Hearing Date: January 30, 2009
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ITEM 4

TEST CLAIM
FINAL STAFF ANALYSIS

Education Code Sections 17387, 17388, 17389, 17390, 17391

Statutes 1982, Chapter 689, Statutes 1984, Chapter 584, Statutes 1986, Chapter 1124, Statutes 1987, Chapter 655, Statutes 1996, Chapter 277

Surplus Property Advisory Committees
02-TC-36

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

This test claim alleges reimbursable state-mandated costs for school districts to appoint, supervise, and consult with a surplus property advisory committee to assist in the adoption and implementation of policies and procedures governing the use or disposition of excess school buildings or space in school buildings.

Staff finds that the reasoning of the Court of Appeal in *City of Merced v. State of California*,[1] and of the Supreme Court in *Kern High School District*,[2] applies to this claim, so it is not a state mandate within the meaning of article XIII B, section 6 of the California Constitution. That is, because there is no legal or practical compulsion for school district governing boards to designate as surplus or transfer (sell, lease or rent) school district property, staff finds that there is no state mandate to perform the activities in the test claim statutes.

As an alternative ground for denial, staff finds that Education Code section 17388 is not a new program or higher level of service. Claimant pled the test claim statutes beginning with Statutes 1982, chapter 689. The advisory committee's formation, however, was first enacted in 1976 (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.). Although this program was not included in the 1976 reorganization of the Education Code (Stats. 1976, ch. 1010), it was enacted again in 1977 (Stats. 1977, ch. 36, § 448, Ed. Code, § 39384 et seq.) and amended in 1980 (Stats. 1980, ch. 1354). Because section 17388 provided for the formation of the advisory committee before the 1982 test claim statute, staff finds that section 17388 is not a new program or higher level of service.

Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.

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[1] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

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

STAFF ANALYSIS

Claimants

Clovis Unified School District

Chronology

6/25/03	Claimant Clovis Unified School District files test claim
7/25/03	Department of Finance files comments on the test claim
8/15/03	Claimant files rebuttal comments on the test claim
7/29/08	Commission staff issues draft staff analysis
8/28/08	Department of Finance files comments on the draft staff analysis
9/12/08	Commission staff issues final staff analysis and proposed Statement of Decision
9/23/08	Claimant files request to postpone hearing
10/30/08	Claimant files authorization for new claimant representative Art Palkowitz
12/12/08	Commission staff re-issues final staff analysis and proposed Statement of Decision
1/16/09	Commission staff re-issues final staff analysis and proposed Statement of Decision (no changes from 12/12/08 re-issue)

Background

This test claim alleges a state-mandate for school districts to appoint, supervise, and consult with a surplus property advisory committee to assist in the adoption and implementation of policies and procedures governing the use or disposition of excess school property.

Test Claim Statutes

The intent behind the test claim statutes is expressed by the Legislature as follows:

> It is the intent of the Legislature that leases entered into pursuant to this chapter provide for community involvement by attendance area at the district level. This community involvement should facilitate making the best possible judgments about the use of excess school facilities in each individual situation.
>
> It is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict and assuring building use that is compatible with the community's needs and desires. (Ed. Code, § 17387.)[3]

[3] The original legislative intent language (Stats. 1976, ch. 606 & Stats. 1977, ch. 36)) stated: "(a) It is the intent of the Legislature that school districts be authorized under specified procedures to make vacant classrooms in operating schools available for rent or lease to other school districts, educational agencies, governmental units, nonprofit organizations, community agencies, professional agencies, commercial and noncommercial firms, corporations, partnerships,

The original 1976 legislation (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.),[4] in addition to creating the advisory committee, repealed a prohibition against joint occupancy of school buildings used for classroom purposes. The intent of the bill was to help districts offset revenue losses due to declining enrollment. The revenue from renting unused facilities could be used to supplement the school districts' regular educational program.[5]

The test claim statute that creates the advisory committee has changed very little since its first enactment.[6] It authorizes the school district to appoint a district advisory committee to help develop "districtwide policies and procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes." The school district is required to appoint the advisory committee "prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days."[7]

The advisory committee has seven to 11 members that represent the ethnic, age-group, and socioeconomic composition of the district, as well as the business community, landowners or

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businesses and individuals. This will place students in close relationship to the world of work, thus facilitating career education opportunities.

