
24 sanctions for noncompliance or what would be some --  
25 if they've withheld grants from other states because they

1 didn't do something. Now, that may not necessarily be  
2 part of this record, but just in terms of -- to your  
3 knowledge, Mr. Shelton, have the feds dinged other  
4 states?

5 MR. SHELTON: I'm actually not prepared at this  
6 time, Madam Chair, to address that. You know, I think  
7 that there are -- or I personally do know of issues where  
8 states have been out of compliance with NCLB. The  
9 federal government has landed on those states in the same  
10 way. Whether sanctions were imposed or not, I'm not sure  
11 of that personally, so I would not want to testify.

12 CHAIR SHEEHAN: Mr. Feller?

13 MR. FELLER: I've done a little bit of research in  
14 that area. And we couldn't find any state that had been  
15 sanctioned yet, which was part of the reason that we  
16 couldn't find certain and severe penalties.

17 I believe Utah has come the closest --

18 CHAIR SHEEHAN: Well, that's what I think.

19 MR. FELLER: -- in their threats.

20 CHAIR SHEEHAN: Right.

21 MR. FELLER: There's been newspaper articles just in  
22 the last month of their adopting their own standards and  
23 giving those primacy over federal standards, and that  
24 state having been threatened with loss of federal funds.

25 CHAIR SHEEHAN: Okay, well, that's what I read, is

1 in the newspaper about Utah.

2 MR. SHELTON: Madam Chair, I think we're waiting to  
3 see, to a certain extent, what happens in Utah. The  
4 actions that that state has taken have been recent  
5 enough, that the federal government really hasn't come  
6 through with a formal response, as far as we know.

7 And also, I'd also point out that the stakes, to a  
8 certain extent, are much lower in Utah as well.

9 CHAIR SHEEHAN: Monetarily?

10 MR. SHELTON: Monetarily, both in an absolute sense  
11 and in a proportional sense, Utah receives about  
12 \$76 million, not in excess of \$3 billion under its NCLB  
13 grants. And where, for us, it's close to 8 percent of  
14 our education funding, because of the heterogeneous  
15 population that we have in this state, relative to a more  
16 homogenous population in Utah, that \$76 million amounts  
17 to a little bit under 3 percent of their level of  
18 educational funding.

19 CHAIR SHEEHAN: You mean, it's all relative?

20 MR. SHELTON: I think, in this sense, it's both  
21 relative and absolute, right.

22 CHAIR SHEEHAN: Especially in dollars.

23 Did you want to -- because I had a question.

24 MR. CERVINKA: If I can just tack on, Madam Chair.

25 Pete Cervinka, Department of Finance.

1 I'd simply note, too, that the absence of any  
2 sanctions actually having been applied in other states is  
3 not particularly relevant to the issue here. Other  
4 states find themselves in the same position we do in  
5 California, with respect to NCLB implementation.

6 It's fairly new. There have been recent changes in  
7 what we think the feds might allow and not allow, in  
8 terms of flexibility within NCLB. So we just want to  
9 state that for the record.

10 Additionally, we think it would be a little bit  
11 unreasonable to expect the state to refuse to implement  
12 a federal program until sanctions were actually applied.  
13 We think it's not a place that we want to go.

14 CHAIR SHEEHAN: No, no, no, I'm not suggesting that  
15 at all. I'm just -- in terms of what have been some of  
16 the other developments around this issue. No, I  
17 wouldn't -- far be it for me to suggest we push them on  
18 this issue.

19 MR. SHELTON: Madam Chair, just -- and I don't mean  
20 this to be glib, although it may sound that way.

21 CHAIR SHEEHAN: We'll take it that way.

22 MR. SHELTON: The other thing is that the absence of  
23 sanctions actually being imposed, notwithstanding  
24 Mr. Cervinka's comment about "NCLB still is a fairly  
25 recent phenomenon," but the absence of sanctions being

1 imposed may also be taken as evidence of the power of the  
2 coercion that the federal government actually places on  
3 states.

4 You know, when we were threatened with that, we  
5 backed off and went into negotiations with the feds on  
6 that less significant issue fairly quickly.

7 MR. STARKEY: Madam Chair, I just wanted to make a  
8 point for the record in terms of the kind of evidence  
9 that we would expect to see. Mr. Feller correctly  
10 pointed out that this record is devoid of any supporting  
11 documentation that, in fact, there is a certain penalty.  
12 And that's where we left our analysis, to say that we  
13 need to have evidence that it is, in fact, certain and  
14 severe.

15 That is not in this record at this point. So what  
16 we would expect by allowing this matter to go forward,  
17 based on the testimony we've heard today and some of the  
18 representations, that, in fact, the evidence will be of  
19 a nature that we can look at it, evaluate it, and make an  
20 effective legal recommendation.

21 What is present in the decision now, the recommended  
22 decision, is that it appears from the reading of the  
23 federal statutes, that, in fact, this is a type of  
24 situation where there is a shared relationship, a shared  
25 goal between the federal government and the states. And

1 it doesn't appear clear, from what we've seen, that, in  
2 fact, that the coercion is certain.

3 So we will be looking for that type of evidence.

4 MR. FELLER: As it applies to testing. Not  
5 categorizing schools and not other areas of NCLB, but we  
6 need the evidence to be particular to the testing  
7 requirements for it to be relevant.

8 MR. SHELTON: I think that the standard that your  
9 staff sets will make it impossible for us to comply.  
10 There have been no threats, and certainly no certain  
11 sanctions placed on us in the area of testing in NCLB;  
12 because, in fact, we've complied with those requirements.

13 So if the Commission is looking for certain  
14 sanctions in the area of assessment, then we have nothing  
15 to offer you further.

16 MR. STARKEY: If I may interject. That's not what  
17 we're directing our attention to. The law has a standard  
18 that the penalties be certain. And so we are going to  
19 take a look at the statutes and we're going to take a  
20 look at any court decisions that are available. But  
21 we're looking at, is there a certainty in the law. Not a  
22 perception, not a belief, not an apprehension; but does  
23 the law impose a certainty for penalties? And I'm  
24 saying, we haven't seen it yet; we haven't seen the  
25 evidence of it. And, frankly, we're a little bit -- it's

1 difficult to do this, where this has been out there for  
2 quite a while.

3 And I understand there's a contemporaneous argument  
4 that this is just new information. But, in fact, we're  
5 not focusing on, again, the perceptions or the "what  
6 ifs." We're looking for clear direction that the federal  
7 government has some -- has done something to make this a  
8 certainty.

9 So I just want to make that clear.

10 CHAIR SHEEHAN: Did you want to say something?

11 MR. PALKOWITZ: Yes. I just -- before he commented,  
12 we were both there when the Supreme Court justices said,  
13 "You need to have a severe penalty." This is not  
14 something that staff is setting the criteria; rather, it  
15 was the Supreme Court that was real clear on that.

16 You know, as pointed out in the analysis, NCLB  
17 states it is not a mandate. And the fact that we do or  
18 do not negotiate, or we set out certain provisions,  
19 that's really our choice.

20 But I also wanted to comment on, we're continuing  
21 this hearing for evidence that there may or may not be  
22 certain or severe penalties. Is that meaning there will  
23 be further evidence being submitted on all the other  
24 issues, or are those issues resolved, and should the  
25 Commission have a hearing, or a ruling on that, or a

1 vote? I'm not sure what the procedure is, because there  
2 are a lot of issues here that we've discussed. And if  
3 we're going to allow further evidence on the NCLB issue,  
4 as far as whether or not it applies because of the severe  
5 certainties, I don't know that it will be appropriate to  
6 discuss the other issues.

7 CHAIR SHEEHAN: Go ahead, Paula.

8 MS. HIGASHI: I would just suggest that if the  
9 Commission decides that, based on Mr. Shelton's  
10 testimony, that they would like him to submit additional  
11 documentation into the record, that once that  
12 documentation is received into the record on the specific  
13 issue that is not now in the record, that we would then  
14 post it on our Web site, and allow the other parties an  
15 opportunity to rebut that evidence or to respond and  
16 review it.

17 Alternatively, the Commission staff could evaluate  
18 that evidence and issue a revised Staff Analysis, set the  
19 matter for hearing, and at that time solicit the  
20 comments.

21 MEMBER BOEL: However, it seems like Mr. Shelton has  
22 already said that he can't submit that evidence.

23 MS. HIGASHI: Exactly. That's why it's --

24 CHAIR SHEEHAN: Go ahead.

25 MR. SHELTON: Well, what I said was, if the



1 standards set by your staff is what the Commission  
2 chooses to follow, and that is, that there is a certain  
3 sanction in the area of assessment, then I know that I  
4 will not be able to provide that. But that was not my  
5 testimony, and that was not what I took the Chair's  
6 initial request to me to be.

7 I took the Chair's initial request to me to be to  
8 provide documentation related to the instance that I  
9 spoke of, which was not in the area of assessment. It  
10 was in the area of defining schools as program  
11 improvement schools.

12 That we will -- or at least I will go back and  
13 examine what written documentation we have from those  
14 discussions. And we could provide that, if there is that  
15 written documentation.

16 CHAIR SHEEHAN: Other questions from the --

17 So the issue would be, if we put this over, the only  
18 issue that will be addressed, to answer your question,  
19 Mr. Palkowitz, would be this one, not -- everything else  
20 has been, people have had time to provide comments in  
21 their testimony, to this specific issue. But then others  
22 can respond to it, after we've posted it. If there is  
23 revised changes, anything, in terms of that.

24 But I think Mr. Shelton knows what the staff is  
25 looking for in terms of the discussion under NCLB, and

1 the comments that would be provided.

2 Go ahead.

3 MEMBER SMITH: Just so I'm clear, given the Chair's  
4 direction, do you think that you're going to be able to  
5 submit any additional testimony? I'm not clear on that.

6 MR. SHELTON: Well, again, I'm not certain what  
7 written documentation there were in these discussions.  
8 I'm certain of the discussions. I was in on some of  
9 those discussions.

10 So I think the first issue is that I need to see  
11 what part of that was communicated in written form. But  
12 I suspect that we will have something then to reply back.  
13 And even if there is nothing, I would at least provide  
14 the Commission the courtesy of a response that, in fact,  
15 there was no written communication.

16 MEMBER SMITH: Mr. Starkey, legally, is this what  
17 we're looking for?

18 MR. STARKEY: Well, they have made representations  
19 at the hearing. And if they can be supported with  
20 documentation -- just, for example, if, in fact, the  
21 federal government has imposed or is threatening to  
22 impose a sanction, I would expect that there would be  
23 a letter that sites a regulation or a statute that gives  
24 them the authority to do that; or there would be  
25 something that you would be able to point to say, this

1 is a tangible, real threat, as opposed to it may or may  
2 not happen. So that's the kind of thing we're looking  
3 for. Because, again, we're looking for something that  
4 will help us to understand what appears to be set out in  
5 the statutes, that it's not intended to work in that  
6 fashion.

7 MEMBER BOEL: Let me make sure I understand this.

8 So if he provides to us some e-mail with some  
9 discussion points or something like that, verifying his  
10 discussions or e-mail traffic, that would not be  
11 sufficient, unless there were quotes referring to  
12 specific statutes?

13 MR. STARKEY: My preference would be is if they  
14 believe they have evidence to support the representations  
15 made today, then they'd be allowed to present it. It  
16 will be evaluated. But, again, I just wanted to give a  
17 notion about what we're looking for.

18 CHAIR SHEEHAN: Yes, I think that is clear. And I  
19 think -- yes, I think what you said is correct: They  
20 represented, give them the opportunity to provide some  
21 information back, and then we don't know whether it will  
22 be acceptable because we don't know what it is yet.

23 So I'd like a little more discussion on the  
24 offsetting issue. I don't know if you want to go into a  
25 little more detail, in terms of the concerns.

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1 Mr. Feller's concern, that there wasn't anything  
2 specifically in the federal statute on the offsetting.  
3 And I don't know if you want to speak for both Finance  
4 and LAO.

5 MR. CERVINKA: Thank you, Madam Chair. Pete  
6 Cervinka.

7 Actually, I was going to seek some clarification  
8 from the staff attorney here.

9 They had stated that it was clear in the statute  
10 that there wasn't a requirement that the reconsideration  
11 be applied retroactively. And I'm curious as to whether  
12 the fact that the Legislature and the Administration and  
13 the executive branch has never provided funding to  
14 implement the previous mandate decision, has any bearing  
15 on whether or not the reimbursement period should be  
16 applied retroactively.

17 It's my understanding that it's really not  
18 considered to be an approved mandate decision, until that  
19 funding is provided. And I think the failure to provide  
20 that funding would indicate that there was significant  
21 disagreement with the Commission on this point, from the  
22 initial reimbursement period forward, not just as of the  
23 time the statute ordering reconsideration was enacted.

24 MR. FELLER: Well, let me just read what the  
25 California Supreme Court has said on retroactivity of

1 statutes. And this is on page 22, at the bottom of the  
2 quoted material in the analysis.

3 *"A statute may be applied retroactively only if it*  
4 *contains express language of retroactively" -- and that*  
5 *should be "retroactivity" -- "or if other sources provide*  
6 *a clear and unavoidable implication that the Legislature*  
7 *intended retroactive application."*

8 That would be the legislative history of the statute  
9 itself.

10 I went through all the committee analyses, and I  
11 couldn't find anything, other than the statement that it  
12 was to effectuate changes included as part of the  
13 proposed 2004-05 Budget Act. I couldn't find anything  
14 else that indicated the intent for it to apply  
15 retroactively.

16 And so, no, I don't believe that the failure to --  
17 I mean, there's a lot of other mandates that haven't been  
18 funded, either. I don't see that as evidence of  
19 legislative intent for this particular reconsideration.

20 CHAIR SHEEHAN: Go ahead.

21 MR. CERVINKA: Well, I think we might respectfully  
22 disagree then. I think the absence of an action,  
23 affirmatively approving a mandate, I think might speak  
24 for itself here.

25 CHAIR SHEEHAN: Mr. Palkowitz?

1 MR. PALKOWITZ: Yes. Thank you.

2 STAR was approved by the Commission on August 2002.  
3 I don't believe there's been funding for any mandate  
4 since that time. Nor would I believe that there's any  
5 law that you could point to that says a mandate not  
6 effective until it's in the budget or appropriated. I'm  
7 not aware of any statute or regulation that states that.

8 CHAIR SHEEHAN: Do you want to address that?

9 MR. FELLER: No. I believe that to be the case.

10 MR. CERVINKA: That's actually not quite correct.

11 The mandates that have been approved, have been funded in  
12 the annual Budget Act. However, pursuant to what is  
13 allowed here, they've actually been deferred.

14 So the approved mandates have been budgeted with a  
15 thousand dollars, which effectively defers them in the  
16 annual Budget Act. That has not been the case with the  
17 STAR mandate, and the funding has never been provided for  
18 STAR.

19 With respect to the prior approved mandates that are  
20 deferred, those costs continue to accrue, and will be  
21 paid with interest at the time determined by the  
22 Legislature.

23 CHAIR SHEEHAN: Did you want to say something,  
24 Paula?

25 MS. HIGASHI: I just wanted to confirm that there's

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1 nothing in statute, that I'm aware of, that specifically  
2 states that if a mandate has not appeared, especially an  
3 education mandate -- has not appeared in the Budget Act,  
4 that it is not a mandate, until the Commission's decision  
5 is set aside by the courts or something else changes.  
6 And there hasn't been anything yet to change this  
7 decision.

8 CHAIR SHEEHAN: Okay. We've got some different  
9 views on this one.

10 The offsetting issue, can you go through, in terms  
11 of your rationale, again, on the offsets?

12 MR. CERVINKA: Well, I think as Mr. Shelton laid  
13 out, that the state is required to do things to ensure  
14 that local districts can receive Title 1 funds; and that  
15 their receipt of those funds indicates that they will  
16 comply with the various requirements here, make it quite  
17 clear that federal funds provided under NCLB which, in  
18 some cases, are dedicated specifically for assessments  
19 and can't be used for other purposes, most definitely  
20 should be considered offsetting.

21 And the fact that the Budget Act doesn't include  
22 a statement to that effect, doesn't really seem to be  
23 material to us. It's a condition of receiving the  
24 federal money. And I don't think that would need to be  
25 reiterated in the annual Budget Act. I just don't follow

1 that logic.

2 CHAIR SHEEHAN: Eric, can you address that?

3 MR. FELLER: Yes. Given the fact that the  
4 Legislature has said in the Education Code that the  
5 school districts have broad authority to carry on  
6 activities in progress, including the expenditure of  
7 funds for programs and activities which, in the  
8 determination of the school board, are necessary or  
9 desirable in meeting their needs, in light of that  
10 provision, we would need to see some intent on the part  
11 of either the federal government or the Legislature, for  
12 funds to be used to offset the STAR program.

13 Obviously, any state-budgeted funds for STAR would  
14 fall under that category. If we receive federal funds  
15 under Title 1 or Title 6 that are earmarked for testing,  
16 and we knew how much money that was, then that would be  
17 earmarked for testing, and that could be considered an  
18 offset. But we haven't gotten that level of evidence  
19 in the record, as far as the amounts or where those legal  
20 requirements are.

21 If the school districts are complying with various  
22 requirements in Title 1, I don't see how we get to the  
23 point where they're required to use it for the STAR  
24 testing requirement, of Title 1, as opposed to any of the  
25 other requirements of Title 1. I think that there would



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1 have to be some kind of legislative direction for that.

2 CHAIR SHEEHAN: All right. So if I understand what  
3 you're saying, is that there would have to be an explicit  
4 statement that you have to use X percent of your money  
5 for testing. Is that in order to be an offset, or --

6 MR. FELLER: A percent or an amount or -- yes, some  
7 kind of legislative intent that that's what this money  
8 is -- there's strings tied to the appropriated funds, to  
9 be used for that purpose.

10 CHAIR SHEEHAN: Do you guys want to address --

11 MR. CERVINKA: Well, I think if that level of  
12 specificity is what is desired here, again, we could work  
13 to providing that.

14 It's our understanding that Title 6 is the NCLB  
15 testing pot. And while some of that's reserved at the  
16 state level for test development and so forth, not only  
17 would those -- you know, those funds are necessary to  
18 ensure California's compliance with the statute, but  
19 they're also local funds as well, coming out of Title 6  
20 for local use. You know, and with respect to Title 1,  
21 again, it's a compliance issue for us. And districts  
22 have some discretion and various pots to use. But we  
23 could certainly work with the Department of Ed. to  
24 identify specific dollar figures that are provided to  
25 districts for these purposes.

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1 MR. FELLER: I wasn't clear on the evidence  
2 submitted by the Department of Finance in the initial  
3 letter. On page 32, there are these charts that provide  
4 General Fund and federal fund amounts. And as indicated  
5 in the state budget for STAR, if those are to be  
6 restricted to testing or if it's more than that, then  
7 would those constitute the offset amounts or what? Some  
8 clarification on that issue would be helpful.

9 CHAIR SHEEHAN: That would be great.

10 Would you like to identify yourself?

11 MR. WARREN: Yes, thank you.

12 Paul Warren with the Legislative Analyst's Office.

13 I think the issue of the offsetting revenues --  
14 you know, we find ourselves kind of engaged in this  
15 conversation that's kind of technical and legal. I'm a  
16 mere budget analyst; and I think I'm operating perhaps in  
17 a slightly different world than this Commission operates  
18 in. So forgive me if I'm arguing in a different way.  
19 But I think the way that we look at this program is that  
20 it's either a federal mandate or it's a program that  
21 provides funding on a voluntary basis to school  
22 districts; okay. There's nothing that requires districts  
23 to participate in No Child Left Behind.

24 There is, however, a mandate on the state, that we  
25 test all students, in all schools, in all school

1 districts, that are in public schools in California in  
2 order for qualify for funding under NCLB.

3 Now, there's technical issues about, "Well, is that  
4 really a federal mandate? Is it really just a voluntary  
5 program? What's the test for that?" And that's all  
6 important things to discuss.

7 I think that we tend to view it as, look, it's got  
8 to be -- from the state perspective, it's either a  
9 mandate that we are required to do this, and that the  
10 decisions that are made about the assessment system are  
11 part of that mandate; or it's a voluntary program for  
12 school districts; and that the things that are required  
13 of school districts by the feds, that the state is  
14 implementing, are things that they voluntarily take on  
15 in exchange for the resources that are provided by the  
16 program.

17 It seems to us, that it's got to be one or the  
18 other, okay. And, again, it's not a very good, legal  
19 argument, perhaps; but it strikes us as kind of a  
20 commonsense approach to dealing with these issues.

21 CHAIR SHEEHAN: Well, let me follow up then on your  
22 question, in terms of that -- of, you know, one or the  
23 other.

24 Then under which circumstances should the  
25 expenditure of those funds by the locals be considered an

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1 offset?

2 MR. WARREN: Well, you would say that, jeez, this is  
3 not a federal mandate; it's a voluntary program. But we  
4 recognize districts receive substantial funds. So for  
5 those activities that are required by the federal law,  
6 you have to use those funds to do all those activities,  
7 okay.

8 Now, there may be activities where the state went  
9 further than what the federal law required; and in those  
10 cases, I think I would say: No, we should not require  
11 districts to pay for that. That was a state-level  
12 decision.

13 CHAIR SHEEHAN: An increment that goes beyond?

14 MR. WARREN: For things that go beyond, right.

15 CHAIR SHEEHAN: Right.

16 MR. WARREN: You know, again, that's just kind of  
17 how it seems, like a reasonable approach to us.

18 MR. FELLER: I wish it were that simple. We would  
19 have been done 45 minutes ago.

20 Obviously, we have to go by what the California  
21 Supreme Court says. They came up with a five-factor  
22 test. So we've got one end of the spectrum that it's  
23 voluntary, and the other end of the spectrum that it's  
24 a mandate. And the Supreme Court has said, "No, look  
25 at all of the gray area in between to make a

1 determination." And that's what we tried to do in this  
2 case.

3 MR. WARREN: The idea, though, that the federal  
4 government should have somewhere said that "X" amount is  
5 set aside for local assessment, I think is assuming that  
6 they understand that we have this law in our Constitution  
7 that says, "The state shall reimburse districts for costs  
8 that are state-decided," okay. I think that that's not a  
9 reasonable position.

10 Obviously, the federal law requires everybody who  
11 wants to participate in this program to test their kids;  
12 okay. So they didn't need to say, you have to pay for  
13 it. California is probably one of a few states -- your  
14 experts here know better than I do -- that have one of  
15 these mandatory reimbursement programs. So that wasn't  
16 a federal issue; it's our issue.

17 So I don't think it's a reasonable position to say,  
18 "We need some evidence to say that they expected this  
19 program to pay for these costs."

20 CHAIR SHEEHAN: I can understand.

21 Can I go back to the issue, though, that the various  
22 Title 6 and Title 1?

23 I think what you said, Eric, if I understand you  
24 correctly, that you did not have information in the  
25 record from Finance addressing that issue. Is that in

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1 terms of either under Title 6 or Title 1?

2 MR. FELLER: Right. I mean, Title 1 is a fairly  
3 broad program. If there is any requirement, either at  
4 the state or the local level, for earmarked Title 1 funds  
5 to go to the STAR program or to go to these testing  
6 programs, that would be the kind of evidence that we're  
7 looking for. Also, any Title 6 grants that the State  
8 receives, that are channeled to the school districts for  
9 purposes of the STAR testing program, would be the other  
10 type of evidence that we're looking for.

11 CHAIR SHEEHAN: Okay.

12 MR. DEL CASTILLO: If you're seeking that type of  
13 clarification, that's something that we could work on and  
14 provide the Commission staff with.

15 CHAIR SHEEHAN: Okay, all right. That --

16 MR. WARREN: Can I make a comment on the issue of  
17 application?

18 CHAIR SHEEHAN: Sure.

19 MR. WARREN: Retroactivity?

20 CHAIR SHEEHAN: Sure.

21 All right, so I want to make sure that we will get,  
22 in addition to the Department of Ed. issue on NCLB, we  
23 will also be getting additional information from Finance  
24 on the offset discussion, that will also be posted to  
25 provide responses for people.

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1           So I want to make sure, in response to your issue,  
2           Mr. Palkowitz, that you understand what those things are  
3           that we will be focusing on subsequently. And it could  
4           be retroactively, we don't know.

5           MR. WARREN: The process as the Legislature -- and I  
6           want to associate myself with being a legislative  
7           employee -- is that the Legislature passes a law, a claim  
8           is made to your organization, it goes through your  
9           process; it comes back to the Legislature, in some form,  
10          for review.

11          It used to be when we had money, that it would come  
12          back in the form of legislation, and that legislation  
13          would be reviewed by the fiscal committees and approved.

14          And that would, essentially, endorse the actions of  
15          this Committee -- or this Commission.

16          That process hasn't worked for a while because of  
17          our fiscal situation. And so we've changed it a little  
18          bit.

19          The Legislature has asked our office, the  
20          Legislative Analyst, to review all new decisions by this  
21          Commission and make a recommendation to them in a report.  
22          We do that now on a routine basis. That was the reason  
23          we reviewed the STAR decision, in the first place.

