Hearing Date: January 29, 2010
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ITEM __

TEST CLAIM
DRAFT STAFF ANALYSIS

Government Code Sections 17553, 17557, and 17564, as Amended by Statutes 2004, Chapter 890 (Assembly Bill No. 2856);

California Code of Regulations,
Title 2, Sections 1183 and 1183.13 (Register 2005, No. 36, effective September 6, 2005)

Mandate Reimbursement Process II
05-TC-05

On Remand from *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183; Judgment and Peremptory Writ of Mandate Issued by Sacramento County Superior Court, Case No. 06CS01335

City of Newport Beach, Claimant

EXECUTIVE SUMMARY

Background

This test claim is on remand from the court following the Third District Court of Appeal's decision in *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183. The test claim statute, Assembly Bill No. (AB) 2856 amended the Government Code statutes that establish the process for seeking reimbursement for state-mandated costs under article XIII B, section 6. The statutes and regulations that are pled in the claim address the test claim filing requirements, the development of a reasonable reimbursement methodology as part of the parameters and guidelines, and the filing of reimbursement claims that comply with the State Controller's claiming instructions for direct and indirect costs.

This test claim was originally denied by the Commission in 2006 on the ground that the statutes and regulations were necessary to implement and/or reasonably within the scope of the ballot measure (Proposition 4) that added article XIII B, section 6 to the California Constitution pursuant to Government Code section 17556, subdivision (f), as amended by AB 138. The court found that portions of section 17556, subdivision (f), were unconstitutional and, thus, directed the Commission to set aside the Statement of Decision and to rehear the claim pursuant to the court's ruling and analysis. The 2006 Statement of Decision was set aside by the Commission on September 25, 2009.

Staff Analysis

Staff finds that:

- Local agencies and school districts are practically compelled and, thus, mandated by the state to comply with the new filing requirements for test claims and test claim amendments imposed by Government Code section 17553, subdivision (b)(1)(C) through (G) and (b)(2) and section 1183, subdivision (d), of the

Commission's regulations, when a test claim is approved and determined to be a reimbursable state-mandated program. This finding is made pursuant to the *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, on the ground that the filing of a test claim that complies with the new filing requirements is the only means to enforce the constitutional right to reimbursement for costs incurred in complying with a reimbursable state-mandated program. Moreover, when the state mandates a new program or higher level of service, but does not fund the program, the cost to perform the new mandated activities *and* the cost to prove and enforce the constitutional right to reimbursement for the costs of the program are shifted to local agencies and school districts, which are "ill-equipped" to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose. Thus, the purpose of article XIII B, section 6 supports the conclusion that the new test claim filing requirements are mandated by the state when the state imposes a reimbursable state-mandated program on local agencies and school districts.

- Government Code sections 17557 and 17564, as amended by A.B. 2856, and section 1183.13 of the Commission's regulations, as added in 2005, do not mandate a new program or higher level of service.

- Government Code section 17556, subdivision (f), as interpreted by the court in the *CSBA* case does not apply to this claim. On page 1217 of the *CSBA* case, the court directed the Commission to apply the holding in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 to interpret the "necessary to implement a ballot measure" language in Government Code section 17556, subdivision (f). Using the rule articulated by the court in the *San Diego Unified* case, duties imposed by a test claim statute or executive order are necessary to implement a ballot measure approved by the voters in a statewide or local election pursuant to Government Code section 17556, subdivision (f), when (1) local agencies and/or school districts are mandated by a ballot measure to perform a duty; (2) the Legislature or any state agency enacts a statute or executive order intended to implement the ballot measure mandate and also requires additional duties that are not expressly included in the ballot measure; (3) absent the statute or executive order enacted by the Legislature or any state agency, local agencies and/or school districts are still required to comply with the duty mandated by the ballot measure; and (4) the requirements imposed by the statute or executive order that exceed the ballot measure mandate are not reimbursable, but are considered part and parcel to the underlying ballot measure mandate, when the excess requirements are intended to implement (i.e., are incidental to) the ballot measure mandate, and whose costs are, in context, de minimis.

  Here, there is no underlying ballot measure mandate imposed on local agencies or school districts. The ballot measure initiatives that added and amended article XIII B, section 6, do not impose any duties on local agencies or school districts. Article XIII B, section 6 imposes a duty solely on the state. Therefore, the duties imposed by Government Code section 17553, and section 1183 of the

Commission's regulations are not incidental or part and parcel to a ballot measure mandate.

Conclusion

Staff finds that Government Code section 17553, subdivision (b)(1)(C) through (G) and (b)(2) as amended by Statutes 2004, chapter 890, and section 1183, subdivision (d), of the Commission's regulations, as adopted in 2005, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities only:

1. All test claims and test claim amendments shall include a written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including

   a. The actual increased costs incurred by the claimant during the fiscal year for which the claim is filed.

   b. The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.

   c. A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.

   d. Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.

   e. Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate. (Gov. Code, § 17553, subd. (b)(1)(C) through (G), as amended by Stats. 2004, ch. 890; Cal. Code Regs., tit. 2, § 1183, subd. (d), Register 2005, No. 36, effective September 6, 2005.)

2. The written narrative in the test claim or test claim amendment shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:

   a. Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

   b. Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

   c. Declarations describing new activities performed to implement specified provisions of the new statute or executive order. (Gov. Code, § 17553, subd. (b)(2), as amended by Stats. 2004, ch. 890; Cal. Code Regs., tit. 2, § 1183, subd. (d), Register 2005, No. 36, effective September 6, 2005.)

These activities are reimbursable only when a test claim is approved.

Staff further finds that Government Code sections 17557 and 17564, as amended by Statutes 2004, chapter 890; section 1183.13 of the Commission's regulations (Register 2005, No. 36, effective September 6, 2005); and all other allegations raised by the claimant do not constitute a reimbursable state-mandated program.

Staff Recommendation

Staff recommends that the Commission adopt this analysis and approve the test claim accordingly.

STAFF ANALYSIS

Claimant

City of Newport Beach

Chronology

09/27/05	Test claim filed by City of Newport Beach, Claimant
10/04/06	Commission hears test claim and adopts Statement of Decision denying test claim pursuant to Government Code section 17556, subdivision (f), as amended by Statutes 2005, chapter 72 (AB 138)
09/11/06	California School Boards Association (CSBA), City of Newport Beach, et al., file a complaint in Sacramento Superior Court, Case No. 06CS01355, challenging the constitutionality of Government Code section 17556, subdivision (f), as amended by Statutes 2005, chapter 72 (AB 138) and seeking to set aside the Commission's Statement of Decision adopted October 4, 2006
03/09/09	Third District Court of Appeal issues *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183
07/02/09	Commission issues Notice of Remanded Test Claim and Schedule for Comments
07/13/09	Sacramento County Superior Court, Case No. 06CS01335, issues a Judgment and Peremptory Writ of Mandate Following Appeal directing the Commission to set aside as null and void the Statement of Decision adopted October 4, 2006 in Proceeding 05-TC-05 (*Mandate Reimbursement Process II*) in its entirety; and to hold new proceedings consistent with the court's ruling that do not take into consideration any legislative determinations which refer to duties imposed which are "reasonably within the scope of … a ballot measure" contained in Government Code section 17556, subdivision (f), as amended by section 7, Statutes 2005, chapter 72 (AB 138)
08/06/09	Claimant files comments on remanded test claim
08/10/09	Interested party, CSBA, files comments on remanded test claim
09/25/09	Commission sets aside as null and void the Statement of Decision adopted October 4, 2006
10/06/09	Department of Finance files comments on remanded test claim

Background

This test claim is on remand from the court following the Third District Court of Appeal's decision in *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183. The test claim statute, Statutes 2004, chapter 890 (AB 2856), amended the Government Code statutes that establish the process for seeking reimbursement for state-mandated costs under article XIII B, section 6. Although many code sections were amended by AB 2856, the claimant pled only Government Code

sections 17553, 17557, and 17564, and sections 1183 and 1183.13 of the Commission's regulations that implemented AB 2856. These Government Code sections and regulations, as amended, are summarized below and address the test claim filing requirements, the development of a reasonable reimbursement methodology as part of the parameters and guidelines, and the filing of reimbursement claims that comply with the State Controller's claiming instructions for direct and indirect costs.

Test Claim Statutes and Regulations

Government Code section 17553, subdivision (b), was amended by the test claim statute to require that the test claim filing contain the following elements and documents:

1. A written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including:
    a. A detailed description of the new activities and costs that arise from the mandate.
    b. A detailed description of existing activities and costs that are modified by the mandate.
    c. The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.
    d. The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.
    e. A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.
    f. Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.
    g. Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate.
2. The written narrative shall be supported with declarations signed under penalty of perjury as follows:
    a. Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
    b. Declarations identifying all local, state, or federal funds, or fee authority that may be sued to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
    c. Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program. Specific references shall be made to

chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program.