(b) It is the intent of the Legislature that priority in leasing or renting vacant classroom space be given to educational agencies, particularly those conducting special education programs. It is the intent of the Legislature that such procedures provide for community involvement by attendance area and at the district level. This community involvement should facilitate making the best possible judgments about the use of excess school facilities in each individual situation. It is the intent of the Legislature to have the community involved before decisions are made about school closure or the use of surplus space, thus avoiding community conflict and assuring building use that is compatible with the community's needs and desires." (Former Ed. Code § 39384, Stats. 1977, ch. 36, § 448.)

[4] The test claim statutes were first enacted in 1976 (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.) but were not included in the 1976 reorganization of the Education Code (Stats. 1976, ch. 1010). They were enacted again in 1977 (Stats. 1977, ch. 36, § 448, Ed. Code, § 39384 et seq.) and were amended in 1980 (Stats. 1980, ch. 1354).

As pled by claimant, the test claim statutes were moved (to former §§ 39295 et seq.) and amended again in 1982 (Stats. 1982, ch. 689) and amended again by Statutes 1984, chapter 584, Statutes 1986, chapter 1124, and Statutes 1987, chapter 655. They were moved to their present location (§§ 17387 et seq.) in 1996 (Stats. 1996, ch. 277).

[5] Assembly Office of Research, Analysis of Assembly Bill No. 2882 (1975-1976 Reg. Sess.) as amended June 9, 1976 (concurrence in Senate amendments).

[6] Education Code section 17388. The word "sale" was amended out of the 1980 version (Stats. 1980, ch. 1354, former Ed. Code, § 39384 et seq.) but was amended back in by Statutes 1982, chapter 689.

[7] *Ibid.*

renters, teachers, administrators, parents, and persons with expertise in specified areas (§ 17389).[8]

According to section 17390, the advisory committee shall perform the following duties:

> (a) Review the projected school enrollment and other data as provided by the district to determine the amount of surplus space and real property.
> (b) Establish a priority list of use of surplus space and real property that will be acceptable to the community.
> (c) Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Section 17458.
> (d) Make a final determination of limits of tolerance of use of space and real property.
> (e) Forward to the district governing board a report recommending uses of surplus space and real property.

Section 17391 states that the "governing board may elect not to appoint an advisory committee in the case of a lease or rental to a private educational institution for the purpose of offering summer school in a facility of the district."

The Advisory Committee in other Statutes

In addition to appointment of the advisory committee for the purpose stated in the test claim statutes ("prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days," § 17388) the committee may be used in acquiring property. Section 17211 provides:

> Prior to commencing the acquisition of real property for a new schoolsite or an addition to an existing schoolsite, the governing board of a school district shall evaluate the property at a public hearing using the site selection standards established by the State Department of Education pursuant to subdivision (b) of Section 17251. The governing board may direct the **district's advisory committee established pursuant to Section 17388** to evaluate the property pursuant to those site selection standards and to report its findings to the governing board at the public hearing. [Emphasis added.]

Additionally, a district governing board that seeks to sell or lease surplus real property may first offer the property to a "contracting agency" (§ 17458), which is an entity that is authorized to establish, maintain, or operate services pursuant to the Child Care and Development Services Act. (See § 8200 et seq., including the definition of "contracting agency" in § 8208, subd. (b).) Specified conditions must be met in order to offer the property under the Act, including hearings by the advisory committee: "No sale or lease of the real property of any school district, as

[8] All references are to the Education Code unless otherwise indicated.

authorized under subdivision (a), may occur until the school district advisory committee has held hearings pursuant to **subdivision (c) of Section 17390.**" (§ 17458, subd. (b)), emphasis added.)