24          Now, upon making that recommendation, if the  
25          Legislature had approved the decision of the Commission,

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1 it would have entered into the Budget Act an entry for  
2 the STAR program, and put a thousand dollars, as my  
3 colleague from Finance has described.

4 It did not do that. It asked -- it put in  
5 legislation a referral back to you, to look at these  
6 issues anew. So we very much believe that this  
7 legislative action indicates that they feel there is a  
8 need to revisit the whole decision. And that would be  
9 going back to the beginning.

10 So I think that's kind of -- we need to have some  
11 process to allow the Legislature to say, yes, the  
12 Commission's decision reflects our intent of what we did  
13 at the time. And I think to say that then your original  
14 decision should somehow be binding on all these years  
15 where the Legislature did not have the benefit of your  
16 view of that, it doesn't strike me as making --  
17 consistent with kind of the process that has been set up.

18 CHAIR SHEEHAN: Yes. And I guess -- I mean, I'll  
19 let Mr. Feller address that -- I guess the only  
20 observation that I would have on that is in the  
21 legislation from last year, whether it would have been  
22 beneficial -- and you don't necessarily have to answer  
23 this -- for them to have been more explicit in terms of  
24 what they were asking us to do. That would be my only  
25 observation.



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1           But I would -- I don't know -- Mr. Feller, if you  
2 have any comments.

3           MR. FELLER: There was a statute -- at the last  
4 hearing, we covered the Councils of Government statute,  
5 and that reconsideration statute said, "Any changes by  
6 the Commission shall be deemed effective July 1, 2004."

7           We didn't have that kind of guidance in this  
8 statute, which is why it's in issue now. But, obviously,  
9 the Legislature had the power to put it in there. They  
10 put it in there for a different reconsideration statute.  
11 And since they did not, we had to infer, based on the  
12 other parts of the statute, that it was intended to  
13 implement the Budget Act, that July 1, 2004, date.

14           But there has to be some clarity from the  
15 Legislature as to that intent; and we don't find it in  
16 the lack of appropriations. That's just too -- there  
17 could be other reasons for that.

18           CHAIR SHEEHAN: So, as I say, I guess the only  
19 issues -- sure, they can -- if they want to work on it  
20 upstairs and clarify it again. But without explicit  
21 instructions saying, "Go back to the beginning and  
22 revisit all those things, it makes it difficult with the  
23 way the statute is currently written to necessarily infer  
24 that..

25           I can certainly understand why people would see it

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1 differently, but I think counsel is saying that they have  
2 done it before, so they know how to do it. And they  
3 didn't do it in this case.

4 I don't know, maybe they assumed -- I don't want to  
5 speculate.

6 MR. FELLER: Yes, and they had two statutes, and  
7 they didn't do it in either one of them.

8 CHAIR SHEEHAN: So I don't want to presume why they  
9 didn't.

10 Anyway, did you have a question, Nick?

11 MEMBER SMITH: The time line, if we were to put this  
12 off, would be the next meeting?

13 CHAIR SHEEHAN: How quickly do Education and Finance  
14 feel they can get the information back to --

15 MR. CERVINKA: The next meeting, being two months?

16 CHAIR SHEEHAN: When's our next meeting?

17 No, June 10th. I don't think you're going to make  
18 June 10th.

19 MS. HIGASHI: Our next meeting is in July, at the  
20 end of July.

21 And typically, we would need to have that in the  
22 record very quickly, for turnaround time, like, I would  
23 say, two weeks, max.

24 MR. SHELTON: On our part, on the issue that we  
25 promised, I think two weeks would be fine.

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1 MS. HIGASHI: All right.

2 MR. CERVINKA: We'll do our best.

3 CHAIR SHEEHAN: Great. We'll prod them.

4 So with that, then the two -- where are we at?

5 Eight, nine, ten will be put over until the July

6 meeting --

7 MEMBER BOEL: Nine.

8 CHAIR SHEEHAN: Nine -- pending receipt of the two

9 additional items that will be discussed. And it will be

10 posted on the Web site, so others who want to comment on

11 that, will have that opportunity.

12 MS. HIGASHI: Correct. We'll issue a revised notice

13 and schedule.

14 CHAIR SHEEHAN: Great. Thank you.

15 Thank you all for your time.

16 MS. HIGASHI: Could we take a ten-minute break?

17 CHAIR SHEEHAN: Sure.

18 MS. HIGASHI: Just so we can adjust staff and

19 records?

20 CHAIR SHEEHAN: Yes.

21 *(A recess was taken from 10:39 a.m.*

22 *to 10:48 a.m.)*

23 CHAIR SHEEHAN: We reconvene the Commission on State

24 Mandates.

25 The next item that we will be hearing, is Item 11,

1        *Handicapped and Disabled Students.*

2                And so would all those individuals who want to  
3 testify or present any testimony on this item please  
4 come forward?

5                MS. HIGASHI: Senior Commission Counsel, Camille  
6 Shelton will introduce this item.

7                MS. SHELTON: Good morning.

8                CHAIR SHEEHAN: Go ahead.

9                MS. SHELTON: This item is the reconsideration  
10 directed by Senate Bill 1895 of the Commission's  
11 Statement of Decision on *Handicapped and Disabled*  
12 *Students.*

13                The test claim legislation implements federal  
14 special education law that requires states to guarantee  
15 to disabled students the right to receive a free and  
16 appropriate public education that includes special  
17 education and related services, including mental health  
18 services, that are designed to meet the students' unique  
19 educational needs.

20                Before the enactment of the test claim legislation,  
21 local educational agencies were financially responsible  
22 for providing mental health services required by students  
23 individualized education plan, or IEP.

24                Beginning in 1986, the test claim legislation  
25 shifted the responsibility and funding for providing

1 mental health services to county mental health  
2 departments.

3 On reconsideration, staff finds that the  
4 Commission's 1990 Statement of Decision correctly  
5 determined that the test claim legislation imposes a  
6 reimbursable state-mandated program. This finding is  
7 supported by three appellate court decisions, including  
8 County of Santa Clara vs. Commission on State Mandates,  
9 Hayes vs. Commission on State Mandates, and TriCounty  
10 SELPA vs. County of Tuolumne.

11 The 1990 Statement of Decision, however, does not  
12 fully identify all of the activities expressly mandated  
13 by the test-claim statutes and regulations that are  
14 identified on pages 51 through 54 of the analysis. These  
15 activities were specifically pled by the original test  
16 claimant.

17 In addition, the 1990 Statement of Decision does not  
18 fully identify all of the offsetting revenue that must be  
19 identified and deducted from the cost claimed for this  
20 program.

21 Finally, the Staff Analysis on reconsideration  
22 analyzes the intervening changes in the law relevant to  
23 the cost and funding of psychotherapy and residential  
24 care of seriously emotionally disturbed peoples.

25 Staff recommends that the Commission adopt the

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1 Staff Analysis on reconsideration and with a  
2 reimbursement period beginning July 1st, 2004, approve  
3 the claim accordingly.

4 Will the parties and witnesses please state your  
5 names for the record?

6 MR. KAYE: Leonard Kaye for the County of  
7 Los Angeles.

8 MR. McIVER: Paul McIver, Los Angeles County  
9 Department of Mental Health.

10 MS. STONE: Pamela Stone on behalf of the County of  
11 Stanislaus.

12 MS. RYAN: Patricia Ryan with the California Mental  
13 Health Directors Association.

14 MS. DOWNS: Linda Downs, Stanislaus County.

15 MR. POLICH: I'm John Polich for Ventura County.

16 MS. OROPEZA: Jeannie Oropeza, the Department of  
17 Finance.

18 MR. SCHWEITZER: Nicholas Schweitzer, Department of  
19 Finance.

20 CHAIR SHEEHAN: Mr. Kaye, would you like to begin?

21 MR. KAYE: Yes, Madam Chairperson.

22 I wish us all a good morning, and I think it will  
23 be, because we really do concur completely with  
24 Commission Staff Analysis.

25 What you have before you are some folks that have

1 looked it over in great detail, and, of course, have a  
2 very small clarification issues that we'd like to  
3 discuss, and briefly discuss.

4 And we'd like to reserve -- because we will be very  
5 brief, we'd like to reserve some of our time, if you  
6 will, so that we may respond to any of your questions; or  
7 if other parties or groups raise questions, we'd like to  
8 respond to those.

9 We, as I say, concur with staff's analysis and  
10 recommendations before you today, and urge your adoption  
11 this morning. We believe their analysis is  
12 comprehensive, it's complete, and it is based on current  
13 law. Further, we believe it's declaratory of existing  
14 law. Further, your staff's analysis is very detailed,  
15 which makes the task of developing detailed reimbursement  
16 rules in the Parameters and Guidelines stage to follow  
17 much easier for us.

18 In this regard, we also welcome staff's suggestion  
19 that a prehearing conference be convened to discuss the  
20 development of the Parameters and Guidelines, so that  
21 state agencies, as well as local claimants, can gather  
22 together and discuss their concerns. It's an additional  
23 opportunity to exchange information on this very, very  
24 complex program.

25 And I'd just point out that, normally, we are the

1       proponents of a test claim. In this case, it is, in  
2       essence, your test claim; and we here are privileged  
3       to be commentators, and we hope that we can work together  
4       in that regard.

5               We are normally responsible for coming up -- we have  
6       statutory responsibilities for providing the initial  
7       first draft of the Parameters and Guidelines. In this  
8       case, I guess we'll have to work together, and the  
9       Commission staff will be providing that for us.

10              But in any case, we are very excited about being  
11       here, and we'd like to move forward.

12              Some of the minor modifications that we are  
13       suggesting, that we are not seeing as sticking points,  
14       they're merely clarifications; if the commissioners -- if  
15       you decide or deem it advisable to slightly modify  
16       staff's recommended or proposed Statement of Decision,  
17       that would be truly wonderful and of assistance to us as  
18       we develop Parameters and Guidelines.

19              And I'd just mention one of them, and that is -- and  
20       I use this as an example -- that staff is recommending  
21       reimbursing us for 60 percent of the total residential  
22       and noneducational costs of a seriously emotionally  
23       disturbed child placed in an out-of-home residential  
24       facility.

25              And this is fine -- and I think this could be found



1 in your proposed Statement of Decision, on the top of  
2 page 58 -- except that what if in the next fiscal year,  
3 our share of costs is reduced to 50 percent? To use a  
4 numerical example, if it simply says 60 percent of our  
5 cost, and our costs are a thousand dollars, then when we  
6 get reimbursed 600 -- the total costs are a thousand, and  
7 our reimbursement share is 60 percent, then we would get  
8 reimbursed \$600.

9           However -- and that would be in the Parameters and  
10 Guidelines. But what if the feds reduce that, or there's  
11 some changes made? What if our share of costs dropped  
12 down to 400? Then the county would pay out 400, and yet  
13 we, according to the Parameters and Guidelines, would be  
14 reimbursed for 600.

15           So there's some minor modifications. And we  
16 recommend something to the effect that we should be  
17 reimbursed for 100 percent of the county's share of  
18 costs. A slight modification to that, to indicate that  
19 the state's interest, as well as our interest, is  
20 protected; and that we don't have to come before this  
21 Commission and trouble it with minor modifications in  
22 these very, very complex federal and state reimbursement  
23 rules, which govern this program.

24           So without further ado, we have others that will be  
25 talking and presenting to you what some of their issues

1 and concerns are.

2 And I'd turn it over to them at this point.

3 MR. McIVER: Hi. Again, my name is Paul McIver,  
4 representing Los Angeles County Department of Mental  
5 Health. And to echo Mr. Kaye, thank you very much for  
6 your thorough and comprehensive analysis.

7 I want to point out one area, however, that needs  
8 some clarification in regard to participation in  
9 due-process hearings. On page 42 of the Staff Analysis,  
10 it indicates that participation by counties in  
11 due-process hearings and special education are mandated  
12 service and reimbursable. However, I believe that it  
13 would be preferred, for clarification to restate that to  
14 participation in all dispute-resolution procedures.

15 In California, there's approximately 3,000 requests  
16 for due-process hearings filed in all areas of special  
17 education per year. Several hundred of those may involve  
18 county mental health agencies.

19 However, proudly, in California, we have a very  
20 effective dispute resolution process, short of  
21 due-process hearings, which is called "mediation."  
22 Mediation is much less costly, much less time-consuming,  
23 much less traumatic on the participants. And this is a  
24 record we should be proud of. But participation in  
25 dispute-resolution procedures is required service of

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1 county mental health, when we're named as a party in the  
2 dispute. And I would strongly recommend you clarifying  
3 that in the Statement of Decision.

4 Thank you.

5 CHAIR SHEEHAN: Okay.

6 MR. POLICH: I'm John Polich, P-O-L-I-C-H.

7 Good morning, ladies and gentlemen, as I just  
8 stated, I'm John Polich. I'm here on behalf of Linda  
9 Shulman, the Behavioral Health Director for our county,  
10 the County of Ventura. And I'd like to echo what Leonard  
11 said initially, congratulating the staff of the  
12 Commission on its comprehensive analysis of the  
13 *Handicapped and Disabled Students* program and the  
14 mandate. It's a complicated area with a lot of history.  
15 And they have done a great job of providing a  
16 comprehensive report on that. And we also join with  
17 Leonard and Paul and the others speakers you'll hear from  
18 this morning with respect to their specific comments on  
19 certain aspects of the Staff Analysis. Our county joins  
20 with them in urging this Commission to adopt the staff  
21 recommendations subject to the comments you'll hear  
22 today.

23 We're especially gratified that the staff of the  
24 Commission has recognized something that our county and  
25 many others have been contending in audits over the past

1 several years: That there were significant and very  
2 important services which were part of the mandate back in  
3 as far back as 1990, when the original test claim was  
4 decided, which should have been included in that  
5 Statement of Decision and the Parameters and Guidelines  
6 which flowed from it, and which were not, and that  
7 resulted in substantial detriment to the county in these  
8 recent audits with respect to denial of reimbursement for  
9 certain services, which I think now the staff and all of  
10 us are in lockstep with, that those things should have  
11 been the original decision when it was first issued.

12 In that spirit, the adoption of the staff  
13 recommendation, the new -- the revised or reconsidered  
14 test claim that's being considered today would be  
15 helpful, in that it would declare for purposes of even  
16 the 1990 law, on a going-forward basis, the original  
17 mandate included those services; and that all of the  
18 authority since that time should have been oriented  
19 towards reimbursing those things, like medication  
20 monitoring and other specific services that were  
21 inadvertently not included in the original statement.

22 In that same vein, I would ask that the Commission  
23 also consider soon an item, not on its agenda today, but  
24 something that has been pending before this Commission  
25 for the past several years, and that is the request filed

1 in the year 2002 by the Counties of Los Angeles and  
2 Stanislaus, for an amendment to the Parameters and  
3 Guidelines.

4 And if you'll recall, that request to amend was  
5 based on the exact, same arguments raised by your own  
6 staff as part of today's reconsideration. In other  
7 words, the concept that there were important services  
8 omitted from the Statement of Decision back in 1990 that  
9 should have been there.

10 The critical reason for considering that amendment  
11 request is that it would give the counties that filed it  
12 and all counties, the benefit of an earlier effective  
13 date. If that amendment request were approved as  
14 proposed, there would be consistency between the new test  
15 claim, the new Statement of Decision that's adopted today  
16 for going forward from 2004, on, and the claiming  
17 guidelines that would be applicable back from that date,  
18 all the way to the year 2000, which would be the  
19 effective date of the amendment request.

20 If both of those items are approved, we would have a  
21 consistent -- or the possibility, anyway -- of consistent  
22 parameters and guidelines that could be issued with  
23 respect to all of those audit years, ranging from 2004,  
24 and all the way into the future, and which we all can  
25 agree will reflect the actual law, as it originally

1 existed back in 1990, when this Commission first made  
2 that decision.

3 As far as the importance of the Commission's  
4 decision today, I can't emphasize enough, and I'm sure  
5 you're aware of comments you've received, of the immense  
6 importance of this program, at least on a fiscal  
7 standpoint to counties.

8 In our county, I know I'm aware of an almost  
9 constant stream of inquiries from our mental health  
10 people, members of our Board of Supervisors, and the CEO,  
11 regarding the importance of this proceeding today, and  
12 also the proceedings going on in the Legislature with  
13 respect to the continued funding of this program.

14 Well, I understand that that funding decision is  
15 going to be an important part of this.

16 The board's decision today is also critical, in that  
17 it would help clear up -- and the test claim you should  
18 also have on your agenda for later -- would help clear up  
19 a lot of the uncertainty which exists even today as to  
20 what services are or are not mandated under this program  
21 and which are reimbursable. And that uncertainty at this  
22 point is creating a lot of problems with fiscal planning  
23 and the day-to-day provision of services, which, at the  
24 county level, we can't be sure at this time really are or  
25 are not part of the mandated program.

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1           It's that sort of clarity and hopefully timely  
2 decisions that will be evident as we transition into the  
3 next fiscal year, will help convince people in our county  
4 and elsewhere, that it is worthwhile to continued with  
5 the mandated program and to continue participating in it.

6           I'm afraid that if there are delays, if there are  
7 problems with clarifying these issues, both here and the  
8 finance situation in the Legislature, that there will be  
9 tremendous pressure, increasing pressure for counties to  
10 attempt to pull out of these programs by participating in  
11 actions such as those filed by the County of San Diego  
12 recently in the superior court here in Sacramento, in an  
13 effort to avoid the mandate, with respect to their  
14 particular county, and, unfortunately, the result would  
15 be a very worthwhile program of potentially disappearing  
16 with county participation.

17           So with that, we would respectfully urge timely  
18 action on the staff report.

19           CHAIR SHEEHAN: All right, thanks.

20           MS. STONE: Good morning, Madam Chair, members of  
21 the Commission. On behalf of the County of Stanislaus,  
22 we would like to express our appreciation for your staff  
23 in the diligent work which has been performed.

24           As someone who has been in this area for over  
25 20 years, I think that we can recognize that the type of

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1 decisions that were rendered by your Commission 20 years  
2 ago and the modicum of detail that was contained within  
3 those decisions has changed substantially during the past  
4 20 years, as a result of which there have become  
5 differences of opinion with regard to the implementation  
6 of programs because of the interpretation of the locals  
7 who actually perform the program and those who are  
8 auditing the program, who were auditing it to the  
9 Parameters and Guidelines, which may not contain all the  
10 elements of specificity needed.

11 What we would like to do, is request that there be  
12 one other change for the purposes of specificity, so we  
13 don't have problems in the future. And that is with  
14 regard to the Medi-Cal used for an offset. The local  
15 government contributes a portion of their funds to the  
16 offset. And unfortunately, the manner in which this is  
17 presently stated, ostensibly, a portion of the county  
18 match could be used as an offset in this program. Thus,  
19 the state would get the benefit of the county match as an  
20 offset to the cost of the program. And Ms. Downs will  
21 speak to that in a minute.

22 Otherwise, we would like to say very much, that we  
23 are in appreciation of the diligent work that was done by  
24 your Commission staff, and are available to answer any  
25 questions which may arise.



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1 CHAIR SHEEHAN: Great.

2 MS. DOWNS: Thank you. Again, my name is Linda  
3 Downs. I represent the Stanislaus County Behavioral  
4 Health and Recovery Services.

5 As Ms. Stone has said, page 53 of the Staff Analysis  
6 recognizes the fact that counties may utilize monies from  
7 the local revenue fund to pay for costs associated with  
8 the provision of services pursuant to Chapter 26.5 of  
9 the Government Code. This paragraph also states that  
10 counties shall be eligible for reimbursement for the  
11 state, for all allowable costs.

12 Medi-Cal currently reimburses 50 percent of the  
13 allowable costs for the eligible pupils, with counties  
14 required to pay the balance. In a subsequent list of  
15 revenue in the staff report that identifies what needs to  
16 be an offset, the language is silent on the use of local  
17 revenue funds as a share of Medi-Cal.

18 It's recommended that the language be clarified to  
19 state, Medi-Cal funds obtained for the purposes of this  
20 mandated program, in accordance with federal law, except  
21 for any local match requirements.

22 Thank you.

23 CHAIR SHEEHAN: Thank you.

24 MS. RYAN: Thank you, Madam Chair and Members, I'm  
25 Patricia Ryan, here representing the California Mental

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1 Health Directors Association.

2 I'm here because this program is of great importance  
3 to county mental health directors throughout the state,  
4 which provide the AB 3632 services to over 32,000  
5 disabled students per year. In fact, ensuring adequate  
6 funding for this program is our association's top public  
7 policy priority, as long as the mandate continues to  
8 remain with counties.

9 As you may know, the California Department of  
10 Education received approximately \$1.2 billion -- receives  
11 approximately \$1.2 billion annually in federal funds to  
12 provide special education services under Part B of the  
13 federal Individuals with Disabilities Education Act, or  
14 IDEA. These federal funds are at risk if California  
15 fails to provide a free and appropriate public education  
16 which meets IDEA Part B requirements, including the  
17 required AB 3632 services that counties are required to  
18 provide. And we will fail if all the reimbursement rules  
19 remain in effect which limit our ability to recover our  
20 costs and in providing these necessary and required  
21 AB 3632 services.

22 We urge you to adopt the staff recommendation before  
23 you today which updates our reimbursement rules with  
24 current law.

25 Thank you. And I'm available for questions.

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1 CHAIR SHEEHAN: Thanks.

2 Anybody else before we turn it over to Finance?

3 Who wants to go first?

4 MR. TROY: I'll go first. Dan Troy with the  
5 Department of Finance.

6 We'd like to urge the panel today, as you're  
7 considering the staff recommendation, to also consider  
8 whether this *Handicapped and Disabled Students* is  
9 actually a mandate at all. We believe, pursuant to  
10 section 17556(c) of the Government Code, it provides that  
11 the Mandate Commission shall not find a reimbursable  
12 mandate in a statute or executive order if that statute  
13 or executive order implemented a federal law or  
14 regulation. We believe that these costs are directly  
15 tied to mandates for the federal government and, thus,  
16 are not reimbursable.

17 The Hayes decision, from, I believe, the early  
18 nineties, found that while the state chose to impose the  
19 costs of certain IDEA-required activities on counties, we  
20 know that changes to IDEA, since the Hayes decision, make  
21 it less clear that the state's choice triggers  
22 reimbursement pursuant to Article XIII B, section 6.

23 Indeed, at the time of the court's decision, IDEA  
24 specified only that the state and local education  
25 agencies were responsible for the provision of special

1 education services.

2 The most recent version of IDEA, however, makes it  
3 clear that the state has broad discretion to designate  
4 responsibility for IDEA services to any public agency.  
5 We find that authority is pretty clear in section 612 of  
6 IDEA.

7 So we would urge you today to consider that issue  
8 as well, in addition to the specific issues that are  
9 addressed in the Staff Analysis.

10 MS. OROPEZA: And just another point. As the  
11 representative for the counties indicated, the state  
12 would be in jeopardy of losing \$1.2 billion, if the  
13 services weren't provided. And so back when the  
14 requirements were moved from the districts to the  
15 counties, it was because the districts were found not to  
16 be providing the services. And because federal law now  
17 allows the state to designate a different entity to  
18 provide the services, we think we're in compliance with  
19 federal law, and federal law allows us to have that  
20 designation.

21 We don't want to lose the federal funds. We think  
22 since the Hayes decision, and even then, it was clear  
23 that in the Hayes decision, the courts found that it was  
24 not necessarily the schools that were going to be  
25 responsible for providing the services. We could

1 designate other entities to provide the services, as long  
2 as we met federal law.

3 And all we're asking is that you look at what the  
4 federal requirements are. And when in order to follow  
5 them and comply with them, it is a federal mandate, not a  
6 state mandate. So we think the reimbursement lies with  
7 the federal funds that are provided for IDEA.

8 And that's how we've been budgeting in the last few  
9 years. The state has chosen to budget these dollars  
10 through the schools, and then allow them to contract with  
11 the counties to provide the services, yet another reason  
12 that we'd like to include to show that the Legislature  
13 also agrees that it is the onus and the ultimate  
14 responsibility lies with the school districts to provide  
15 these services.

16 CHAIR SHEEHAN: Okay, Camille, do you want to start  
17 at the beginning, in terms of some of the issues raised?

18 MS. SHELTON: Sure. If I can, I'd like to address  
19 the Department of Finance's concern first.

20 CHAIR SHEEHAN: Sure.

21 MS. SHELTON: There is one Supreme Court case and  
22 one case by the Third District Court of Appeal,  
23 instructing the Commission on how to analyze federal  
24 mandate issues. It's actually a two-part test and not a  
25 one-part test.

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1           The City of Sacramento case dealt with the issue of  
2 whether or not the federal legislation was a federal  
3 mandate on the state.

4           In this case, the IDEA is a federal mandate on the  
5 state. The Hayes court has already determined that; and  
6 we are bound -- the Commission is bound by that part of  
7 the decision.

8           But what is lacking from the argument of the  
9 Department of Finance is that the Hayes court has  
10 instructed the Commission that you can't just stop there.  
11 Just because there's a federal mandate, there can still  
12 be a reimbursable state mandate on local agencies, if the  
13 state freely chose to shift some of those  
14 responsibilities and funding on to local agencies.

