EXHIBIT A

RESPONSE BY THE STATE CONTROLLER'S OFFICE TO THE INCORRECT REDUCTION CLAIM (IRC) BY SAN DIEGO UNIFIED SCHOOL DISTRICT
Emergency Procedures, Earthquake and Disasters

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OFFICE OF THE STATE CONTROLLER
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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

INCORRECT REDUCTION CLAIM ON: *Emergency Procedures, Earthquake and Disasters* Chapter 1659, Statues of 1984 SAN DIEGO UNIFIED SCHOOL DISTRICT, Claimant	No.: CSM 01-4241-I-03 AFFIDAVIT OF BUREAU CHIEF

I, Jim L. Spano make the following declarations:

1) I am an employee of the State Controller's Office and am over the age of 18 years.

2) I am currently employed as a bureau chief, and have been so for the past 2 years and 8 months. Before that I was employed as an audit manager for 2 years and 3 months.

3) I am a California Certified Public Accountant (CPA).

4) I reviewed the work performed by the State Controller's Office (SCO) auditor.

5) Any attached copies of records are true copies of records as provided by the San Diego Unified School District or records retained at our place of business.

6) The records include claims for reimbursement, along with any attached supporting documentation, explanatory letters, or other documents relating to the above-entitled Incorrect Reduction Claim.

7) A field audit of the claims for fiscal year 1996-97 and fiscal year 1997-98 commenced on October 20, 1999, and ended on January 6, 2000.

I do declare that the above declarations are made under penalty of perjury and are true and correct to the best of my knowledge, and that such knowledge is based on personal observation, information, or belief.

Date: July 16, 2002

OFFICE OF THE STATE CONTROLLER

By: _____

Jim L. Spano, Chief
Compliance Audits Bureau
Division of Audits
State Controller's Office

RESPONSE BY THE STATE CONTROLLER'S OFFICE
TO THE INCORRECT REDUCTION CLAIM BY
SAN DIEGO UNIFIED SCHOOL DISTRICT
For Fiscal Years 1996-97 and 1997-98

Chapter 1659, Statues of 1984
Emergency Procedures, Earthquake and Disasters

SUMMARY

The following is the State Controller's Office's (SCO's) response to the Incorrect Reduction Claim submitted on March 26, 2002, by the San Diego Unified School District. The SCO performed an audit of the legislatively mandated Emergency Procedures, Earthquake and Disasters Program costs claimed by the San Diego Unified School District for the period of July 1, 1996, through June 30, 1998 (fiscal year (FY) 1996-97 and FY 1997-98). The final report was issued on December 22, 2000 **(Exhibits O and Q)**.

The district submitted reimbursement claims totaling $1,201,436: $588,819 for FY 1996-97 **(Exhibit E)** and $612,617 for FY 1997-98 **(Exhibit F)**. This total was reduced by $176,739, from $1,201,436 to $1,024,697, by the SCO's Division of Accounting and Reporting on August 16, 1999, based on a desk review. The adjustment related to FY 1996-97 claims, which were reduced from $588,819 to $412,080. Subsequently, the SCO performed an audit for the period of July 1, 1996, through June 30, 1998, and determined that the entire amount claimed was unallowable. The unallowable costs resulted primarily from lack of documentation substantiating claimed costs. The entire amount previously paid to the district, totaling $1,008,704, has been offset by the State. A summary of the audit results follows.

