Hearing Date: April 16, 2007
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ITEM 7

TEST CLAIM
PROPOSED STATEMENT OF DECISION

Government Code Section 16262.5
Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110

As Added, Amended, or Repealed by

Statutes 1999, Chapters 90 and 91
Statutes 2000, Chapter 445

In-Home Supportive Services II (00-TC-23)

County of San Bernardino, Claimant

EXECUTIVE SUMMARY

The sole issue before the Commission on State Mandates ("Commission") is whether the Proposed Statement of Decision accurately reflects the Commission's decision on the *In-Home Supportive Services II* test claim.[1]

Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision, beginning on page three, which accurately reflects the staff analysis and recommendation on this test claim. Minor changes, including those that reflect the hearing testimony and vote count, will be included when issuing the final Statement of Decision.

If the Commission's vote on item 6 modifies the staff analysis, staff recommends that the motion to adopt the Proposed Statement of Decision reflect those changes, which will be made before issuing the final Statement of Decision. Alternatively, if the changes are significant, staff recommends that adoption of a Proposed Statement of Decision be continued to the May 31, 2007 Commission hearing.

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[1] California Code of Regulations, title 2, section 1188.1, subdivision (a).

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Section 16262.5; Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as Added, Amended, or Repealed by Statutes 1999, Chapters 90 and 91; and Statutes 2000, Chapter 445; Filed on June 29, 2001, By County of San Bernardino, Claimant.	Case No.: 00-TC-23 *In-Home Supportive Services II* PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Proposed for Adoption on April 16, 2007)

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 16, 2007. [Witness list will be included in the final Statement of Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the staff analysis to partially approve this test claim at the hearing by a vote of [vote count will be included in the final Statement of Decision].

Summary of Findings

County of San Bernardino's test claim filing alleges that legislative amendments governing the operation of the In-Home Supportive Services (IHSS) program in California, added by Statutes 1999, chapters 90 and 91, and Statutes 2000, chapter 445, "imposed a new state mandated program and cost … by substantially amending the administrative requirements of the IHSS program." The test claim statutes, in part, address the form in which in-home supportive services care providers are employed, referred to as the "mode of service," including requiring that all counties establish an employer of record for IHSS providers, other than the recipient of the services. The test claim statutes also provide that "[e]ach county shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals."

At the outset, the advisory committee must make recommendations on the best method of employing IHSS providers, and for establishing an "employer of record." According to Welfare and Institutions Code section 12301.4, the advisory committee must also have an ongoing role providing "advice and recommendations regarding in-home supportive services." Claimant asserts that the state funding provided at the time of the test claim filing was inadequate to cover

the actual costs of the advisory committee, and seeks to recover the remainder of their claimed costs of creating and operating the advisory committee through mandate reimbursement.

The Commission finds that while counties may incur increased costs for higher wages and benefits as an indirect result of the requirement to act as or establish an employer of record, a showing of increased costs is not determinative of whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone do not result in a reimbursable state-mandated program under article XIII B, section 6.[2] The test claim statutes create a situation where the employer may be faced with "a higher cost of compensation to its employees." As held by the court, "[t]his is not the same as a higher cost of providing services to the public." Therefore, the Commission finds that any increased wage and benefit costs that may be incurred indirectly following implementation of Welfare and Institutions Code section 12302.25, is not a new program or higher level of service.

In addition, the Commission finds that the plain language of the test claim statute does not *require* collective bargaining, but rather confirms that the code section does not prohibit collective bargaining or other negotiations on wages and benefits. However, for the activities listed below, the Commission finds that the test claim statutes mandated a new program or higher level of service, and costs mandated by the state:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (c).)
- Each county that does not qualify for the exception provided in section 12301.3, subdivision (d), shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals, with membership as required by section 12301.3, subdivision (a): "No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article." (Welf. & Inst. Code, §§ 12301.3, subd. (a), 12302.25, subd. (d).)

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[2] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

- Following the September 14, 2000 amendment by Statutes 2000, chapter 445, counties shall appoint membership of the advisory committee in compliance with Welfare and Institutions Code section 12301.3, subdivision (a)(1) and (a)(4):

  > In counties with fewer than 500 IHSS recipients, at least one member of the advisory committee shall be a current or former provider of in-home supportive services; in counties with 500 or more IHSS recipients, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.
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  > A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee. (Welf. & Inst. Code, § 12301.3, subd. (a).)

- Prior to the appointment of members to a committee required by section 12301.3, subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations. (Welf. & Inst. Code, § 12301.3, subd. (b).)

- The county shall solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12302.25, subd. (d).)

- The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12301.3, subd. (c).)

- Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about IHSS on an ongoing basis. (Welf. & Inst. Code, § 12302.25, subd. (e).)

- One advisory committee formed pursuant to sections 12301.3 or 12301.6, shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees. (Welf. & Inst. Code, § 12301.4.)

The Commission concludes that all claims for reimbursement for the approved activities must be offset by any funds already received from state or federal sources, including funds allocated for the direct costs of the advisory committee. The Commission further concludes that Government Code section 16262.5, and Welfare and Institutions Code sections 12301.6, 12301.8, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as pled, along with any other test claim statutes and allegations not specifically approved above, do not impose a program, or a new program or higher level of service, subject to article XIII B, section 6.

BACKGROUND

In-Home Supportive Services (IHSS) is a social services program developed to provide necessary care to aged, blind or permanently disabled, low-income persons, with the goal of allowing the individual (hereafter referred to as the "recipient") to remain in their home and out of nursing homes or other institutional care for as long as possible. The services provided range according to the needs of the recipient and can include all manner of housekeeping, including cleaning, laundry, meal preparation, and grocery shopping. In addition, some recipients require and receive additional personal and medical care services: assistance with bathing, grooming and related activities; transportation to medical appointments; and administration of para-medical procedures, including injections. Since its inception in 1973, IHSS has been jointly funded by federal, state, and county government.