3. The written narrative shall be supported with copies of the test claim statute (including the bill number) or executive order alleged to impose or impact a mandate; relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate; administrative decisions and court decisions cited in the narrative (except state mandate determinations of the Board of Control, the Commission, or the courts).

Some of the test claim elements were required by section 1183 of the Commission's regulations before the enactment of AB 2856. Thus, to implement AB 2856, the Commission amended section 1183 of its regulations, effective September 6, 2005, to remove the test claim filing requirements and to add language to subdivision (d) of section 1183 to state, "All test claims, or amendments thereto, shall be filed on a form developed by the executive director and shall contain all of the elements and supplemental documents required by the form and statute."

AB 2856 also amended Government Code section 17557 to add subdivision (f), which states the following: "In adopting parameters and guidelines, the commission shall consult with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants to consider a reasonable reimbursement methodology that balances accuracy with simplicity."

Section 1183.13 of the Commission's regulations was added effective September 6, 2005, to address the reasonable reimbursement methodology as follows:

(a) If the claimant indicates in the proposed parameters and guidelines or comments that a reasonable reimbursable methodology, as defined in Government Code section 17518.5, should be considered; or if the Department of Finance, Office of the State Controller, any affected state agency, claimant, or interested party proposes consideration of a reasonable reimbursement methodology, commission staff shall immediately schedule an informal conference to discuss the methodology.

(b) Proposed reasonable reimbursement methodologies, as described in Government Code section 17518.5, shall include any documentation or assumptions relied upon to develop the proposed methodology. Proposals shall be submitted to the commission within sixty (60) days following the informal conference.

(c) Claimants, state agencies, and interested parties shall submit an original and two (2) copies of a proposed reasonable reimbursement methodology, and shall simultaneously serve a copy on the other parties and interested parties on the mailing list described in Section 1181.2 of these regulations.

(d) Commission staff shall notify all recipients that they shall have the opportunity to review and provide written comments or

recommendations concerning the proposed reasonable reimbursement methodology within fifteen (15) days of service.

(e) Claimants, state agencies, and interested parties shall submit an original and two (2) copies of written responses to commission staff and shall simultaneously serve a copy on the other parties and interested parties on the mailing list described in Section 1181.2 of these regulations.

(f) Within fifteen (15) days of service of the written comments prepared by other parties and interested parties, the party that proposed the reasonable reimbursement methodology may submit an original and two (2) copies of written rebuttals to commission staff, and shall simultaneously serve a copy on the other parties and interested parties on the mailing list described in Section 1181.2 of these regulations.[1]

The test claim statute also amended Government Code section 17564 to add the underlined text as follows:

> (b) Claims for direct and indirect costs filed pursuant to Section 17561 shall be filed in the manner prescribed in the parameters and guidelines <u>and claiming instructions.</u>

<u>Statement of Decision Adopted October 4, 2006</u>

On October 4, 2006, the Commission denied this test claim pursuant to Government Code section 17556, subdivision (f), as amended by AB 138, on the ground that the test claim statutes and regulations were necessary to implement and/or reasonably within the scope of article XIII B, section 6, which was adopted by the voters through Proposition 4. The Statement of Decision states the following:

> Government Code section 17500 et seq. was enacted to implement article XIII B, section 6. Government Code section 17500 expressly states that the legislative intent "in enacting this part [is] to provide for the implementation of Section 6 of Article XIII B of the California Constitution." Thus the test claim statutes and executive orders, as part of that statutory scheme, meet the standard of section 17556, subdivision (f), in that they are "necessary to implement [or] reasonably within the scope of" article XIII B, section 6.
>
> Since the Legislature has made this express declaration regarding Government Code section 17500 et seq., an analysis regarding whether these statutes and executive orders are "necessary to implement" or "reasonably within the scope of" article XIII B, section 6, is unnecessary.
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> [¶][¶]

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[1] In 2007, the Commission amended section 1183.13 of the regulations to implement Statutes 2007, chapter 329 (AB 1222). (Reg. 2007, No. 37.) Section 1183.13, as amended in 2007 has not been pled in this test claim.

> Since the test claim statutes and executive orders do not impose costs mandated by the state, there is no need to analyze whether they constitute a new program or higher level of service within the meaning of article XIII B, section 6.

The Commission did not make any findings on the issue of whether the test claim statutes and executive orders mandate a new program or higher level of service.

Court's Decision in *California School Board's Association v. State of California* and Direction on Remand

The California School Boards Association, school districts, and local agencies challenged the Commission's decision on this test claim in *California School Boards Assoc. v. State of California* (*CSBA*) (2009) 171 Cal.App.4th 1183.[2] On page 1203 of the court's opinion, the court concluded that the Commission's legal analysis of Government Code section 17556, subdivision (f), was wrong because it relied on the Legislature's declaration of intent in Government Code section 17500 to determine that the test claim statutes and executive orders were necessary to implement and/or reasonably with the scope of a ballot measure, rather than determining for itself whether a reimbursable state-mandated program exists. On remand, the Commission is directed to ignore the Legislature's declaration in Government Code section 17500 as follows:

> In finding that the duties imposed by the State did not give rise to reimbursable costs in the *Mandate Reimbursement Process II* test claim decision, the Commission did not decide for itself whether those duties were expressly included in or necessary to implement a ballot measure. Instead, the Commission simply cited the Legislature's declaration in Government Code section 17500 that the Legislature's intent in enacting the statutes was "to provide for the implementation of [Proposition 4]." "Thus," concluded the Commission, "the test claim statutes and executive orders, as part of that statutory scheme, meet the standard of section 17556, subdivision (f), in that they are 'necessary to implement [or] reasonably within the scope of' article XIII B, section 6."
>
> The Commission's conclusion that the Legislature's statement of intent resolved the matter was unjustified because legislative declarations concerning whether a state mandate exists are irrelevant to the Commission's determination of whether a state mandate exists. [Citations omitted.]
>
> [¶]

[2] The plaintiffs in the *CSBA* case also challenged the decisions on reconsideration of the *Mandate Reimbursement Process I, School Accountability Report Cards, and Brown Act/Open Meetings Act* test claims, arguing that the reconsideration statutes and Government Code section 17556, subdivision (f), as amended by AB 138 were unconstitutional.

> ...On remand, the Commission must disregard any declarations of legislative intent and, instead, decide for itself whether a reimbursable state mandate exists.

The court also held that Government Code section 17556, subdivision (f), as amended by AB 138, is unconstitutional with respect to the language that excludes from reimbursement duties that are "reasonably within the scope" of a ballot measure.[3] The language in Government Code section 17556, subdivision (f), which excludes reimbursement for duties that are "expressly included in" or "necessary to implement" a ballot measure, however, is constitutional and does not violate article XIII B, section 6 of the California Constitution.[4] The court severed the unconstitutional language from the remaining language in Government Code section 17556, subdivision (f), which leaves subdivision (f) to provide as follows:[5]

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:
>
> (f) The statute or executive order imposes duties that are necessary to implement, ~~reasonably within the scope of,~~ or expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

Pursuant to the court's writ of mandate, the Commission is to

> Set aside as null and void the Statement of Decision adopted October 4, 2006 in Proceeding 05-TC-05 (*Mandate Reimbursement Process II*) in its entirety; you are further directed to commence new proceedings in that matter which are consistent with the ruling of this court, and which do not take into consideration any legislative determinations which refer to duties imposed which are "reasonably within the scope of ... a ballot measure" contained in Government Code section 17556, subdivision (f), as amended by section 7, Statutes 2005, chapter 72 (AB 138).

On September 25, 2009, the Commission set aside as null and void the Statement of Decision adopted on October 4, 2006.

Prior Commission Decision in *Mandate Reimbursement Process I*

On April 24, 1986, the Commission adopted the *Mandate Reimbursement Process I* Statement of Decision, determining that Statutes 1975, chapter 486 and Statutes 1984, chapter 1459, which established the reimbursement process for state-mandated programs, was a reimbursable state-mandated program pursuant to article XIII B, section 6 of the

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[3] *CSBA, supra*, 171 Cal.App.4th 1183, 1215-1216.

[4] *Id.* at pages 1205-1210 and 1214-1215.

[5] *Id.* at page 1216.