15           Here, we've got federal legislation -- it's actually  
16 in section 1412 of Title 20 of the U.S. Code -- that  
17 authorizes states to shift some of these services to  
18 noneducational agencies. There is no language in the  
19 federal law that requires them to do that.

20           And, in fact, the state is free to repeal those  
21 statutes and shift them back to the local educational  
22 agencies now.

23           The decision that the test claim legislation is a  
24 state-mandated program is supported by the Hayes case,  
25 but it's also supported by the Tri-County SELPA case.

1 And in that case, the County of Tuolumne just stopped  
2 providing the services because they weren't receiving any  
3 funding.

4 So the SELPA suit, to get them to continue to  
5 provide those services, in that case -- I mean, the court  
6 ultimately held that neither party satisfied their  
7 administrative remedies. But the court did make findings  
8 that here it is clear, under federal law, the state could  
9 reassign those services to either the educational  
10 agencies or to the counties. That the state has a true  
11 choice on how they implement this federal law.

12 So under the Hayes case, which the Commission is  
13 bound by, the state has a free choice on how to implement  
14 IDEA. And, therefore, it is a reimbursable  
15 state-mandated program.

16 Some of these other issues raised by the claimants  
17 are new, that were not provided in any written comment.  
18 Some of the comments were provided on Item 13 and were  
19 not provided on Item 11. So we've addressed some of them  
20 here and some of them I'm going to address now.

21 Mr. Kaye suggested that -- or questioned whether --

22 MS. OROPEZA: Can I actually comment back on the  
23 first point she made?

24 CHAIR SHEEHAN: No. Once she gets through, then  
25 I'll have people respond in terms of that. So, yes,

1 you'll be able to --

2 MS. SHELTON: Mr. Kaye suggested that the law  
3 provides a cost-sharing formula for residential care  
4 services, where the counties are paying 60 percent and  
5 the state is paying 40 percent for providing residential  
6 care services to seriously emotionally disturbed pupils.  
7 He suggested that there be some room for changes in the  
8 law that may change the cost-sharing formula.

9 The problem with doing that is that the cost-sharing  
10 formula is provided by statute. And here, we have -- in  
11 the test claim statutes, that the counties are  
12 responsible pursuant to the Welfare and Institutions Code  
13 sections that describe the cost-sharing formula to pay  
14 for those residential-care services.

15 If the state, through legislation, changes one of  
16 those statutes, unfortunately, you would have to file  
17 another test claim to reflect that.

18 The Commission's decision is a point-in-time  
19 decision. If the Legislature takes subsequent action on  
20 legislation and changes that, then it would have to be  
21 subject to a new test claim. You couldn't even do it  
22 through a P's and G's amendment, because the law would  
23 change.

24 MR. KAYE: Can I respond?

25 CHAIR SHEEHAN: Hold on.



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1 MS. SHELTON: I believe the next point was -- I  
2 wasn't real clear on the due-process hearing. There was  
3 a request to make it more specific and to have some  
4 dispute resolution mediation activities --

5 CHAIR SHEEHAN: Yes, I guess the question I have  
6 is -- you know, being familiar with this process for the  
7 *Special Ed* hearings, I see the whole process as  
8 including, if there's arbitration instead of a formal  
9 hearing.

10 I don't know how staff has --

11 MS. SHELTON: Well, we've already provided for that  
12 on pages 42 and 43 of the Staff Analysis.

13 Government Code section 7586 says that the  
14 resolution of all issues shall be through a due-process  
15 hearing, established in the Education Code, beginning  
16 with Education Code section 56500.

17 And in 56500.3 they describe a lot of types of  
18 activities, including mediation, and those types of  
19 things. All of that is in the Staff Analysis and in the  
20 proposed Statement of Decision.

21 So I'm not sure what the request actually is.

22 CHAIR SHEEHAN: Sir, can you let her finish on her  
23 other issues, and then we'll rebut them?

24 MS. SHELTON: And then Mr. Polich discussed the  
25 P's and G's amendment that is currently pending. That

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1 item is not before the Commission today. I am not going  
2 to discuss what has been requested or pled, or the  
3 reimbursement period of those issues.

4 Our intent is to get that to a Commission hearing,  
5 hopefully by September. You know, we have recommended  
6 and suggested that once all of these procedural items get  
7 taken care of and adopted by the Commission that we do  
8 ultimately adopt one set of Parameters and Guidelines and  
9 one set of claiming instructions that identify clearly  
10 the periods of reimbursement and the activities for which  
11 eligible claimants are entitled during those periods of  
12 reimbursement. So it will ultimately come together.  
13 It's just going to take time to do that.

14 CHAIR SHEEHAN: And then the Medi-Cal issue.

15 MS. SHELTON: The Medi-Cal issue. That comment was  
16 raised in comments on Item 13. And we did actually  
17 address the -- we believe we addressed the issue.

18 Let me just turn to it real quickly.

19 Under the Medi-Cal program, there is a share of  
20 costs. In Welfare and Institutions Code section 14158.5,  
21 there is a cost-sharing program. And what we did between  
22 the draft Staff Analysis and this Staff Analysis, we did  
23 add language that says to define the Medi-Cal offset --  
24 excuse me -- as Medi-Cal proceeds obtained from the state  
25 and federal government, which makes clear that it's not

1 the funds that have already been appropriated or used by  
2 the County under the Medi-Cal share. So we believe that  
3 we've already fixed that.

4 CHAIR SHEEHAN: Okay, and I think that was it.  
5 Jeannie?

6 MS. OROPEZA: So if I could request that Camille  
7 restate -- that she said we needed to make two --

8 CHAIR SHEEHAN: Two findings.

9 MS. OROPEZA: -- two findings. And if she could  
10 restate those two findings.

11 MS. SHELTON: Under the Hayes case, if you read the  
12 whole decision, it's really broken up into two parts.  
13 The Hayes case laid out a two-part test.

14 One, you must apply the City of Sacramento factors,  
15 which are those horrible factors that we had to apply in  
16 the last case, to determine whether or not the federal  
17 law was a mandate on the state.

18 Here, there's no question that IDEA is a mandate on  
19 the state. But that does not stop the analysis. You  
20 have to then determine whether the state has a true  
21 choice in how to implement that federal mandate. And  
22 under federal law, under the IDEA, there is no  
23 requirement that a state require or delegate the mental  
24 health service responsibilities to counties. It is a  
25 true choice by the state, a choice exercised by the

1 state.

2 And now, as I understand it in the May revise, the  
3 state is -- or the Administration is proposing to repeal  
4 those statutes and give it back to the local educational  
5 agencies which, again, would comply with federal law.  
6 But it's a policy decision of the state.

7 MS. OROPEZA: And I just wanted to make the point,  
8 that we think federal law does allow states to choose, to  
9 do -- it tells you, you have to comply with the law, and  
10 you may decide who provides the services.

11 So our point simply was that because they allow us  
12 to make the choice, that, in fact, they're allowing the  
13 mandate to be, in a sense, transferred -- or the  
14 obligations to be transferred.

15 It's not that we chose on our own to just give it  
16 to someone else without federal authority. And because  
17 federal law does permit us to choose who is going to  
18 provide the service, we think that federal law  
19 contemplated allowing states to make the decision where  
20 the services had to be provided in order to adhere to  
21 federal law and not be out of compliance.

22 CHAIR SHEEHAN: Now, if I understand this issue, we  
23 both agree that federal law allows the state to choose  
24 how to do this; correct?

25 MS. OROPEZA: Yes.

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1 CHAIR SHEEHAN: But at that point, we end up in  
2 different places.

3 MS. OROPEZA: Right. And so we think because  
4 federal law permits that choice, that they contemplated  
5 that states would allow, or designate someone else as a  
6 provider, whoever they decided was best suited to provide  
7 the services. So they contemplated allowing the states  
8 to say, in this case, "We will have the counties provide  
9 this service, allowing us to comply with federal law."  
10 So it wasn't a choice that we took without authority to  
11 make.

12 And so we would just argue, because the federal law  
13 specifically allows us to make that choice, that they  
14 contemplate that the services must continue. And if we  
15 choose to have somebody else provide it, it still is  
16 within federal law and within the federal mandate.

17 CHAIR SHEEHAN: Thereby not having a state  
18 mandate --

19 MS. OROPEZA: Correct.

20 CHAIR SHEEHAN: -- is where your conclusion is?

21 MS. OROPEZA: Correct. And it's a federal mandate.  
22 In particular with it, the new passage of the Laird bill;  
23 that because there is a federal mandate that allows us to  
24 designate someone else, that federal law mandate  
25 continues to apply.

1           If they hadn't allowed that and we chose to do it,  
2           without any obligation, then I would agree that it was  
3           our choice, our decision not to abide by what federal law  
4           proscribed, and so we took this on our own.

5           But because federal law has made it clear that we  
6           can make that choice, we think they anticipated states  
7           being able to move the function to other entities within  
8           the federal mandate.

9           MS. SHELTON: Can I put this into some factual  
10          perspective, though, too?

11          CHAIR SHEEHAN: Yes.

12          MS. SHELTON: The state shifted those funding and  
13          activities over to counties before the federal law was  
14          amended to authorize states to do that.

15          So California was doing that way before -- years --  
16          ten years before the federal government amended IDEA. So  
17          that amendment really doesn't really do anything because  
18          the amendment just authorizes it; it doesn't require it.  
19          It leaves the state with a true discretion, the policy  
20          choice of whether or not to keep it with counties or to  
21          keep it with the local educational agencies.

22          And I'm following the plain holding of Hayes. And  
23          the language is quoted on page 17. And it says,

24                   *"If the state freely chose to impose the*  
25                   *costs upon the local agency as a means of*

1           *implementing a federal program, then the costs*  
2           *are the result of a reimbursable state mandate,*  
3           *regardless whether the costs were imposed upon*  
4           *the state by the federal government."*

5           If the state has a free choice -- and here, they  
6           clearly have a free choice, by the plain language of the  
7           federal law, they have a free choice to shift those  
8           responsibilities to the counties.

9           MS. OROPEZA: But, again, I think the distinction  
10          here is that when the Laird bill was implemented last  
11          year, prospectively -- while I would agree with you --  
12          before we had that language in place, I would agree with  
13          your point. But because the Laird bill said it doesn't  
14          matter what came first, we are now at a different  
15          position. And that bill allows us, the state, to say  
16          if -- regardless of what came first, federal law or state  
17          law, we can now have federal law supersede.

18          And that's our point here, that things have changed  
19          since the Hayes decision. And so we want this to be  
20          reconsidered on that basis.

21          MS. SHELTON: The Laird bill -- under the Laird  
22          bill, you still have to show there's a federal mandate on  
23          the local agencies, though. You still have to make that  
24          finding.

25          All the Laird bill did was say if there's a

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1 subsequent federal mandate, that is a mandate on the  
2 local agencies, then it's not a reimbursable  
3 state-mandated program.

4 Here, there is no finding and no evidence under the  
5 law or the facts to show that there's a federal mandate  
6 on the counties. There's a state mandate on the  
7 counties, but not a federal mandate on the counties.

8 MS. OROPEZA: And we think, with the recent changes  
9 in federal law, that becomes more clear, that the mandate  
10 can be shifted onto the counties.

11 And so in combination with the Laird bill and the  
12 sections that we cite, that have been revised in IDEA  
13 that make it clear what the intent of the federal law is,  
14 we think in combination of those two factors, that it's a  
15 valid position to be at, for us.

16 MR. KAYE: Madam Chair?

17 CHAIR SHEEHAN: Yes.

18 MR. KAYE: I was just wondering, Camille had  
19 mentioned regarding any future law which might change the  
20 reimbursement ratios for that. And what she was saying,  
21 if I understood her correctly, is, as painful as it is,  
22 we can't apply what might happen in the future, to what  
23 is happening today, before you now.

24 Now, this is relevant to the State Department of  
25 Finance argument -- and I say this with all due



1 respect -- they have not pled with any particularity the  
2 specific federal law that they allege affects current  
3 law.

4 It is our understanding, because we looked up the  
5 law, that it goes into effect on July 1st, 2005, which is  
6 not today. It's something in the future.

7 And so if they are hypothetically saying that some  
8 future law might change this current situation, I think  
9 using Camille's standard, that we can't prevaricate, we  
10 can't base our findings today on something that may  
11 happen on July 1st.

12 And I think it's quite plain that this -- there is  
13 no result that would disturb the Commission's finding  
14 based upon any change in federal law.

15 CHAIR SHEEHAN: Jeannie, did you want to address that  
16 point?

17 MS. OROPEZA: Yes, if I'm hearing correctly then,  
18 he's saying after July 1st, we can come back and make  
19 this same argument, if I'm hearing him correctly.

20 MR. KAYE: No, I'm just saying --

21 MS. OROPEZA: To take effect on July 1st.

22 MR. KAYE: -- that I'm just applying the standard  
23 that -- the Commissioners, I believe, are bound to  
24 consider what the current law is, at the time of this  
25 hearing. And it's my understanding that the current --

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1 that the law that they're referring to, goes into effect  
2 on July 1st, 2005. So at some later point, Finance could  
3 perhaps bring this up.

4 We think the result will be exactly the same it is  
5 today. But even in theory, that law, that they're  
6 relying on, is not in effect today, before you now.

7 CHAIR SHEEHAN: Go ahead.

8 MR. TROY: Sure. We would certainly acknowledge  
9 that it may well be in the past, due to the versions of  
10 IDEA that was, in fact, at a certain point in time, that  
11 our argument may not apply to some prior years. But we  
12 do know that this is the current version of IDEA, and we  
13 think that this is when -- at this point the issue is in  
14 front of the Mandate Commission, so I do not think this  
15 is an inappropriate time for us to address such a crucial  
16 issue.

17 We'd also note, getting back to the argument that  
18 Camille was making earlier, that she seems to be stating  
19 that if we had given responsibility to the schools for  
20 this mandate, that it would not be a reimbursable  
21 mandate. But it seems that all the state is doing in  
22 this case is shifting responsibility from one entity of  
23 local government to another. That is a shift in  
24 responsibility and not a transfer of responsibility from  
25 the state to local government. So we don't see much of a

1 distinction between saying that schools would be  
2 responsible for these activities as opposed to county  
3 offices of mental health.

4 MS. SHELTON: Well, there is a distinction because  
5 under the federal law, schools have requirements under  
6 IDEA. Counties do not have requirements under the IDEA.  
7 So that is part of it.

8 Since we're doing the reconsideration of the  
9 original program, this is a brand-new program on  
10 counties. They have never had any educational  
11 responsibilities with respect to special education or  
12 otherwise before this. So it is a brand-new program for  
13 them.

14 It has shifted from the state because it's the  
15 state's policy decision to do that. Federal law does not  
16 require that they shift it to the counties.

17 MR. TROY: Would it have been a policy decision for  
18 the state to say that schools are responsible for it?

19 MS. SHELTON: No, because the federal IDEA requires  
20 responsibilities on schools. And, in fact, under current  
21 law, it makes the Superintendent of Public Education  
22 ultimately responsible.

23 CHAIR SHEEHAN: So if I understand the argument,  
24 that if the policy decision had not been made for the  
25 counties to carry this out, then it would be only a

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1 federal mandate; correct?

2 MS. SHELTON: Yes. But I'm not going to sit and  
3 analyze that -- because the school districts have never  
4 filed a test claim, I don't want to get into that.

5 CHAIR SHEEHAN: I know. Yes, I understand that.  
6 But I think what -- I want to make sure I understand this  
7 legal argument.

8 MS. OROPEZA: And we would agree with that  
9 statement, that it would not be a state mandate on the  
10 schools. It's a federal mandate.

11 CHAIR SHEEHAN: Right. And so now it is with that  
12 change for the counties, the legal opinion of the  
13 Commission's counsel is that that is what triggered the  
14 state mandate, that decision.

15 And I still am a little bit -- Finance doesn't feel  
16 that because? "Because," that's what I'm trying to  
17 grasp.

18 MS. OROPEZA: Because it's simply the federal  
19 mandate allows us to shift those activities to another  
20 local agency.

21 It doesn't say that we're not required to provide  
22 the services. It simply says the services have to be  
23 provided in order for there to be a free and appropriate  
24 education.

25 So what we're saying is, federal law contemplated

1 allowing states to ensure that that activity occurs. And  
2 as the previous speaker indicated, if we don't provide  
3 the services, we're in jeopardy of losing \$1.2 billion.  
4 So the fact that we shifted the activities to the county,  
5 does not alleviate the federal mandate. And federal law  
6 would still require that we use federal monies to pay for  
7 those activities.

8 And so we're saying, with the changes, whether it be  
9 July 1st, 2005, or whenever it be, that this is a federal  
10 mandate and not a state-imposed mandate.

11 If we exceed federal law, that's a different issue.  
12 But to the extent we are simply complying with federal  
13 requirements, then it's a federal mandate.

14 CHAIR SHEEHAN: And your position is, we have the  
15 authority to pick and choose who should do that?

16 MS. OROPEZA: Under federal law, under the current  
17 mandate, to provide these activities, it clearly says the  
18 state may choose to designate whoever they want to  
19 provide the activities, thus allowing us to make that  
20 choice, unlike --

21 CHAIR SHEEHAN: Without creating any new burden --

22 MS. OROPEZA: Right. Prior to this, I would agree,  
23 that wasn't there. And so the Hayes decision was  
24 correct, we made a choice at that point. But now that  
25 the law has changed, and the Laird bill is in place as

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1 well, we are asking for reconsideration prospectively.

2 CHAIR SHEEHAN: Let me get a clarification on this.

3 Is the federal law that allows us that discretion in  
4 effect today?

5 MS. SHELTON: Yes.

6 CHAIR SHEEHAN: Okay. And the one for July 1st is  
7 what?

8 MS. SHELTON: I believe it still allows the  
9 discretion. But I have not received any evidence to the  
10 contrary.

11 CHAIR SHEEHAN: Okay, so then regardless of that,  
12 the statute before us today and the issues before us  
13 today, still allow that discretion on the part of the  
14 state to make that decision?

15 MS. SHELTON: Yes.

16 MS. OROPEZA: Yes.

17 CHAIR SHEEHAN: Okay, then --

18 MS. SHELTON: Just a point of clarification, on the  
19 Laird bill, we're talking about an amendment to 17556(c).  
20 And very first line requires, first, that the statute or  
21 executive order imposes a requirement that is mandated by  
22 federal law. And there is no requirement mandated by  
23 federal law that the counties perform these services.  
24 So you haven't met the first burden under 17556(c).

25 MS. OROPEZA: And we think that there is a federal

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1 requirement that the activities be provided. Otherwise,  
2 we're going to lose the \$1.2 billion. And the fact that  
3 we can choose to shift the activity is a different issue.

4 MS. SHELTON: I agree. I agree with everything that  
5 the Department of Finance is saying, except they need to  
6 apply the Hayes case.

7 CHAIR SHEEHAN: Different places.

8 MS. SHELTON: Yes, the Hayes case, the Commission is  
9 bound to follow. We're an administrative agency. It is  
10 precedential. We're bound to follow the published  
11 decision by the Third District Court of Appeal.

12 MR. KAYE: This is Leonard Kaye.

13 I'd just like to make one clarifying remark. I hope  
14 it clarifies that. And that, oftentimes, folks get --  
15 and I don't mean -- I say this respectfully -- but they  
16 get confused between the power of the state to do an act,  
17 versus the county's or local government's right to  
18 reimbursement under XIII B.

19 Nobody is disputing the fact that the state has  
20 unfettered discretion to assign this particular mandate  
21 to counties. And counties, by the way, have willingly  
22 provided these services.

23 What we're saying is, for doing so, under Hayes,  
24 it's a requirement that we be reimbursed under  
25 Article XIII B, Section 6, and that that is what the

1 issue is; and not the issue of how the state chose, why  
2 the state chose, and so forth. That's a policy decision,  
3 that's a plenary power of the state to do, and we  
4 willingly obey.

5 What we're here before you today is to determine,  
6 under Hayes, whether we're entitled to reimbursement for  
7 such a choice, after it having been made.

8 CHAIR SHEEHAN: Right. But I guess the point I need  
9 to understand from Finance is why it isn't -- why they  
10 contend it is not reimbursable activities.

11 MS. OROPEZA: Because we think that the obligation,  
12 as was stated earlier, is actually ultimately on the  
13 superintendent, on the schools. And so to the extent  
14 that these costs are incurred on behalf of the schools,  
15 to make sure that the students are provided a free  
16 education, then the costs should be reimbursed from the  
17 federal mandate and not state law. Because, after all,  
18 the only thing that was asked of the counties, was to  
19 ensure that we adhered to the federal mandate. That  
20 everything that's required under an individual education  
21 plan, under IDEA, be proscribed.

22 And so we have, in the last several years, provided  
23 federal funds to cover these costs through the counties,  
24 recently. And our policy continues to be that if the  
25 counties provide this service, that they're entitled to



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1 reimbursement through the federal funds because it is a  
2 federal mandate.

3 And so we're trying to just clarify that, in fact,  
4 what's driving these costs is a federal mandate. So any  
5 activities that occur at the county level, on behalf of  
6 the districts, be funded through federal mandates. And  
7 whether or not they consider it a mandate or not, it  
8 would not be reimbursable from the state; it would be a  
9 federally-reimbursable program.

10 MS. SHELTON: Can I just comment?

11 Any money that comes from the federal government  
12 to the state that is ultimately appropriated to the  
13 counties, has to be identified as an offset. So if the  
14 state is receiving money under this program, and they do  
15 pass it on to the county, that money has to be identified  
16 and deducted from the cost claimed.

17 MS. STONE: I would like to comment very briefly on  
18 the Medi-Cal issue.

19 I will concur that Ms. Shelton has made an attempt  
20 to clarify, especially in the test claim on page 59, that  
21 she is attempting to eliminate the local county share.  
22 However, sometimes this takes form in realignment funds,  
23 which are a mixture of state and local funds. And when  
24 they come back via Medi-Cal, there is a commingling. So  
25 if it refers mainly to Medi-Cal, even if it says, "Obtain

1 from the state and federal government," there's still a  
2 county component within that mix.

3 And so that's why we had requested to share the  
4 language in the other one, that, "Medi-Cal funds obtained  
5 for purposes of this mandated program, in accordance with  
6 federal law, except any local match required."

7 We want to make sure that the local match is up  
8 because we don't want to have to deal with the  
9 Controller's office and/or any IRCs, if there is a  
10 dispute with regard to whether or not there's any county  
11 component to the Medi-Cal.

12 MS. SHELTON: You know, it's up to the Commission  
13 whether they want to add that language. I thought I was  
14 doing that. But if you want to add that language, it's  
15 not hard to do.

16 CHAIR SHEEHAN: Okay, so your feeling is --

17 MS. SHELTON: Legally, their --

18 CHAIR SHEEHAN: Their intent -- everybody agrees, we  
19 get to the same place, whether the words are in there or  
20 not?

21 MS. SHELTON: Right. Legally, under the Supreme  
22 Court, when interpreting Article XIII B, Section 6, if  
23 there's a finding that there's a reimbursable  
24 state-mandated program, they're entitled to the  
25 reimbursement for all the costs incurred. And so if they

1 are already putting -- paying for some of the Medi-Cal  
2 services that are provided, and funds that are provided  
3 for this particular program, they are entitled to  
4 reimbursement for that.

5 CHAIR SHEEHAN: Right, which would be the offset.

6 MS. SHELTON: So the offset -- the offset, I have on  
7 page 52, the offset to identify is, we said to the extent  
8 counties obtain proceeds under the Medi-Cal program from  
9 either the state or the federal government for purposes  
10 of this mandated program, such proceeds must be  
11 identified and deducted from the costs claimed.

12 So I'm saying to the extent they received money from  
13 the state or federal government --

14 CHAIR SHEEHAN: We acknowledge and --

15 MS. SHELTON: Not their own money.

16 CHAIR SHEEHAN: -- subtract it from their claim.

17 MS. SHELTON: Right, right.

18 CHAIR SHEEHAN: Okay.

19 Do you have input on the Medi-Cal?

20 MS. OROPEZA: I think we concur that we'd like to  
21 see those funds offset. And we'd also like to make sure  
22 that the P's and G's, the claiming instructions are all  
23 narrowed down to meet what is required under federal law,  
24 as opposed to anything broader.

25 MS. SHELTON: I'm not sure exactly what that comment

1 means, because the language of the activities to be  
2 tracked here, are tracked by the express language of the  
3 statute and the regulations. I didn't change a word of  
4 what's already in state law.

5 To the extent the state has done something different  
6 than federal law, that would be up to the state to change  
7 the regulations and statute. We are just tracking the  
8 language of the statute and the regulations that are  
9 before the Commission on this test claim.

10 MS. OROPEZA: Her comment simply meant -- and maybe  
11 it's better when we get into the P's and G's -- is that  
12 we found, in many cases, the language is overly broad.  
13 And so we'd like it to be narrowed, so that there is no  
14 confusion in terms of the counties or the schools or  
15 whoever is providing the services, what exactly is  
16 required to be provided; and that we don't exceed federal  
17 law. But I understand her point.

18 MS. SHELTON: Yes, we can have a lot of discussions  
19 on the Parameters and Guidelines, other than -- but for  
20 purposes of these activities, I didn't make up any words.  
21 These are the words that are in the statutes and  
22 regulations that are required by law.