The test claim statutes, in part, address the form in which the IHSS care providers are employed, referred to as the "mode of service." Prior law did not require the designation of an employer of record for individual providers. In 1990, a California appellate decision addressed the issue of who was the employer of record for individual providers of IHSS, particularly for the purposes of collective bargaining under the Meyers-Milias-Brown Act (MMBA). In *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 765, the court discussed the way that providers were employed under prior law, as follows:

> A county may deliver services under the IHSS program by (1) hiring in-home supportive personnel in accordance with established county civil services requirements, (2) contracting with a city, county, city or county agency, a local health district, a voluntary nonprofit agency, a proprietary agency or an individual, or (3) making direct payment to a recipient for the purchase of services. (Welf. & Inst. Code, § 12302.) Defendant county chose the third alternative.

The court made findings that the county was not a *de facto* employer of record for purposes of collective bargaining, *id.* at pages 772-773:

> Plaintiff insists that the state and the county are joint employers of the IHSS providers and the county's role as a joint employer is sufficient to render the providers employees of the county for purposes of the MMBA.[FN4]
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> FN4. Interestingly, in the attorney general's opinion upon which plaintiff relied below it is stated: "While the concept that IHSS workers may have more than one 'employer' appears appropriate for purposes of some laws, it would seem inappropriate and unworkable for purposes of collective bargaining under California statutes." (68 Ops.Cal.Atty.Gen. 194, 199, *supra.*)
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> The trial court found that the county acts as the agent of the state in administering the IHSS program and concluded that in some circumstances an agent may be a joint employer, a dual employer or a special employer. (See *County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 405, 179 Cal.Rptr. 214, 637 P.2d 681.) However, such a relationship arises only where both the general employer and the special employer have the right to control the employee's activities. (*Ibid.*) The court found the county had no such right of control and therefore was not an employer of the IHSS providers under a dual or

> special employer theory. … As previously indicated, substantial evidence supports the trial court's finding that the county does not exercise control over and direct the activities of the IHSS providers.

Creating a distinct change from the case law cited above, the test claim statutes require that all counties establish an employer of record for IHSS providers, other than the recipient of the services. Welfare and Institutions Code section 12302.25, as added by Statutes 1999, chapter 90, provides, in part:

> (a) On or before January 1, 2003, each county shall act as, or establish, an employer for in-home supportive service providers … . Each county may utilize a public authority or nonprofit consortium …, the contract mode …, county administration of the individual provider mode … for purposes of acting as, or providing, an employer …, county civil service personnel …, or mixed modes of service authorized pursuant to this article and may establish regional agreements in establishing an employer for purposes of this subdivision for providers of in-home supportive services. … Upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers pursuant to this subdivision, counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option.[3]

In addition, Welfare and Institutions Code section 12301.3, with certain exceptions, provides that "[e]ach county shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals."

Claimant's Position

County of San Bernardino's June 29, 2001[4] test claim filing alleges that legislative amendments governing the operation of IHSS in California, by Statutes 1999, chapters 90 and 91, and Statutes 2000, chapter 445, "imposed a new state mandated program and cost … by substantially amending the administrative requirements of the IHSS program."

Employer of Record

The claimant asserts that the legislation "mandates the establishment of an 'employer of record' [for the individuals who provide the in-home care] on or before January 1, 2003." The claimant alleges that this requirement results in multi-million dollar increased costs, with estimates varying widely according to which form of "employer of record" is ultimately selected: a public authority, a contract with an outside agency, or the county itself.

The claimant is also seeking reimbursement for any collective bargaining that may result if providers unionize after the "employer of record" is established.

Advisory Committee

The claimant asserts that the statutes mandate the creation of county advisory committees, with specific membership requirements of up to eleven members, largely made up of current or past

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[3] References to applicable Welfare and Institutions Code sections omitted for ease of reading.

[4] The potential reimbursement period begins no earlier than July 1, 1999, based upon the filing date for this test claim. (Gov. Code, § 17557.)

users and providers of IHSS, with participation of only one county employee. At the outset, the advisory committee is to make recommendations on the best method of employing IHSS providers, and establishing an "employer of record." According to Welfare and Institutions Code section 12301.4, the advisory committee is also to have an ongoing role providing "advice and recommendations regarding in-home supportive services."

Claimant asserts that the state funding provided at the time of the test claim filing was inadequate to cover the actual costs of the advisory committee, and seeks to recover the remainder of their claimed costs of creating and operating the advisory committee through mandate reimbursement.

In comments on the draft staff analysis, dated March 26, 2007, the claimant disagrees with the finding that reimbursement does not include "any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining." The claimant maintains that collective bargaining was the intent of the test claim legislation, and that the "costs pertaining to collective bargaining, must be reimbursable." In addition, the claimant maintains that any "costs incurred as part of that new activity [of acting as or establishing an employer of record], such as higher wages and benefits, must be reimbursable.

Department of Social Services Position

DSS, in comments filed November 9, 2001, disputes the test claim filing. As for the requirement to establish an "employer of record," DSS responds that with the multiple choices available to the county, the claimant has not "shown that the legislation at issue "requires" the county to incur an increase in costs and that therefore a basic element of a reimbursable state mandate is not met here."

In addition, DSS asserts that the test claim legislation does not require that the county engage in collective bargaining, nor does it require an increase of wages and benefits to the providers. DSS also cites case law to support the contention that higher costs of compensation or benefits are not subject to article XIII B, section 6.

DSS also argues that San Bernardino has not claimed all available funds set aside by the state for the advisory committee portion of the test claim, and therefore asserts that this portion of the claim should be dismissed.

In comments on the draft staff analysis, dated March 23, 2007, DSS argues that Government Code section 17556, subdivision (e) applies to deny reimbursement "with respect to the establishment and operation of advisory committees pursuant to Welfare and Institutions Code Sections 12301.3 and 12301.4, [because] revenue, specifically intended to fund the costs of the activities required of the advisory committees, and in an amount sufficient to cover those costs, has been available to the counties from the outset." This argument is address further below.