California Constitution. On November 20, 1986, the Commission adopted parameters and guidelines, determining that the following activities are reimbursable:

> A. Scope of the Mandate
>
> Local agencies and school districts filing successful test claims and reimbursement claims incur State-mandated costs. The purpose of this test claim was to establish that local governments (counties, cities, school districts, special districts, etc.) cannot be made financially whole unless all state mandated costs—both direct and indirect—are reimbursed. Since local costs would not have been incurred for test claims and reimbursement claims but for the implementation of State-imposed mandates, all resulting costs are recoverable.
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> B. Reimbursable Activities—Test Claims
>
> All costs incurred by local agencies and school districts in preparing and presenting successful test claims are reimbursable, including court responses, if an adverse Commission ruling is later reversed. [**Note:** the phrase, "including court responses, if an adverse Commission ruling is later reversed" was amended out in March 1987 and replaced with "including those same costs of an unsuccessful test claim if an adverse Commission ruling is later reversed as a result of a court order."] These activities include, but are not limited to, the following: preparing and presenting test claims, developing parameters and guidelines, collecting cost data, and helping with the drafting of required claiming instructions. The costs of all successful test claims are reimbursable.
>
> Costs that may be reimbursed include the following: salaries and benefits, materials and supplies, consultant and legal costs, transportation, and allowable overhead.
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> C. Reimbursable Activities –Reimbursement Claims
>
> All costs incurred during the period of this claim for the preparation and submission of successful reimbursement claims to the State Controller are recoverable by the local agencies and school districts. Allowable costs include, but are not limited to, the following: salaries and benefits, service and supplies, contracted services, training, and overhead.
>
> Incorrect Reduction Claims are considered to be an element of the reimbursement claim process. Reimbursable activities for successful incorrect reduction claims include the appearance of necessary representatives before the Commission on State Mandates to present the claim, in addition to the reimbursable activities set forth above for successful reimbursement claims.

The parameters and guidelines have been amended 11 times between 1995 and 2005. The 1995 amendment was the result of a provision in the state budget act that limited reimbursement for independent contractor costs for preparation and submission of reimbursement claims. Identical amendments were required by the Budget Acts of 1996 (amended Jan 1997), 1997 (amended Sept. 1997), 1998

(amended Oct. 1998), 1999 (amended Sept. 1999), 2000 (amended Sept. 2000), 2001 (amended Oct. 2001), 2002 (amended Feb. 2003), 2003 (amended Sept. 2003), 2004 (amended Dec. 2004), and 2005 (amended Sept. 2005). In addition to technical amendments, the language in the parameters and guidelines was updated as necessary for consistency with other recently adopted parameters and guidelines.

In 2005, section 17, subdivision (a) of AB 138 directed the Commission to reconsider the Statement of Decision and parameters and guidelines "in light of federal and state statutes enacted and state court decisions rendered since [the test claim statutes] were enacted." On May 25, 2006, the Commission adopted a Statement of Decision on reconsideration finding that the test claim statutes were necessary to implement and/or reasonably within the scope of article XIII B, section 6, which was adopted by the voters through Proposition 4. The Commission also amended the parameters and guidelines to allow local agencies and school districts to be reimbursed for the costs to prepare successful test claims and reimbursement claims that were filed before July 1, 2006, but denied reimbursement for the costs incurred to prepare successful test claims and reimbursement claims after July 1, 2006. The court in *CSBA* found the reconsideration statute was unconstitutional and, thus, the Commission's decision on reconsideration was void. On September 25, 2009, the Commission reinstated the original Statement of Decision and amended the parameters and guidelines pursuant to the court's writ of mandate in *CSBA*.

The *Mandate Reimbursement Process I* mandate was suspended for local agencies in the 2006 through 2008 Budget Acts,[6] but has been deferred for school districts with an appropriation of $1000.[7]

Claimant's Position

The claimant contends that the test claim statutes and regulations constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The claimant argues that the test claim filing pursuant to Government Code section 17553 and section 1183 of the Commission's regulations can no longer be drafted with general pleading language, but must now be drafted with detail showing actual costs incurred by the claimant and an estimate of statewide costs.

With respect to Government Code section 17557 and section 1183.13 of the Commission's regulations, the claimant argues that local agencies and school districts are now required to participate on the issue of a reasonable reimbursement methodology when proposing parameters and guidelines. The claimant is requesting reimbursement for the process of developing and adopting a reasonable reimbursement methodology.

Finally, Government Code section 17564 addresses reimbursement claims for direct and indirect costs and was amended to require that reimbursement claims be filed in the

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[6] Statutes 2006, chapter 48; Statutes 2007, chapter 171; Statutes 2008, chapter 268 (Item 8885-295-0001, Schedule (3)(y)).

[7] Statutes 2005, chapter 38; Statutes 2006, chapter 48; Statutes 2007, chapter 171; Statutes 2008, chapter 268; Statutes 2009, chapter 1 (Item 6110-295-0001, Schedule (4)).

manner prescribed in the claiming instructions (as well as in the parameters and guidelines). Claimant states the following:

> Although claiming instructions are to be "derived from the test claim decision and the parameters and guidelines adopted by the commission" [fn. Omitted], such [claiming] instructions can require specificity not otherwise addressed in the parameters and guidelines or envisioned in the test claim process. Compliance with this section will now increase accounting requirements making claiming a laborious process through the additional research and compilation of materials not otherwise required under prior law.[8]

The claimant also contends that the test claim statutes and regulations result in increased costs mandated by the state and has submitted declarations to that effect from Glen Everroad, Revenue Manager for the claimant, Leonard Kaye of Los Angeles County, and Keith Petersen of SixTen and Associates representing local educational agencies. The claimant states the following:

> [T]his test claimant and other test claimants similarly situated have incurred costs ranging from $1,500 to $38,600 to comply with the new test claim filing requirements. An additional cost of $2,000 to $5,000 may be also incurred per test claim and a one-percent increase over total program costs may also be incurred should the claiming instructions deviate in specificity from the parameters and guidelines as adopted. The average new test claim filings for years prior to 2004 numbered 19, however, under the current shorter statute of limitations, 4 new test claims were filed last year. Based on an expected average between 4 and 19 and at an increased cost of $3,500 to $44,000 per test claim, Test Claimant estimates an annual statewide cost in the range of $14,000 to $836,000. Due to the highly speculative nature of compliance with the claiming instructions, no estimate can be made at this time.[9]

The claimant has also submitted comments with respect to the court's decision in *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183 and contends that Government Code section 17556, subdivision (f), does not apply to deny this claim.

Position of the Department of Finance

The Department of Finance contends that the test claim statutes and regulations do not constitute a reimbursable state-mandated program. The Department argues that the activities claimed to be new were required by prior law and, thus, do not constitute a new program or higher level of service. Moreover, the Department argues that local agencies and school districts are not required to participate in the reasonable reimbursement methodology process. Rather the statute requires the Commission to consult with affected agencies to consider the benefit of the process. Finally, the Department contends

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[8] Test claim, page 6.

[9] Test claim, page 10.

that Government Code section 17556, subdivision (f), applies to deny this claim, arguing that the test claim statutes and regulations are necessary for the implementation of Proposition 4, the ballot initiative that added article XIII B, section 6 to the California Constitution.

> Implicit in the phrases, "to provide a subvention of funds" and "to reimburse," is the directive that the state make payment to local government in the correct amount – no more and no less than the amount necessary to subvene or reimburse – and only when legally required. Therefore under GC Section 17556(f) the test claim regulations and statutes, which ensure test claims are accurate and complete when submitted, are necessary for the implementation of Proposition 4 and are not reimbursable.[10]

Comments of Interested Party, the California School Boards Association (CSBA)

CSBA contends that the test claim statutes and regulations are not necessary to implement article XIII B, section 6 and, thus, Government Code section 17556, subdivision (f), as interpreted by the court in the *CSBA* case, does not apply to deny this claim. CSBA argues the following points:

- "The phrase 'necessary to implement' [in Government Code section 17556, subdivision (f),] must be construed narrowly to apply only to legal requirements that are so clear from the language of the ballot measure that they can reasonably be said to be the act of the voters rather than the act of the Legislature, i.e., those requirements must be the legal and practical equivalent of duties 'expressly included in' the ballot measure... If the required acts reflect Legislative discretion or preference rather than being 'inescapable,' 'compulsory' or 'required' by the language of the ballot measure, they may be 'adopted to implement' that measure, but are not 'necessary' to implement that measure. As a consequence, any new program or higher level of service required by the Legislature that does not meet this standard is properly attributable to "the Legislature" rather than the voters and must be reimbursed under article XIII B, section 6."[11]
- The requirements of the test claim statutes and regulations cannot be considered "necessary to implement" article XIII B, section 6, within the meaning of Government Code section 17556, subdivision (f), since article XIII B, section 6 has been implemented for almost 30 years without the need for the new requirements.[12]
- Pursuant to Evidence Code section 500, the burden of producing sufficient evidence in the record as to whether the duties at issue are "necessary to

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[10] Department of Finance comments dated October 1, 2009, page 2.

[11] CSBA comments dated August 10, 2009, page 3.