23 CHAIR SHEEHAN: Okay, did we hit all the other  
24 issues? Ventura and that?

25 Camille, I want you to summarize for me one more

1 time the issue you have on the -- the disagreement you  
2 have with Jeannie on the federal mandate, under the Hayes  
3 decision.

4 MS. SHELTON: Just that under Hayes, the Court has  
5 defined a two-step test.

6 The first test is to determine whether or not there  
7 is a federal mandate on the state. Here, we all agree,  
8 there's a federal mandate on the state.

9 The second test is to determine even if there is a  
10 federal mandate on the state, are the costs that are  
11 incurred by the local agency a result of the state freely  
12 choosing to shift those costs to the local agency. And  
13 here, we all agree with what the federal law says. The  
14 Department of Finance agrees that the federal law allows  
15 them -- the states -- to shift those costs to  
16 noneducational agencies. That gives the policy decision  
17 to the state. It is not something they are forced to do  
18 by the federal government.

19 Therefore, under the Court's holding in Hayes, which  
20 the Commission is bound by, we are required to find that  
21 this is a reimbursable state-mandated program.

22 MS. OROPEZA: And I would just point out, on page 18  
23 of the Staff Analysis, even the Hayes case says that it  
24 did not contemplate that the state impose all the costs  
25 on school districts, implying that they have a choice to

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1 move, shift some of the costs, activities on other than  
2 local education agencies.

3 MS. SHELTON: Except that that language in the  
4 decision was relating to the *Special Ed* test claims, not  
5 the *Handicapped and Disabled Students* test claim. That  
6 was a test claim filed by districts. So factually, that  
7 sentence was taken out of context.

8 MS. OROPEZA: But mental health is part of what's  
9 required under IDEA. It's all part of special education.

10 MS. SHELTON: Except that the schools were not  
11 claiming reimbursement for the mental health services for  
12 the test claim that was at issue in Hayes.

13 CHAIR SHEEHAN: Okay, other questions from the --

14 MEMBER SMITH: Not a question. I'd just like to  
15 thank staff for the thorough analysis and all the  
16 testimony provided to date. I'm ready to move the staff  
17 recommendation.

18 MEMBER BOEL: I second it.

19 MS. OROPEZA: I think we had somebody from our  
20 health unit to testify on the other little pieces. I  
21 don't know if you're taking this piece and then the other  
22 separate.

23 CHAIR SHEEHAN: Well, we're going to do --

24 MS. SHELTON: This is Item 11. Are you talking  
25 about Item 13?

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1 CHAIR SHEEHAN: Yes, because that will be next.

2 MS. OROPEZA: Okay, if the other issues are in 13.

3 MS. SHELTON: Yes.

4 CHAIR SHEEHAN: So don't go far, because that will  
5 be next, in terms of this.

6 All right, so the recommendation before us is the  
7 adoption of the Staff Analysis; is that what you're  
8 saying?

9 MEMBER SMITH: Yes.

10 CHAIR SHEEHAN: All right, then all those in favor,  
11 signify by saying "aye."

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

13 CHAIR SHEEHAN: Any opposed?

14 *(No audible response was heard.)*

15 CHAIR SHEEHAN: It passes.

16 MS. HIGASHI: Okay, thank you.

17 Next is Item 12.

18 MS. SHELTON: Item 12 is the proposed Statement of  
19 Decision on the reconsideration of the *Handicapped and*  
20 *Disabled Students*.

21 The sole issue before the Commission is whether the  
22 proposed Statement of Decision accurately reflects the  
23 Commission's decision on the reconsideration of this  
24 program. I do recommend that the Commission adopt this  
25 proposed Statement of Decision, although I will take it

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1 back and add in the hearing testimony from the witnesses  
2 today. All of the issues really have been already  
3 addressed in the proposed Statement of Decision.

4 CHAIR SHEEHAN: And I see it more as clarification  
5 of the issue versus any substantive difference.

6 MS. SHELTON: Right.

7 CHAIR SHEEHAN: Further expanding on them.

8 MS. SHELTON: That's correct.

9 CHAIR SHEEHAN: All right, what is the --

10 MEMBER SMITH: To move approval.

11 MEMBER BOEL: I second.

12 CHAIR SHEEHAN: So we have a motion and a second.

13 No further discussion?

14 *(No audible response was heard.)*

15 CHAIR SHEEHAN: All those in favor?

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

17 CHAIR SHEEHAN: Any opposed?

18 *(No audible response was heard.)*

19 CHAIR SHEEHAN: That passes.

20 MS. HIGASHI: Thank you.

21 CHAIR SHEEHAN: All right, now we're to Item 12.

22 MS. HIGASHI: 13.

23 CHAIR SHEEHAN: Oh, I'm sorry, 13. Yes.

24 MS. HIGASHI: Item 13, Ms. Shelton will also present  
25 this item.



1 MS. SHELTON: This test claim addresses the  
2 amendments to the *Handicapped and Disabled Students*  
3 program, administered by county mental health  
4 departments. This test claim was filed by the Counties  
5 of Stanislaus and Los Angeles.

6 Pursuant to the Court's ruling in Hayes vs.  
7 Commission on State Mandates, in Tri-County SELPA vs.  
8 County of Tuolumne, staff finds that the test claim  
9 statutes and the regulations mandate a new program or  
10 higher level of service and impose costs mandated by the  
11 state on counties for the activities listed on pages 54  
12 through 59 of the analysis, with a reimbursement period  
13 beginning July 1st, 2004.

14 Staff recommendation is that the Commission adopt  
15 the staff analysis and approve the test claim  
16 accordingly.

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

19 MR. KAYE: Leonard Kaye for the County of Los  
20 Angeles.

21 MR. McIVER: Paul McIver, Los Angeles Counties  
22 Department of Mental Health.

23 MS. STONE: Pamela Stone on behalf of the County of  
24 Stanislaus.

25 MR. SCHWEITZER: Nicholas Schweitzer, Department of

1 Finance.

2 MS. McCOY: Jody McCoy, Department of Finance.

3 CHAIR SHEEHAN: Great.

4 Would you like to start?

5 MR. KAYE: Thank you.

6 MS. DOWNS: Linda Downs, County of Stanislaus.

7 MR. KAYE: I'm sorry.

8 Good morning. We, again, concur with staff's  
9 analysis and recommendations before you today; and we  
10 urge your adoption this morning. And, again, we feel  
11 that their analysis is comprehensive, complete and based  
12 on current law. And we believe it's declaratory of  
13 existing law.

14 And I would say this: That our test claim that --  
15 and that was their test claim that you heard, the last  
16 matter. Our test claim was a little bit different, and  
17 was filed under the provisions of AB 3000, which gave us  
18 until September 29th of, I think, a couple years ago, to  
19 go back to the beginning of time.

20 And Commission staff essentially ruled that the  
21 Statement of Decision, the 1990 Statement of Decision  
22 governing this, was final and could not be disturbed.  
23 And then there were subsequent Statements of Decision and  
24 so forth.

25 And the whole purpose of filing this new test claim,

1 was to get in subsequent developments to that. But after  
2 we filed the test claim, along came SB 1895, which  
3 invited the Commission to reexamine this original  
4 decision. And so our feelings were somewhat soothed  
5 because we just have put in the record, and it's a final  
6 decision now, SB 1895, which I think cures a lot of the  
7 problems we had, and led to us filing this claim.

8         Nevertheless, there are certain things in the  
9 additional activities which were subsequently after the  
10 1990 decision and after these amendments that were  
11 subsequently added to California law. And as Commission  
12 staff correctly found, I think one is medication  
13 monitoring, and there are several other features that  
14 Paul and Pam, I'm sure, would like to address.

15         But we're pleased with the overall result. And  
16 again, what our hope is, that we have also, on the  
17 Commission's books, an item on our amended P's and G's  
18 for the old thing, where we're consolidating the  
19 P's and G's. All this is sort of a way of saying that  
20 this summer, whenever we get together, we'll be  
21 developing matrices to show which decision authorized  
22 which services; so when we get all done, we can get  
23 something that's intelligible to the accountants out in  
24 the field that are filling in these forms in one  
25 consolidated types of responses that they can prepare

1 these claims. And also when the state auditors roll  
2 through town, that they'll have one consolidated set of  
3 documents that will tell them what we should be doing  
4 and what we can't be doing, and that kind of thing. So  
5 that's our overall result.

6 So having said that, I turn it over to Paul.

7 MR. McIVER: Thank you.

8 I want to merely reiterate my concern previously  
9 stated about the dispute resolution language, and I want  
10 to just echo what's been said, that based on our  
11 experience with the auditors and controllers who look for  
12 the plain language of what is allowable and what is not,  
13 I want to make sure that the language specified that  
14 participation in all aspects of dispute resolution, not  
15 just what is the plain language of the Staff Analysis,  
16 which describes participation in due-process hearings.  
17 So if that clarification can be underscored, that would  
18 be great appreciated.

19 Thank you.

20 CHAIR SHEEHAN: Great. Thanks.

21 Go ahead.

22 MS. STONE: Thank you. And it's still good morning.

23 We would like to, again, commend Camille and your  
24 staff for the work they did on it.

25 We do have one issue for clarification purposes,

1 because we've had unfortunate experiences with regard to  
2 audits, and wanted to avoid problems in the future.

3 In the last reconsideration, you allow the  
4 interagency agreements to be reviewed every three years,  
5 as required by statute, and that's authorized. In this  
6 test claim, at page 23, you allow the one-time activity  
7 of revisions of the interagency agreement to include the  
8 new procedures that are required to be in it.

9 The footnote notes that you will be able to revise  
10 that every three years in conjunction with the  
11 reconsideration. However, because it's not contained  
12 within the document and the document specifically states  
13 you're only allowed the one-time activity of revising the  
14 interagency agreement, we are concerned that some auditor  
15 in the future, who audits to the P's and G's, will say,  
16 "You can get it every three years under the  
17 reconsideration for these items; but these other items  
18 that are now required to be in the interagency agreement,  
19 it doesn't say you get it specifically on an ongoing  
20 basis every three years."

21 So because we have two separate documents and we  
22 will have one set of Parameters and Guidelines, I just  
23 want to make perfectly clear, we will be able to get the  
24 new elements of the interagency agreement at such time as  
25 they must be renegotiated every three years. And that's

1 a matter of clarification.

2 Thank you very much.

3 CHAIR SHEEHAN: You're welcome.

4 There was someone else who wanted -- oh, you did  
5 come up. Great.

6 MS. DOWNS: I have some notes. Sorry.

7 CHAIR SHEEHAN: That's okay.

8 MS. DOWNS: And once again, I just wanted to talk  
9 about the clarification on the Medi-Cal, as stated  
10 earlier. That page 3 of the Staff Analysis does  
11 recognize the fact that counties may utilize money from  
12 local revenue funds to pay for costs associated with the  
13 provision of these services. I just want to clarify that  
14 the local funds received at one point do come from the  
15 state as part of our realignment allocation. So I wanted  
16 to make it very clear on there that once they become --  
17 once they come to the counties, they then become county  
18 local funds, and are not subject to the offsets that are  
19 provided in here.

20 So, again, we are requesting a clarification that  
21 says Medi-Cal funds obtained for the purposes of this  
22 mandate in accordance with federal law, except for any  
23 local match requirements.

24 CHAIR SHEEHAN: Okay. Finance, you're on.

25 MR. SCHWEITZER: All right. Nicholas Schweitzer,

1 Department of Finance.

2 We believe that the new activities identified by the  
3 claimants aren't really new activities. For example,  
4 medication monitoring, we believe that -- actually, let  
5 me start -- before medication monitoring, let me start  
6 with the residential placement in the requirement  
7 documentation -- the documentation requirements there.  
8 Our understanding is, existing activities for considering  
9 other alternative -- possible alternatives to out-of-home  
10 placement and documenting the pupil's educational and  
11 mental health treatment needs already include the  
12 development of a plan for using less-restrictive and  
13 in-state alternatives. So we don't believe that the plan  
14 requirement is new.

15 Then the requirement -- the authorization for  
16 payments for out-of-home residential care providers,  
17 again, our understanding is that these are activities  
18 that counties already have to do as part of development  
19 of the pupil's plan. And so that is not a new activity.

20 And then the medication monitoring, counties are  
21 responsible for activities of dispensing medications,  
22 evaluating side effects, and the results of medication.  
23 Again, we believe that this is essentially medication  
24 monitoring. And so the medication monitoring claim is  
25 not new, either.

1 CHAIR SHEEHAN: Okay, so just the three -- there  
2 were three items you identified?

3 MR. SCHWEITZER: Yes, those three items. The  
4 residential placement plan, the --

5 CHAIR SHEEHAN: Okay. The assessment? The  
6 additional activities under the assessment?

7 MR. SCHWEITZER: Right. The authorization of  
8 payments for out-of-home care, and the medication  
9 monitoring.

10 CHAIR SHEEHAN: Okay. Did you want to add  
11 something?

12 MS. McCOY: No.

13 CHAIR SHEEHAN: All right. Camille, do you want to  
14 start at the top?

15 MS. SHELTON: Mr. McIver, again, discussed the  
16 dispute resolution issue, and it's sort of the same  
17 comments on the interagency agreement issue.

18 I have to put this into context. This is a test  
19 claim filed on all the subsequent amendments to the  
20 *Handicapped and Disabled* program. This is not a new  
21 program. It really would be reflective of a higher level  
22 of service.

23 The dispute resolution issues and the due-process  
24 issues are whether or not the amendments increase the  
25 level of service of counties. And this analysis finds



1 that there is no increase in the level of service on  
2 counties with respect to the due-process hearing.  
3 The only thing that it really changed was identifying  
4 who the administrative officer to hear those hearings  
5 would be. So that really doesn't change the activities.  
6 So for the purposes of this analysis here, there's  
7 nothing new.

8 Now, certainly it is still the law that they have to  
9 participate in due-process hearings. And so that would  
10 be reflective in a set of Parameters and Guidelines. So  
11 for the purposes of this analysis, there's nothing new  
12 with respect to due process.

13 CHAIR SHEEHAN: Thanks.

14 MS. SHELTON: The interagency agreement issue, let  
15 me get to that.

16 The test claim statute was amended by the  
17 legislation, the subsequent amendment, to require a  
18 review of the interagency agreement between the state and  
19 the counties, to review it and revise, if necessary,  
20 every three years. But that requirement existed in prior  
21 law through the former set of regulations adopted by the  
22 Department of Mental Health and the Department of  
23 Education.

24 So the law, in that respect, to review and revise,  
25 if necessary, every three years is not new and does not

1 increase the level of service of the county.

2 But the regulations were amended to add an  
3 additional eight items that have to be included in the  
4 agreement. Those, obviously, when you add more items  
5 that have to be in the agreement, you need to provide  
6 reimbursement for the activity of creating or developing  
7 that new agreement. So the Staff Analysis recommends  
8 reimbursement for the one-time activity of adopting that  
9 new agreement based on the new regulations.

10 If they want the ongoing activity of revising that,  
11 it is still in the law, it would still be reflected in  
12 the P's and G's because that law has not changed. But  
13 for purposes of this analysis, it's not new and it does  
14 not increase the level of service.

15 CHAIR SHEEHAN: Okay.

16 MS. SHELTON: The Medi-Cal match is complicated  
17 because it appears to be complicated if we're talking  
18 about realignment funds -- in the mixing of state and  
19 local funds with the realignment appropriation.

20 In the comments that we did receive from the  
21 claimants, there was no law or citations to statute or  
22 anything to describe how that actually works.

23 At this point, I think that if they want more  
24 specificity, that they should recommend that during the  
25 Parameters and Guidelines phase; because currently, this

1 analysis recommends that to the extent counties receive  
2 funds from the state or federal government under the  
3 Medi-Cal program, that those funds be identified as an  
4 offset. If they are recommending changes to that  
5 language, I think that that discussion can be had during  
6 the Parameters and Guidelines hearing. Any audits that  
7 occur would be taken from the Parameters and Guidelines,  
8 primarily. And if it just is clarifying something that's  
9 in the Statement of Decision, that would be appropriate.

10 CHAIR SHEEHAN: Okay.

11 MS. SHELTON: With respect to the Department of  
12 Finance's allegations, we have responded to all of those  
13 in the analysis. And primarily, it becomes an exercise  
14 of applying the rules of statutory construction to the  
15 regulations. And under the rules of statutory  
16 construction, you have to first look to the plain  
17 language of the regulations; and then to the extent that  
18 it's still vague and ambiguous, you have to go into the  
19 history.

20 And for purposes of regulations, the history would  
21 be the final statement of reasons, which we have provided  
22 as part of the record. The reasons why the departments  
23 made the changes, why they included the language in the  
24 new regulations.

25 Finance is arguing, with respect to the IEP team,

1 in which the county participates as a member, whenever  
2 residential placement of a pupil is recommended by the  
3 educational community, they have to become a member of  
4 the expanded IEP team. And the test claim statutes and  
5 regulations increased the level of service for the IEP  
6 team for which the county now is a participant for these  
7 kids. And the first activity that it added, in  
8 Government Code section 7572.55, was to "develop a plan  
9 for using less-restrictive alternatives and in-state  
10 alternatives, when the recommendation is made that a  
11 child be placed in an out-of-state facility."

12 That statute and that activity was added by the test  
13 claim statute. It was not in prior law. Government Code  
14 section 7572.55 is brand-new.

15 Under prior law, the expanded IEP team only had to  
16 consider all the possible alternatives. They did not  
17 have to develop a plan for using less-restrictive  
18 alternatives. So nowhere in the plain language of the  
19 law did it require them to develop a plan. And that  
20 analysis is on page 29.

21 The second issue, I believe that Finance raised, was  
22 with respect to payments for out-of-home residential care  
23 providers. And the Department of Finance argues that  
24 there really is no meaningful difference between the  
25 requirements under prior regulations and the new

1 regulations with respect to authorizing payments to  
2 out-of-home residential facilities.

3 The language of the regulations did absolutely  
4 change. And with respect to analyzing new regulations  
5 under the rules of statutory construction, you have to  
6 look to the plain language.

7 In here, the new regulation requires that the  
8 county, when they're authorizing the payments to the  
9 out-of-home residential-care provider, they have to  
10 perform the authorization pursuant to Welfare and  
11 Institutions Code, before the payment actually goes out.  
12 And that requirement was not in the law before.

13 And under that, under the Welfare and Institutions  
14 Code, they have to ensure that the placement meets all  
15 the regulations, and that the facility be licensed in  
16 accordance with the Community Care Facilities Act. And  
17 that is new.

18 And so the comments made by the Department of  
19 Finance does not support, or is not supported by any  
20 legal document or any declaration signed under penalty of  
21 perjury from any of the agencies, saying that this  
22 finding is incorrect.

23 So based on the plain language which was changed,  
24 you have to presume, under the rules of statutory  
25 construction, that they intended a change to occur.

1           And lastly, under medication monitoring, this  
2           one -- the Department of Finance argues that medication  
3           monitoring does not increase the level of service. And  
4           basically, their written comments are summarized on  
5           page 38 of the analysis. They argue that there is really  
6           no meaningful difference between the medication  
7           requirements under prior regulations and of any  
8           requirements under the test claim legislation. And staff  
9           disagrees.

10           Again, under the rules of statutory construction,  
11           it's presumed that whenever an administrative agency  
12           materially alters the language used, then it's presumed  
13           that they intended to change the law.

14           Under prior law, they did require counties to  
15           dispense medication; and that language was deleted. So  
16           they are no longer required to dispense medication.

17           Under prior law, they were required to evaluate the  
18           side effects and the results of the medication. That  
19           activity was deleted and replaced with "monitoring the  
20           psychiatric medications or biologicals, as necessary, to  
21           alleviate the symptoms of mental illness."

22           Now, the definitions of "evaluating" and  
23           "monitoring" are different. And the definition of  
24           "monitoring" implies an ongoing activity necessary to  
25           ensure that the pupil receives a free and appropriate

1 education. And when you look to the final Statement of  
2 Reasons, the reasons adopted by the Department of Mental  
3 Health and the Department of Education for the change in  
4 the language, they indicate that medication monitoring is  
5 an educational service. And they wanted to make that  
6 clear. Any educational services that's provided pursuant  
7 to an IEP, rather than a medical service that is not  
8 allowable under the program. And that was the reason for  
9 the change.

10 So when you compare the two versions of regulations,  
11 activities were deleted and activities were changed, with  
12 different verbs being used. And using the dictionary  
13 definition of those verbs, as the courts do when they're  
14 interpreting the plain language of a statute, it does  
15 increase the level of service because there's new  
16 activities required.

17 CHAIR SHEEHAN: Did Finance want to respond to any  
18 of those?

19 MS. McCOY: Well, I think we would agree that the  
20 words changed. But functionally speaking, we didn't see  
21 any meaningful difference in what the counties would  
22 actually be doing in each of those cases.

23 CHAIR SHEEHAN: Okay. Questions from the members?

24 MEMBER BOEL: No.

25 CHAIR SHEEHAN: All right, any other issues?

1 I think we covered those.

2 Any other questions from the staff?

3 MEMBER BOEL: I'd like to move that we adopt the  
4 Staff Analysis and approve this test claim accordingly  
5 should.

6 MEMBER SMITH: Second.

7 CHAIR SHEEHAN: We have a motion and a second to  
8 adopt the Staff Analysis.

9 All those in favor, signify by saying "aye."

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

11 CHAIR SHEEHAN: Any opposed?

12 *(No audible response was heard.)*

13 CHAIR SHEEHAN: That is adopted.

14 MR. KAYE: Thank you.

15 CHAIR SHEEHAN: Next would be 14?

16 MS. HIGASHI: Yes.

17 CHAIR SHEEHAN: The proposed Statement of Decision.

18 MS. SHELTON: Yes, this is the proposed Statement of  
19 Decision on the *Handicapped and Disabled Students II* test  
20 claim that was just adopted by the Commission. The sole  
21 issue before the Commission is whether the Statement of  
22 Decision accurately reflects the Commission's decision  
23 today.

24 I will modify the witness list to include the  
25 witness names. The comments, however, have been already



1 analyzed in this analysis, so I wouldn't have to change  
2 any of the testimony provided.

3 CHAIR SHEEHAN: All right, so any questions for  
4 staff on that?

5 MEMBER BOEL: I would like to move that we adopt the  
6 proposed Statement of Decision.

7 MEMBER SMITH: Second.

8 CHAIR SHEEHAN: We have a motion and a second on the  
9 proposed Statement of Decision.

10 All those in favor, signify by saying "aye."

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

12 CHAIR SHEEHAN: Any opposed?

13 *(No audible response was heard.)*

14 CHAIR SHEEHAN: All right, that is adopted.

15 MR. KAYE: Thank you.

16 CHAIR SHEEHAN: We've got to go back to 7, and then  
17 do Butte.

18 MS. HIGASHI: We should call 7 and 8 now.

19 CHAIR SHEEHAN: All right, do you want to do that  
20 now; and then we'll recess at, like, 12:30?

21 MS. HIGASHI: Yes.

22 CHAIR SHEEHAN: All right, so let's go back to  
23 Item 7.

24 Are you ready for this?

25 MS. HIGASHI: We're now at Item 7. And this item

1 will be presented by Commission Counsel Katherine  
2 Tokarski.

3 MS. TOKARSKI: Good afternoon. *School*  
4 *Accountability Report Cards* was a test claim approved by  
5 the Commission at the April 23rd, 1998, hearing. AB 2855  
6 directs the Commission to reconsider this prior final  
7 decision. Statutes 1997, Chapter 912, was not named  
8 explicitly in AB 2855. Therefore, staff finds the  
9 Commission does not have authority to rehear that portion  
10 of the original decision at this time.

11 In enacting Proposition 98, the Classroom  
12 Instructional Improvement and Accountability Act, the  
13 voters provided public schools with state-funding  
14 guarantees by amending the California Constitution. As  
15 part of this constitutional guarantee of funding, the  
16 voters also required schools to undergo an annual audit  
17 and to issue an annual school accountability report card.  
18 The test claim was filed on statutory amendments to the  
19 Prop. 98 requirements for the *School Accountability*  
20 *Report Card*.

21 Staff finds that requiring some new data elements  
22 and a new method for publicizing and distributing the  
23 existing school accountability report card, the State has  
24 not shifted from itself to districts the burdens of state  
25 government, when the directive can be complied with by a

1 minimal reallocation of resources as described by the  
2 Court in the 2003 decision, County of Los Angeles vs.  
3 Commission on State Mandates. Based on this controlling  
4 case law, staff finds no new program or higher level of  
5 service was imposed.

6 As a second and independent ground for denying  
7 reimbursement, staff finds that there are also no costs  
8 mandated by the state.

9 In Department of Finance vs. Commission on State  
10 Mandates, the California Supreme Court found, regarding a  
11 school district mandates claim, that the availability of  
12 state program funds precludes a finding of a reimbursable  
13 state mandate.

14 Staff finds that there is a unique relationship  
15 between the voter-enacted *School Accountability Report*  
16 *Card* requirement and the Prop. 98 school funding  
17 guarantee. Therefore, the state funds received under  
18 Prop. 98 are program funds that can be used for  
19 completing the annual school accountability report card.