Department of Finance Position

DOF, in a letter filed March 6, 2002, also disputes the test claim filing "in its entirety." Specifically, as to the claims of potential costs related to collective bargaining, DOF argues "[e]ven if local governments were in fact required by the test claim statutes to incur these costs, they would not be reimbursable because they are wage/benefit related costs incurred by local governments as a result of state statutes regulating the terms and conditions of employment," which is not a reimbursable state mandate pursuant to case law. In addition, DOF maintains that "local governments retain options pursuant to which there would be no increased costs to them

resulting from the employer of record, … [which] preclude any findings of reimbursable state mandated costs."

DOF claims that the claimant failed to adequately address the exceptions to "costs mandated by the state" set out in Government Code section 17556, and therefore the test claim "is incomplete under the Commission's regulations and should be returned to the test claimant or disallowed."[5]

DOF also contends that the advisory committee costs are not reimbursable costs mandated by the state "because there is an allocation of funds by DSS pursuant to an appropriation to cover these costs. The test claimant has presented no evidence that these appropriations are insufficient to cover claimed costs as required by the Commission's regulations."

DOF filed comments on the draft staff analysis on March 28, 2007, which are addressed below.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[6] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[7] "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."[8] 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.[9] 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.[10]

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

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[5] On June 10, 2001, Commission staff issued a completeness review letter finding that all required elements for filing a test claim had been met, and the filing was accepted.

[6] 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.

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

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

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

[10] *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).*

policy, but does not apply generally to all residents and entities in the state.[11] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[12] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[13]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[14]

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.[15] 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."[16]

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

In order for a test claim statute or executive order to be subject to article XIII B, section 6 of the California Constitution, it must constitute a "program." In *County of Los Angeles v. State of California*, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[17] The court has held that only one of these findings is necessary.[18]

The Commission finds that establishing an in-home supportive services advisory committee and an employer of record imposes a program within the meaning of article XIII B, section 6 of the

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[11] *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.)

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

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

[14] *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.

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

[16] *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.

[17] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

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

California Constitution. Several of the Welfare and Institutions Code sections claimed governing the administrative activities of IHSS impose unique requirements on the counties that do not apply generally to all residents and entities in the state.

Next, the analysis must continue to determine if the individual elements of the test claim filing also impose a new program or higher level of service. The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "it is apparent that the subvention requirement for increased or higher level of service is directed to state-mandated increases in the services provided by local agencies in existing programs."[19] A statute or executive order mandates a reimbursable "higher level of service" when, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, it increases the actual level of governmental service to the public provided in the existing program.[20]

IHSS Employer of Record: Welfare and Institutions Code Section 12302.25, Subdivisions (a)-(c)

Welfare and Institutions Code section 12302.25, subdivision (a), as added by Statutes 1999, chapter 90, requires counties to act as, or establish an employer of record for IHSS providers, other than the state or the individual recipient by January 1, 2003.

Claimant alleges that the test claim statutes "require the establishment of an 'employer of record'" and a "mandate of collective bargaining with providers of IHSS services, as well as the increased costs [of wages and benefits] that will arise once collective bargaining has been instituted."[21]

The county shall establish an employer of record through several options: a contract, public authority, nonprofit consortium, or by the county acting as the employer of record itself, or a combination of the above. There is no mandate for the county to act as the employer of record, but this is one of the options available to the counties; each option can have great impact on the downstream costs of operating IHSS, but this is a choice made at the discretion of each county. Counties have always had a share of cost for the ongoing administration of IHSS: [22] the test claim statutes do not alter that share of cost, and no downstream administrative activities are newly required as a result of this statute. However, the requirement to *establish* an employer of record pursuant to the test claim statute is not discretionary and requires administrative action on the part of the counties.[23]

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[19] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

[21] Test Claim Filing, pages 13 and 14.

[22] Welfare and Institutions Code section 12306.

[23] DOF, in its comments filed March 28, 2007, continues to argue that the "contract mode" provides a no-cost option for counties to establish an employer of record. The claimant persuasively countered this argument at pages 6-14 of the September 9, 2002 rebuttal, identifying significant administrative costs involved in establishing a contract.

DOF filed comments on March 28, 2007, arguing that the test claim statute "requires any county, not in compliance with the mandates of AB 1682 within a specified timeframe, to act as the employer of record." Presumably DOF's argument is that counties did not need to engage in any administrative activities to comply with the law, because they could simply wait and default to become the employer of record. The provision that DOF refers to is section 12302.25, subdivision (j), as amended by Statutes 2002, chapter 1135, operative January 1, 2003. Therefore, counties were required to engage in administrative activities to establish an employer of record from July 12, 1999, the operative date of Statutes 1999, chapter 90, until December 31, 2002. The Commission finds that only on or after January 1, 2003 was the "default" employer of record provision applicable, and any requirement to *establish* an employer of record was no longer mandatory.

Therefore, the Commission finds that Welfare and Institutions Code section 12302.25 imposes a new program or higher level of service for the following new time-limited activity:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [24]

In addition, the Commission finds that Welfare and Institutions Code section 12302.25 imposes a new program or higher level of service for the following new activity:

- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [25]

DSS, in its November 9, 2001 test claim comments, provides a rebuttal to the mandate claim for collective bargaining costs:

> The claimant, on page 2 of the mandate summary, characterizes the legislation at issue as mandated collective bargaining between the employer of record and the providers. A careful reading of the statutes, however, reveals no such mandate. The statutes at issue do not mandate collective bargaining. Collective bargaining rights and duties are established and controlled by other state and federal laws that operate upon labor relations. The mandate to establish an employer for Individual Providers (IPs) for purposes of the [MMBA] or any other applicable state and

[24] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[25] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

> federal laws makes no statement on whether IPs will organize or whether any representative will be able to force collective bargaining upon counties under [MMBA] or any other provision. What the legislation does is to require counties to appoint, name or otherwise establish the entity that will respond in the event there is a right or obligation to engage in collective bargaining that IPs posses[s] under other law. If collective bargaining between the employer of record and the providers is mandated by law it is not the law at issue that does so.