School-District Surplus Property Law

The test claim statutes apply only to disposal of surplus or "excess real property"[9] so a discussion of school district surplus property law is warranted.

Generally, school district governing boards have power to sell or lease "any real property belonging to the school district … which is not or will not be needed by the district for school classroom buildings at the time of delivery of title or possession." (§ 17455.)

In addition to using surplus property for childcare facilities discussed above (§ 17458), the governing board may sell surplus property for less than fair market value to a park district, city or county for recreational purposes or open-space purposes under certain conditions (§ 17230).[10]

Most transfers of school-district surplus property fall under the Naylor Act,[11] which governs offers to sell or lease schoolsites[12] to public agencies ("Notwithstanding Section 54222 of the Government Code").[13] The Act also governs retention of part of a schoolsite, sales price or rate of lease, public agencies buying or leasing the land, maintenance by public agencies, uses of the land, reacquisition by the school district, and limitations on the right of acquisition or lease.

The legislative intent of the Naylor Act is "to allow school districts to recover their investment in surplus property while making it possible for other agencies of government to acquire the property and keep it available for playground, playing field or other outdoor recreational and open-space purposes."[14] In accordance with this intent, the Naylor Act applies to schoolsites in which all or part of the land is used for a school playground, playing field, or other outdoor recreational purposes and open-space land particularly suited for recreational purposes, and has been used for one of these purposes for at least eight years before the governing board decides to sell or lease the schoolsite (§ 17486). The Act also applies if no other available publicly owned land in the vicinity of the schoolsite would be adequate to meet the existing and foreseeable

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[9] Education Code section 17388.

[10] Section 17230 states that it is in addition to requirements placed on school districts pursuant to Section 54222 of the Government Code, which requires making written offers to specified government entities when selling surplus land. The entities to which the offers are made depend on the intended or suitable purpose for the land.

[11] Education Code sections 17485-17500. For the Supreme Court's summary and interpretation of the Naylor Act, see *City of Moorpark v. Moorpark Unified School Dist.* (1991) 54 Cal.3d 921.

[12] Schoolsite is defined in the Naylor Act as "a parcel of land, or two or more contiguous parcels, which is owned by a school district." (§ 17487.)

[13] Section 54222 of the Government Code requires, when selling surplus land, making written offers to specified government entities, depending on the land's intended or suitable purposes.

[14] Education Code section 17485.

needs of the community for outdoor recreational and open-space purposes, as determined by the purchasing or leasing public agency (*Ibid).*

School districts with more than 400,000 pupils in average daily attendance are not included in the Naylor Act (§ 17500), and it does not apply if other public agencies do not wish to purchase the surplus land (§ 17493, subd. (b)). Also, a school district may exempt property from the Act under certain conditions (§ 17497).

Claimants' Position

Claimant alleges that the test claim statutes constitute a reimbursable mandate under article XIII B, section 6 of the California Constitution because they require claimant to:

A) Develop, adopt and implement policies and procedures for community involvement in the disposition of school buildings or space in school buildings which is not needed for school purposes prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, pursuant to Education Code Section 17388.

B) Appoint, supervise and consult with a district advisory committee established to advise the governing board in the use and disposition of surplus space and real property, pursuant to Education Code Section 17388.

C) Appoint an advisory committee consisting of not less than seven nor more than 11 members, and that is representative of each of the criteria required by Education Code Section 17389.

D) For the school district advisory committee appointed pursuant to Education Code Section 17388 to implement all of the following duties, pursuant to Education Code Section 17390:
   1) Review the projected school enrollment and other data as provided by the district to determine the amount of surplus space and real property;
   2) Establish a priority list of use of surplus space and real property that will be acceptable to the community;
   3) Circulate throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Section 17458;
   4) Make a final determination of limits of tolerance of use of space and real property; and
   5) Forward to the district governing board a report recommending uses of surplus space and real property, pursuant to Education Code Section 17390 (e).