[12] *Ibid.*

implement" a ballot measure cannot be placed on the claimant, but should be placed on any person or entity challenging the test claim.[13]

- Since the Commission's decisions must be supported by substantial evidence in the record pursuant to Government Code section 17559, any finding that the test claim duties are "necessary to implement" the ballot measure that added article XIII B, section 6 to the California Constitution must be supported by evidence that demonstrates why these duties are necessary.
- CSBA believes that the analysis of the 17556, subdivision (f), issue is analogous to the analysis for impairment of contracts; i.e., that the state may impair an existing contract when the impairment "is reasonable and necessary to serve an important public purpose." Under this standard, the courts have not deferred to a legislative assessment of reasonableness and necessity because of the state's self-interest in the conclusion. "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." In addition, the impairment cases have made clear that the government has the burden of demonstrating necessity and that mere conclusory statements of necessity are insufficient.[14]

Discussion

The courts have found that article XIII B, section 6, of the California Constitution[15] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[16] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[17]

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity

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[13] *Id.* at page 4.

[14] *Id.* at page 5.

[15] Article XIII B, section 6, subdivision (a), provides: (a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[16] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

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

or task.[18] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[19]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[20] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[21] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[22]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[23]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[24] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[25]

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[18] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[19] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 *(Lucia Mar)*.

[20] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[21] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[22] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

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

[25] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

Issue 1: **Do the test claim statutes and regulations mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?**

A. Test Claim Filings (Gov. Code, § 17553; Tit. 2, Cal. Code Regs., § 1183)

The test claim statute, AB 2856, amended Government Code section 17553, subdivision (b), to add the following to the test claim filing requirements, effective January 1, 2005:

(b) All test claims shall be filed on a form prescribed by the commission and shall contain at least the following elements and documents:

(1) A written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including:

(A) A detailed description of the new activities and costs that arise from the mandate.

(B) A detailed description of existing activities and costs that are modified by the mandate.

(C) The actual increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate.

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed.

(F) Identification of all of the following:

(i) Dedicated state funds appropriated for this program.

(ii) Dedicated federal funds appropriated for this program.

(iii) Other nonlocal funds dedicated for this program.

(iv) The local agency's general purpose funds for this program.

(v) Fee authority to offset the costs of this program.

(G) Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate.

(2) The written narrative shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:

(A) Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

(B) Declarations identifying all local, state, or federal funds, or fee authority that may be sued to offset the increased costs that will be incurred by the

claimant to implement the alleged mandate, including direct and indirect costs.

(C) Declarations describing new activities performed to implement specified provisions of the new statute or executive order alleged to impose a reimbursable state-mandated program. Specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program.

(3)(A) The written narrative shall be supported with copies of all of the following:

(i) The test claim statute that includes the bill number or executive order alleged to impose or impact a mandate.

(ii) Relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate.

(iii) Administrative decisions and court decisions cited in the narrative.

(B) State mandate determinations made by the Board of Control and the Commission on State Mandates and published court decisions on state mandate determinations made by the Commission on State Mandates are exempt from this requirement.

As indicated in the background, at the time Government Code section 17553 was amended by AB 2856, local agencies and school districts were already required by section 1183 of the Commission's regulations to comply with some of the test claim filing requirements listed above. For example, section 1183, subdivision (c)(3)(A),(B) and (C), of the Commission's regulations provided that the test claim include a written narrative that included a "detailed description" of the activities required under prior law or executive order, the new program or higher level of service required under the statute or executive order alleged to impose a mandate, and the increased costs mandated by the state as defined in Government Code sections 17514 and 17556. Thus, the language in Government Code section 17553, subdivision (b)(1)(A) and (B), that requires the written narrative in the test claim to include "a detailed description of the new activities and costs that arise from the mandate" and "a detailed description of existing activities and costs that are modified by the mandate" are not new. Additionally, the requirement in Government Code section 17553, subdivision (b)(3)(A) and (B) - that the written narrative be supported with copies of the test claim statute or executive order, relevant portions of state constitutional provisions, federal statutes, and executive orders that may impact the alleged mandate, and administrative decisions and court decisions - was already required by the Commission's regulations, in section 1183, former subdivision (d)(1) and (2).

However, the remaining elements of a test claim filing in Government Code section 17553, subdivision (b)(1)(C) through (G), and (b)(2), are new. Subdivision (b)(1)(C) through (G) requires that the test claim narrative include:

- The actual increased costs incurred by the claimant during the fiscal year for which the claim is filed

- The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed
- A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.
- Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.
- Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate.

Under prior law, former section 1183, subdivision (c)(5), of the Commission's regulations required only that written narrative include a statement that the actual or estimated costs of the alleged mandate exceeded $1,000. The other bulleted elements in Government Code section 17553, subdivision (b)(1)(C) through (G), were not required.

In addition, Government Code section 17553, subdivision (b)(2) requires that the narrative be supported with the following declarations:

- Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
- Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
- Declarations describing new activities performed to implement specified provisions of the new statute or executive order.

Under prior law, former section 1183, subdivision (c)(4) of the Commission regulations required a test claimant to file a declaration only "*if* the narrative describing the alleged mandate involves more than discussion of statutes, regulations, or legal argument and utilizes assertions or representations of fact" and to authenticate any documentary evidence filed by the claimant. Thus, the declarations in Government Code section 17553, subdivision (b)(2), are new required elements of a test claim filing.

The claimant also pled section 1183 of the Commission's regulations, which was amended in September 2005 to implement AB 2856 to remove the test claim filing requirements and to add language to subdivision (d) of section 1183 to state, "All test claims, or amendments thereto, shall be filed on a form developed by the executive director and shall contain all of the elements and supplemental documents required by the form and statute." Test claims and test claim amendments have always been required to be filed on a form developed by the Commission and, thus, that provision is not new. The requirement that the test claim and any test claim amendment contain all of the elements and documents required by statute refers to the test claim filing requirements in Government Code section 17553.

Thus, the issue is whether Government Code section 17553, subdivision (b)(1)(C) through (G), and (b)(2), and section 1183, subdivision (d) of the Commission's regulations, which identify the following new elements of a test claim filing and a test claim amendment filing, mandate a new program or higher level of service:[26]

- A written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including:
    - The actual increased costs incurred by the claimant during the fiscal year for which the claim is filed
    - The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed
    - A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.
    - Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.
    - Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate.
- The written narrative shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:
    - Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
    - Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
    - Declarations describing new activities performed to implement specified provisions of the new statute or executive order.

As described below, staff finds that Government Code section 17553, subdivision (b)(1)(C) through (G), and (b)(2), and section 1183, subdivision (d) of the Commission's regulations mandate a new program or higher level of service.

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[26] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816; *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835; *Kern High School Dist., supra,* 30 Cal.4th 727, 735; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189-1190.

1. **Local agencies and school districts are not legally compelled by the state to file test claims and comply with the new test claim and test claim amendment filing requirements.**

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[27] In *Kern High School Dist.*, school districts participated in various education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and utilize school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.[28]

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[29] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[30] The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[31] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[32]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which

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[27] *Kern High School Dist., supra*, 30 Cal.4th 727.

[28] *Id.* at page 730.

[29] *Id.* at page 737.

[30] *Ibid.*

[31] *Id.* at page 743.

[32] *Ibid.*

> claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][33]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.[34]

Similarly in this case, state law does not legally compel local agencies or school districts to file test claims. Rather, Government Code sections 17550 et seq., which implement the mandate reimbursement process, provide local agencies and school districts the authority to file test claims to seek reimbursement from the state under article XIII B, section 6. Local agencies and school districts may file claims with the Commission for reimbursement of state-mandated costs. (Gov. Code, §§ 17551, 17552, and 17560.)[35] The first claim filed by a local agency or school district alleging that a statute or an executive order imposes a reimbursable state-mandated program is a "test claim." (Gov. Code, § 17521.) Government Code section 17564 provides that "no claim shall be made pursuant to Sections 17551 ..., unless these claims exceed one thousand dollars ($1,000). However, a county superintendent of schools or county may submit a combined claim on behalf of school districts, direct service districts, or special districts within their county if the combined claim exceeds one thousand dollars ($1,000) even if the individual school district's, direct service district's or special district's claims do not each exceed one thousand dollars ($1,000)."

Thus, the decision to file a test claim or a test claim amendment, and to comply with the new downstream test claim filing requirements, is made at the local level and is not legally compelled by the state.

2. However, the filing of a test claim or test claim amendment in accordance with the new filing requirements is practically compelled and, thus, mandated by the state when a test claim is approved in order for local agencies and school districts to receive their constitutional right to reimbursement under article XIII B, section 6.

For the reasons below, staff finds that local agencies and school districts are practically compelled by the state to file test claims and to comply with the new test claim filing requirements in order to obtain mandate reimbursement under article XIII B, section 6 of the California Constitution for reimbursable state-mandated programs.

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[33] *Id.* at page 731.

[34] *Id.* at pp. 744-745.

[35] See also, *California School Boards Association, supra*, 171 Cal.App.4th 1183, 1190, where the court stated that "Local governments *may* file test claims, which the Commission adjudicates." (Emphasis added.)