20 In December 2004, interested parties and state  
21 agencies were asked to file opening briefs on the issues  
22 under reconsideration. Until yesterday, the only written  
23 comments received were on the draft Staff Analysis.

24 Sweetwater Union High School District, one of the  
25 original claimants, stated complete disagreement with the

1 conclusions, arguing that the test claim legislation did  
2 impose a higher level of service on school districts.

3 Department of Finance filed comments supporting the  
4 Staff Analysis.

5 Yesterday afternoon, a late filing was received from  
6 the Education Management Group. And you should have that  
7 before you. This letter asserts that the staff's  
8 analysis on costs mandated by the state is based on a  
9 new legal theory, requiring schools to prove that  
10 reimbursable state-mandated costs are paid from a  
11 property tax source. The Education Management Group  
12 argues that would make it impossible for school districts  
13 to prove any past or future mandate claims due to an  
14 accounting burden that schools cannot meet.

15 Staff finds that this filing takes the property tax  
16 argument out of context. The Staff Analysis is on a test  
17 claim for *School Accountability Reports Cards* which, as  
18 previously stated, is uniquely tied to the Prop. 98  
19 funding guarantee.

20 Districts receive well over \$31 billion a year  
21 through Prop. 98. Therefore, staff finds that to receive  
22 reimbursement for this particular test claim, districts  
23 have the burden to prove that they are required to exceed  
24 Prop. 98 funding in order to provide annual school  
25 accountability report cards.

1           The argument that if staff's recommendation is  
2 adopted by the Commission, districts are going to be  
3 forced in future claims to prove that they used their  
4 Prop. 98 funds to offset all mandates is incorrect. As a  
5 quasi judicial body, each of the Commission's mandate  
6 decisions must be supported by constitutional, statutory  
7 and case law. But each decision is limited to the claim  
8 presented, and Commission decisions are not precedential.

9           That said, staff notes that this decision does not  
10 present a novel theory of law as stated in the late  
11 filing. This exact issue was presented and approved by  
12 the Commission over a year ago, at the March 2004 hearing  
13 on *School Accountability Report Cards II and III*.

14           Staff recommends the Commission adopt the Staff  
15 Analysis to deny the reconsidered portions of the  
16 original test claim decisions as stated in the conclusion  
17 beginning at page 22.

18           Will the parties and witnesses please state your  
19 names for the record?

20           MR. HAJELA: Abe Hajela, School Innovations and  
21 Advocacy.

22           MR. SOOKPRASERT: Jai Sookprasert with the  
23 California School Employees Association.

24           MR. MIYASHIRO: Robert Miyashiro with the Education  
25 Mandated Cost Network.

1 MR. McFADDEN: Brent McFadden on behalf of the  
2 Education Coalition and the Association of California  
3 School Administrators.

4 MR. HAMILTON: Richard Hamilton, on behalf of the  
5 California School Boards Association.

6 MS. THORNTON: Sandra Thornton on behalf of the  
7 California Teachers Association.

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

10 MR. CERVINKA: Pete Cervinka, Department of Finance.

11 CHAIR SHEEHAN: I will ask you to go ahead and  
12 start.

13 I guess one thing that I would say is if most of the  
14 testimony is on this one issue. If someone could  
15 articulate it -- if you have new ideas, please bring up  
16 new substantive issues. But if you are simply supporting  
17 what someone else has said, you don't need to go through  
18 the legal analysis in detail for us.

19 MR. HAJELA: Thank you very much. Abe Hajela with  
20 School Innovations.

21 There are two issues here in the Staff Analysis that  
22 I want to address. One is this issue of, is it really a  
23 higher level of service? And that is, are the new things  
24 added to the *School Accountability Report Card* by  
25 subsequent legislation simply too minimal to be a higher

1 level of service? So that's one issue.

2 The second issue is the property-tax issue. So what  
3 is the requirement of a school district claimant to prove  
4 that they use local property tax revenues?

5 So let me take the second one first and make sure  
6 I understand staff's analysis because all I have to work  
7 on is what is in here. And it states the issue pretty  
8 broadly.

9 If I can direct you to page 18, there's a sentence  
10 here that says, *"School districts have not demonstrated*  
11 *that the state funds received through Article XVI,*  
12 *sections 8 and 8.5, or any other sources beyond property*  
13 *tax revenues" -- so they're not limiting themselves to*  
14 *Prop. 98 -- "are unavailable for the claimed additional*  
15 *costs of adding data elements to existing School*  
16 *Accountability Report Cards. In the absence of that*  
17 *showing, staff finds the test claim legislation does not*  
18 *impose costs mandated by the state."*

19 Now, I read that to say that you have to prove your  
20 spending local property-tax revenues before you can file  
21 or claim a reimbursement from the state. And it was my  
22 understanding that that's what was intended in this  
23 analysis. And that is what we are disputing. There is  
24 no way school districts can prove they use local  
25 property-tax revenues when they comply with specific

1 mandates, because those funds are commingled with other  
2 funds we receive through Prop. 98. We largely receive  
3 our Prop. 98 funding as revenue limits. And that  
4 commingles both property tax revenues, plus other funds  
5 received by the state. And school districts accounting  
6 procedures are largely regulated by the state and state  
7 agencies, and they don't require you to segregate out  
8 your funds that way. So that's the first issue.

9 Secondly, if this is only to apply to SARC -- so  
10 this argument is not made for any other program, it's  
11 only for SARC, and that's because the SARC was initially  
12 created by Prop. 98 -- the case they cite is easily  
13 distinguishable. The case they cite is relating to a  
14 program that is funded by the Legislature. So there's a  
15 specific appropriation for that program. In that case,  
16 you could say there needs to be an offset.

17 There is no specific appropriation for SARCs, and  
18 there's no -- and SARCs have been in the law since  
19 Prop. 98. And so there's nothing new that's happened  
20 for the Commission to believe that there's a new  
21 interpretation of law necessary here.

22 So if that's not clear what I'm saying is, if there  
23 is a funding stream for something, like there was in the  
24 case cited by staff, that needs to be used as an offset.  
25 There's no funding stream for SARC.



1           So that's the first issue. So it's impossible to  
2 comply.

3           And secondly, if you're to take the property-tax  
4 issue broadly, we've got 20 years of history, saying that  
5 that's not the way we analyze the law for school  
6 districts. And if that was the case, school districts  
7 would never be able to show that they ought to be  
8 reimbursed. Okay, and obviously Proposition 4 put school  
9 districts into the Constitution. All right, that's that  
10 issue.

11           On the second issue, of whether there's really a  
12 higher level of service, as I read the Staff Analysis,  
13 what they've done is, they've looked at each piece of  
14 legislation since the original SARC requirements in  
15 Prop. 98, and said each of them by themselves are too  
16 minimal to justify a reimbursement.

17           The problem with that is, you need some sort of  
18 standard. I mean, do we mean minimal in terms of dollar  
19 amounts? Do we mean minimal, in terms of percentage of  
20 the overall activity? And is it appropriate to take each  
21 one individually, or should you look at them in the  
22 aggregate?

23           So, for example, let's say the initial SARC -- and  
24 I'm making this up -- the initial SARC created by the  
25 Constitution was three pages long, and then let's say you

1 have twenty pieces of legislation, each adding a  
2 paragraph. It doesn't seem to me you need a standard for  
3 what is minimal. Because if you take those 20 paragraphs  
4 together, they triple the initial SARC. So there just  
5 needs to be a standard here. It ought to either be a  
6 dollar-amount standard, or it ought to be a percentage of  
7 the program. And then I think the Commission needs to  
8 give us guidance on whether that's in the aggregate,  
9 because the SARC could be amended 20 more times in the  
10 next ten years.

11 So is it in the aggregate, or do you just take each  
12 one individually and analyze them? Because I believe  
13 that the SARC has become considerably longer, has a lot  
14 more data elements in the aggregate since the initial  
15 Prop. 98 SARC.

16 So those are my opening comments. Thanks.

17 CHAIR SHEEHAN: Okay.

18 MR. SOOKPRASERT: Jai Sookprasert with the  
19 California School Employees Association.

20 I would associate myself with the comments that Abe  
21 has made, and also, just to add a little bit more  
22 information.

23 In my years as the Assembly Appropriations Committee  
24 consultant, looking at all legislation that came through  
25 our desk, to argue that a school district must break it

1 down on the property tax cost, and then to make the  
2 argument that this is a minimal change, seems to go too  
3 far in trying to address this issue. It undermines just  
4 a lot of activities that is done normally by the  
5 Department of Finance or by the Appropriations Committee  
6 in trying to make the determination whether this new  
7 piece of legislation has had an impact or not. You're  
8 opening the door that is just so wide, that you would  
9 deny either essentially all legislation, or all  
10 legislation that you think, "Well, clearly, these have  
11 been funded in some level or manner, therefore, they  
12 should be passed." And at some point, though, as Abe had  
13 indicated -- I mean, metaphorically, at some point the  
14 straw will break the camel's back. I mean, you can think  
15 the additional straw is only an additional line on the  
16 SARC, but at some point, those will add up and have an  
17 incredible burden on the school districts that will harm  
18 them.

19 Thank you.

20 CHAIR SHEEHAN: Okay.

21 MR. MIYASHIRO: Thank you, Madam Chair and Members  
22 of the Commission. Again, Robert Miyashiro with the  
23 Education Mandated Cost Network.

24 The two broad points that the staff are using to  
25 recommend a reversal of the Commission's prior finding

1 rests with the argument on the property tax and on the  
2 de minimis nature of the claim. I think others will  
3 speak, again, more broadly on the property tax side, so I  
4 will speak to the nature of the de minimis nature of the  
5 claim.

6 Current law specifies that local agencies must have  
7 a claim of a thousand dollars or more to put forth before  
8 this Commission. It used to be \$200. It was raised to  
9 \$1,000. So the Legislature has established a minimum  
10 threshold for consideration of a claim.

11 Staff has not put forth a dollar amount that  
12 establishes a minimum amount. They have suggested that  
13 the activities are de minimis; they have suggested that  
14 it's a minor reallocation of resources. They have  
15 indicated in the analysis, that incidental duties do not  
16 require reimbursement. That is not correct, according to  
17 the law, as far as a claim can be made.

18 The law specifies a thousand-dollar minimum claim.

19 The Commission itself adopted a statewide cost  
20 estimate for *School Accountability Reports Cards* of  
21 \$1.7 million. That is not a minimal amount of a claim.  
22 That is the thirteenth-largest claim of the 30 for which  
23 there were statewide cost estimates made by this  
24 Commission for 2002-03. So we would say the fact of  
25 the matter does not bear out a de minimis cost to local

1 agencies. Again, the thirteenth largest of statewide  
2 cost estimates adopted by this Commission.

3 Staff references Proposition 98 and it's detailing  
4 the general requirements of the SARC, linking the two and  
5 suggesting that 30-plus billion dollars provided by  
6 Proposition 98, in essence, funds the activities of  
7 local agencies to provide the SARC. To be clear,  
8 Proposition 98 does not appropriate money for any  
9 program. Proposition 98 establishes a minimum funding  
10 level for which the Legislature then makes appropriations  
11 to specific programs, in satisfaction of that minimum  
12 requirement. So it is not sufficient to reference SARC  
13 in the Proposition 98 guarantee, and then conclude that  
14 the minimum requirements, therefore, fund a particular  
15 program. An appropriation must be made to fund the  
16 program.

17 And your staff, in other issues before you today,  
18 have made it clear that the Government Code, when it  
19 assesses whether there are offsetting revenues, is that  
20 the amount provided be specifically intended for the  
21 program and that it be sufficient. We would argue that  
22 the language of Proposition 98 is not specifically  
23 intended for the program. It fails on that first test.

24 So on this entire issue of adequacy and de minimis,  
25 we think that the Staff Analysis has not overcome the

1 original findings of this Commission; that there is, in  
2 fact, a reimbursable mandate. And, in fact, that amount  
3 is not de minimis, and should, in fact, be provided. We  
4 would strongly urge your rejection of the Staff Analysis  
5 and let your 1998 decision stand.

6 CHAIR SHEEHAN: Okay.

7 MR. McFADDEN: Madam Chair and Members, Brett  
8 McFadden on behalf of the Association of California  
9 School Administrators, as well as the Education  
10 Coalition. My colleague from the labor side of the  
11 Education Coalition will be up here shortly.

12 I'd like to associate myself and the Coalition with  
13 the remarks made by the previous three speakers. They  
14 spoke eloquently to our core arguments on this issue.

15 Thank you.

16 CHAIR SHEEHAN: Thanks.

17 MS. THORNTON: Sandra Thornton.

18 I agree with all the comments that have been made.

19 And speaking on behalf of the California Teachers  
20 Association and as a classroom teacher, I would urge this  
21 Commission to oppose any test claim recommendation that  
22 would affect the funding source or perpetuate the  
23 underfunding of funds for the California schools.

24 CHAIR SHEEHAN: Thank you.

25 MR. HAMILTON: Richard Hamilton on behalf of the

1 California School Boards Association.

2 And I also would like to concur with the comments  
3 that you've already heard, and endorse them before you.

4 I would also point out that the Staff Analysis, in  
5 addition to not considering the offset language with  
6 respect to specifically-intended funding, as has been  
7 referred to earlier, does not address subpart (f) of  
8 Government Code section 17556, which speaks of imposing  
9 duties that are expressly included in a ballot measure.

10 CHAIR SHEEHAN: Thank you.

11 Anyone else, before we go to Finance?

12 Okay, go ahead.

13 MR. CERVINKA: Thank you, Madam Chair.

14 Pete Cervinka, Department of Finance.

15 I actually don't particularly believe that we would  
16 agree with the interpretation of the Staff Analysis  
17 that's been presented here today by the speakers before  
18 me.

19 In fact, I think our interpretation -- and we happen  
20 to agree with the Staff Analysis here -- is simply that  
21 Government Code section 17556(f) specifically states that  
22 ballot measures adopted by the voters on a statewide  
23 initiative do not impose reimbursable mandates for duties  
24 expressly included in the ballot measures.

25 As part of the ballot measure for Prop. 98,

1 Education section 35256 was added to the code. And  
2 specifically, again, says that the report card shall  
3 include, but is not limited to, the conditions listed  
4 in Ed. Code section 33126, which was also added by  
5 Proposition 98.

6 In addition, 35256 states that:

7 *"The governing board of each school*  
8 *district shall compare the content of the*  
9 *school district's SARC to the model SARC*  
10 *adopted by the State Board of Education."*

11 I think your staff has reimbursed the appropriate  
12 conclusion here, that the electorate clearly recognize  
13 that the precise models of the model report card are  
14 subject to change, and that the Districts are required  
15 to make modifications as necessary, with allowances for  
16 unique local circumstances.

17 As staff again correctly noted, Prop. 98 clearly  
18 states that, "No provision of the Act may be changed,  
19 except to further its purposes."

20 Each staff issue in this present test claim also  
21 affirmatively states that, "The Legislature finds and  
22 declares that this Act furthers the purposes of the  
23 Classroom Instructional Improvement and Accountability  
24 Act."

25 And I think, simply by specifying that the SARC is



1 not limited to the provisions originally set out in the  
2 Education Code, and by requiring districts to  
3 periodically update their SARCs, the electorate recognize  
4 that the precise details of the model report card are  
5 subject to change and districts are required to comply  
6 with those changes.

7 So this is a statewide ballot measure. It can't be  
8 found reimbursable. And I think our analysis needs to  
9 stop there. This is very cut and dried.

10 CHAIR SHEEHAN: Do you have any comments on the  
11 other concern raised by the other witnesses?

12 MR. CERVINKA: Honestly, we hadn't thought about it  
13 a whole lot because our analysis really didn't go further  
14 than this.

15 We appreciate the concern. I think the Commission  
16 has a long-standing position that local funds cannot be  
17 required to be used to offset state-mandated local costs.  
18 However, again, your staff has pointed out that the  
19 language in this particular claim is limited simply to  
20 this particular issue because it was enacted as part of  
21 Prop. 98. But I'm not going to offer an opinion as to  
22 whether that conclusion is right or wrong. We just  
23 didn't go there.

24 CHAIR SHEEHAN: You didn't? Okay.

25 MEMBER SMITH: Madam Chair, may I ask a question?

1 CHAIR SHEEHAN: Yes.

2 MEMBER SMITH: Just to understand that correctly,  
3 you have no opinion on the higher-level-of-service  
4 argument that was made earlier?

5 CHAIR SHEEHAN: No, he does have an opinion on that.

6 MR. CERVINKA: That's exactly what I do have an  
7 opinion on. This is a voter-enacted statute and cannot  
8 be found to be reimbursable, and that's where it stops.

9 CHAIR SHEEHAN: He has an opinion on that. He  
10 doesn't have an opinion on the property tax issue.

11 MR. HAJELA: May I comment on that?

12 CHAIR SHEEHAN: On whether they have an opinion?  
13 Sure.

14 MR. HAJELA: No. I'm sorry, I need to know which  
15 target we're shooting at, because there's three different  
16 ones. If it's a higher --

17 CHAIR SHEEHAN: Well, the issues that you raised  
18 were the higher level of service and the property-tax  
19 issue.

20 MR. HAJELA: Correct. But Finance has just made an  
21 argument that no matter what you add by legislation to  
22 the SARC, it wouldn't be reimbursable.

23 MR. CERVINKA: Not by legislation, but by  
24 voter-enacted statute. And that's clear in the  
25 Constitution.

1 MR. HAJELA: But none of us are claiming the  
2 voter-enacted part is reimbursable. Nobody is making  
3 that claim.

4 MR. CERVINKA: I would argue that the Commission  
5 correctly concluded that because the proposition said,  
6 "including, but not limited to, the following" and  
7 required periodic updates to reflect changes made in that  
8 legislation," they clearly envision that there would be  
9 changes. And that precludes any finding of reimbursable  
10 mandate here.

11 MR. HAJELA: I think that's my point. Staff is  
12 saying the changes are de minimis, so don't worry about  
13 it too much, it's not a higher level of service.

14 I think what the gentleman here is arguing, is any  
15 changes in the future were contemplated in Prop. 98,  
16 therefore, any of them are okay. And I just want to be  
17 clear which are we responding to.

18 CHAIR SHEEHAN: You disagree with that?

19 MR. HAJELA: Yes, I disagree with both.

20 CHAIR SHEEHAN: You were responding to the Staff  
21 Analysis.

22 MR. HAJELA: Okay, thank you.

23 CHAIR SHEEHAN: All right, did that answer your  
24 question?

25 MEMBER SMITH: That's fine, for now.

1 CHAIR SHEEHAN: Okay. Katherine, do you want to  
2 respond? And can we address the property-tax issue  
3 first?

4 I have to say, this Commission member did not feel  
5 that was the justification for the final -- the  
6 recommendation from the staff. As you know, I did not  
7 see that in here, I didn't read it in here. I was  
8 surprised by the letter that I received this morning. So  
9 that that's why I am grateful that Katherine will address  
10 this issue.

11 MS. TOKARSKI: Again, there is a finding in multiple  
12 cases that the appropriate focus of mandate reimbursement  
13 is the expenditure of property taxes, as opposed to state  
14 funds. Those cases in the letter were distinguished  
15 summarily, that they were based on city and county claims  
16 and not school district claims; and that school districts  
17 are distinct.

18 As far as I know, the Commission or the State  
19 Controller's Office, when paying claims, has never  
20 required the claimant to prove that the money came from  
21 their property-tax source. It was sufficient to prove  
22 that they didn't have funds available from another  
23 source.

24 And my point here was simply that I did not receive  
25 any initial briefing. And in the comments that I did

1 receive on the draft Staff Analysis, nobody put out any  
2 evidence that this funding, \$31 billion from the state  
3 for Prop. 98, was unavailable.

4 And so my point -- which I understand how it was  
5 misconstrued -- and I do see that, because what I think  
6 people are doing is envisioning a future where you take  
7 out the words, "School Accountability Report Card," and  
8 put in any other mandate claim, to say that you have to  
9 prove that you used your property-tax pot of money versus  
10 your state pot of money.

11 All I was trying to point out here was that unless  
12 you had to go beyond the funds that you received under  
13 Prop. 98 to complete the additional requirements of the  
14 *School Accountability Report Card*, I couldn't find a cost  
15 mandated by the state using the analysis in the  
16 Department of Finance, also known as the Kern School  
17 District case. So that's to start with.

18 I don't believe you will ever see an analysis that  
19 starts using this sentence, and substituting in the  
20 words, "Put your test claim here."

21 In this case, my point was, you have "X" number of  
22 billions of dollars available to local school districts  
23 to meet these fairly minimal requirements of adding some  
24 things to SARC. And I understand that that's another  
25 dispute. But no evidence was put into the record that

1 they met their costs mandated by the state requirement.  
2 So that's where I start with the property-tax issue.

3 As far as going back to the higher-level of service  
4 issue --

5 CHAIR SHEEHAN: Hold on. Do you have a question?

6 MEMBER LUJANO: So if I'm hearing right, you're  
7 saying that the school districts don't have to prove that  
8 local property tax received were used to comply with the  
9 state mandates program?

10 MS. TOKARSKI: They have to prove that they have to  
11 go beyond their state funds in this case --

12 MEMBER LUJANO: No, but I'm being specific with the  
13 local property tax.

14 You're actually saying that the state funds are not  
15 available or committed to the mandates, but they don't  
16 have to prove that the local property tax revenues were  
17 used? Because what I'm hearing is, that's impossible  
18 because they're commingled.

19 MS. TOKARSKI: They're commingled.

20 MR. STARKEY: Let me interject. All we have at this  
21 point is this late filing of a letter which has some  
22 interesting language in it. In the third paragraph, it  
23 says, "From both the practical and legal standpoint, this  
24 new theory is ludicrous" -- which it's not a new theory  
25 and it's not ludicrous; it's been in the case law for

1 years -- "and almost impossible" -- note the words  
2 "almost impossible" -- "for districts to demonstrate."

3 The point is that in this case, the Prop. 98 funding  
4 is basically a quid pro quo. The voters said, "Hey,  
5 look, we want some accountability. And I'll tell you  
6 what: If we get the accountability, you're going to get  
7 the funding."

8 Okay, yes, it's not an appropriation; but it's clear  
9 in the intent of that proposition, this was a quid pro  
10 quo.

11 So you take a look at this proposition, and then you  
12 take a look at what is required here. And I'm blending  
13 the arguments about higher level of service. But we have  
14 case law that has said to us -- and, in fact, that case  
15 law comes from the courts of appeal and then from the  
16 California Supreme Court, that if there is a notion of a  
17 de minimis cost in state mandates law, and the notion is  
18 that if the Legislature imposes some activity, and that  
19 activity really does not cause the local agency to have  
20 this financial burden imposed upon them, which they  
21 cannot pay, and they are looking in all the cases at the  
22 imposition of taxes.

23 Article XIII B is about a balance, it's about a  
24 protection, where there were provisions to say, "You  
25 cannot -- we're going to put a limit on taxing and we're

1 going to put a limit on spending." And Article XIII B,  
2 Section 6, is a protection, so that the state does not  
3 impose this financial burden.

4 And so is there a de minimis element to mandates  
5 law? I think there is. I think it's in the court cases.

6 Is there a de minimis element to Prop. 98 and the  
7 *School Accountability Report Cards*? I think there is  
8 because the voters said, "Give us a report card. Tell us  
9 what you're doing." And they did leave it open to the  
10 Legislature. But the important thing was, they said the  
11 Legislature cannot, in their legislation, frustrate the  
12 intent of the voters.

13 And then the other thing is that this case is only  
14 saying, in this particular situation, with the activities  
15 we've identified, "these are de minimis and they don't  
16 impose a state mandate."

17 Could there be other things down the road where the  
18 camel's back is broken? Absolutely. And in fact -- and  
19 correct me, Ms. Tokarski, if I'm wrong -- I think in  
20 *SARC II*, we, in fact, identified activities that went, we  
21 thought, beyond the appeal and imposed the mandate that  
22 this is talking about.

23 CHAIR SHEEHAN: Imposed a higher level of service?

24 MR. STARKEY: A higher level of service.

25 And the other thing I want to say, is that the cases



1 that we're relying upon cannot be distinguished away  
2 because they're not school district cases. This is  
3 boilerplate, black-letter law, that every time the courts  
4 address this issue, they say, "What is Article XIII B  
5 about?" It is about this protection -- that you need  
6 this protection, in this tax-and-spend limitation  
7 situation. And they have never distinguished between  
8 school districts and local governments because the  
9 Constitution itself doesn't make that distinction.

10 So we have the case law, and that's what we're  
11 relying upon.

12 So my position is that very strongly, yes, I think  
13 there is a de minimis element. And you can't look to the  
14 statute and say, "Well, there used to be a \$200 minimum,  
15 now it's \$1,000 minimum." That's not the point, because  
16 the courts have told us that in certain situations, these  
17 incremental changes are just simply not going to be  
18 legally recognizable for purposes of imposing the state  
19 mandate.

20 And the policy rationale is that the counties or the  
21 local governments are not burdened within the meaning of  
22 a cost shift to the local governments.