Claimant estimates that it will incur more than $1000 in staffing and other costs to implement these duties.

Claimant, in its August 2003 comments, argues that the July 25, 2003 comments by the Department of Finance should be excluded because they are not accompanied by a signed declaration that the comments are true and complete to the best of the representative's personal

knowledge or information and belief, as required by section 1183.02(d) of the Commission's regulations.[15] Claimant also argues that (1) the appointment of an advisory committee is not discretionary; (2) a district does incur costs in appointing a committee; and (3) that Finance is incorrect in stating that the district may use the proceeds resulting from the sale, lease or rental of excess property to offset the costs of the committee.

Claimant did not comment on the draft staff analysis.

State Agency Positions

The Department of Finance, in its July 2003 comments, states:

> [W]e believe that a school district's appointment of a Surplus Property Advisory Committee is the result of a discretionary action taken by the governing board of the district. As a result, we conclude that the cited State laws do not create a State-mandated reimbursable activity; therefore the test claim should be denied.

Finance also asserts that nothing in the statute directs the governing board to sell, lease or rent excess real property, so that "even though a district is required to appoint an advisory board prior to the sale, lease or rental of excess property, it is a local discretionary action that caused the requirement of an advisory board, not a State-mandated activity."

Finance also states that it does not believe a district would incur any costs due to the statute, and that in the absence of the requirement for an advisory committee, a district facilities or business manager and staff would perform all or similar duties specified of the advisory committee in the normal conduct of good school district policies. Finally, Finance believes that should a district incur costs in complying with the test claim statutes, that it may use the proceeds from the sale, lease or rental of excess property to offset the costs.[16]

Finance filed comments on August 28, 2008, concurring with the draft staff analysis.

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[15] Section 1183.02, subdivision (d), requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief, and that any assertions of fact are to be supported by documentary evidence. Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109). Thus, factual allegations raised by a party regarding how a program is implemented are not relied on by staff when determining eligibility for reimbursement under article XIII B, section 6. Finance's comments as to whether the Commission should approve this test claim and are thus not stricken from the administrative record.

[16] Education Code section 17462 requires the proceeds from the sale of surplus school district property to be used for "capital outlay or for costs of maintenance of school district property that the governing board of the school district determines will not recur within a five-year period."

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[17] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[18] "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."[19] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[20]

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.[21]

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.[22] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim

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[17] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) 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.

[18] *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

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

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

[21] *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 District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

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

legislation.[23] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[24]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[25]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[26] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[27]

I. Are the test claim statutes state mandates within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[28] The issue is whether the test claim statutes mandate a school district to form an advisory committee to perform specified duties.

As a preliminary matter, staff finds that the test claim statutes that require discussion are sections 17388, which forms the advisory committee, and 17390, which enumerates its duties (see pp. 3-4). The remaining statutes merely define the advisory committee's scope, in that they specify the membership of the advisory committee (§ 17389), and excuse its formation for a specified purpose (§ 17391). Thus, the sole issue is whether sections 17388 and 17390 constitute a state mandate. Section 17388 reads:

> The governing board of any school district may, and the governing board of each school district, prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, shall, appoint a district advisory committee to advise the governing board in the development of districtwide policies and procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes. (§ 17388.)

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

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

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

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

[27] *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.

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

The plain language of this single-sentence statute indicates two things. First, that the governing board may form an advisory committee. And second, that prior to the sale, lease, or rental of any excess real property (except rentals not exceeding 30 days) the governing board shall appoint an advisory committee.