Cost Elements	Costs Claimed	Allowable Costs	Adjustment
July 1, 1996 through June 30, 1997			
Salaries and benefits	$ 563,463	$ 0	$ 563,463
Indirect costs	25,356	0	25,356
Claimed costs	588,819	0	588,819
Less claim adjustment based on SCO desk review	(176,739)	0	(176,739)
Claim adjusted based on SCO audit	$ 412,080	0	$ 412,080
Less amount paid by State		(412,080)	
Amount paid in excess of allowable costs		412,080)	
Less SCO offset		(412,080)	
Net payment		$ 0	
July 1, 1997 through June 30, 1998			
Salaries and benefits	$ 587,079	$ 0	$ 587,079
Indirect costs	25,538	0	25,538
Claimed costs	$ 612,617	0	$ 612,617
Less claim adjustment based on SCO desk review	(0)	0	(0)
Claim adjusted based on SCO audit	$ 612,617	0	$ 612,617
Less amount paid by State		(596,624)	
Amount paid in excess of allowable costs		596,624	
Less SCO offset		(596,624)	
Net payment		$ 0	

Cost Elements	Costs Claimed	Allowable Costs	Adjustment
Summary			
Salaries and benefits	$ 1,150,542	$ 0	$ 1,150,542
Indirect costs	50,894	0	50,894
Claimed costs	1,201,436	0	1,201,436
Less claim adjustment based on SCO desk review	(176,739)	0	(176,739)
Claim adjusted based on SCO audit	$ 1,024,697	0	$ 1,024,697
Less amount paid by State		(1,008,704)	
Amount paid in excess of allowable costs		1,008,704	
Less SCO offset		1,008,704	
Net payment		$ 0	

The district believes that it provided documentation that adequately substantiated claimed costs.

I. SCO REBUTTAL TO STATEMENT OF THE DISPUTE

Parameters and Guidelines

On March 23, 1989, the Commission on State Mandates adopted *Parameters and Guidelines* for Chapter 1659, Statutes of 1984 **(Exhibit A)**. On February 28, 1991, the Commission on State Mandates adopted *Amended Parameters and Guidelines* for Chapter 1659, Statues of 1984 **(Exhibit B)**. *Amended Parameters and Guidelines* deleted one reimbursable activity—time spent by district teachers in providing instructions on earthquake emergency procedures—and added one reimbursable activity—costs of consultants who provided earthquake emergency procedures instruction to other employees and students.

Section I. Summary of Mandate, of *Amended Parameters and Guidelines* states that Chapter 1659, Statutes of 1984, "requires the governing board of each school district or private school and the county superintendent of schools of each county to establish an earthquake emergency procedure in each school building under its jurisdiction." The legislation also states "the governing board of any school districts shall grant the use of school buildings, grounds and equipment to public agencies, 'including the American Red Cross,' for mass care and welfare shelters during disasters or other emergencies affecting the public health and welfare, and eliminated the authority of the school districts to recover direct costs from the public agencies for the use of school facilities during local emergencies."

Section V.B. of *Amended Parameters and Guidelines* states that no reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedures systems and that the following reimbursable emergency procedures costs are allowable.

1. Emergency Procedures

   a. The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of non-teacher district employees, including consultants, directly engaged in providing instruction to other employees and students of the district in

earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instructions.

The reimbursable costs incurred by non-teacher personnel in providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

b. Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

2. Mass Care and Welfare Shelters:

All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

a. Salaries and related employees benefits of district employees assigned to facility supervision and security for the purpose of opening and closing the facility or portions of the facilities and to provide security at the facility during the period of the emergency.

b. Salaries and related employee benefits of district custodial employees to maintain and clean-up district facilities during the emergency or after for the purpose of making the facility ready for normal operation.

c. Utility costs incurred by the district directly related to the usage of district facilities for Mass Care and Welfare Shelters.

The district claimed only salaries and wages relating to Emergency Procedures under the first two paragraph of V.B.1.a., above. The district did not claim any salaries and wages for Mass Care and Welfare Shelters. Furthermore, the district did not claim any costs for supplies or contracted services.

Section VI of *Amended Parameters and Guidelines* describes the claim preparation process, as follows.