In *Kern High School Dist.*, the school districts urged the court to define "state mandate" broadly to include situations where participation in the program is practically compelled; where the absence of a reasonable alternative to participation creates a "de facto" mandate.[36] The court previously applied such a construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the court considered whether state statutes enacted as a result of various federal "incentives" for states to extend unemployment insurance coverage to public employees constituted a reimbursable state-mandated program under article XIII B, section 6. The court in *City of Sacramento* concluded that the costs resulted from a federal mandate because the financial consequences to the state and its residents of failing to participate in the federal plan (full, double unemployment taxation by both state and federal governments) were so onerous and punitive; amounting to "certain and severe federal penalties" including "double taxation" and "other "draconian" measures.[37]

Although the court in *Kern High School Dist.* declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies – the court stated: "In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[38]

In 2009, the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 analyzed practical compulsion with respect to the Peace Officers Procedural Bill of Rights (POBOR) test claim. The issue there was whether school districts, which had the statutory authority to hire peace officers, were mandated by the state to comply with the POBOR statutes. The court clarified that the *Kern* practical compulsion standard means "facing 'certain and severe ... penalties' such as 'double taxation or other draconian consequences' and not merely having to 'adjust to the withdrawal of grant money along with the lifting of program obligations.'"[39] The court recognized that practical compulsion could be found under this standard if exercising the authority to hire peace officers was *the only reasonable means* to carry out their core mandatory functions. The court stated the following:

> Similarly, we do not see the bearing on a necessity or practical compulsion of the districts to hire peace officers, of any or all the various rights to public safety and duties of peace officers to which the Commission points. *If affording those rights or complying with those duties as a practical matter could be accomplished only by exercising the authority given to*

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[36] *Kern High School Dist., supra*, 30 Cal.4th 727, 748.

[37] *City of Sacramento, supra*, 50 Cal.3d 51, 74; *Kern High School Dist., supra,* 30 Cal.4th 727, 750.

[38] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

[39] *Department of Finance, supra*, 170 Cal.App.4th 1355, 1366.

> *hire peace officers, the Commission's argument would be forceful.* However, it is not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply. (Emphasis added.)[40]

The court concluded by stating the following:

> However, the districts in issue are authorized, but not required, to provide their own peace officers and do not have provision of police protection as an essential and basic function. *It is not essential unless there is a showing that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions.* (Emphasis added.)[41]

In this case, the filing of a test claim that complies with the new filing requirements is the ***only*** means to enforce the constitutional right to reimbursement for costs incurred in complying with a reimbursable state-mandated program. Government Code section 17552 states that "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement by the state as required by Section 6 of Article XIII B of the California Constitution." At the time the test claim statute was enacted in 2004, the filing of a test claim was the only procedure established by state law to obtain reimbursement from the state. Test claims that do not comply with the filing requirements are deemed incomplete and returned to the claimant.[42] In such cases, the Commission does not have jurisdiction to determine the reimbursement issue. Without a determination by the Commission on a test claim, there is no exhaustion of administrative remedies and, under such circumstances, local agencies and school districts are barred from seeking relief from the court.[43]

> The Legislature enacted procedures to determine if reimbursable state-mandated costs have been imposed: the local agency files a test claim. If the Commission approves it, it determines the amount to be reimbursed; if the Commission denies it, the agency can seek review by means of a petition for writ of administrative mandate. [Citations omitted.] Generally, test claims must be filed within a year of the effective date of the mandate or of the incursion of costs. (Gov. Code, § 17551, subd. (c); See Cal. Code Regs., tit. 2, § 1183, subd. (c); but see Gov. Code, § 17573 [tolled while procedures for referring the issue to the Legislature is employed].) The failure to exhaust these administrative remedies bars a party from seeking court relief. [Citation omitted.]

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[40] *Id.* at page 1367.

[41] *Id.* at page 1368.

[42] California Code of Regulations, title 2, section 1183, subdivision (g).

[43] *Grossmont Union High School District v. California Department of Education* (2009) 169 Cal.App.4th 869, 896.

> A Commission determination that a cost results from an unfunded state mandated does not necessarily mean the Legislature will pay for it. If the Legislature does not pay, with a favorable Commission determination in hand, an entity may seek a court order that it no longer has to obey the mandate: "If the Legislature refuses to appropriate money to satisfy a mandate found to be reimbursable by the commission, a claimant may bring an action for declaratory relief to enjoin enforcement of the mandate. (Gov. Code, § 17612, subd. (b).)" [Citations omitted.][44]

In *County of Contra Costa*, the court further explained that even if article XIII B, section 6 is self-executing, it does not relieve a party from complying with the procedures established by the Legislature for assertion of the right to reimbursement:

> Counties emphasize that they consider article XIII B, section 6 to be self executing and consequently they may disregard the statutory scheme for claiming reimbursement for state mandated costs. But the fact that a constitutional provision is self executing does not relieve a party from complying with reasonable procedures for assertion of the right. While the Legislature may not unreasonably curtail or impair a right granted by a self executing constitutional provision, it may adopt reasonable procedural requirements for assertion of the right. [Citation omitted.]...Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages. [Citations omitted.][45]

In 2008, the Legislature added sections 17573 et seq. to the Government Code to provide a process for the Department of Finance and local government to jointly request the Legislature to determine that a statute or executive order imposes a reimbursable state-mandated program and to appropriate funds for the reimbursement of the costs for a set term. The legislatively determined mandate process is *not* a quasi-judicial process, but in effect, a negotiated settlement agreement between the Legislature, the Department of Finance, and a local entity. (See, Gov. Code, § 17574.) A local entity can reject the reimbursement deal, and can file a test claim or take over a withdrawn test claim. In addition, if the Legislature amends the reimbursement methodology or the term of the legislatively determined mandate expires, a test claim can be filed. Under this process, the determination of a legislatively determined mandate is *not* binding on the Commission when making its determination of the reimbursement issue on the test claim pursuant to Government Code section 17551. (See, Gov. Code, § 17574.5.) If the

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[44] *Id.* at page 895-896. See also, *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 335-336, where the court held the following: "The remedy for the failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county."

[45] *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75-76.

negotiation fails or the term of the previous agreement expires, and a test claim statute is not suspended or repealed, a test claim has to be filed and determined by the Commission as a party's exhaustion of its administrative remedies in order to enforce the right to reimbursement.

Thus, the filing of a test claim that complies with the new filing requirements is the *only* means to enforce the constitutional right to reimbursement for costs incurred in complying with a reimbursable state-mandated program.

This required procedure to enforce the right to reimbursement, coupled with the purpose of article XIII B, section 6, supports the conclusion that local agencies and school districts are practically compelled by the state to comply with the new filing requirements for test claims and test claim amendments. The California Supreme Court has stated that the purpose of article XIII B, section 6 is to preclude the state from shifting to local agencies and school districts the financial responsibility for carrying out governmental functions because of the "severe" restrictions in articles XIII A and XIII B to raise and spend tax revenue:

> Through the adoption of Proposition 13 in 1978, the voters added article XIII A to the California Constitution, which "imposes a limit on the power of state and local governments to adopt and levy taxes..." [Citations omitted.] The next year, the voters added article XIII B to the Constitution, which "impose[s] a complementary limit on the rate of growth in governmental spending." [Citations omitted.] These two constitutional articles "work in tandem, together restricting California governments' power to both levy and to spend for public purposes." [Citation omitted.] Their goals are "to protect residents from excessive taxation and government spending ..." [Citation omitted.]
>
> California Constitution, article XIII B includes section 6, which is the constitutional provision at issue here... Section 6 recognizes that articles XIII A and XIII B *severely* restrict the taxing and spending powers of local governments. [Citation omitted.] Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill-equipped" to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose. [Citations omitted.] With certain exceptions, section 6 "essentially" requires the state "to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies." [Citations omitted.][46]

When the state enacts a reimbursable state-mandated program, but does not fund the program, Government Code sections 17500 et seq. place the burden on local agencies and school districts to initiate the mandate reimbursement process by filing a test claim with the Commission. Under the process, the local agency or school district claimant has the

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[46] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 80-81. (Emphasis added.)

burden of proof to establish a reimbursable state-mandated program.[47] Thus, even though local agencies and school districts have the constitutional right to reimbursement from the state when the state mandates a new program or higher level of service, the cost to perform the new mandated activities *and* the cost to prove and enforce the constitutional right to reimbursement for the costs of the program have been shifted to local agencies and school districts, which are "ill-equipped" to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose. Thus, the purpose of article XIII B, section 6 is violated when local agencies and school districts incur the cost to file a test claim in cases when the state has imposed a reimbursable state-mandated program.[48]

Accordingly, staff finds that complying with the new test claim and test claim amendment filing requirements in Government Code section 17553, subdivision (b)(1)(C) through (G), and (b)(2), and section 1183, subdivision (d) of the Commission's regulations, imposes a state-mandated program on local agencies and school districts when the test claim is approved.