As to the first part of the sentence (formation of the committee when there is no excess property), the plain meaning of the word "may" indicates that section 17388 is not mandatory.[29] An appellate court decision confirms this interpretation. The case, *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley School Dist.*,[30] involved a school district accused of failing to comply with various statutes in closing two elementary schools. The court interpreted section 17388 as follows:

> Given the circumstances here-with no surplus property then proposed to be sold, leased, or rented within the meaning of the statute-the District's use of the committee was discretionary, not mandatory. (See § 75 ["may" is permissive; "shall" is mandatory].) Because the SPAC [surplus property advisory committee] was not a statutorily mandated committee, the District was not bound by the statutory requirements for its composition or duties.[31]

Based on the plain language of section 17388, and the interpretation of it by the *San Lorenzo Valley* court, staff finds section 17388 is not a state mandate within the meaning of article XIII B, section 6 if there is no surplus property involved.

The second part of section 17388 states that before the sale, lease, or rental of any excess real property (except rentals not exceeding 30 days) the governing board shall appoint an advisory committee. The issue is whether this is a state mandate.

In 2003, the California Supreme Court, in the *Kern High School Dist.* case,[32] considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. In *Kern*, 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 use 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.[33]

In analyzing the concept of "state mandate," the court reviewed the ballot materials for article XIII B, which defined state mandate as "something that a local government entity is required or

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[29] Education Code section 75: ""Shall' is mandatory and 'may' is permissive."

[30] *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley School Dist.* (2006) 139 Cal.App.4th 1356 ("*San Lorenzo Valley*").

[31] *San Lorenzo Valley, supra,* 139 Cal.App.4th 1356, 1419.

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

[33] *Id.* at page 730.

forced to do" and "requirements imposed on local governments by legislation or executive orders."[34]

The *Kern* court also reviewed and affirmed the holding of *City of Merced v. State of California*,[35] where the city, under its eminent domain authority condemned privately owned real property and was required by statute to compensate the property owner for the loss of business goodwill. Upon review, the Supreme Court determined that, when analyzing state mandates, the underlying program must be reviewed to determine whether the claimant's participation in the underlying program is voluntary or legally compelled.[36] The *Kern* court stated:

> 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.[37] (Emphasis in original.)

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 claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled*.[38] [Emphasis added.]

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.

One of the underlying programs the Supreme Court discussed in *Kern* was the American Indian Early Childhood Education Program (Ed. Code § 52060 et seq.) which, as part of participation, requires a districtwide American Indian advisory committee for American Indian early childhood education. The court stated:

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[34] *Id.* at page 737.

[35] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[36] *Kern High School Dist., supra*, 30 Cal.4th 727, 743.

[37] *Ibid.*

[38] *Id.* at 731.

> Plainly, a school district's initial and continued participation in the program is voluntary, and the obligation to establish or maintain an advisory committee arises only if the district elects to participate in, or continue to participate in, the program. … [T]he obligation to establish or maintain a site council or advisory committee arises only if a district elects to participate in, or continue to participate in, the particular program.[39]

In this claim, as with the eminent domain in *City of Merced* and the advisory committee in *Kern High School Dist.,* there is no state requirement for the school district to declare property surplus or excess, or to participate in what the *Kern* court calls the "underlying program." It is the local school district officials who make the triggering decision to designate property as surplus or transfer it. Therefore, there is no legal compulsion that creates a state mandate.[40]

In addition to the test claim statutes, the other school district surplus property statutes do not legally compel property to be designated as surplus or excess, or to be transferred. For example, the Naylor Act (§§ 17485-17500) states that "The governing board of any school district may sell or lease any schoolsite containing land described in Section 17486, and, if the governing board decides to sell or lease such land, it shall do so in accordance with this article."[41] A second example is in Education Code section 17458, which requires the advisory committee to hold hearings before selling or leasing real property to contracting agencies under the Child Care and Development Services Act (see pp. 4-5 above). But there is no requirement to sell or lease the property, as stated in part: "[T]he governing board of any school district … seeking to sell or lease any real property it deems to be surplus property **may** first offer that property for sale or lease to any contracting agency, as defined in Section 8208 of the Education Code, pursuant to the following conditions …"[42] One of the conditions is the advisory committee hearing, which is contingent on the initial decisions to deem the property surplus and offer it to a contracting agency.