Claim Preparation

A. Each claim must be filed in a timely manner in accordance with Section 7560 of the Government Code. Attach a statement showing the actual increased costs incurred to comply with the mandate which summarizes these costs as follows:

1. Emergency procedures
   Salaries
   Employee benefits . . .

B. A listing to support the following reimbursable items shall be provided:
   1. Emergency procedures
      For those employees whose function is to prepare and implement emergency plans and to provide instruction, provide a listing of each employee, describe their function, their hourly rate of pay and related employee benefit costs and the number of hours devoted to their function as they relate to this mandate. . . .

Section VIII of *Amended Parameters and Guidelines* describes the supporting data activities, as follows.

> Supporting Data
>
> For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs. These documents must be kept on file by the school district submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate, and made available on the request of the State controller or his agent.

SCO Claim Instructions

The SCO first issued its claiming instructions for Chapter 1659, Statues of 1984, in 1993 **(Exhibit C)**. The original claim instructions were revised in 1995, 1996 and 1998 **(Exhibit D)**. The revised claim instructions not only include a description of reimbursable components, but they describe the Reimbursement Limitations in paragraphs 6A and 6B, as follows.

> Reimbursement Limitations
>
> A. No reimbursement shall be claimed for in-classroom teachers' time spent on the instruction of students on emergency procedure systems.
>
> B. No salaries and related employee benefit costs shall be claimed for supervision, security, and custodial employees for any time which they would have normally worked at the school facility during the period of emergency.

In addition, the revised Claim Instructions describe the claim forms and instructions in paragraph 7A, which are consistent with *Amended Parameters and Guidelines*.

Allowable Costs

When *Amended Parameters and Guidelines* for the Emergency Procedures, Earthquake and Disasters Program is reviewed in light of the clear legislative intent of the mandate, emergency preparation is limited only to those costs incurred with respect to earthquake emergency procedures.

Amended Parameters and Guidelines for this mandate references Chapter 1659, Statutes of 1984. This statute added Article 10.5, entitled "Earthquake Emergency Procedures," to Chapter 2 of Part 21 of the *Education Code* (Sections 35295, 35296, and 35297). No other disasters or emergencies are specifically mentioned in any of these sections. Section 35295(c) clearly states that "It is therefore the intent of the Legislature in enacting this article to authorize the establishment of earthquake emergency procedure systems in kindergarten and grades 1 through 12 in all public or private schools in California." Section 35296 addresses the establishment of the earthquake emergency procedure systems. Furthermore, the State of Decision by the Commission on State Mandates adopted on July 23, 1987, states, ". . . this statute has imposed a new program by requiring the governing board of any school district to establish an earthquake emergency procedures system. . . ."

II. AUDIT DOCUMENTATION WAS NOT SUBMITTED SUBSTANTIATING EMPLOYEE AND HOURS CHARGED TO THE MANDATE

Issue 1

The district states that it provided the SCO with time logs of the actual effort expended on the mandated activities for the period indicated.

SCO Analysis:

During the audit, the SCO auditor requested to see time records or time logs that would substantiate the employees and hours charged to the mandate. The SCO auditor was not provided with time records or time logs. Instead, the auditor was provided with "Data Collection" sheets. The Data Collection sheets **(Tab 3),** referred to as "after-the-fact certifications" by the district, were prepared at the end of each school year by a school's principal or vice principal. The sheets reflect estimated time spent on specific activities for that year by principals, vice principals, nurse, counselors, teachers, support staff, and maintenance staff, ranging from 0.5 hours to 20 hours per employee per year.

The Data Collection sheets do not provide names of each employee or the specific date and time of the charges, as required by *Amended Parameters and Guidelines* Section VI.B.1(a). That section states that the support for salary and employee benefits claimed costs must include "a listing of each employee, description of their function, their hourly rate of pay and related employee benefit costs and the number of hours devoted to their function as they relate to this mandate."