Subdivision (b) states: "Nothing in this section shall prohibit any negotiations or agreement regarding collective bargaining or any wage and benefit enhancements." The Commission finds that the plain language of the test claim statute does not *require* collective bargaining, but rather confirms that the code section does not prohibit collective bargaining or other negotiations on wages and benefits.[26] The Commission finds that Welfare and Institutions Code section 12302.25, subdivision (b), does not mandate a new program or higher level of service for collective bargaining.

Subdivision (c) provides: "Nothing in this section shall be construed to affect the state's responsibility with respect to the state payroll system, unemployment insurance, or workers' compensation and other provisions of Section 12302.2 for providers of in-home supportive services." This section maintains the existing law regarding the state's responsibilities under section 12302.2, which addresses certain withholding and contribution requirements when paying individual IHSS providers. This section is only applicable to the state, and clarifies that the test claim statute is to have no impact on another provision of law; therefore, the Commission finds that Welfare and Institutions Code section 12302.25, subdivision (c) does not mandate a new program or higher level of service.

In addition, while counties may incur increased costs for higher wages and benefits as an indirect result of the requirement to act as or establish an employer of record, a showing of increased costs is not determinative of whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone do not result in a reimbursable state-mandated program under article XIII B, section 6.[27] The Court also found in *Lucia Mar, supra,* 44 Cal.3d 830, 835:

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[26] In comments on the draft staff analysis, dated March 26, 2007, the claimant states that "the fundamental rule of statutory construction is [to] ascertain legislative intent," citing *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645. The claimant then quotes the Legislative Counsel's Digest for Assembly Bill No. 1682 to argue that collective bargaining costs are reimbursable. While the case law cited is correct, it is equally fundamental that "[t]he statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861. Moreover, the Legislative Counsel's Digest is not determinative of the ultimate issue whether a statute constitutes a state-mandated program under article XIII B, section 6. (*City of San Jose, supra,* 45 Cal.App.4th 1802, 1817.)

[27] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.

Comments filed by the state agencies, DOF and DSS, both assert that case law interpreting article XIII B, section 6, including *County of Los Angeles, supra, City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, and *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, results in a finding that "increases in employment benefits or compensation, as the result of legislation that does not directly mandate the increase, are not considered a "new program or "higher level of service in an existing program" as meant by the Constitution."[28]

In *County of Los Angeles, supra,* 43 Cal.3d 46, the Court addressed the costs incurred as a result of legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide to their employees. The Supreme Court recognized that workers' compensation is not a new program and, thus, the court determined whether the legislation imposed a higher level of service on local agencies.[29] The court defined a "higher level of service" as "state mandated *increases in the services provided* by local agencies in existing programs." (Emphasis added.)

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."

The Supreme Court in *County of Los Angeles* continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.[30]

The court held that reimbursement for the increased costs of providing workers' compensation benefits to employees was not required.

> Section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must

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[28] DSS Comments, filed November 9, 2001, page 5. DOF's Comments, filed March 6, 2002, page 4, expresses similar arguments.

[29] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

[30] *Id.* at pages 56-57.

> provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers… In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6. (*Id.* at pp. 57-58, fn. omitted.)

Although "[t]he law increased the cost of employing public servants, … it did not in any tangible manner increase the level of service provided by those employees to the public." (*San Diego Unified School Dist., supra,* 33 Cal.4th 859, 875.) In this sense, the present test claim is also indistinguishable from the analysis presented by the Court in *County of Los Angeles*.

City of Richmond, supra, 64 Cal.App.4th 1190, similarly held that requiring local governments to provide death benefits to local safety officers, under both PERS and the workers' compensation system, did not constitute a higher level of service to the public. The court stated:

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.[31]

The court also found that "[a]lthough a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[32]

In *City of Anaheim, supra,* 189 Cal.App.3d 1478, the court determined that an increase in PERS benefits to retired employees, which resulted in a higher contribution rate by local governments, does not constitute a higher level of service to the public. In this case the court found that:

> While focusing on the exceptions to reimbursement, City conveniently presumes that [the test claim statute] mandated a higher level of service on local government, a prerequisite to reimbursement when an existing program is modified.
>
> City's claim for reimbursement must fail for the following reasons: (1) [the test claim statute] did not compel City to do anything, (2) any increase in cost to City was only incidental to PERS' compliance with [the test claim statute], and (3) pension payments to retired employees do not constitute a "program" or "service" as that term is used in section 6.[33]

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[31] *City of Richmond, supra,* 64 Cal.App. 1190, 1196.

[32] *Id.* at page 1197.

[33] *City of Anaheim, supra,* 189 Cal.App.3d at page 1482.

The court in *Anaheim* found that an increase in pension benefits to employees was not a "program" or "service" within the meaning of article XIII B, section 6.[34] The claimant in *City of Anaheim*:

> argues that since [the test claim statute] specifically dealt with pensions for *public* employees, it imposed unique requirements on local governments that did not apply to all state residents or entities. [Footnote omitted; emphasis in original.]

However, the court continued:

> Such an argument, while appealing on the surface, must fail. As noted above, [the statute] mandated increased costs to a state agency, not a local government. Also, PERS is not a program administered by local agencies.
>
> Moreover, the goals of article XIII B of the California Constitution "were to protect residents from excessive taxation and government spending... [and] preclud[e] a shift of financial responsibility for carrying out governmental functions from the state to local agencies.... Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear-neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61.) *Similarly,* City *is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public.* [Emphasis added, footnote omitted.]