Legal compulsion aside, in the *Kern High School Dist.* case, the California Supreme Court found that state mandates could be found in cases of practical compulsion on the local entity when a statute imposes "certain and severe penalties such as double taxation or other draconian consequences"[43] for not participating in the programs. The court also described practical compulsion as "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[44]

Claimant, in August 2003 rebuttal comments, argues that school districts are practically compelled to use the advisory committee as follows:

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[39] *Id.* at 744.

[40] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[41] Education Code section 17488.

[42] Education Code section 17458. Emphasis added.

[43] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[44] *Id.* at p. 731.

> This argument is pure nonsense and suggests that school districts should permit the underutilization of district assets. Migrating populations, changes in the population density of school age children, and other socio-economic conditions dictate the sale or disposal of surplus school property. The decision to act is not discretionary, demographic conditions beyond the control of governing boards dictate those decisions. And once the decision is dictated, the appointment of an advisory committee is a mandated activity for which reimbursement is required.[45]

Local governments could make the same argument about use of eminent domain at issue in *City of Merced*, i.e., that conditions beyond the control of local government make the use of eminent domain necessary. The *City of Merced* court, however, did not find this a compelling reason for making the cost of eminent domain reimbursable. The decision to invoke eminent domain, just like the decision to designate property as surplus, is made at the local level.[46]

There is no evidence in the record of practical compulsion, in that there are no "certain and severe penalties such as double taxation or other draconian consequences"[47] for school districts' failing to designate or transfer property as surplus or excess.

Therefore, staff finds that the reasoning of *City of Merced* and *Kern High School Dist.* control this claim. That is, because there is no legal or practical compulsion to designate as surplus or transfer (sell, lease, or rent) school district property, neither formation of the advisory committee (§ 17388), nor its activities (§ 17390), are state mandates imposed on a school district. Accordingly, the test claim statutes (§§ 17387-17389) do not constitute a state mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution.

II. Does Education Code section 17388 constitute a new program or higher level of service?

As an alternative ground for denial, staff finds that section 17388 is not a new program or higher level of service.[48] Claimant pled the test claim statutes starting with Statutes 1982, chapter 689. The advisory committee statute, however, was first enacted in 1976 (Stats. 1976, ch. 606, Ed. Code, §§ 10651.1 et seq.). Although it was not included in the 1976 reorganization of the Education Code (Stats. 1976, ch. 1010), it was enacted again in 1977 (Stats. 1977, ch. 36, § 448, Ed. Code, § 39384 et seq.) and amended in 1980 (Stats. 1980, ch. 1354).

The 1977 statute, former section 39384, subdivision (c), read as follows:

> The governing board of any school district may, and the governing board of each school district, prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, shall, appoint a district advisory committee to advise the governing board in the development of districtwide policies and

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[45] Letter from claimant, August 18, 2003, page 2.

[46] Cf. *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 880.

[47] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[48] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835-836.

procedures governing the use or disposition of school buildings or space in school buildings which is not needed for school purposes.

Because this statute provided for the formation of the advisory committee before the 1982 test claim statute pled by claimant, staff finds that section 17388 is not a new program or higher level of service.

CONCLUSION

For the reasons discussed above, staff finds that the test claim statutes (Ed. Code, §§ 17387, 17388, 17389, 17390, 17391; Statutes 1982, chapter 689, Statutes 1984, chapter 584, Statutes 1986, chapter 1124, Statutes 1987, chapter 655, Statutes 1996, chapter 277) are not a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Recommendation

Staff recommends that the Commission adopt this analysis to deny the test claim.