23 And the reason I focus on cost shift is because that  
24 language is found in the Supreme Court case Ms. Tokarski  
25 cited. It is cited in our boilerplate, every time we put

1 one of these decisions out, that we are focusing on the  
2 imposition of those costs. So I just want to bring that  
3 clarification.

4 And I have to tell you, I take a little bit of  
5 umbrage where we have parties coming in at the last  
6 minute, filing letters with no support, no legal  
7 authority whatsoever, calling the staff work "ludicrous"  
8 and "based upon new theories," which have been in law for  
9 a long time.

10 And that's a personal comment from the Chief  
11 Counsel. But I really had a reaction to this letter, as  
12 you can tell.

13 CHAIR SHEEHAN: Thank you, Paul.

14 Yes, would you like to say something?

15 MR. HAJELA: Yes. May I respond to that?

16 I'm still trying to figure out, and there's a  
17 question asked by one of the Commissioners, which part of  
18 this staff is saying, "Sorry, you've misinterpreted what  
19 we've said," and which they aren't. And by the comments  
20 we just received here, it's, again, unclear to me. The  
21 cases that are cited on page 17 -- I mean, I'm not making  
22 this up, it's the first paragraph on page 17, and it  
23 talks about funding, in that schools receive most of  
24 their funding from state sources, which is true. And  
25 then they receive less from local property tax revenues.

1 And then they cite a series of cases to defend the  
2 proposition. It's the expenditure of tax revenues of  
3 a local government that is the appropriate focus of  
4 section 6.

5 What I had argued is, that is not about school  
6 districts. It's in the County of Sonoma case. And if  
7 you applied it to school districts, it would wipe out  
8 mandate reimbursements for school districts.

9 I'm not sure whether you are saying you didn't mean  
10 it or you did. And I would appreciate -- I agree that we  
11 came in late. And if we can somehow put this over to the  
12 next one and figure out exactly what it is that we agree  
13 and disagree on.

14 I felt like I agreed with a lot of things she was  
15 saying there a minute ago, which is, this has got nothing  
16 to do with property tax revenue; but now I'm not so sure  
17 again. So which cases are we relying on and what are we  
18 arguing about?

19 MR. STARKEY: Well, we're relying upon all the case  
20 law that has been cited in the paragraph on page 17, that  
21 you've talked about, combined with, if you read the rest  
22 of the section, the Department of Finance case. And the  
23 notion is that there is, in mandates law, the notion that  
24 property taxes matter.

25 And you want us to rule in this case for all future,

1 that that is not one of the issues that matters, that you  
2 have to consider property tax.

3 One, we didn't -- we're not relying upon that --  
4 we're not making a pronouncement for all future cases.  
5 The first part of this analysis is basically an analysis  
6 of how mandates law works. What is that balance in  
7 Article XIII B?

8 The case goes on to say then, we take a look -- and  
9 then in answering the comments from the Sweetwater Union,  
10 we then came back and provided further analysis to say,  
11 "Look, the most recent pronouncement of the California  
12 Supreme Court has done exactly the same thing: Taken a  
13 look at, are there funds available, and should this be a  
14 mandated situation? Has there been a cost shift?" And  
15 that court said, no, under those facts, we think that  
16 that court case is very, very analogous to this  
17 situation.

18 Hopefully, that's a little clearer.

19 CHAIR SHEEHAN: All right.

20 MR. HAJELA: I don't know why they even have to make  
21 the de minimis argument, given their read of the law;  
22 that's why I'm confused.

23 If you can't show that the \$31 billion under  
24 Prop. 98 doesn't cover SARC, if that's the issue, then  
25 you don't even have to get to the de minimis issue.

1 So I apologize that we came in late, but there is some  
2 confusion in here. And it would be nice to know which  
3 issues we're talking about.

4 CHAIR SHEEHAN: Did you want to add anything, Paul?

5 MR. STARKEY: No, I think that's fine.

6 CHAIR SHEEHAN: Any other comments?

7 Questions from the Members?

8 MEMBER SMITH: Madam Chair, just for clarification.

9 So as I understand the Staff Analysis, they're  
10 saying, number one, it's not a new program or higher  
11 level of service. Even if that weren't the case, they  
12 haven't shown that they've used anything other than local  
13 property-tax revenue -- or than Prop. 98 money.

14 So is the last part of this analysis really  
15 necessary on this case? I'm just trying to -- that seems  
16 to be the third issue. If you weren't to find the first  
17 two, then here's a third.

18 MS. TOKARSKI: Well, obviously the issue of whether  
19 there's a higher level of service remains in dispute.  
20 So staff counsel's recommendation is that the strongest  
21 analysis includes both the new program or  
22 higher-level-of-service analysis, and continues on to --  
23 which is typical in court decisions to say that even if  
24 you found this was the case -- and that is actually what  
25 the California Supreme Court did in the Department of

1     Finance case that we're relying on -- even if you find  
2     that this was the case, you still haven't shown us that  
3     you've met the burden of proof on costs mandated by the  
4     State.

5             In the Department of Finance, the issue was *School*  
6     *Site Councils*. And there were nine different types of  
7     school site councils at issue. And the court found that  
8     eight of them were not mandated.

9             But as to a ninth, there was a continuing level of  
10    dispute. And they went on to discuss why even if that  
11    was a mandated school site council, the notice and agenda  
12    costs resulting from that did not result in costs  
13    mandated by the state because the schools couldn't prove  
14    that the program funds that they had available for that  
15    school site council could not be used to adequately cover  
16    those expenses.

17            The court went on to say -- and I think this  
18    addresses some of the other arguments that were made --  
19    that it is conceivable, with regard to some programs,  
20    that increased compliance costs imposed by the state  
21    might become so great, or funded program grants might  
22    become so diminished, that funded program benefits would  
23    not cover the compliance costs or that expenditure of  
24    granted program funds on administrative costs might  
25    violate a spending limitation set out in applicable

1 regulations or statutes.

2 In those circumstances, a compulsory program  
3 participant likely would be able to establish the  
4 existence of a reimbursable state mandate under  
5 Article XIII B, Section 6.

6 But that certainly is not the situation faced by  
7 the claimants in this case. That's directly from the  
8 California Supreme Court decision in Kern. And I think  
9 that that addresses some of the issues that are raised:  
10 What if the state kept adding to this, and kept adding to  
11 this and kept adding to this, and created a greater  
12 burden? And I don't think, based on the statutes that  
13 are before you today, that that's been proved.

14 CHAIR SHEEHAN: It doesn't meet that test; right?

15 MEMBER SMITH: I hear that argument and I'm just  
16 troubled by it. It seems that the voters enacted to say  
17 whatever it is, ten provisions --

18 CHAIR SHEEHAN: Thirteen.

19 MEMBER SMITH: At some point, that could be, you  
20 know, 300.

21 But with the argument that's in the analysis, as  
22 long as it comes in chunks for each time, that it may  
23 never be considered a higher level of service. That's  
24 how I'm reading this, and that's why I'm a little  
25 troubled with the de minimis argument in the analysis,

1 unless I'm misunderstanding something.

2 MS. TOKARSKI: Again, those arguments were not made  
3 up wholesale by myself or other staff at the Commission.  
4 They're taken from recent court decisions that we think  
5 are applicable.

6 CHAIR SHEEHAN: That we're bound by.

7 MS. TOKARSKI: And we're bound by, I'm sorry.

8 MR. MIYASHIRO: If I might. I don't think the staff  
9 has sufficiently provided the linkage between a court  
10 finding and their assertion that this is, in fact,  
11 de minimis.

12 I mean, to cite a court finding and say, "Well, that  
13 applies here," would, to me, suggest that they have come  
14 to some conclusion about the costs incurred by the local  
15 agencies, and, in fact, then say, "Well, those amounts  
16 are de minimis."

17 And what I would suggest is that we already have a  
18 record of local costs incurred, and recognize cumulative  
19 costs exceed \$5 million on the costs of the *School*  
20 *Accountability Report Card*. When measured against other  
21 mandates that the State -- that this Commission has  
22 adopted statewide cost estimates on, this is in the top  
23 third.

24 So, again, the assertion about it being a minor,  
25 absorbable or incidental cost I don't think has been



1 borne out by any analytical work to draw that conclusion.  
2 And there's a body of evidence that suggests to the  
3 contrary, that it is not minimal. That among all of the  
4 mandates that, in fact, this Commission has recognized  
5 already, that it, again, is in the top third.

6 CHAIR SHEEHAN: But I think the issue in this claim  
7 is, these specific changes, staff has determined do not  
8 require. That does not say other changes to SARC -- you  
9 know, the previous cases have already proven that, in  
10 fact, there are these. The issue is, what is before us  
11 today, and are those in the test claims -- you know, do  
12 they provide a higher level of service? And so I think  
13 staff has made the determination through applicable law,  
14 understanding previous SARC, it is a reversible claim,  
15 and there is this higher level of service. And those --  
16 you know, that the locals, the school districts are  
17 entitled to that funding.

18 But the issue here, are these additions in the test  
19 claim -- you know, the new ones, do they meet that?

20 MR. HAJELA: On this one, I'm confused then. Are we  
21 saying that many of the legislative enactments that  
22 create a larger SARC are reimbursable, but just these  
23 ones aren't? Because that's not what I understood.

24 CHAIR SHEEHAN: No, what I'm saying is, we have to  
25 look at what the issue is before us today.

1 MR. HAJELA: Correct.

2 CHAIR SHEEHAN: Okay, that's my point.

3 MR. HAJELA: But what's before you today is all of  
4 them, except one; isn't that correct?

5 MS. TOKARSKI: No. Going back to the elements of  
6 the *School Accountability Report Card*, at page 13, the  
7 things that are underlined, are what the changes were  
8 made to 33126.

9 So everything that is not underlined was part of the  
10 original Prop. 98.

11 MR. HAJELA: No, no, no. I don't mean to be making  
12 the argument that anything from Prop. 98 is reimbursable.  
13 I'm saying, every piece of legislation since Prop. 98  
14 that added --

15 MS. TOKARSKI: But that's not all before us today.  
16 The reconsideration is limited to what the Legislature  
17 ordered us to --

18 MR. HAJELA: So as Mr. Miyashiro suggested, do we  
19 know -- this is my position on how much is the cost or  
20 how much of a percentage is it? Do we know of these  
21 ones, how much of the total cost that folks are claiming  
22 from reimbursement these ones are? Or do we know what  
23 percentage of the total program? Because before we know  
24 it's de minimis, you'd have to know that, it seems.

25 CHAIR SHEEHAN: Finance, did you want to say

1 something?

2 MR. CERVINKA: If I may. I guess I just profess a  
3 little bit of puzzlement by this whole discussion. You  
4 know, as I stated earlier, this is a voter-enacted  
5 statute. They clearly envisioned there would be changes  
6 here, and that precludes the finding of a mandate.  
7 I don't see de minimis discussions or property-tax  
8 discussions as really having much relevance to the issue  
9 here before the Commission.

10 CHAIR SHEEHAN: Go ahead.

11 MR. HAMILTON: But I think we're addressing the  
12 Staff Analysis here. And the Staff Analysis is saying  
13 it's a de minimis cost.

14 And apologetically, I think we have to say that we  
15 haven't brought before the Commission, up to this point  
16 in time, a quantification of what that is.

17 And my trouble with the analysis is that there is a  
18 court case, it talks about de minimis, and it is just  
19 being applied to this particular effort, dealing with the  
20 three, identified as new components, without  
21 quantification.

22 We are at fault. But I think staff needs to  
23 quantify the analysis.

24 And we'd be happy to help -- if you put this over,  
25 we will come back with information to help with the

1 quantification of it.

2 MEMBER BOEL: Can I ask a question?

3 Your position wouldn't change?

4 MR. CERVINKA: No. Our position wouldn't change.

5 In fact, I think the Commission could adopt the Staff  
6 Analysis, striking all the parts except the piece that  
7 I've just mentioned. And you would just be fine and not  
8 need to respond to the de minimis and property-tax issues  
9 that are brought here.

10 MR. HAJELA: The staff never even made that argument  
11 you just made.

12 MR. CERVINKA: Actually, my testimony quoted from  
13 the draft Staff Analysis. So I apologize for the  
14 confusion.

15 CHAIR SHEEHAN: Did you want to add anything, Paul?

16 MR. STARKEY: Just a second.

17 MS. HIGASHI: Just information. Mr. Miyashiro made  
18 some cost references for this program. And I believe  
19 that the numbers that he gave, 4.2 or 4.3 million  
20 dollars, those are numbers that can be attributed to the  
21 Controller's most recent deficiency letter, in terms of  
22 costs that have actually been claimed for this program  
23 for two prior fiscal years.

24 What we don't have is detail in terms of what  
25 percentage of those costs or what exact amount of those

1 costs claimed would be specifically attributed to the  
2 activities that are from these specific statutes that  
3 are the subject of this claim.

4 MR. MIYASHIRO: And also the Department of Finance  
5 has indicated in its response to the Staff Analysis, that  
6 it would be intending to seek legislation that would  
7 apply this to all of the SARCs. So I think it is  
8 relevant that we recognize the cost to the entire  
9 mandate.

10 And while the directive of the Legislature was to  
11 isolate it to this, the Department of Finance has  
12 indicated that it views this as almost an oversight, and  
13 that the intent of the Legislature was to encompass the  
14 entire SARC requirement.

15 MR. CERVINKA: If I may.

16 The Laird bill last year ordered reconsideration of  
17 five specific statutes. There were actually six, one  
18 being Chapter 912. And that was, in our opinion,  
19 inadvertently left off the list.

20 But, again, it's our belief that it wasn't a cost  
21 issue, de minimis consideration type of analysis here  
22 that had the Legislature ask the Commission to reconsider  
23 this decision.

24 Again, this was a voter-enacted initiative. It  
25 can't be found to be reimbursable. And that would be the

1 basis of our request to the Legislature to reconsider the  
2 sixth and final statute here.

3 CHAIR SHEEHAN: What's the will of the Commission?

4 MEMBER BOEL: I'd like to move that we accept the  
5 Staff Analysis on this.

6 MEMBER LUJANO: One more comment. I'm sorry.

7 CHAIR SHEEHAN: Can you hold on?

8 MEMBER BOEL: Okay.

9 CHAIR SHEEHAN: He's got one more comment on this.

10 MEMBER BOEL: Yes.

11 MEMBER LUJANO: Well, this item is very concerning  
12 to the Treasurer. And what I'm hearing is staff saying  
13 that Prop. 98 actually funds this program. Correct?

14 MS. TOKARSKI: The Prop. 98 funds should be able to  
15 be used to pay for the costs of providing the school  
16 accountability report card.

17 There's two elements to the *School Accountability*  
18 *Report Card*, the parts that were explicitly required by  
19 the voters. When they enacted Prop. 98, they adopted  
20 some Education Code provisions that laid out what they  
21 intended to have in the school accountability report  
22 card. And in addition, explained that there were  
23 intended to be future changes to this, if those changes  
24 were in keeping with the original *School Accountability*  
25 *Report Card* requirement.

1           So it's staff's position that the Prop. 98 funds  
2           should be used to meet any additional requirements of the  
3           *School Accountability Report Card*. And anything that was  
4           a part of the original Prop. 98 language is explicitly  
5           not mandate-reimbursable under statutory and  
6           constitutional law.

7           MEMBER LUJANO: Well, since Prop. 98 has been  
8           underfunded for over the past two years by about  
9           \$3.1 billion, the Treasurer will be voting no on this  
10          item.

11          Thank you.

12          CHAIR SHEEHAN: Did you want to make your motion?

13          MEMBER BOEL: Yes, I'd like to make a motion that we  
14          adopt the Staff Analysis.

15          CHAIR SHEEHAN: Do we have a second on the motion?

16          MEMBER SMITH: No.

17          CHAIR SHEEHAN: I'll give a courtesy second.

18          So why don't we go ahead and take the roll?

19          MS. HIGASHI: Ms. Boel?

20          MEMBER BOEL: Aye.

21          MS. HIGASHI: Mr. Lujano?

22          MEMBER LUJANO: No.

23          MS. HIGASHI: Mr. Smith?

24          MEMBER SMITH: No.

25          MS. HIGASHI: Ms. Sheehan?

1 CHAIR SHEEHAN: Aye.

2 MS. HIGASHI: We have a tie vote. So staff will  
3 keep the matter until we have more members appointed.  
4 And at that time, we can update the analysis to reflect  
5 the testimony here.

6 MR. STARKEY: Could we have just a second?

7 CHAIR SHEEHAN: Yes.

8 All right, we'll recess until -- what time?

9 MS. HIGASHI: 1:30.

10 CHAIR SHEEHAN: 1:30? Okay.

11 So we'll be back here at 1:30 for Butte County.

12 *(Midday recess taken at 12:58 p.m.)*

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Thursday, May 26, 2005  
Sacramento, California

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*(Midday recess taken from 12:58 p.m.  
to 1:36 p.m.)*

CHAIR SHEEHAN: The Commission on State Mandates,  
May 26th meeting is reconvening.

The next item is Item 20, I believe; is that right?

MS. HIGASHI: Yes.

CHAIR SHEEHAN: We will finish up all the issues.

MS. HIGASHI: Yes, it's a separate binder.

CHAIR SHEEHAN: Right. Which Ms. Patton was nice  
enough to go get for me, that I left in my office.  
But, anyway, we can start.

So, Shirley will present the Staff Analysis on this?

MS. OPIE: Yes, I will.

MS. HIGASHI: Before we start, I just wanted to  
point out that we had the minutes for the May 12th  
hearing as part of your binder.

CHAIR SHEEHAN: Okay, should we go ahead and approve  
those?

MS. HIGASHI: It would be good if you could approve  
the minutes if you've all reviewed them.

CHAIR SHEEHAN: All right, the three of us who were  
there.

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1 MEMBER SMITH: Move approval.

2 MEMBER LUJANO: Second.

3 CHAIR SHEEHAN: All right. So we have a motion and  
4 a second for approval of the minutes.

5 All those in favor, signify by saying "aye."

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

7 CHAIR SHEEHAN: Any opposed?

8 *(No audible response was heard.)*

9 CHAIR SHEEHAN: Abstentions?

10 Do you want to abstain?

11 MEMBER BOEL: Abstain, yes.

12 CHAIR SHEEHAN: All right.

13 MS. HIGASHI: Thank you very much.

14 CHAIR SHEEHAN: Uh-huh.

15 MS. HIGASHI: Ms. Opie will now present the staff  
16 recommendation.

17 CHAIR SHEEHAN: Go ahead.

18 MS. OPIE: Good afternoon.

19 Senate Bill 1033 was enacted in 1993 and added  
20 section 17000.6 to the Welfare and Institutions Code.

21 That section authorizes the county board of supervisors  
22 to adopt a general assistance standard of aid below the

23 level established in Welfare and Institutions -- in that

24 section of the code, if the Commission finds that meeting

25 the general assistance standard of aid results in

1 significant financial distress.

2 On February 10, 2005, Butte County filed an  
3 application for a finding of significant financial  
4 distress.

5 On May 12th, the Commission conducted a fact-finding  
6 hearing in Oroville to hear testimony from the County  
7 officials. No action was taken at that hearing.

8 Based on the evidence and the testimony provided,  
9 staff recommends that the Commission find that the  
10 County's fiscal year 2004-2005 final budget totals  
11 320.9 million, with a General Fund contingency  
12 appropriation of 5.6 million.

13 While this represents increased financing  
14 requirements of approximately \$2 million from the prior  
15 year, the General Fund contingency is expected to  
16 decrease by \$400,000.

17 The County's discretionary expenditure flexibility  
18 is constrained both by fund restrictions and by state and  
19 federal mandates, leaving \$70.4 million of the  
20 \$320.9 million in the final budget appropriations, as  
21 theoretically available for discretionary use.

22 The full \$70.4 million cannot be considered truly  
23 discretionary inasmuch as 35 percent, or \$24.7 million,  
24 is directed towards state-mandated costs and  
25 state-established required maintenance of efforts.

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1           The County's total available discretionary resource  
2 for fiscal year 2004-2005 is projected to decline by  
3 \$4 million, from \$74.4 million in fiscal year 2004-2005.

4           The County has unmet needs in basic county services,  
5 including public safety, in the amount of \$17,459,947.

6           The County has total resource flexibility of  
7 \$8,290,839, comprised of revenue and reserves, including  
8 appropriation of contingency of \$5,616,078.

9           Therefore, the County's unmet needs of \$17,459,947,  
10 offset by its resource flexibility of \$8,290,839, leaves  
11 the County with a net county cost of identified basic  
12 county services unmet need of \$9,169,108.

13           Demands outside of the County's growth and program  
14 and service, such as the increased cost of health care  
15 premiums for employees and California Department of  
16 Forestry contract costs have increased.

17           Staff recommends that the Commission determine that  
18 Butte County has made a compelling case that meeting the  
19 general assistance standard of aid established in Welfare  
20 and Institutions Code 17000.5 will result in significant  
21 financial distress to the County, and that absent this  
22 finding, basic county services, including public safety,  
23 cannot be maintained.

24           Staff also recommends that the Commission make a  
25 finding of significant financial distress for a period of

1 12 months.

2 Will the witnesses please introduce themselves for  
3 the record?

4 MR. MCINTOSH: Paul McIntosh, Chief Administrative  
5 Officer for Butte County.

6 MS. GRAMS: Cathi Grams, Director of Employment and  
7 Social Services, Butte County.

8 MS. MCCRACKEN: Shari McCracken, Deputy County  
9 Administrative Officer.

10 MR. FARRELL: Sean Farrell, Deputy County  
11 Administrative Officer.

12 MR. ITURRIA: Greg Iturria, Deputy County  
13 Administrative Officer and Budget Director.

14 CHAIR SHEEHAN: All right, Mr. McIntosh, do you want  
15 to start?

16 MR. MCINTOSH: Thank you, Madam Chair. And I will.

17 Again, I'm Paul McIntosh. I'm the Chief  
18 Administrative Officer for Butte County. It's good to  
19 see you again. I wish, though, it were under different  
20 circumstances.

21 I want to begin again by thanking the Commission and  
22 staff for the time and resources that you all have  
23 invested in this process. We appreciate sincerely, and  
24 endorse the findings enumerated by Ms. Opie, with the  
25 exception of the last finding. And I would like to get

1 into some discussion regarding the 12-month issue.

2 There are four points, I think, included on that  
3 page 18 of your report of the May 20th Staff Analysis  
4 that are used to justify a 12-month duration, and request  
5 that the Commission reconsider its decision and grant a  
6 funding for 36 months, as it did in 1996 and again in  
7 1999.

8 First, the Commission quotes the County as  
9 estimating a fund balance in fiscal year 2008 of  
10 \$5,484,466. It appears that this is a key rationale for  
11 the finding for a duration of 12 months; but it's based  
12 on a typographical error.

13 CHAIR SHEEHAN: Well, isn't this where we got the  
14 errata?

15 MS. HIGASHI: Yes.

16 MR. McINTOSH: Okay. So you've already gotten an  
17 errata on that?

18 CHAIR SHEEHAN: Right.

19 MR. McINTOSH: It's really 484,466.

20 CHAIR SHEEHAN: Right. Yes, we do have -- and I  
21 think each of us should have received the errata last  
22 night.

23 MS. HIGASHI: Yes.

24 MR. McINTOSH: We submit that based upon the  
25 five-year fiscal forecast that was presented in our

1 original application, our financial situation will not  
2 be improving anytime in the near future.

3 In fact, projections showed the fund balance for  
4 2008-09 will drop to \$283,704, nowhere near what is  
5 needed to begin meeting the \$17.5 million in unmet needs  
6 that your staff has supported.

7 The second point brought out in the analysis  
8 discusses the VLF gap loan repayment and the proposal in  
9 the Governor's May revision to repay half of the VLF gap  
10 loan to cities and counties in 2005-06.

11 The County wants to make it clear, that any funds  
12 received from the State's repayment of VLF gap will be  
13 one-time in nature, and will be used by the County as  
14 such. Upon receipt of any VLF gap loan repayment, my  
15 office will recommend to the Board of Supervisors that  
16 those funds be used to refund the Fire and Sheriff's  
17 Departments' Equipment Replacement Fund. This  
18 \$2.3 million was liquidated in 2004-05 to offset the  
19 local impact to the State's borrowing of county funds.

20 It was, in reality, a loan from the Equipment Replacement  
21 Fund to the General Fund to cover the loan to the State.

22 My office will recommend that any remaining VLF gap  
23 loan repayment be used for other one-time costs that have  
24 been deferred over the past years, such as maintenance of  
25 existing capital assets.

1 Key to this discussion, though, is the fact that  
2 no one knows what the adopted state budget will or will  
3 not include.