Therefore, the court concluded that the test claim statute did "not fall within the scope of section 6."[35]

In *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that simply because a state law or order may *increase the costs* borne by local government *in providing services,* this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

The test claim statutes create a situation where the employer may be faced with "a higher cost of compensation to its employees." As held by the court, in *City of Anaheim, supra,* "[t]his is not the same as a higher cost of providing services to the public." Therefore, the Commission finds that any increased wage and benefit costs that may be incurred indirectly following implementation of Welfare and Institutions Code section 12302.25, is not a new program or higher level of service.

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[34] *Ibid.*

[35] *Id*. at pages 1483-1484.

IHSS Advisory Committee: Welfare and Institutions Code Sections 12301.3, 12301.4, and 12302.25, Subdivisions (d) & (e)

Welfare and Institutions Code section 12301.3, was added by Statutes 1999, chapter 90. The amendments by Statutes 2000, chapter 445, are indicated by underline, as follows:

> (a) Each county shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals. No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article.
>
> (1)(A) In counties with fewer than 500 recipients of services provided pursuant to this article or Section 14132.95, at least one member of the advisory committee shall be a current or former provider of in-home supportive services.
>
> (B) In counties with 500 or more recipients of services provided pursuant to this article or Section 14132.95, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.
>
> (2) Individuals who represent organizations that advocate for people with disabilities or seniors may be appointed to committees under this section.
>
> (3) Individuals from community-based organizations that advocate on behalf of home care employees may be appointed to committees under this section.
>
> (4) A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee, but may designate any county employee to provide ongoing advice and support to the advisory committee.
>
> (b) Prior to the appointment of members to a committee required by subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations.
>
> (c) The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services.
>
> (d) Any county that has established a governing body, as provided in subdivision (b) of Section 12301.6, prior to July 1, 2000, shall not be required to comply with the composition requirements of subdivision (a) and shall be deemed to be in compliance with this section.

Welfare and Institutions Code section 12301.4, was added by Statutes 1999, chapter 90. The amendments by Statutes 2000, chapter 445, are indicated by underline, as follows:

> (a) Each advisory committee established pursuant to Section 12301.3 or 12301.6 shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services,

and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees.

(b) Each county shall be eligible to receive state reimbursements of administrative costs for only one advisory committee and shall comply with the requirements of subdivision (e) of Section 12302.25.

Welfare and Institutions Code section 12302.25, subdivision (d), as added by Statutes 1999, chapter 90, provides that prior to implementing the "employer of record" requirement, "a county shall establish an advisory committee as required by Section 12301.3 and solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services."

Subdivision (e) provides that "Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about the program on an ongoing basis."

A test claim statute mandates a new program or higher level of service within an existing program when it compels a claimant to perform activities not previously required.[36] Establishing, maintaining and taking advice from an advisory committee regarding the operation of IHSS was not required of counties prior to Statutes 1999, chapter 90. Therefore, the Commission finds that the plain language of Welfare and Institutions Code sections 12301.3, 12301.4, and 12302.25, subdivisions (d) and (e), mandates a new program or higher level of service, for the following new activities:

- Each county that does not qualify for the exception provided in section 12301.3, subdivision (d), shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals, with membership as required by section 12301.3, subdivision (a): "No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article." (Welf. & Inst. Code, §§ 12301.3, subd. (a), 12302.25, subd. (d).)[37]
- Following the September 14, 2000 amendment by Statutes 2000, chapter 445, counties shall appoint membership of the advisory committee in compliance with Welfare and Institutions Code section 12301.3, subdivision (a)(1) and (a)(4):

  In counties with fewer than 500 IHSS recipients, at least one member of the advisory committee shall be a current or former provider of in-home supportive services; in counties with 500 or more IHSS recipients, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.

[36] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

[37] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee. (Welf. & Inst. Code, § 12301.3, subd. (a).)[38]

- Prior to the appointment of members to a committee required by section 12301.3, subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations. (Welf. & Inst. Code, § 12301.3, subd. (b).)[39]
- The county shall solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12302.25, subd. (d).)[40]
- The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12301.3, subd. (c).)[41]
- Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to section 12301.3, prior to making policy and funding decisions about IHSS on an ongoing basis. (Welf. & Inst. Code, § 12302.25, subd. (e).)[42]
- One advisory committee formed pursuant to sections 12301.3 or 12301.6, shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees. (Welf. & Inst. Code, § 12301.4.)[43]

Since 1992, Welfare and Institutions Code section 12301.6 has provided an option for counties to "[c]ontract with a nonprofit consortium to provide for the delivery of in-home supportive services … or … [e]stablish, by ordinance, a public authority to provide for the delivery of in-home supportive services." According to the September 1999 California State Audit Report on In-Home Supportive Services,[44] provided by the claimant as Exhibit 4 to the test claim, "As of

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[38] As amended by Statutes 2000, chapter 445 (oper. Sept. 14, 2000.)

[39] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[40] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[41] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999) and amended by Statutes 2000, chapter 445 (oper. Sept. 14, 2000.)

[42] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[43] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[44] Subtitled "Since Recent Legislation Changes the Way Counties Will Administer the Program, the Department of Social Services Needs to Monitor Service Delivery."

June 1999, 6 of the State's 58 counties—Alameda, San Mateo, San Francisco, Santa Clara, Los Angeles, and Contra Costa—had elected to create public authorities for the delivery of in-home supportive services," under the optional program described in Welfare and Institutions Code section 12301.6. Therefore, those counties, plus any others meeting the exception described in section 12301.3, subdivision (d), are not required to *establish* an advisory committee, but they may be subject to the ongoing requirements of section 12301.4.[45]

DSS does not dispute that the formation and continuing operation of advisory committees pursuant to Welfare and Institutions Code sections 12301.3 and 12301.4 results in an entirely new program or higher level of service to the public. However, both DSS and DOF argue that it is already being sufficiently funded by the state.[46] This is addressed at Issue 3, below, regarding "costs mandated by the state."

Issue 2: Are the remaining test claim statutes subject to article XIII B, section 6 of the California Constitution?

Several code sections pled were not in fact substantively amended by the test claim statutes, and therefore are not subject to article XIII B, section 6.