3. The new test claim and test claim amendment filing requirements constitute a new program or higher level of service.

The courts have defined the type of "program" subject to article XIII B, section 6 of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy and does not apply generally to all residents and entities in the state.[49] Only one of these findings is necessary to trigger reimbursement.[50] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[51]

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[47] By statute, only the local agency or school district may bring a claim, and the local entity must present and prove its claim that it is entitled to reimbursement. (Gov. Code, §§ 17521, 17561.)

[48] Staff notes that the purpose of article XIII B, section 6, would *not* be violated for test claims that are denied because the statutes or executive orders pled do not constitute a reimbursable state-mandated program. Under these circumstances, the state has not shifted the financial responsibility to local government to perform a governmental program and seek the costs for reimbursement. Rather, the filing of a test claim under these circumstances is truly a choice of local government and is not mandated by the state.

[49] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[50] *Carmel Valley Fire Protection District v. State of California* (1987)190 Cal.App.3d 521, 537.

[51] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

As indicated above, Government Code section 17553, subdivision (b)(1)(C) through (G), and (b)(2), and section 1183, subdivision (d) of the Commission's regulations, impose the following new test claim and test claim amendment filing requirements when compared to prior law:

- A written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including:
    - The actual increased costs incurred by the claimant during the fiscal year for which the claim is filed.
    - The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.
    - A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.
    - Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.
    - Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate.
- The written narrative shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:
    - Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
    - Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
    - Declarations describing new activities performed to implement specified provisions of the new statute or executive order.

These requirements are uniquely imposed on local agencies and school districts and do not generally apply to all residents and entities in the state.[52] The requirements also provide a service to the public to implement article XIII B, section 6 and ensure that the

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[52] See, *Kinlaw, supra*, 54 Cal.3d 326, 334, where the court held as follows: "The right involved [in article XIII B, section 6], however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services." See also, Government Code sections 17518, 17519, and 17520, which define "local agency," "school district," and "special district" claimants.

tax and spend provisions of the Constitution, which were adopted by the voters, are properly carried out.

Accordingly, staff finds that the test claim and test claim amendment filing requirements imposed by Government Code section 17553, subdivision (b)(1)(C) through (G), and (b)(2), and section 1183, subdivision (d) of the Commission's regulations mandate a new program or higher level of service.

B. Reasonable Reimbursement Methodology (Gov. Code, § 17557; Cal. Code Regs., tit. 2, § 1183.13)

The claimant is also requesting reimbursement for the process of developing and adopting a reasonable reimbursement methodology when submitting parameters and guidelines. The claimant pled Government Code section 17557, as amended by A.B. 2856, which added subdivision (f) as follows:

> In adopting parameters and guidelines, the commission shall consult with the Department of Finance, the affected state agency, the Controller, the fiscal and policy committees of the Assembly and Senate, the Legislative Analyst, and the claimants to consider a reasonable reimbursement methodology that balances accuracy with simplicity.

The claimant also pled section 1183.13 of the Commission's regulations, which was added effective September 6, 2005, to address the reasonable reimbursement methodology as follows:

> (a) If the claimant indicates in the proposed parameters and guidelines or comments that a reasonable reimbursable methodology, as defined in Government Code section 17518.5, should be considered; or if the Department of Finance, Office of the State Controller, any affected state agency, claimant, or interested party proposes consideration of a reasonable reimbursement methodology, commission staff shall immediately schedule an informal conference to discuss the methodology.
>
> (b) Proposed reasonable reimbursement methodologies, as described in Government Code section 17518.5, shall include any documentation or assumptions relied upon to develop the proposed methodology. Proposals shall be submitted to the commission within sixty (60) days following the informal conference.
>
> (c) Claimants, state agencies, and interested parties shall submit an original and two (2) copies of a proposed reasonable reimbursement methodology, and shall simultaneously serve a copy on the other parties and interested parties on the mailing list described in Section 1181.2 of these regulations.
>
> (d) Commission staff shall notify all recipients that they shall have the opportunity to review and provide written comments or recommendations concerning the proposed reasonable reimbursement methodology within fifteen (15) days of service.

(e) Claimants, state agencies, and interested parties shall submit an original and two (2) copies of written responses to commission staff and shall simultaneously serve a copy on the other parties and interested parties on the mailing list described in Section 1181.2 of these regulations.

(f) Within fifteen (15) days of service of the written comments prepared by other parties and interested parties, the party that proposed the reasonable reimbursement methodology may submit an original and two (2) copies of written rebuttals to commission staff, and shall simultaneously serve a copy on the other parties and interested parties on the mailing list described in Section 1181.2 of these regulations.[53]

Although not pled in this claim, A.B. 2856 also added Government Code section 17518.5 to define the elements of a "reasonable reimbursement methodology" and to specify that the claimant, the state, or any interested party may develop a reasonable reimbursement methodology. From January 1, 2005 (the effective date of A.B. 2856) until December 31, 2008, Government Code section 17518.5 stated the following:

(a) "Reasonable reimbursement methodology" means a formula for reimbursing local agency and school district costs mandated by the state that meets the following conditions:

(1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-effective manner.

(2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

(b) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state, rather than detailed documentation of actual local costs. In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

(c) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The Controller.

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[53] In 2007, the Commission amended section 1183.13 of the regulations to implement Statutes 2007, chapter 329 (AB 1222). (Reg. 2007, No. 37.) Section 1183.13, as amended in 2007 has not been pled in this test claim.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.

Effective January 1, 2008, Government Code section 17518.5 was amended by Statutes 2007, chapter 329 (AB 1222) to make it easier to satisfy the elements of a reasonable reimbursement methodology. Instead of having to show that the proposed reasonable reimbursement methodology fully offsets projected costs to implement the mandate in a cost-efficient manner for 50 percent or more of the eligible local agency and school district claimants, Government Code section 17518.5, subdivisions (b) and (c), now provide that the reasonable reimbursement methodology shall be based on cost information from a representative sample of eligible claimants, information provided by associations of local government, or other projections of local costs, and shall consider the variation of costs among local government to implement the mandate in a cost-efficient manner.

Staff finds that Government Code section 17557, as amended by A.B. 2856, and section 1183.13 of the Commission's regulations, as added in 2005, do not mandate a new program or higher level of service. Although the successful test claimant has been required by Government Code section 17557, subdivision (a), to submit parameters and guidelines since 1984 ("the successful test claimants shall submit proposed parameters and guidelines within 30 days of adoption of a statement of decision on a test claim ..."), the test claimant is not legally compelled by the state to develop and propose a reasonable reimbursement methodology as part of the submittal.

Moreover, local agencies and school districts are not practically compelled by the state to develop and submit a proposed reasonable reimbursement methodology in the parameters and guidelines. A reasonable reimbursement methodology is *not* the only means to enforce the constitutional right to reimbursement for costs incurred in complying with a reimbursable state-mandated program.[54] Rather, reimbursement can be obtained by developing and submitting parameters and guideline based on actual costs. The courts have recognized the right to reimbursement for "increased actual expenditures."[55]

In addition, the costs for developing parameters and guidelines are already reimbursable in *Mandate Reimbursement Process I.* The parameters and guidelines for *Mandate Reimbursement Process I* state the following:

> A. Reimbursable Activities—Test Claims
>
> All costs incurred by local agencies and school districts in preparing and presenting successful test claims are reimbursable, including court responses, if an adverse Commission ruling is later reversed. [**Note:** the phrase, "including court responses, if an adverse Commission ruling is later reversed" was amended out in March 1987 and replaced with

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[54] See, *Department of Finance, supra,* 170 Cal.App.4th at pages 1367-1368.

[55] *County of Sonoma v. Commission on State Mandates* (2000)84 Cal.App.4th 1264, 1284.

> "including those same costs of an unsuccessful test claim if an adverse Commission ruling is later reversed as a result of a court order."] These activities include, but are not limited to, the following: preparing and presenting test claims, *developing parameters and guidelines*, collecting cost data, and helping with the drafting of required claiming instructions. The costs of all successful test claims are reimbursable.
>
> Costs that may be reimbursed include the following: salaries and benefits, materials and supplies, consultant and legal costs, transportation, and allowable overhead. (Emphasis added.)

When *Mandate Reimbursement Process I* was adopted, the Commission had the authority to adopt parameters and guidelines with an allocation formula or uniform cost allowance. Former Government Code section 17557 stated the following:

> In adopting parameters and guidelines, the commission may adopt an allocation formula or uniform allowance which would provide for reimbursement of each local agency or school district of a specified amount each year.

Thus, staff finds that Government Code section 17557, as amended by AB 2856, and section 1183.13 of the Commission's regulations, as added in 2005, do not mandate a new program or higher level of service.