4 As quoted by the Commission in its 1999 finding, in  
5 the Goff case, including a ruling on applicability of  
6 future events in the Commission's decisions, I'll quote:

7 *"The Goff court agreed that the Commission  
8 must consider alternative revenue enhancements  
9 and expenditure reductions when determining if  
10 a county is in significant financial distress.  
11 But the court stated that the alternatives must  
12 be viable and practical, not speculative."*

13 The Commission also quoted, again in the 1999  
14 finding:

15 *"The Court also stated that the  
16 alternatives are relevant only to the extent  
17 that they can cover the financial shortfall  
18 giving rise to the claim of significant  
19 financial distress. For example, the fact that  
20 some funds might be found to cover certain  
21 county programs is immaterial, as that simply  
22 reduces the deficit to a small but still  
23 unmanageable size."*

24 Those are direct quotes out of the Goff case.

25 To emphasize the speculative nature of these funds,



1 the Legislative Analyst's Office projections of revenues  
2 available to fund the 2005-06 State budget is about  
3 \$600 million less than those used by the Governor's  
4 May revise, a figure ominously close to the amount of the  
5 VLF gap repayment.

6 When the dust settles on the State budget, then it's  
7 quite likely that those funds will not be appropriated.

8 The County respectfully submits that not only is the  
9 VLF gap repayment in the Governor's May revision  
10 speculative, but quite likely will not be in the budget  
11 passed by the Legislature; but if the funds are received,  
12 those funds may simply help reduce the deficit the County  
13 faces to a smaller but still unmanageable size. Nothing  
14 contained in the Governor's May revision will eliminate  
15 the County's deficit.

16 The Commission analysis brings up a third point that  
17 also relates to the Governor's May revise proposal, to  
18 restore funding for the Small and Rural Sheriffs Program  
19 which provided \$500,000 to Butte County. Once again, I  
20 will point out that the May revision is speculative.

21 Furthermore, the amount is not large enough to  
22 impact the unmet needs of the Sheriff's office. If the  
23 County does receive \$500,000 in funding, it will cover  
24 6.9 percent of the \$7.2 million of unmet needs in the  
25 Sheriff's office. The point to support the 12-month

1 duration of the finding does not appear to meet the  
2 materiality of the Goff decision.

3 The fourth point the staff makes relates to the  
4 receipt of the Prop. 63 funds by Butte County for  
5 planning and into the future for expansion of behavioral  
6 health services. As the Commission is aware,  
7 Proposition 63 funds may only be used for new or expanded  
8 programs, not to supplant programs the County is  
9 currently operating or reducing. Since the Commission  
10 did not recommend any of the unmet needs identified in  
11 the Behavioral Health Department, the County is unclear  
12 how Proposition 63 funds will help fund the unmet needs  
13 approved by the Commission. The funds are not  
14 discretionary and are governed by legislation passed by  
15 the voters.

16 I'd like to make three additional points to support  
17 a finding for a 36-month duration. I'll refer you to  
18 Matrix A, which is one of our handouts.

19 First, as illustrated in Matrix A, the Commission  
20 has consistently found that Butte County has a  
21 17-plus million-dollar unmet need on an ongoing basis.  
22 In 1996, the Commission found Butte County had  
23 \$17.6 million in basic county services unmet. The  
24 Commission also found that the County had resource  
25 flexibility in the range of 5.4 to 6.8 million dollars,

1 netting out to a total unmet need in the range of  
2 10.8 to 12.2 million dollars.

3 By 1999, we had improved significantly. We only had  
4 an unmet need of \$17.3 million, in the basic service  
5 unmet needs.

6 The Commission also found the County had resource  
7 flexibility of \$9.6 million, netting out the total unmet  
8 needs of 7.8 million. These findings reflect a decrease  
9 in County unmet needs and an increase in resource  
10 flexibility, and still the Commission granted a 36-month  
11 finding.

12 Now, preliminary findings are that Butte County has  
13 a 17.5 million basic unmet need in county services,  
14 \$8.3 million in resource flexibility, netting out to a  
15 total unmet need of \$9.2 million. 1.4 million in the  
16 findings just in 1999.

17 Based on the Commission's preliminary findings,  
18 unmet needs have increased and resource flexibility has  
19 decreased since the 1999 decision.

20 Now, I would refer you again to Matrix B, which is  
21 another spreadsheet that we have given you. The second  
22 key point is that if you use the public safety area as an  
23 example, Butte County has had the same unmet needs over  
24 time, and will, well into the future.

25 As you can see, the same five attorneys have been

1 needed in the District Attorney's Office since <sup>1996</sup>~~1966~~.  
2 They will continue to be needed well into the future.  
3 The Sheriff's office remains understaffed as it has been  
4 for the past ten years, and will continue to be well into  
5 the future.

6 The third key point is that the five-year financial  
7 forecast for Butte County is based on current levels of  
8 service and does not include resources to bring the  
9 County back to where it was, as far as service levels a  
10 few years ago, much less even begin meeting the unmet  
11 needs identified by the Commission.

12 The five-year financial forecast already takes into  
13 account any increases in revenues that the County would  
14 anticipate from the passage of Proposition 1A. There is  
15 no objective basis in section 17000.6 or in the  
16 regulations adopted by the Commission against which the  
17 Commission may predict that in the next 12 months things  
18 will improve.

19 Commission staff has found the County's unmet needs  
20 have only slightly decreased from 17.6 in 1996, to 17.5  
21 in 2005. \$100,000 less in unmet needs in nine years.

22 The County is hard-pressed to see a trend that  
23 indicates the financial state of the county is improving.  
24 The Commission's findings reflect a decrease of \$100,000  
25 in ten years, as I say.

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1           Unmet needs of 17.5 are not going to disappear in  
2           12 months, given that trend.

3           The consequences of the Commission adopting a  
4           finding for a duration of only 12 months, include the  
5           County returning to the Commission with another  
6           application in 2006, and each year thereafter.

7           Senate Bill 1033 was amended by the Legislature in  
8           light of extreme administrative burden of gathering,  
9           producing and presenting the evidence necessary to  
10          convince the Commission of the County's significant  
11          financial distress.

12          The Commission's process itself cannot be ignored,  
13          either, nor the cost to the taxpayers of the state of  
14          California. It's likely that the cost to the Commission  
15          in processing this application and the staff time  
16          involved in this analysis exceed the County's cost in  
17          preparing the information.

18          The fiscal reality is that the process only works to  
19          save the taxpayers money if a 36-month finding is made.

20          In summary, Commission findings over the past  
21          ten years show Butte County has consistently had  
22          17 million-plus in unmet needs. Many of the unmet needs  
23          identified in 1996 and 1999 remain unmet in 2005. The  
24          Commission granted 36 months in 1999, where unmet needs  
25          were less and the resource flexibility greater than the

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1 current situation. The County's financial forecast  
2 showed that the financial picture will not improve over  
3 time, to any extent that will allow the County to begin  
4 funding its unmet needs.

5 Butte County must, again, request the Commission  
6 grant the finding of significant financial distress for a  
7 period of 36 months.

8 I appreciate the amount of time and resources the  
9 Commission members and Commission staff have dedicated to  
10 this process. The staff have been very responsive  
11 throughout this process and outstanding to work with.  
12 I thank you on behalf of the Board of Supervisors and the  
13 citizens of Butte County.

14 I'd be happy to answer any questions.

15 CHAIR SHEEHAN: Great. Thank you.

16 Did anyone else want to make any statements?

17 MR. McINTOSH: We don't have any other statements,  
18 Madam Chair. We are here to respond to questions.

19 CHAIR SHEEHAN: Okay, all right.

20 Commission members, questions?

21 MEMBER BOEL: I have some questions, since I was not  
22 at the hearing in Butte County, but I did read the  
23 transcript. So I do have some questions.

24 First of all, I read in the transcript, I thought,  
25 that if you get the \$4 million from the VLF -- or was

1 that from the VLF funds?

2 MR. McINTOSH: It's the VLF gap loan repayment, yes.

3 MEMBER BOEL: Right. If you get that money, I had  
4 read that you were going to spend it on some solar  
5 system.

6 Are you changing that now?

7 MR. McINTOSH: Our recommendation -- and I think we  
8 discussed this during the hearing -- our first  
9 recommendation would be to restore those vehicle  
10 replacement funds that were stripped out in 2004-05.

11 We have the option of using that money in a one-time  
12 manner. And if we got all four million, we're only  
13 supposed to get half, that's why we're looking at  
14 different options.

15 If we got all four million, one option, and a  
16 one-time expenditure which would work to our financial  
17 advantage, is to invest that one-time revenue source into  
18 a second phase of solar, which would then produce an  
19 ongoing General Fund savings to us of about \$320,000,  
20 \$325,000 a year.

21 MEMBER BOEL: Yes, that was your recommendation.

22 What about the Board of Supervisors? Did they act  
23 on that?

24 MR. McINTOSH: No, they have not.

25 MEMBER BOEL: Okay.

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1 MR. McINTOSH: We have, in fact, awarded a contract  
2 for Phase 2 of the solar; but that contract is totally  
3 contingent upon first receiving grant funds from PG&E, in  
4 the tune of about \$4.2 million; and then second of all,  
5 thus returning to them with a financial mechanism for the  
6 remaining second half of the project.

7 MEMBER BOEL: Okay, if we grant you this finding of  
8 significant financial distress, you said there's only 300  
9 people, approximately, that are on assistance.

10 MR. McINTOSH: That's correct.

11 MEMBER BOEL: And so what was the savings in that,  
12 that you would have, in annual savings?

13 MR. McINTOSH: As I recall, the net savings is about  
14 \$176,000, \$180,000 a year.

15 MEMBER BOEL: Okay, and then what was the cost for  
16 you to present your case to the Commission, did you say?

17 MR. McINTOSH: Well, we've been doing some  
18 discussion on that. Our actual out-of-pocket cost is  
19 virtually zero. We have the -- all the staff before you  
20 are all exempt staff, so we don't get paid overtime.  
21 We're all salaried employees. Our time has been devoted  
22 to doing this process. And there's been a considerable  
23 amount of time. And we would estimate that that cost  
24 well exceeds \$100,000. But it's an opportunity cost as  
25 opposed to a real cost.



1 MEMBER BOEL: And I need to ask Ms. Opie just a  
2 question.

3 When I read the statute on the finding of 17000.6,  
4 it says,

5 *"The Commission shall not make a finding*  
6 *of significant financial distress unless the*  
7 *county has made a compelling case that absent*  
8 *the finding, basic county services, including*  
9 *public safety cannot be maintained."*

10 MS. OPIE: That's correct.

11 MEMBER BOEL: Okay. Now, my question would be --  
12 I know we've been dwelling on whether -- it seems like  
13 we've been doing the entire study on whether there is a  
14 financial problem in the County, and it seems pretty  
15 obvious that there is. But my question more is the other  
16 half of that, whether a finding or a savings of what you  
17 said, two-hundred-and-some-thousand dollars is  
18 significantly going to save the County that much, that  
19 will possibly impact public safety. Can we use that? Do  
20 we look at that part of the law as well?

21 MS. OPIE: I would defer to Paul on the legal  
22 interpretation of that.

23 I think the judgment that we've been making, as  
24 staff, is the relationship between the total amount of  
25 unmet needs and the County's resource flexibility.

1 So the 8 million -- or, I'm sorry, the \$9,169,000, as it  
2 stands now, is what we find to be the unmet needs, the  
3 net unmet needs.

4 MEMBER BOEL: So if you look at the other side of  
5 this, though, it seems to me, just practically, how is --  
6 it's like making one little tiny 1 percent payment or  
7 something on your credit card.

8 MR. STARKEY: Let me attempt to address that.

9 I don't understand the statute to work that way.

10 MEMBER BOEL: Oh, okay.

11 MR. STARKEY: It's a very odd statute, I think --  
12 maybe a personal opinion I shouldn't be offering. But  
13 basically under the statute, in the definitions, the  
14 notion is if the extra amount of provided general  
15 assistance, whatever that is, if the County cannot do  
16 that and still meet its basic needs, then the Legislature  
17 has made a policy decision that the County can then, if  
18 they get the finding that they're looking for here today,  
19 they can go back and make the political decision about  
20 whether or not they should, in fact, do that.

21 So if I understand what you're saying, do we  
22 consider how much of a dent this is going to be, I don't  
23 understand the statute and the regulations to work that  
24 way.

25 The definition in the regulations -- and I'll be

1 candid with you. The first time I read it, I had the  
2 same impression. But then I started looking into the  
3 process and stuff, and I think it's a different policy  
4 decision that's being made. But under the regulations,  
5 1186.5(d), Basic County Services, it doesn't have the  
6 layperson's notion of distress, because that definition  
7 means those services which are fundamental or essential.  
8 And it says, "*Such services shall include, but are not*  
9 *limited to, those services required by state or federal*  
10 *law, and may vary from county to county.*"

11 So basically, the Legislature has said to all the  
12 counties in the state: If you can't meet your county  
13 operational needs and this relief will cause you not  
14 to meet those needs, then you're allowed to make that  
15 political determination.

16 Is that clear?

17 MEMBER BOEL: Well, not really. Because if you say  
18 "if this relief will cause you not to make this," this  
19 relief --

20 MR. STARKEY: No, then I misspoke. I don't think  
21 that's how the statute works.

22 I think what the statute is saying that if you're in  
23 this situation, then this is a form of relief we're  
24 giving you. And the question about whether it's a good  
25 form of relief or whether it makes a lot of sense --

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1 MEMBER BOEL: Is not one for us to make?

2 MR. STARKEY: -- I don't think it goes into our  
3 equation.

4 MEMBER BOEL: Okay.

5 MR. STARKEY: But when I first read it years ago --

6 MEMBER BOEL: Look where I am.

7 MR. STARKEY: -- I thought it was --

8 CHAIR SHEEHAN: Because I guess the issue -- and  
9 I think -- my guess is all of us have been struggling  
10 with this issue -- is, have they demonstrated a finding  
11 of significant financial distress? And I think from our  
12 staff and the auditor's perspective, who have gone  
13 through this, they have met that first threshold  
14 question.

15 If you look at the percentage of unmet needs that  
16 they have, I think the staff has determined, yes.

17 Now, you're right. What is the relief under the  
18 statute that we can provide them? It's somewhat limited  
19 because the Legislature hasn't given us any additional  
20 mechanisms to -- I'd have some other ideas about things  
21 that counties could do. But the problem is, we don't  
22 have that in front of us. The only thing we have is the  
23 ability to make that finding, which would then allow  
24 them, if they want to make that decision or not, that  
25 would be the net effect. But I don't think we can opine

1 on the wisdom of the net effect and how much that savings  
2 is and all of that.

3 But I will say, it's hard not to, as we all have  
4 gone through this process, just logically. But the  
5 statute is pretty specific in terms of the steps and the  
6 mechanisms that have to be taken.

7 Does it make sense? No.

8 Did you want to say something, Shirley?

9 MS. OPIE: I just wanted to add, when you were  
10 speaking about staff's review of the documentation that  
11 the County provided, that it's really limited in terms of  
12 the amount of time that we have, as well as, it wasn't  
13 anything like going up and doing a full-blown audit of  
14 the County's finances. So it was strictly just of the  
15 paper we had in front of us.

16 CHAIR SHEEHAN: All right, other questions?

17 MEMBER SMITH: Madam Chair, if I may.

18 CHAIR SHEEHAN: Yes.

19 MEMBER SMITH: The main problem that the Controller  
20 has with this item is that the potential savings, he  
21 questions.

22 And just a little background, we recently had a big  
23 debate at CalPERS around the state about having defined  
24 contribution versus defined benefit -- and this will make  
25 sense in a second, why I bring it up -- that the argument

1 that we use against defined contribution, we think, makes  
2 sense here, is the study shows people retire with less.  
3 And that's going to have some net effect to the State.  
4 The costs resurface somewhere else, they don't go away.  
5 Because people don't retire with adequate benefits,  
6 taxpayers are not off the hook.

7 Similarly here, you have a proposal to -- and,  
8 again, this would be up to the board of supervisors --  
9 but to allow the board of supervisors to reduce a  
10 significant portion of the income to the poorest of the  
11 poor in a community of 330 individuals, or 303 now, or  
12 whatever.

13 MR. McINTOSH: Three hundred.

14 MEMBER SMITH: Regardless, \$60 -- obviously, no one  
15 is living off of \$280, whatever it is now; but maybe they  
16 are buying food and administration with it. Who knows?  
17 This is all speculative. But it's troublesome that in  
18 this factor of savings, there's no assumption that these  
19 costs are going to somehow resurface. Maybe three people  
20 end up going to jail because they have to steal food or  
21 whatever -- you know, coroner costs, because someone  
22 died.

23 So I have a real problem with the savings estimate  
24 because it doesn't assume that these costs -- they just  
25 don't go away. People don't go away, their needs don't

1 go away. They're still going to be in a community, and  
2 they're still going to have some need for a social safety  
3 net program, for whatever it's worth.

4 MR. McINTOSH: May I address that?

5 CHAIR SHEEHAN: Sure.

6 MR. McINTOSH: We had this discussion at the hearing  
7 on May 12th, and I think that we recognized that the  
8 sheer monetary savings as provided in the statute is  
9 minimal. There may even be additional costs associated  
10 with achieving those savings.

11 But the designation, the financially-distressed  
12 county, offers us a lot of other availabilities and  
13 grants and things of that nature, and can be used in  
14 support.

15 But on May 20th, the Attorney General issued  
16 Opinion 5766, which also found that a community may  
17 establish -- now, I'll just read you the conclusion from  
18 this opinion.

19 *"A community may establish its maximum*  
20 *number of housing units by income category that*  
21 *can be constructed, rehabilitated, and*  
22 *conserved over the next five-year period below*  
23 *the number of housing units that would meet the*  
24 *community's goal of achieving its share of the*  
25 *regional housing needs established pursuant to*

1           *Planning and Zoning Law, if the community finds*  
2           *that its available resources in the aggregate,*  
3           *including, but not limited to, federal and*  
4           *state funds for its housing program, its own*  
5           *local funds, tax or density credits and other*  
6           *affordable housing programs, are insufficient*  
7           *to meet those needs."*

8           This process provides the support for this type of  
9           exemption. So there are a lot of other applications of  
10          this designation, other than just those spelled out in  
11          17000.6.

12          CHAIR SHEEHAN: Okay, so if I understand you, the  
13          finding of financial distress will give you sort of other  
14          mechanisms. By you having this finding from this  
15          Commission, there may be other avenues available to you  
16          for --

17          MR. McINTOSH: That's correct.

18          CHAIR SHEEHAN: -- to cut back on expenses, in terms  
19          of some of your other County budget --

20          MR. McINTOSH: A relief from another mandate under  
21          the planning and zoning law.

22          CHAIR SHEEHAN: Correct. Or, as you say, additional  
23          grants or something else that may be available?

24          MR. McINTOSH: Exactly right.

25          CHAIR SHEEHAN: Okay.



1 Other questions?

2 MR. McINTOSH: I would again point out to the  
3 Commission, unfortunately, the decision before you is  
4 whether or not we are a financially-distressed county,  
5 not what we do with that.

6 CHAIR SHEEHAN: Yes, exactly. And I think that's  
7 the difficult thing in terms of the statute is, our  
8 obligation is that finding. And then how you carry out  
9 the actions after that, everybody up here may have  
10 different ideas about what you do. I think everybody --  
11 you know, the one that clearly the statute gives you  
12 authority, is to reduce the general assistance; but it's  
13 not presumed that you will do that.

14 MR. McINTOSH: That's correct.

15 CHAIR SHEEHAN: Some of these other mechanisms, you  
16 may exercise or go after some of these other grants or  
17 other types of findings.

18 Okay, I'm sorry. What did we -- oh, this is the --

19 MR. McINTOSH: That's the opinion.

20 CHAIR SHEEHAN: Okay, all right.

21 Do you want to address the 12-month issue? Because  
22 I think that seemed to be the sum and substance of your  
23 comments on your written comments.

24 MR. McINTOSH: That's our only disagreement.

25 CHAIR SHEEHAN: Yes, yes.

1 MS. OPIE: I'll start to do that.

2 As pointed out in the Staff Analysis, there are some  
3 reasons where we felt that the Commission's finding  
4 should be limited to the 12 months. Part of the  
5 difficulty, I think, in doing the analysis of this  
6 application was just the timing of it. Most of the  
7 information that we had in front of us was the proposed  
8 and actual budget for the current year. So we couldn't  
9 see much about the future years, especially 2005-06.

10 In addition to, and commenting on Mr. McIntosh's  
11 comments about the speculativeness of it, yes, there is  
12 some softness to what will happen in the State budget;  
13 but, it's all right there in front of us, in black and  
14 white.

15 There were a couple other sources that I would leave  
16 it to the County to respond to, as to whether or not  
17 they're actually included in their upcoming budget, or  
18 even in the current year. And some of the things are  
19 what Mr. McIntosh has already talked about: The grants  
20 to Sheriffs, Proposition 63 funds, and the savings that  
21 they would anticipate from the Phase 2 of the solar  
22 savings.

23 In addition, from their fund balance that they're  
24 carrying over into the next fiscal year, there is an  
25 increase of \$1,107,000, in addition -- it's more than

1 what they carried over to the current year. So there's  
2 also that money.

3 In the chart that describes the Commission's prior  
4 actions on the applications, I mean, I think it clearly  
5 lays out what the Commission approved in terms of unmet  
6 needs, as well as the resource flexibility.

7 However, I also wanted to note that there was a  
8 period of time there when the County did not apply for a  
9 finding. The last application expired in December 2002.  
10 So the County has been without a finding, and  
11 theoretically, still has the same needs for that period  
12 of time. So that is kind of why we landed on the  
13 12-month.

14 CHAIR SHEEHAN: Okay.

15 MR. McINTOSH: December 2002.

16 CHAIR SHEEHAN: Do you want to ask -- do you have  
17 anything to add to that?

18 MR. MEHL: No.

19 MR. McINTOSH: The Prop. 63 funds are not  
20 appropriated in our budget, other than those that we know  
21 we're receiving from a planning standpoint. But I would  
22 again reiterate, they're restricted funds. That has no  
23 relevance to the level of unmet needs to Butte County.  
24 Prop. 63 funds cannot supplant existing programs. We  
25 have identified no unmet needs in behavioral health.

1 Prop. 63 funds are limited exclusively to behavioral  
2 health. They will be in addition to and add to that  
3 program.

4 We have not appropriated the Rural Sheriffs funds  
5 that have been proposed in the May revise.

6 I would point out to you, they aren't even in the  
7 Assembly's version of the budget. So talk about  
8 speculative. The Governor's proposed it but they're not  
9 in the budget yet. So it would be presumptuous of us to  
10 put them in our budget.

11 Solar savings have not been appropriated, either,  
12 simply for the same reason. We don't have the project in  
13 hand yet. And, by the way, it would probably be most of  
14 the fiscal year before we'd ever bring the solar power  
15 on-line, anyway, so we would never put that in our budget  
16 as an accrued savings. But, again, it would be  
17 speculative in nature and is not online.

18 Why didn't we file again at the end of 1999? I  
19 think we covered that -- or 2002. I think, again, we  
20 covered that during the May 12th hearing. We thought we  
21 were pulling ourselves up by the boot straps. We thought  
22 that this process was helping us; but that was when we  
23 were addressing -- we were faced with a 42 percent  
24 increase in the firefighter's salary and benefit package.

25 What turned out to be a cumulative five or

1 six million dollar increase in our CDF contract -- at no  
2 offer of us for relief, simply increasing it. We were  
3 again faced with having to put additional funds in  
4 social-service programs because realignment revenues were  
5 insufficient to meet, to the tune of some \$11 million  
6 over a three-year period.

7 So we had a huge amount of money. And memory  
8 escapes me, but it's in the record. I think it was about  
9 \$43 million over a three-year period of impacts directly  
10 related to the State budget on Butte County. It put us  
11 back. It drove us back, down that spiral.

12 And if you look at history and you look at growth,  
13 it's going to take us four, five or six years to recover  
14 from that. Again, that's why we beg you to give us the  
15 36 months, or three-year designation as opposed to  
16 12-month.

17 CHAIR SHEEHAN: Paula?

18 MS. HIGASHI: I just wanted to make a point of  
19 clarification. Mr. McIntosh's reports, in terms of the  
20 duration of the prior findings, is certainly accurate.  
21 What I wanted to note, though, is that the last  
22 application process at that time, the Commission staff  
23 did come in, similarly, with a one-year recommendation,  
24 12-month duration. And it was the Commission itself that  
25 decided during the hearing, based on the evidence that

1 they heard, to make the finding and to base it on the  
2 36-month period.

3 The other point is, I know we have at least one, if  
4 not two interested persons that would like to speak as  
5 well.

6 CHAIR SHEEHAN: Great.

7 Any other questions for the County?

8 I know you're not going far, in case we do have  
9 questions.

10 Are there individuals who would like to testify?

11 MR. HERALD: Good afternoon, Madam Chair and  
12 Commissioners. My name is Michael Herald. I'm a  
13 legislative advocate with the Western Center on Law and  
14 Poverty.

15 For those of you who don't know, Western Center is a  
16 legal service backup organization. We work on impact  
17 litigation and we do legislative advocacy here in  
18 Sacramento around the areas of housing, welfare and  
19 health care.

20 It's our determination that Butte has failed to make  
21 a compelling case by clear-and-convincing evidence that,  
22 indeed, they have significant financial distress. We  
23 disagree with the staff's conclusion. And in a moment,  
24 I'll talk through a couple of those issues.

25 I also will try to fit into my comments some of the

1 debate and discussion which just occurred, and I'll try  
2 to add a couple of pieces. Hopefully, they won't be out  
3 of place; but they are scribbled on my margins of my  
4 notes, so I apologize.