Welfare and Institutions Code section 2 provides: "[t]he provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments."[47] The Commission finds that a renumbering, reenactment or restatement of prior law does not impose a reimbursable state-mandated program to the extent that the provisions and associated activities remain unchanged.

Welfare and Institutions Code Section 12301.6

Welfare and Institutions Code section 12301.6 provides an option for counties to "[c]ontract with a nonprofit consortium to provide for the delivery of in-home supportive services … or … [e]stablish, by ordinance, a public authority to provide for the delivery of in-home supportive

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[45] Government Code section 17565 provides that if a claimant "at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

[46] DOF's March 6, 2002 comments, pages 3-4, also argue that because the advisory committees "relate to the process of determining the rate of pay and benefits and of paying workers who provide services administered or overseen by the county, there is no "program" … for which reimbursement is required." The cases cited by DOF in support of this proposition do not include facts where there were distinct administrative activities *required* by the test claim statutes, in addition to the higher contribution costs alleged, therefore, the Commission finds that this argument does not preclude a finding of a new program or higher level of service.

[47] This is in accordance with the California Supreme Court decision, which held that "[w]here there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." (*In re Martin's Estate* (1908) 153 Cal. 225, 229.)

services." It was amended by Statutes 1999, chapter 90,[48] but then repealed and reenacted in its original form by Statutes 1999, chapter 91; both statutes were effective and operative on July 12, 1999. Government Code section 9605 provides: "In the absence of any express provision to the contrary in the statute which is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the same session … ." Thus Statutes 1999, chapter 91 conclusively prevails over chapter 90 with respect to Welfare and Institutions Code section 12301.6 so that no language was changed when compared to prior law. Therefore, the Commission finds that Welfare and Institutions Code section 12301.6 was not substantively amended by the test claim statutes and is not subject to article XIII B, section 6.

Welfare and Institutions Code Section 12301.8

Similarly, Welfare and Institutions Code section 12301.8 was added by Statutes 1999, chapter 90[49] and repealed entirely by Statutes 1999, chapter 91, both effective and operative on July 12, 1999. Government Code section 9605 also applies here, therefore, due to the repeal in Statutes 1999, chapter 91, Welfare and Institutions Code section 12301.8 never operated as law. Thus, the Commission finds that Welfare and Institutions Code section 12301.8 was never operative and is not subject to article XIII B, section 6.

Several test claim statutes do not impose a new program or higher level of service because they do not require any new activities or impose a cost shift pursuant to article XIII B, section 6.

A test claim statute or executive order mandates a new program or higher level of service within an existing program when it compels a local agency to perform activities not previously required,[50] or when legislation requires that costs previously borne by the state are now to be paid by local agencies. Thus, in order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must order or command that local governmental agencies perform an activity or task, or result in "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."[51]

Government Code Section 16262.5

Government Code section 16262.5 provides that counties "shall not be reduced for the state share of the nonfederal costs for the administration of the In-Home Supportive Services program," under certain circumstances. This section was amended by Statutes 1999, chapter 90, to extend the period of time that this provision was applicable from June 30, 1998 to June 30, 2001, and amended other references to fiscal years consistent with this extension. The

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[48] Statutes 1999, chapter 90 would have amended the cost sharing provision between the state and the county for operating a public authority or nonprofit consortium under section 12301.6.

[49] Statutes 1999, chapter 90 would have added specific state cost-sharing language for increased wages and benefits, above the federal minimum wage, for IHSS providers employed through a public authority, nonprofit consortium, or contract.

[50] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 836.

[51] California Constitution, article XIII B, section 6, subdivision (c).

section generally provides an opportunity for fiscal relief for counties that are reducing funding for administrative activities county-wide in their budget, and also seek to reduce the administrative costs of IHSS in their budget.

Claimant alleges that this section, as amended, "extends the period for which the counties shall not be reduced for the state share of nonfederal costs for administration of the IHSS program but limits the state share of those costs."[52]

The costs of IHSS have been shared between federal, state and county government since the inception of the program. The test claim statute extended a county fiscal relief program for two additional fiscal years which functioned to provide applicant counties with a reduced share of administrative costs of IHSS. Extending the number of years of fiscal relief available to counties does not require new activities on the part of the claimant, and does not transfer from the state to local agencies "financial responsibility for a required program," as described in article XIII B, section 6, subdivision (c), of the California Constitution. Therefore, the Commission finds that Welfare and Institutions Code section 16262.5, as amended by Statutes 1999, chapter 90, does not mandate a new program or higher level of service.

Welfare and Institutions Code Sections 14132.95, 17600 and 17600.110

Statutes 1999, chapter 90 amended Welfare and Institutions Code section 17600, by *deleting* subdivision (b)(4), which eliminated the "In-Home Supportive Services Registry Model Subaccount" from the Sales Tax Account of the Local Revenue Fund.

The deleted language was originally added to the code by Statutes 1993, chapter 100. An uncodified portion of Statutes 1999, chapter 90, (§ 12), provides that "The unencumbered amount residing in the In-Home Supportive Services Registry Subaccount of the Sales Tax Account of the Local Revenue Fund on January 1, 2000, shall be transferred to the General Fund." Statutes 1999, chapter 90 also deleted Welfare and Institutions Code section 17600.110, which previously provided that "(a) Moneys in the In-Home Supportive Services Registry Model Account shall be available for allocation by the Controller for the purposes of Section 12301.6."

Welfare and Institutions Code section 14132.95 is a detailed description of IHSS eligibility services and funding, established by prior law. Statutes 1999, chapter 90, deleted subdivision (k)(3)(A) – (C), which previously specified the allocation of the subaccount funding in Welfare and Institutions Code section 17600.110. This funding was earmarked for "the establishment of an entity specified in Section 12301.6." Prior law allowed a county "*at its option*, [to] elect to"[53] contract with a nonprofit consortium or establish a public authority, to provide IHSS.