C. Filing of reimbursement claims that comply with the State Controller's claiming instructions for direct and indirect costs

The test claim statute (Stats. 2004, ch. 890, AB 2856) also amended Government Code section 17564 to add the underlined text as follows:

> (b) Claims for direct and indirect costs filed pursuant to Section 17561 shall be filed in the manner prescribed in the parameters and guidelines <u>and claiming instructions.</u>

With respect to Government Code section 17564, the claimant states the following:

> Although claiming instructions are to be "derived from the test claim decision and the parameters and guidelines adopted by the commission" [fn. Omitted], such [claiming] instructions can require specificity not otherwise addressed in the parameters and guidelines or envisioned in the test claim process. Compliance with this section will now increase accounting requirements making claiming a laborious process through the additional research and compilation of materials not otherwise required under prior law.[56]

Staff finds that the language added to Government Code section 17564 does not mandate a new program or higher level of service. Local agencies and school districts had to file reimbursement claims pursuant to the claiming instructions before the enactment of the test claim statute in 2005.

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[56] Test claim, page 6.

The enactment of new statutory language does not always mean that the Legislature intended to change the law, or to increase the level of service provided by local agencies and school districts. The courts have recognized that changes in statutory language can be intended to clarify the law, rather than to change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][57]

The law as it existed in 2004 required the State Controller's Office to issue claiming instructions for each mandate that requires state reimbursement no later than 60 days after receiving the adopted parameters and guidelines "to assist local agencies and school districts in claiming costs to be reimbursed."[58] Issuance of the claiming instructions provided notice of the right of local agencies and school districts to file reimbursement claims. Local agencies and school districts had 120 days from the issuance date of the claiming instructions to file reimbursement claims for the initial fiscal year costs. When the Commission was requested to review claiming instructions, "each local agency or school district to which the mandate is applicable shall submit a claim for reimbursement within 120 days after the commission reviews the claiming instructions for reimbursement issued by the Controller."[59] If the Commission amended parameters and guidelines, the Controller was required to issue revised claiming instructions. If the revised claiming instructions were issued by the Controller's Office at the time annual reimbursement claims were due, a local agency or school district filing an annual reimbursement claim had 120 days following the issuance date of the revised claiming instructions to file a claim.[60]

Thus, under prior law, reimbursement claims had to be filed pursuant to the instructions provided in the claiming instructions. Any other interpretation of prior law would make the language in Government Code sections 17558, 17560, and 17561 (that claiming instructions must be issued 120 days before reimbursement claims are to be filed to assist local agencies and school districts in filing their claims) meaningless and unnecessary. "Courts must avoid statutory constructions that render provisions unnecessary."[61] Thus, prior law imposed the same requirement as the test claim statute.

Accordingly, the amendment to Government Code section 17564 does not mandate a new program or higher level of service, but merely clarifies existing law.

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[57] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[58] Government Code section 17558, subdivision (a), as last amended before 2004 by Statutes 1996, chapter 45.

[59] Government Codes section 17561, subdivision (d)(1)(A) and (B), as last amended before 2004 by Statutes 2002, chapter 1124.

[60] Government Code section 17560, subdivision (c), as last amended before 2004 by Statutes 1998, chapter 681.

[61] *Stone v. Davis* (2007) 148 Cal.App.4th 596, 602.

Issue 2 Do Government Code section 17553, subdivision (b)(1)(C) through (G) and (b)(2), and section 1183, subdivision (d), of the Commission's regulations impose costs mandated by the state within the meaning of Government Code section 17514 and 17556?

As indicated above, Government Code section 17553, subdivision (b)(1)(C) through (G) and (b)(2), and section 1183, subdivision (d), of the Commission's regulations mandate a new program or higher level of service on local agencies and school districts as follows:

1. All test claims and test claim amendments shall include a written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including:
   a. The actual increased costs incurred by the claimant during the fiscal year for which the claim is filed.
   b. The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.
   c. A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.
   d. Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.
   e. Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate. (Gov. Code, § 17553, subd. (b)(1)(C) through (G); Cal. Code Regs., tit. 2, § 1183, subd. (d).)
2. The written narrative in the test claim or test claim amendment shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:
   a. Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.
   b. Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.
   c. Declarations describing new activities performed to implement specified provisions of the new statute or executive order. (Gov. Code, § 17553, subd. (b)(2); Cal. Code Regs., tit. 2, § 1183, subd. (d).)

These activities are mandated only when a test claim is approved.

In order for these activities to be reimbursable, they must result in costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any

increased costs a local agency or school district is required to incur as a result of any statute or executive order that mandates a new program or higher level of service. In this case, the claimant has alleged actual increased costs ranging from $1,500 to $38,600 to comply with the new test claim filing requirements, and estimates annual increased costs between $3,500 and $44,000 per test claim.

Pursuant to Government Code section 17556, subdivision (f), however, the Commission shall not find costs mandated by the state if the duties are expressly included or necessary to implement a ballot measure approved by the voters. In this case, Government Code section 17553, and sections 1183 and 1183.13 of the Commission's regulations, were enacted to implement article XIII B, section 6.[62] Article XIII B, section 6 of the California Constitution was adopted by the voters through Proposition 4 on November 6, 1979, to provide as follows:

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

Article XIII B, section 6 was amended by the voters on November 3, 2004, through Proposition 1A to designate the original language as subdivision (a) and to add subdivisions (b) and (c) as follows:

> (b) (1) Except as provided in paragraph (2), for the 2005-06 fiscal year and every subsequent fiscal year, for a mandate for which the costs of a local government claimant have been determined in a preceding fiscal year to be payable by the State pursuant to law, the Legislature shall either appropriate, in the annual Budget Act, the full payable amount that has not been previously paid, or suspend the operation of the mandate for the fiscal year for which the annual Budget Act is applicable in a manner prescribed by law.
>
> (2) Payable claims for costs incurred prior to the 2004-05 fiscal year that have not been paid prior to the 2005-06 fiscal year may be paid over a term of years, as prescribed by law.

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[62] See Government Code section 17552, which states that "This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement by the state as required by Section 6 of Article XIII B of the California Constitution."

(3) Ad valorem property tax revenues shall not be used to reimburse a local government for the costs of a new program or higher level of service

(4) This subdivision applies to a mandate only as it affects a city, county, city and county, or special district.

(5) This subdivision shall not apply to a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section.

(c) A mandated new program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

Based on the plain language of article XIII B, section 6, the duties imposed in Government Code section 17553 and section 1183, subdivision (d), of the Commission's regulations are not expressly included in the ballot measures adopted by the voters.

Thus, the issue is whether the duties imposed by Government Code section 17553 and section 1183, subdivision (d), of the Commission's regulations are necessary to implement the ballot measures adopted by the voters in Propositions 4 and 1A within the meaning of Government Code section 17556, subdivision (f). For the reasons below, staff finds that Government Code section 17556, subdivision (f), does not apply to deny this claim.

A. The court's interpretation of Government Code section 17556, subdivision (f)

Government Code section 17556, subdivision (f), requires the Commission to not find costs mandated by the state if the test claim statute or executive order imposes duties that are necessary to implement a ballot measure approved by the voters in a statewide or local election. The comments filed by the claimant, CSBA, and the Department of Finance want the Commission to focus on the word "necessary" when interpreting this provision. Using their definitions, however, they come to different conclusions. The claimant urges the Commission to define "necessary to implement" as "indispensable or an absolute physical necessity," thus arguing that the duties imposed by the test claim statutes and regulations are not indispensable to article XIII B, section 6. [63] CSBA similarly argues that:

> The phrase 'necessary to implement' [in Government Code section 17556, subdivision (f),] must be construed narrowly to apply only to legal requirements that are so clear from the language of the ballot measure that they can reasonably be said to be the act of the voters rather than the act of the Legislature, i.e., those requirements must be the legal and practical

[63] Claimant's comments on remand filed August 6, 2009, page 5.

> equivalent of duties 'expressly included in' the ballot measure... If the required acts reflect Legislative discretion or preference rather than being 'inescapable,' 'compulsory' or 'required' by the language of the ballot measure, they may be 'adopted to implement' that measure, but are not 'necessary' to implement that measure.[64]

CSBA urges the Commission to find that the duties imposed by the test claim statutes and regulations are not necessary to implement article XIII B, section 6.

The Department of Finance argues that the test claim statutes and regulations are necessary for the implementation of Proposition 4, the ballot initiative that added article XIII B, section 6 to the California Constitution in order to ensure accurate test claims and reimbursement in the correct amount and, thus, the claim should be denied:

> Implicit in the phrases, "to provide a subvention of funds" and "to reimburse," is the directive that the state make payment to local government in the correct amount – no more and no less than the amount necessary to subvene or reimburse – and only when legally required. Therefore under GC Section 17556(f) the test claim regulations and statutes, which ensure test claims are accurate and complete when submitted, are necessary for the implementation of Proposition 4 and are not reimbursable.[65]

The parties, however, are ignoring the court's interpretation of Government Code section 17556, subdivision (f), and direction to the Commission in the *CSBA* case. On page 1217 of the *CSBA* case, the court held that the Commission is required to consider the holding in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859 to determine whether costs are reimbursable for ballot measure mandates.