Each Data Collection sheet identifies various staff member classifications (principals, vice principals, nurse, counselor(s), teachers, support staff, maintenance) and has a blank space for the estimated number of hours spent on four activities, ranging from 0.5 to 20 hours. There is a line at the bottom of the sheet for a school staff member to sign and date at the end of each fiscal year for a specific school. The four activities are as follows:

A: Preparing and implementing the district earthquake emergency plans and procedures;
B: Training all staff in the earthquake emergency plans and procedures;
C: Preparing standard lesson plans for training students in earthquake emergency procedures; and

D: Preparing a standard testing program to ensure that students are properly trained in the plan.

The district provided the following analysis, based on completed Data Collection sheets.

FY 1996-97 Hours

	Principals	Vice Principals	Nurses	Counselors	Teachers	Support Staff	Maintenance
Average:							
A	2	2	2	2	1.765	2	1.991
B	2	2	1.935	1.865	1	1.92	0
C	1	1.696	0	0	1	0	0
D	1.957	2	2	2	1	0	0
Total	6.957	7.696	5.935	5.865	5.765	3.92	3.991
Mean Avg.	1.73925	1.924	1.9783	1.955	1.44126	1.96	1.9955
Mode	2	2	2	2	1	N/A	N/A
Median	1.9785	2	2	2	1.3825	1.95	1.9955
Statistical Totals	7.914	7.696	5.935	5.865	4	3.92	3.991
Actual Hours Claimed	1	1	1	1	2	1	1

FY 1997-98 Hours

	Principals	Vice Principals	Nurses	Counselors	Teachers	Support Staff	Maintenance
Average:							
A	2	2	2	1	2	2	2
B	1	1	1	1	1	1	2
C	1	1	0	0	1	0	0
D	1	1.76	0.6	1	1	0	0
Total	5	5.75	3.5	3	5	3	4
Mean Avg.	1.25	1.4375	1.1667	1	1.25	1.5	2
Mode	1	1	N/A	1	1	N/A	2
Median	1	1.375	1	1	1	1.5	2
Statistical Total	4	4	3	3	4	3	4
Actual Hours Claimed	2	2	1	1	2	1	1

The hours claimed by the district consisted of estimated hours per position (identified by the district as "Actual Hours Claimed") multiplied by the number of annual positions (authorized positions plus or minus excess or vacant positions). The information used was obtained from 87 of the 165 school sites in FY 1996-97 and 97 of the 169 school sites in FY 1997-98 that submitted a Data Collection sheet.

The district did not provide the SCO auditor with corroborating documentation to confirm the information provided in the Data Collection sheets. The district did not maintain workload data throughout the year or any other supportive documentation to substantiate the estimated hours and to validate that the hours were spent for activities required under the mandate. SCO interviews with school site personnel indicated that claimed activities

included non-reimbursable activities, such as full-disaster-preparedness drills conducted during classroom hours. Furthermore, the schools used in the projection above were not representative of the population, since the schools used were the responding schools rather than schools selected randomly.

Consequently, the methodology used by the district in determining actual hour per position and the resulting projection to total annual employee in a position are not valid.

Activity A: Preparing and implementing district earthquake emergency plans and procedures

District Response

> There can be no doubt the "District school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. "District" provided copies of the plans from nearly all of the school sites for 1996-97 and 1997-98. The draft audit report incorrectly states these plans "were not developed during the audit period." The plans are prepared or reviewed and updated each year and the plans provided to the auditors were the plans in effect during the audit period. Thus, the district provided sufficient documentation to prove each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate.

SCO Comment

The district provided no time records or time logs to support claimed costs relating to preparing district earthquake-emergency plans and procedures. Allowable costs relate to salaries and related employee benefits of employees (other than in-classroom teacher time) assigned the responsibility of preparing district earthquake procedure plans. The SCO auditor interviewed seven school principals. The principals stated that the emergency preparedness plans had been developed prior to FY 1996-97 and were merely updated each year thereafter. Review of the plans disclosed that the only changes made during the audit period were updates to the fiscal year, the names of the disaster preparedness committee members (including school staff), and the maps **(Tab 4)**.