The removal of specific state subaccount funding tied to a discretionary program[54] does not require a claimant to perform new activities, nor does it transfer from the state to local agencies "financial responsibility for a required program," as described in article XIII B, section 6, subdivision (c), of the California Constitution. The Commission finds that Statutes 1999, chapter 90, amending Welfare and Institutions Code sections 14132.95, 17600 and 17600.110, does not mandate a new program or higher level of service.

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[52] Test Claim Filing, page 9.

[53] Welfare and Institutions Code section 12301.6

[54] *Ibid.*

Welfare and Institutions Code section 12302.7

Welfare and Institutions Code section 12302.7 was repealed by Statutes 1999, chapter 90. Prior to repeal of the law, the code section provided for an optional method for counties to contract for IHSS. The section had an inoperative date of July 1, 2001, and an automatic repealer provision operative January 1, 2002. The earlier repeal of this section did not operate to place any new requirements on counties. Therefore, the Commission finds that the repeal of Welfare and Institutions Code section 12302.7 does not mandate a new program or higher level of service.

Welfare and Institutions Code Section 12303.4

As amended by Statutes 1999, chapter 90, language was stricken from Welfare and Institutions Code section 12303.4, as follows:

> (a)~~(1)~~ Any aged, blind, or disabled individual who is eligible for assistance under this chapter or Chapter 4 (commencing with Section 12500), and who is not described in Section 12304, shall receive services under this article which do not exceed the maximum of 195 hours per month.
>
> ~~(2) Recipients served in modes of delivery other than the individual provider mode shall be limited in the maximum number of service hours per month to 195 hours times the statewide wage rate per hour for the individual provider mode as calculated by the department and by dividing this product by the hourly cost of the mode of service to be provided.~~
>
> (b)~~(1)~~ Any aged, blind, or disabled individual who is eligible for assistance under this chapter or Chapter 4 (commencing with Section 12500), who is in need, as determined by the county welfare department, of at least 20 hours per week of the services defined in Section 12304, shall be eligible to receive services under this article, the total of which shall not exceed a maximum of 283 hours per month.
>
> ~~(2) Recipients served in modes of delivery other than the individual provider mode shall be limited in the maximum number of service hours per month to 283 hours times the statewide wage rate per hour for the individual provider as calculated by the department and dividing this product by the hourly cost rate of the mode of service to be provided.~~

The claimant alleges "this section amends the total hours of services a qualified recipient is entitled to receive."[55]

Prior law allowed for reduction of the number of hours per month of service that a recipient might otherwise be eligible for, when the provider was employed in a method other than the individual provider mode. As an example, if the provider was paid through a contract with an hourly cost rate of $10 per hour, but the current state wage rate for individual providers was $8, a recipient otherwise eligible for 283 hours would be limited to approximately 226 hours. This could keep costs to the state and county comparable between the individual provider mode and another mode of service with a higher negotiated hourly cost rate, but could also result in a cut in services to the recipient.

[55] Test Claim Filing, page 10.

Statutes 1999, chapter 90 eliminated this exception to the maximum number of hours of eligibility for a recipient. The Commission finds that Welfare and Institutions Code section 12303.4, by removing an exception to the maximum number of hours a recipient is eligible to receive, does not require any activities on the part of the counties and thus does not mandate a new program or higher level of service.

Welfare and Institutions Code Section 12306.1

Welfare and Institutions Code section 12306.1, as added by Statutes 1999, chapter 91, provides:

> Notwithstanding paragraph (3) of subdivision (c) of Section 12301.6, with regard to wage increases negotiated by a public authority pursuant to Section 12301.6, for the 1999-2000 fiscal year the state shall pay 80 percent, and each county shall pay 20 percent, of the nonfederal share of paid increases up to fifty cents ($0.50) above the hourly statewide minimum wage. This section shall be applicable to wage increases negotiated prior to or during the 1999-2000 fiscal year.

This section was repealed by Statutes 2000, chapter 108, effective and operative July 10, 2000.[56] Welfare and Institutions Code section 12301.6, as referred to in section 12306.1, is a discretionary statute, and the Commission finds that any negotiated wages in excess of the state minimum wage, or cost-sharing resulting from such a statute, are all costs assumed at the option of the county.[57] The Commission finds that Welfare and Institutions Code section 12306.1 did not require any activities on the part of the counties, nor did it transfer from the state to local agencies "financial responsibility for a required program," as described in article XIII B, section 6, subdivision (c), of the California Constitution, and thus did not mandate a new program or higher level of service.

Issue 3: Do the test claim statutes found to impose a new program or higher level of service also impose costs mandated by the state pursuant to Government Code section 17514?

Reimbursement under article XIII B, section 6 is required only if any new program or higher level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute or executive order that mandates a new program or higher level of service. At the time of filing the test claim, the claimant was required to allege costs in excess of $200, pursuant to Government Code section 17564. The claimant estimated increased costs to the county share of wages and benefits in the range of $10 to 21.7 million after establishing a public authority as the employer of record. In addition, the claimant states that these figures "do not include the administrative costs incurred with: creation and ongoing activities of the advisory committee, costs associated with the creation of any new modality or contracting with same, and costs associated with collective bargaining."

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[56] Statutes 2000, chapter 108 was not pled in the test claim.

[57] *Kern High School Dist., supra*, 30 Cal.4th at page 743: "We instead agree with the Department of Finance, and with *City of Merced*, *supra*, 153 Cal.App.3d 777, that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves."

Government Code section 17556 provides, in pertinent part:

> 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:
>
> …
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
>
> …
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> … .

Although IHSS is a joint federal-state-local program, there is no evidence in the record that any of the mandated activities are required by federal law. Therefore, the Commission finds that Government Code section 17556, subdivision (c) does not apply.

The claimant stated that *none* of the Government Code section 17556 exceptions apply. However, DOF specifically argues that the claimant has been provided with funding for the advisory committee activities and that Government Code section 17556, subdivision (e) applies to deny a mandate finding.[58] In the response to comments filed September 9, 2002, page 5, the claimant asserts that of the $11,944 already claimed for the advisory committee expenses "[t]he costs for the Advisory Committee alone have exceeded several times the allotment actually paid by the Department of Social Services."