5 CHAIR SHEEHAN: Excuse me, were you here this  
6 morning to be sworn in, when everybody --

7 MR. HERALD: I was not sworn in. I was not here  
8 this morning. I was not advised to be here this morning.

9 MS. HIGASHI: Okay, I just need to do this. This is  
10 just a technicality of the testimony, that all of the  
11 witnesses and parties who are in the hearing that we do a  
12 swearing in of witnesses.

13 So if the County folks could apply this to their  
14 prior testimony.

15 CHAIR SHEEHAN: If there's somebody else --

16 MR. HERALD: Oh, it's not just me? Okay.

17 MS. HIGASHI: It's everybody.

18 MR. McINTOSH: Do you want us to do it again, too?

19 MS. HIGASHI: Yes. Let's just do it again.

20 CHAIR SHEEHAN: Were you here -- you were sworn in,  
21 in May.

22 MR. McINTOSH: I was sworn in on May 12th.

23 CHAIR SHEEHAN: Right. You can do it again. It  
24 won't hurt anybody.

25 If there's anybody else in the audience that wants

1 to testify, if they could also stand up and raise their  
2 hand.

3 MS. HIGASHI: Do you solemnly swear or affirm that  
4 the testimony which you are about to give is true and  
5 correct, based upon your personal knowledge, information  
6 or belief? And it also applies to the past.

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

8 CHAIR SHEEHAN: And the testimony you gave before.  
9 All right, sorry.

10 MR. HERALD: No problem.

11 A few of the issues that we're concerned about  
12 regarding the staff report, I'll set aside the issues  
13 around the vehicle license fee. I think the Commission  
14 has had a frank and good discussion around that.

15 It's certainly unclear what the Legislature and the  
16 Governor are going to agree to, in terms of  
17 reimbursements there. But, obviously, that would affect  
18 the future of Butte County's ability to manage their  
19 budget.

20 More appropriately, I was disturbed when I read the  
21 Staff Analysis, that there was not a more full discussion  
22 about the impact of property tax revenue, in terms of the  
23 County's flexibility funding going forward. And I would  
24 note that from 2003 to 2004, to the previous budget --  
25 to this budget year of 2004-05, we saw an increase in



1 property taxes in Butte go from \$15 million to  
2 \$24 million. I don't have to tell you in the room that  
3 housing costs continue to go up rapidly across  
4 California.

5 In many of these counties, such as Yuba and  
6 Sutter -- I don't have a figure for Butte -- but I know  
7 the other two approximate counties went up by 30 percent  
8 and 32 percent, in terms of the increase in resale home  
9 values in those counties, from 2003-04 to 2004-05.

10 So we think that the staff report has failed to account  
11 for what is going to be a sizable increase in  
12 property-tax revenue that's going forward. We think it's  
13 going to give Butte County much more fiscal flexibility  
14 than the staff report would suggest.

15 We understand that there are issues about when we'll  
16 know exactly how much that will be. And it's unfortunate  
17 that the timing of this process doesn't coincide better  
18 with that. But we would suggest that the Commission  
19 still has the discretion in its power to be able to  
20 reject a finding of significant financial distress  
21 because I think it's realistic to know that there is  
22 going to be a sizable increase in property-tax revenue.

23 Secondly, I would like to expand upon the point made  
24 by the representative from the Controller's office about  
25 the staff report's failure to account for what we believe

1 will be substantial increased costs due to the reduction  
2 taken for general-assistance recipients.

3 I, in my previous capacity, prior to working for the  
4 Western Center, I was an appointee of Governor Davis at  
5 the Department of Housing and Community Development. And  
6 in that capacity, I helped to staff the Governor's  
7 Homeless Task Force. We produced a series of reports  
8 that outlined the substantial state costs for allowing  
9 people to become homeless. And they're not just the fact  
10 that some people may end up in jail. There are many,  
11 many additional costs.

12 Significant among them is the huge increases that we  
13 see in use of 9-1-1 systems, when people get on the  
14 streets and they get into despair, there are huge costs  
15 for bringing out those officers. We also know that there  
16 are increased costs in mental health facilities. We also  
17 know that there are going to be increased costs in the  
18 public health systems.

19 The County of San Diego found that ten inebriates  
20 alone in one year cost the county hospital a million  
21 dollars. So these costs really add up.

22 And allowing people to live on the streets by  
23 reducing their benefits because they can't afford rent  
24 in the community, we think actually is ultimately  
25 counterproductive, and will cost the county more money

1 than they will save from the Commission staff's proposal.

2 So those are, I think, the two main issues that we  
3 had with the staff report, besides the VLF, which we  
4 think has been covered already.

5 An additional point that I want to bring to your  
6 attention is that the Butte County Board of Supervisors  
7 recently commissioned a report by the Institute on  
8 Law and Public Planning. And this report found that  
9 there are -- there is essentially -- and I'm paraphrasing  
10 here, using my own abbreviations -- that we're seeing an  
11 overprosecution of minor offenses in Butte County. We  
12 are seeing huge amounts of money going into public safety  
13 programs that exceed what we're seeing in other counties.  
14 The example being that the County of Butte has three  
15 times the number of investigators as a comparable county,  
16 such as Merced, which has a similar population. Butte  
17 County has 29 investigators at the District Attorney's  
18 office.

19 We also think that the District Attorney's Office  
20 is, frankly, using a lot of funds. For example, from the  
21 CalWORKS eligibility funds. Much of those funds are  
22 being poured into fraud investigations, which are leading  
23 to increased convictions, and which are leading to  
24 increased costs for the county.

25 Again, the Staff Analysis didn't have the

1 opportunity to go into depth, I think, about some of  
2 these issues; but, again, we would think that those are  
3 things that the Commission should take into  
4 consideration.

5 And then my two comments in the margin is, first of  
6 all, I wanted to comment on the additional powers, if you  
7 will, that may come from the Commission making a finding  
8 of significant financial distress. And the examples  
9 cited by the County was, I believe, a recent Attorney  
10 General opinion, although I have not read it -- it was  
11 somewhat paraphrased here in front of the Commission  
12 today -- which said that they, for example, might be able  
13 to demonstrate that they would be able to reduce their  
14 obligation towards affordable housing goals.

15 Well, these are the same affordable housing goals  
16 that provide extremely low-income housing for the same  
17 people that we're going to cut off. So it's unclear to  
18 me why the Commission granting a finding of significant  
19 financial distress -- you know, is that the outcome that  
20 we want, that the County is going to reduce services and  
21 benefits around housing for poor people in the County?  
22 That's the outcome that we get? I don't think that's  
23 really what the 17000.6 process is set up to establish.

24 And lastly, in all due respect to Butte County, we  
25 believe that the Commission does have the discretion to

1 be able to evaluate the needs that the County puts forth,  
2 and judge whether or not we're just putting up a laundry  
3 list of every wish list in the world that we would like  
4 to see funded in our county, or whether or not this is  
5 just one person's need, is another person's luxury.

6 And it does seem, to us, that the heavy focus in the  
7 needs analysis on public safety, given the fact that  
8 so much of the County's funding is already going in that  
9 direction, seems problematic, to us, at best. And we  
10 would suggest that the Commission has the discretion to  
11 review that on their own and to make that decision.

12 If Butte County is not comfortable with the decision  
13 that the county makes to reject the finding that the  
14 staff has proposed, they certainly have the option of  
15 litigation.

16 And I lastly just want to finish by acknowledging  
17 something that was said, I think, by the panelists -- by  
18 the commissioners, which is, it's unclear to us how a cut  
19 of \$262,000 is anything to resolve Butte's problems now  
20 or in the future. And, in fact, the County acknowledged  
21 that in front of you here today.

22 So we have a choice in front of us: We can either  
23 choose to make the poorest people in the County of Butte  
24 even poorer, and subject them to even more distress; or  
25 we can throw a very nominal amount of money to Butte

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1 County that will not solve their problems, but will cause  
2 more problems for the poor.

3 Thank you very much.

4 CHAIR SHEEHAN: Yes, I guess the only question I  
5 have, or comment, is that we are not deciding here today  
6 to reduce general assistance. I want to make that clear.

7 MR. HERALD: I understand, ma'am. I understand.

8 CHAIR SHEEHAN: That's not our decision.

9 MR. HERALD: Correct.

10 CHAIR SHEEHAN: What we are bound by the law is the  
11 finding of financial distress. So for you to say that,  
12 "This is what you're doing to these people," we are not,  
13 who are sitting up here.

14 MR. HERALD: I stand corrected. It is the County's  
15 decision to do that, you're right.

16 CHAIR SHEEHAN: I understand people may have  
17 disagreements about whether they should do that or not;  
18 but I don't want anyone to go away from here somehow  
19 misinterpreting what the role of this commission is.

20 MR. HERALD: Fair comment.

21 CHAIR SHEEHAN: Anyone else?

22 The only other observation that I would make, is  
23 that I would suggest you go upstairs and talk to them  
24 about changing the statute, because --

25 MR. HERALD: I'll go with you right now.

1 CHAIR SHEEHAN: -- we're sort of stuck with what the  
2 statute is before us; not, do I like this process? Not  
3 particularly, with all due respect to my friends in  
4 Butte and others who have had to go through this, no.  
5 But I have the statute before me. I don't have a statute  
6 that -- I mean, could I think of other ways to do this?  
7 Absolutely.

8 But what we have before us and what we are  
9 obligated, based on the application that they have filed,  
10 is to carry out the statute that's before us. Not one  
11 that we wish was before us. So I want to make sure you  
12 understand that.

13 MR. HERALD: I do understand that. And I hope that  
14 in my testimony, what I tried to bring out, what I  
15 thought was information that was not provided to the  
16 Commission by the staff because of the limited time that  
17 they had to analyze this application.

18 And I think, in light of some of that additional  
19 information about the extreme costs for public safety  
20 that was not mentioned in the report, nor the issues  
21 around property taxes, that there is additional  
22 information for the Commission to consider.

23 CHAIR SHEEHAN: Sure. And I think a couple of  
24 issues, and I can ask staff and/or representatives from  
25 Butte County to respond to, in terms of property tax, but

1 at least estimates from their assessor as to what is  
2 going on, as well as from staff, in terms of our  
3 authority under the current law.

4 I mean, what we don't have is the authority to go  
5 say, "Well, you should move that money from the DA's  
6 office over here, and you should take that money from the  
7 Sheriff's office and put it" -- you know, our job is not  
8 to tell them how to budget their funds.

9 I mean, I can tell you from the bigger role of this  
10 Commission, the State already tells the counties how to  
11 budget enough, so we don't want to do that anymore.

12 So I don't know if staff wants to address that.

13 MS. OPIE: I just wanted to -- and Chikako can  
14 supplement whatever I have to say -- on page 3246 of the  
15 Staff Analysis -- of the binder that you have, there is  
16 the portion of the analysis related to property tax  
17 revenues. And it shows what's been the actual and what  
18 the estimate is for 2004-2005.

19 But as pointed out in the Staff Analysis, there was  
20 no real way for staff to analyze that, just because of  
21 the timing of things, so -- and I just want to point out  
22 that the estimate for 2004-05 shows a significant  
23 increase over the prior years.

24 CHAIR SHEEHAN: Right. And that information came  
25 directly from the County.



1 MR. McINTOSH: It did, Madam Chair.

2 And let me just point out, I think Mr. Herald fails  
3 to recognize what we effectually in the county refer to  
4 as a triple-flip that occurred.

5 CHAIR SHEEHAN: I know what that is.

6 MR. McINTOSH: You know what that is?

7 Yes, property taxes increased from 16 million to  
8 25 million. Sales taxes dropped from 4 million to  
9 3 million, and vehicle license fees dropped from  
10 11 million to 5 million. The net result is a growth of  
11 \$2 million, thankfully associated with that, but that  
12 \$2 million has sucked up -- more than sucked up our  
13 increased costs.

14 So we do take into account the change in the  
15 property tax revenue. And then we've taken that into  
16 account in our five-year fiscal forecast as well.  
17 But you've got to look at the total budget picture, not  
18 just one line item within that budget.

19 If I may, I think there were some other points that  
20 Mr. Herald made. First of all, as you've acknowledged,  
21 this is the wrong forum for discussion on what the impact  
22 of this decision is on the low-income individuals who  
23 live in Butte County. That's before the Board of  
24 Supervisors of the County of Butte. That's not before  
25 this Commission.

1           Regarding the ILPP finding, you will note in our  
2 proposed budget, we've recommended cutting  
3 9.5 investigators, or positions out of the District  
4 Attorney's Office, a reduction in the Welfare Fraud  
5 Program.

6           That Butte County is not a compelling case for  
7 fiscal distress; we are the poster child of fiscal  
8 distress. As we presented in the record on May 12th,  
9 historically from 1989 through today, Butte County has  
10 been the distressed county.

11           Low-income housing, I just left a meeting this  
12 morning regarding the relicensing of Lake Oroville. And  
13 I presented testimony to this Commission on May 12th  
14 regarding the impact that that relicensing had had on  
15 Butte County, historically. And I will share with you --  
16 and, unfortunately, I don't have the 15 copies, but we'll  
17 certainly make them available to you -- that -- let me  
18 hand out one that can be shared, perhaps.

19           In the wake of the design and construction of Lake  
20 Oroville, that Lake Oroville was completed in 1967. So  
21 we went back and used state figures on subsistence  
22 payments and subsistence caseloads starting in 1960,  
23 and just show you what happened with aid payments in  
24 Butte County between 1960 and 1975. There's a clear  
25 trend after Lake Oroville closed, that low-income

1 individuals -- there's a tremendous glut of low-income  
2 housing on the market on Butte County that was built when  
3 Lake Oroville was being constructed. It was the largest  
4 construction project in the world at the time. There was  
5 a tremendous glut of housing that occurred in Butte  
6 County in 1967 and 1968, as those workers left that  
7 project and moved on to other things. Those houses were  
8 occupied by predominantly low-income individuals who  
9 ended up, unfortunately, on our welfare rolls. And  
10 that's an issue that we're taking up with DWR in the  
11 licensing of that process.

12 But Butte County, again, is the poster child of  
13 low-income housing in this state. So it's not that this  
14 finding by this Commission is going to have a tremendous  
15 impact on low-income housing in Butte County. It's not  
16 going to.

17 And litigation? I mean, we've spent \$100,000 on  
18 this. Why would we spend \$250,000 litigating a finding  
19 that you make? That would be pouring good money after  
20 bad.

21 So we again request that the Commission find for the  
22 36-months and support the findings and recommendations of  
23 your staff.

24 CHAIR SHEEHAN: Thanks.

25 MS. HIGASHI: Madam Chair.

1 CHAIR SHEEHAN: Yes?

2 MS. HIGASHI: I've sent that handout out for  
3 copying. So we'll get copies back for all of you.

4 MR. McINTOSH: I apologize.

5 MS. HIGASHI: Yes, I asked them to go to your office  
6 and ask your assistant.

7 CHAIR SHEEHAN: Okay.

8 MS. HIGASHI: I also wanted to point out that there  
9 was a document that was referenced in the prior  
10 testimony, the study. And it is in the record. It was  
11 the report that was cited by the Sheriff in his testimony  
12 to the Commission. And copies are in your binders, as  
13 you know.

14 CHAIR SHEEHAN: Right. Okay, additional questions  
15 from Commission members or staff? Any final comments?  
16 What is the will of the -- oh, Paul?

17 MR. STARKEY: I know you dread it when I hit that  
18 button. I'm sorry.

19 I just feel it is my job to put this in perspective,  
20 and because we are on the record.

21 The comment about litigation, I wanted to point out  
22 that it is our job today to make the best possible  
23 decision. That's what our statutory charge is. And we  
24 actually have spent a lot of time and effort to avoid  
25 litigation, so that we give the best legal

1 recommendation.

2 So much of this is not legal, though. But I just  
3 wanted to sort of put a little bit of legal framework on  
4 this with respect to the three-year finding. This is --  
5 I think this is a very difficult issue. The Commission  
6 members have to basically do fact-finding and make a  
7 determination, and you're charged with your expertise to  
8 do that.

9 What we have is a statutory framework, which the  
10 first statute is the one that says it's the policy of  
11 this state that the recipients of general assistance are  
12 provided for. That's the first policy.

13 The secondary statute is the one which allows the  
14 Commission to make that finding.

15 So I think you always need to have that in mind.

16 And then with the notion of the three-year finding,  
17 the statute authorizes, as was noted, the authority to  
18 make a three-year finding. It does not require it. It  
19 basically authorizes the Commission to do that.

20 And I think for a lot of the reasons that were  
21 mentioned by the County, there is an administrative  
22 efficiency that's probably in there as well. But the  
23 statute does not compel it. It is not a given. At every  
24 stage, the Commission members have to keep in mind that  
25 this is a compelling case that has to be made for not

1 just the first 12 months, but the second 12 months and  
2 the third 12 months.

3 CHAIR SHEEHAN: If we make a three-year finding?

4 MR. STARKEY: If you make the three-year finding,  
5 then you've made a determination that it's a compelling  
6 case for the next three years.

7 CHAIR SHEEHAN: Okay, well, that was my -- back to  
8 your statement, what you just said. So if we make a  
9 three-year finding, they do not have to come back, if  
10 they are still having problems, for three years?

11 MR. STARKEY: That's correct.

12 CHAIR SHEEHAN: Okay, I want to make sure, because  
13 if they have to make it, make it, make it. Okay.

14 MR. STARKEY: Again, just to put the legal framework  
15 around here, there is a process in the regulations for  
16 reapplication. So I just want to draw that to the  
17 Commission's attention under 1186.72. There is a process  
18 that the county may file a reapplication.

19 Under part B, it says, "The application follows the  
20 same format." So as was noted, yes, there are costs  
21 attendant to that reapplication. But there are  
22 additional factors, and I just want to go through these  
23 for the record.

24 How the applicant utilized the savings in reduction  
25 of the general assistance standard of aid realized from

1 the preceding finding of significant financial distress,  
2 that's a factor.

3 The difference in the county's total population  
4 between the date of the application and the  
5 reapplication. So population, according to the  
6 regulation, is a factor.

7 Any staff changes, changes to working conditions,  
8 including, but not limited to, reduced work hours or  
9 salary increases or decreases that occurred between the  
10 two findings.

11 Any statutes enacted during that period of time,  
12 between the preceding application and the new  
13 application.

14 That statutes that change county revenue sources or  
15 expenditures or impose new mandates upon the county. And  
16 then they are to provide tables that include the  
17 difference between the proposed and approved unmet need.

18 Basically, the point of all this is that the  
19 reapplication process seems to suggest that it has to be  
20 a current -- I call it a "snapshot." It's got to be a  
21 clear snapshot that, yes, in fact, this is the situation.

22 CHAIR SHEEHAN: So let me understand what you're  
23 saying. If the Commission today voted a 12-month  
24 finding, and the County felt that next year after they  
25 got through their budget, they still weren't out of the

1 woods, they would file a reapplication during this  
2 12-month period; that is correct?

3 MR. STARKEY: They could, yes, to anticipate the  
4 next application.

5 CHAIR SHEEHAN: I want to make sure I'm  
6 understanding the difference between a "reapplication"  
7 and a "new application."

8 Is there a difference?

9 MR. STARKEY: The only difference is, as far as I  
10 can tell, is that the regulations seem to recognize that  
11 in the reapplication system, at least in the regulation,  
12 there are, in addition to all the factors that you would  
13 do in a new application, there are additional types of  
14 factors. And looking at those factors, like I say,  
15 population change, new statutes, again, all of those  
16 factors that would require a compelling case.

17 And, in fact, in the regulations, it specifically  
18 states that the reapplication must also make that  
19 compelling-case standard.

20 And on that standard, again, just for making your  
21 decision, the legal standard of compelling case is not  
22 "more probable than not." If it were more probable than  
23 not, or likely, that would be a "preponderance of the  
24 evidence" type of standard.

25 This compelling case is -- in layperson's terms:



1 I'm convinced that this is the way it's going to be.

2 CHAIR SHEEHAN: Well, is it the clear-and-convincing  
3 standard --

4 MR. STARKEY: Yes.

5 CHAIR SHEEHAN: -- versus preponderance of the  
6 evidence?

7 MR. STARKEY: So it is a higher standard.

8 So all I'm saying, in terms of the Staff Analysis  
9 and the recommendation we gave, the reason that I think  
10 that it's a sound recommendation is that, despite the  
11 County's documented historical record -- and certainly  
12 it's documented -- in this discussion, there are  
13 uncertainties on both sides. You know, what the Governor  
14 has proposed, what the Legislature may do, those same  
15 kind of uncertainties are in the fiscal picture for the  
16 next couple years.

17 I just think, looking at the regulation, those  
18 factors, you have to be convinced that you can say for  
19 the next three years, "I think this is going to be the  
20 situation."

21 So I'm just, again, trying to put --

22 CHAIR SHEEHAN: In order to do a three-year finding,  
23 is what you're saying?

24 MR. STARKEY: Right.

25 CHAIR SHEEHAN: Okay, all right, I think that's

1 helpful.

2 What is the next step that we take?

3 MS. HIGASHI: The next step, the step for today,  
4 that's scheduled is for the Commission to adopt a  
5 preliminary decision. And once the Commission adopts  
6 that decision, then staff will prepare a proposed  
7 Statement of Decision, and that would be --

8 CHAIR SHEEHAN: For June 10?

9 MS. HIGASHI: -- for the June 10th meeting. And  
10 that would be before the Commission for adoption on  
11 June 10th.

12 MEMBER BOEL: I would like to make a motion that we  
13 approve the application for Butte County with a finding  
14 of significant financial distress for 12 months.

15 CHAIR SHEEHAN: And the 12 months would begin  
16 July 1st?

17 What is the recommendation?

18 MS. HIGASHI: We did not give you a specific date  
19 because we would ask the County to give us the actual  
20 date that they would want the finding to be effective.

21 MR. McINTOSH: July 1.

22 CHAIR SHEEHAN: Okay, is there a second?

23 MEMBER SMITH: Second.

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

25 Is there any further discussion on the motion?

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1           (No audible response was heard.)

2           CHAIR SHEEHAN: All right. So we'll do a roll call.

3           MS. HIGASHI: Okay.

4           Ms. Boel?

5           MEMBER BOEL: Aye.

6           MS. HIGASHI: Mr. Lujano?

7           MEMBER LUJANO: Aye.

8           MS. HIGASHI: Mr. Smith?

9           MEMBER SMITH: Aye.

10          MS. HIGASHI: Ms. Sheehan?

11          CHAIR SHEEHAN: Aye.

12          MS. HIGASHI: The motion is carried.

13          CHAIR SHEEHAN: So the staff will come back with the  
14 final on June 10th. All right.

15          MR. McINTOSH: Make it September 1, because it will  
16 take us that long.

17          MS. HIGASHI: The finding --

18          CHAIR SHEEHAN: You can work with staff on the  
19 12 months.

20          MS. HIGASHI: September 1.

21          CHAIR SHEEHAN: Okay, is that what you -- okay.

22          MR. McINTOSH: Thank you.

23           And for any who don't like the statute, yes, feel  
24 free to go upstairs.

25          CHAIR SHEEHAN: All right. So we're closing for the

1 day; right?

2 MEMBER BOEL: Do we have executive session?

3 CHAIR SHEEHAN: I don't think we have any  
4 closed-session items, do we?

5 MS. HIGASHI: No.

6 We have some -- both Paul and I have some written  
7 material in your binders. Nothing which requires any  
8 action.

9 CHAIR SHEEHAN: Okay, all right. You have your  
10 report. All right, hold on.

11 So nothing in closed session.

12 Anything you wanted to report on, Paula, in terms of  
13 budget or --

14 MS. HIGASHI: In terms of the budget, the  
15 Commission's budget was approved by both subcommittees.  
16 And there is a conference item that is part of the  
17 Commission's budget item. And that relates to the test  
18 claim decision on the mandate-reimbursement process. And  
19 there is interest in, I believe, both houses for the  
20 Commission to reconsider that decision. And it's a  
21 1986 decision, that consists of about six numbered  
22 paragraphs on two statutes, that comprise the  
23 reimbursement process for filing a test claim and also  
24 for filing reimbursement claims and incorrect reduction  
25 claims. So that's a very good possibility for a

1 trailer-bill language.

2 Other than that, there's still a lot of open issues  
3 regarding which mandates are suspended, which ones are  
4 deferred, which ones might be fully funded because of  
5 Prop. 1A.

6 And there are working groups convened in the Budget  
7 Conference Committee process -- or I should say,  
8 anticipated. Staff is now talking with fiscal committee  
9 staff in providing technical assistance, as requested.

10 CHAIR SHEEHAN: Okay, great.

11 So would anyone from the public like to address the  
12 Commission before we close?

13 *(No audible response was heard.)*

14 CHAIR SHEEHAN: Okay, then I think we are adjourned  
15 for today.

16 MS. HIGASHI: Thank you very much.

17 *(Proceedings concluded at 2:39 p.m.)*

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REPORTER'S CERTIFICATE

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

That the testimony of said witnesses was reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

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

In witness whereof, I have hereunto set my hand on June 1st, 2005.



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

--oOo--