> In *San Diego Unified*, the court considered whether costs resulting from statutes that were not adopted to implement federal due process requirements were reimbursable under article XIII B, section 6, and Government Code section 17556, subdivision (c). The court determined that "the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections." (*San Diego Unified, supra*, 33 Cal.4th at p. 889, ...) It also determined that the statutes, "viewed singly or cumulatively, did not significantly increase the cost of compliance with the federal mandate." (*Ibid.*) The court concluded that, "for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate." (*Id.* at p. 890 ...)

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[64] Comments filed by CSBA filed August 10, 2009, page 3.

[65] Department of Finance comments dated October 1, 2009, page 2.

> There is no reason not to apply this practical holding similarly to ballot measure mandates. Thus, the Commission ***must consider*** the holding in *San Diego Unified* in determining whether costs are reimbursable for ballot measure mandates. (Emphasis added.)

The issue in *San Diego Unified School Dist.* was whether procedural due process activities imposed by the test claim statute were reimbursable when a school district sought to expel a student. The court recognized that federal due process law requires school districts to comply with federal procedural steps, such as notice and a hearing, to safeguard the rights of a student when the student is subject to an expulsion from school. The Education Code statute pled in the test claim mandated procedures on school districts that complied with federal due process requirements. The test claim statute also required school districts to comply with additional procedures that were not expressly required by federal law; i.e. "primarily various notice, right of inspection, and recording rules."[66] With respect to expulsions that are not required by state law, but are undertaken at the discretion of the school district, the claimant was seeking reimbursement, not for the procedures mandated by federal law, but for the procedures imposed by the test claim statute that exceeded federal law.[67] The court held that all procedures set forth in the test claim statute, including those that exceed federal law, are considered to have been adopted to implement a federal due process mandate and, thus, the costs were not reimbursable under article XIII B, section 6 of the California Constitution and Government Code section 17556, subdivision (c).[68] The court held that for purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an applicable federal law – and whose costs are, in context, de minimis – should be treated as part and parcel of the underlying federal mandate."[69]

In reaching this conclusion, the court relied on the holding in *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 and applied the reasoning in that case as follows:

> In this regard, we find the decision in *County of Los Angeles II, supra*, ... to be instructive. That case concerned Penal Code section 987.9, which requires counties to provide indigent criminal defendants with defense funds for ancillary investigation services related to capital trials and certain other trials, and further provides related procedural protections – namely, the confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request. The county in that case asserted that funds expended under the statute constituted reimbursable state mandates. The Court of Appeal disagreed, finding instead that the Penal Code section merely implements the requirements of federal constitutional law, and that

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[66] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 873, fn. 11, and 890.

[67] *Id.* at page 885.

[68] *Id.* at page 888.

[69] *Id.* at page 890.

> "even in the absence of section 987.9, ... counties would be responsible for providing ancillary services under the constitutional guarantees of due process ... and under the Sixth Amendment." (32 Cal.App.4th at p. 815 ...) Moreover, the Court of Appeal concluded, the procedural protections that the Legislature had built into the statute – requirements of confidentiality of a request for funds, the right to have the request ruled upon by a judge other than the trial judge, and the right to an in camera hearing on the request – were merely incidental to the federal rights codified by the statute, and their "financial impact" was de minimis. (*Id.* at p. 817 ...) Accordingly, the Court of Appeal concluded, the Penal Code section, in its entirety – that is, even those incidental aspects of the statute that articulated specific procedures, not expressly set forth in federal law, for the filing and resolution of requests for funds – constituted an implementation of federal law, and hence those costs were nonreimbursable under article XIII B, section 6.
>
> We conclude that the same reasoning applies in the present setting, concerning the District's request for reimbursement for procedural hearing costs triggered by its discretionary decision to seek expulsion. As in *County of Los Angeles II*, ..., the initial discretionary decision ... in turn triggers a federal constitutional mandate ... In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they did not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *Count of Los Angeles II* concluded, that for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added costs, should be viewed as part and parcel of the underlying federal mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[70]

Thus, under facts and ruling in the *San Diego Unified* and *County of Los Angeles II* cases, the local agencies and school districts are mandated by federal law to perform a duty. The Legislature then passes a law setting forth procedures to comply with the federal law, and in the process, requires additional procedural duties that are intended to implement the federal law, but are not expressly required by federal law. Absent the state law, however, local agencies and school districts are still required to comply with the underlying federal mandate. Under these circumstances, the excess procedural requirements constitute an implementation of federal law and, therefore, not reimbursable as a state mandated program. "[F]or purposes of ruling upon a request for reimbursement, challenged state rules or procedures that are intended to implement an

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[70] *Id.* at pages 888-889.

applicable federal law – and whose costs are, in context, de minimis- should be treated as part and parcel of the underlying federal mandate."[71]

The court in *CSBA* has directed the Commission to apply the holding in *San Diego Unified* to interpret the "necessary to implement a ballot measure" language in Government Code section 17556, subdivision (f).[72] Accordingly, using the rule articulated by the court in the *San Diego Unified* case, duties imposed by a test claim statute or executive order are necessary to implement a ballot measure approved by the voters in a statewide or local election pursuant to Government Code section 17556, subdivision (f), when:

- A local agency and/or school district is mandated by a ballot measure to perform a duty.
- The Legislature or any state agency enacts a statute or executive order intended to implement the ballot measure mandate and also requires additional duties that are not expressly included in the ballot measure.
- Absent the statute or executive order enacted by the Legislature or any state agency, the local agency and/or school district is still required to comply with the duty mandated by the ballot measure.
- The requirements imposed by the statute or executive order that exceed the ballot measure mandate are not reimbursable, but are considered part and parcel to the underlying ballot measure mandate, when the excess requirements are intended to implement (i.e., are incidental to) the ballot measure mandate, and whose costs are, in context, de minimis.

B. Government Code section 17556, subdivision (f), does not apply here

Government Code section 17556, subdivision (f), does not apply here. The facts and circumstances in this case are distinguishable from those in the *San Diego Unified* and *County of Los Angeles II* cases.

The cases in *San Diego Unified* and *County of Los Angeles II* both present facts where local agencies and school districts were already required by existing federal law to perform a duty. In this case, however, there is no underlying ballot measure mandate imposed on local agencies or school districts. The ballot measure initiatives that added and amended article XIII B, section 6, do not impose any duties on local agencies or school districts. Article XIII B, section 6 imposes a duty solely on the state. Therefore, the duties imposed by Government Code section 17553 and section 1183 of the Commission's regulations are not incidental or part and parcel to a ballot measure mandate. Absent Government Code sections 17500 et seq., and the test claim statute and regulations, local agencies and school districts would still have a right to reimbursement, but would not have to comply with the administrative process established by the Legislature for the reimbursement of state-mandated costs.

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[71] *Id.* at page 890.

[72] *CSBA, supra*, 171 Cal.App.4th at page 1217.

Accordingly, staff finds that Government Code section 17556, subdivision (f), does not apply in this case. Staff further finds, based on the declarations in the record, that local agencies and school districts have incurred costs mandated by the state pursuant to Government Code section 17514 to comply with the test claim statute and regulations.

CONCLUSION

For the reasons stated above, Government Code section 17553, subdivision (b)(1)(C) through (G) and (b)(2) as amended by Statutes 2004, chapter 890, and section 1183, subdivision (d), of the Commission's regulations, as adopted in 2005, constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities only:

1. All test claims and test claim amendments shall include a written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate, including

    a. The actual increased costs incurred by the claimant during the fiscal year for which the claim is filed.

    b. The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.

    c. A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim is filed.

    d. Identification of dedicated state funds appropriated for the program; dedicated federal funds appropriated for the program; other nonlocal agency funds dedicated to the program; the local agency's general purpose funds for the program; and fee authority to offset the costs of the program.

    e. Identification of prior mandate determinations made by the Board of Control or the Commission that may be related to the alleged mandate. (Gov. Code, § 17553, subd. (b)(1)(C) through (G), as amended by Stats. 2004, ch. 890; Cal. Code Regs., tit. 2, § 1183, subd. (d), Register 2005, No. 36, effective September 6, 2005.)

2. The written narrative in the test claim or test claim amendment shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:

    a. Declarations of actual or estimated increased costs that will be incurred by the claimant to implement the alleged mandate.

    b. Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

c. Declarations describing new activities performed to implement specified provisions of the new statute or executive order. (Gov. Code, § 17553, subd. (b)(2), as amended by Stats. 2004, ch. 890; Cal. Code Regs., tit. 2, § 1183, subd. (d), Register 2005, No. 36, effective September 6, 2005.)

These activities are reimbursable only when a test claim is approved.

Staff further finds that Government Code sections 17557 and 17564, as amended by Statutes 2004, chapter 890; section 1183.13 of the Commission's regulations (Register 2005, No. 36, effective September 6, 2005); and all other allegations raised by the claimant do not constitute a reimbursable state-mandated program.

Staff Recommendation

Staff recommends that the Commission adopt this analysis and approve the test claim accordingly.