The district did not identify employees with assigned responsibility to prepare district earthquake procedures plans and their related costs. The SCO review also disclosed that the emergency preparedness plans relate to disaster preparedness as well as earthquake drills, and not to earthquake drills alone.

Consequently, time included on the Data Collection sheets was unsupported and included time not related to the mandate, such as time related to fires, civil defense, and other school emergencies and disasters.

District Response

> Each school site conducts an emergency evaluation drill as part of the plan implementation. These drills are not the "drop, cover, and hold" exercises that are periodically conducted by teachers in class, but are comprehensive drills conducted

to test the emergency procedures, to provide an opportunity to make necessary changes to the procedures, and to ensure that staff members are properly trained on their individual duties under the procedures. "District" provided copies of the verifications signed by nearly 100 percent of the schools in which the school site verifies that the school conducted an emergency evaluation drill in each of the fiscal years. The auditor also received samples of drill logs maintained by the school sites selected by the auditor showing the date and times of the drills. Each school site evaluates their evacuation drill and makes appropriate changes to the emergency preparedness plans. These activities are reimbursable under the Parameters and Guidelines.

SCO Comment

Allowable costs relate to salaries and related employee benefits of employees (other than in-classroom teacher time) with assigned responsibility to implement district earthquake procedures plans. The district did support that each school site conducted an emergency evaluation drill as part of the plan implementation; however, the district did not identify employees with assigned responsibility to implement district earthquake procedures plans and it did not identify their related costs.

Furthermore, the district did not support that school sites evaluated their evacuation drill and made appropriate changes to the emergency preparedness plans. Interviews with principals or vice principals disclosed that emergency drills implemented at the school sites were conducted to test the procedures for all emergencies rather than for earthquakes alone.

Consequently, time included on the Data Collection sheets was unsupported and included time not related to the mandate, such as time related to fires, civil defense, and other school emergencies and disasters.

Activity B: Training all staff in the earthquake emergency plans and procedures

District Response

In interviews with the auditors, the "District's" school principals or vice principals affirmed they conduct at least one general staff meeting, normally prior to the beginning of the school year, in which they discuss the emergency procedures with all staff members and each staff member reviews the emergency procedures and prepares for the evacuation drills. The principals and vice principals provided samples of the meeting agendas for the meetings in which the emergency procedures plans were discussed, confirming the schools performed the reimbursable activities. Thus, the "District" provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans, an activity that is clearly reimbursable under the Parameters and Guidelines.

SCO Comment

The district provided no time records or time logs to support claimed costs relating to training all staff members in the earthquake emergency plan and procedures. Allowable costs relate to: (1) salaries and related employee benefits of non-teacher district employees, including consultants, directly engaged in providing instruction to employees and students of

the district in earthquake procedures; and (2) the cost incurred by the district of employees attending these meetings to receive instructions.

Interviews with seven school principals or vice principals affirmed that they conducted at least one general staff meeting prior to the beginning of the school year. However, only one of the seven schools produced an agenda for FY 1996-97 and FY 1997-98 **(Tab 5)**. The agenda listed various topics that included earthquakes under the "Procedures Enclosed" topic and stated that the entire meeting would last for two hours (1 p.m. to 3 p.m.). The agenda did not identify whether earthquake procedures were discussed or the time spent discussing them. The SCO requested copies of agendas or meeting minutes for the other schools, but none were provided.

Activity C: Preparing standard lesson plans for training students in earthquake emergency procedures

District Response

None provided.

SCO Comment

The district provided no time records or time logs to support claimed costs relating to preparing standard lesson plans for training students in earthquake emergency procedures. Allowable costs relate to the reimbursable costs incurred by non-teacher personnel in the preparation and dissemination to students of standard lesson plans on a district-wide basis.

Activity D: Preparing a standard testing program to ensure that students are properly trained in the plan

District Response

None provided.