While state funds already provided must be used to offset any mandate reimbursement claimed, the claimant has provided a declaration that their administrative costs of forming and operating the advisory committee are not being fully reimbursed. To further support this claim, the claimant provided a copy of DSS claiming instructions for the January- March 2001 quarter, which allowed for 100 percent of "IHSS Advisory Committee/Direct Costs," retroactive to July 2000, but required claims for reimbursement of county administrative costs "for supporting the IHSS Advisory Committee," be charged separately under the standard claiming instructions for IHSS. Specifically the document states:

> Costs incurred by the County Welfare Department (CWD) for supporting the IHSS Advisory Committee are not allowable for reimbursement under these

[58] DOF Comments, page 1, filed March 6, 2002. DOF's March 28, 2007 comments also include a chart showing funds appropriated for the "IHSS Advisory Committee" through 2005-06.

codes. Any CWD costs for providing support activities for the IHSS Advisory Committee should be charged to the appropriate IHSS/PCSP claim codes on the County Expense Claim (CEC.)[59]

This requires a county share of costs as required by Welfare and Institutions Code section 12306.[60] Section 12306 requires that the state and county share non-federal administrative costs of IHSS in a 65 percent state/35 percent county split. Requiring the claimant to maintain this share of costs for a mandated new program or higher level of service would defeat the stated purpose of article XIII B, section 6 to "provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."

Various DSS County Fiscal Letters show that funds have been allocated for reimbursing counties for the direct costs of the mandatory advisory committee on an annual basis since July 2000.[61] However, the reimbursement period for this test claim begins on the operative date of Statutes 1999, chapter 90--July 12, 1999. In addition, the state could also fail to allocate such funds in any future budget year.[62]

Another source of funds noted in the County Fiscal Letters, beginning in fiscal year 2003-04, was for a small number of counties' administrative costs to act as the employer of record for IHSS providers.[63] In the current fiscal year, 2006-07, this funding is limited to the counties of Alpine and Tuolumne and is for "the cost of administrative activities necessary for counties to act as the employer of record for IHSS providers."[64] However, the mandated activity pursuant to Welfare and Institutions Code section 12302.25 is for the initial *establishment* of an employer of record *on or before January 1, 2003*. Therefore, this funding is not specific to the mandated activity.

The Commission finds that section 17556, subdivision (e) does not apply to disallow a finding of costs mandated by the state, but all claims for reimbursement for the approved activities must be offset by any funds already received from state or federal sources. Thus, for the activities listed in the conclusion below, the Commission finds accordingly that the new program or higher level of service also imposes costs mandated by the state within the meaning of Government Code section 17514, and none of the exceptions of Government Code section 17556 apply.

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[59] County Fiscal Letter (CFL) No. 00/01-48, page 3, issued December 22, 2000, by DSS. (Also, Exh. 2 to Claimant's Response to Comments.)

[60] Claimant Response to Comments, page 5, filed September 9, 2002.

[61] DSS CFL, Nos. 00/01-14, 00/01-33, 00/01-48, 01/02-12, 02/03-28, 02/03-73, 03/04-46, 03/04-51, 04/05-16, 04/05-22, 04/05-27, 05/06-10, 06/07-02.

[62] In *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299, the Court discussed that, subject only to the Governor's veto power, the Legislature has the power to determine how funds are expended in each annual budget: "Legislative determinations relating to expenditures in other respects are binding upon the executive: 'The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds.'"

[63] DSS CFL, No. 02/03-73, page 2.

[64] DSS CFL, No. 06/07-02, page 2.

CONCLUSION

The Commission concludes that Welfare and Institutions Code sections 12301.3, 12301.4, and 12302.25, as added by Statutes 1999, chapter 90 or amended by Statutes 2000, chapter 445 impose new programs or higher levels of service for counties within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [65]
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [66]
- Each county that does not qualify for the exception provided in section 12301.3, subdivision (d), shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals, with membership as required by section 12301.3, subdivision (a): "No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article." (Welf. & Inst. Code, §§ 12301.3, subd. (a), 12302.25, subd. (d).)[67]
- Following the September 14, 2000 amendment by Statutes 2000, chapter 445, counties shall appoint membership of the advisory committee in compliance with Welfare and Institutions Code section 12301.3, subdivision (a)(1) and (a)(4):

> In counties with fewer than 500 IHSS recipients, at least one member of the advisory committee shall be a current or former provider of in-home supportive services; in counties with 500 or more IHSS recipients, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.

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[65] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[66] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[67] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee. (Welf. & Inst. Code, § 12301.3, subd. (a).)[68]

- Prior to the appointment of members to a committee required by section 12301.3, subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations. (Welf. & Inst. Code, § 12301.3, subd. (b).)[69]
- The county shall solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12302.25, subd. (d).)[70]
- The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12301.3, subd. (c).)[71]
- Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about IHSS on an ongoing basis. (Welf. & Inst. Code, § 12302.25, subd. (e).)[72]
- One advisory committee formed pursuant to sections 12301.3 or 12301.6, shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees. (Welf. & Inst. Code, § 12301.4.)[73]

The Commission concludes that all claims for reimbursement for the approved activities must be offset by any funds already received from state or federal sources, including funds allocated for the direct costs of the advisory committee. The Commission further concludes that Government Code section 16262.5, and Welfare and Institutions Code sections 12301.6, 12301.8, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as pled, along with any other test claim statutes and allegations not specifically approved above, do not impose a program, or a new program or higher level of service, subject to article XIII B, section 6.

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[68] As amended by Statutes 2000, chapter 445 (oper. Sept. 14, 2000.)

[69] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[70] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[71] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999) and amended by Statutes 2000, chapter 445 (oper. Sept. 14, 2000.)

[72] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[73] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).