SCO Comment

The district provided no time records or time logs to support claimed costs relating to preparing a standard testing program to ensure that students are properly trained in the plan. Allowable costs relate to the reimbursable costs incurred by non-teacher personnel in the preparation of a standard testing program to ensure that students are properly trained.

Issue 2

The district states that:

- Time logs (after-the-fact certifications) were completed by the individuals who performed the tasks or by a supervisory official having first-hand knowledge of the activity performed by the employees;

- After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective;
- Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs;
- After-the-fact certifications are used to determine actual costs; they are not estimates; and
- The source documents provided are reliable and credible evidence that personnel performed the mandated activities.

SCO Comment

Amended Parameters and Guidelines for this mandate does not indicate that OMB Circular A-87 or California Department of Education memoranda are criteria for cost claims. Nevertheless, the Data Collection sheets used by the district for "after-the-fact certifications" are not in compliance with OMB Circular A-87 or the timekeeping requirements established by the California Department of Education.

OMB Circular A-87, Attachment B.11.h. (5), as amended on August 29, 1997, **(Tab 6)** states that personnel activity reports must meet the following standards: (a) they must reflect an after-the-fact distribution of the actual activity of each employee; (b) they must account for the total activity for which each employee is compensated; (c) they must be prepared at least monthly and must coincide with one or more pay periods; and (d) they must be signed by the employee.

The Data Collection sheet used by the district for "after-the-fact certifications" are not in compliance with OMB Circular A-87 Attachment B.11.h (5) because it: (a) does not identify the actual activity for each employee; (b) does not identify the total activity for which each employee is compensated; (c) was not prepared at least monthly (it was prepared at the end of the fiscal years); and (d) was not signed by the employee.

In a letter dated August 28, 1997, **(Tab 7)** the California Department of Education describes the minimum requirement for documenting salary or wages of an employee who is funded from more than one categorical program source or cost objective (as is the case herein). The minimum requirement for such an employee is a personnel activity report (PAR) or equivalent documentation to be prepared at least monthly, in compliance with the requirements of OMB Circular A-87. The district did not comply with this requirement.

In a letter dated June 26, 1998, **(Tab 8)** the California Department of Education describes a substitute system approved for California effective July 1, 1998, by which districts are required to collect PARs from employees every fourth month (three times a year). The information from the PARs is used to estimate the percentage of time that employees will spend on various federal programs in the next three months and to reconcile the federal timekeeping estimates from the previous three months. The California Department of Education states that, "This system works best when the composite workload produces an even distribution of salaries to accounts over the full 12-month period." The California Department of Education also states that each district "must ensure that their timekeeping efforts are compliant with the requirements of Circular A-87." The substitute system is not applicable to the mandated costs program, since activities relating to emergency procedures

do not occur evenly throughout the fiscal year. Furthermore, the district did not follow the timekeeping requirement of OMB Circular A-87.

The California Department of Education also issued letters dated March 22, 2000, and June 8, 2000, relating to a second time reporting system implemented January 1, 2000, that simplified record keeping for employees funded with both federal Schoolwide Program (SWP) funds and state School Based Coordinated Program (SBCP) funds. This record keeping allows schoolsite-level employees to be considered as funded by a single cost objective. This time reporting system is not applicable to the mandated costs program since the employees are performing various activities other than SWP and SBCP and, therefore, are funded by more than one categorical program source or cost objective.

Issue 3

The district states the following:

> The "District's" method of determining the actual costs of performing the mandated activities is reasonable. In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, provided time logs. The district performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.
>
> Had the "District" used only the actual time reported by 97 school sites for Fiscal Year 1997-98, the reimbursement claim would have been $390,387.32. However, the "District's" documents evidence that all school sites performed the reimbursable activities. Therefore, the statistical method used by the "District" to determine the actual costs of performing the reimbursable activities is reasonable and not excessive.

SCO Comment

The district's method of determining the actual costs of performing the mandated activities is not reasonable. In FY 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, submitted time logs. In FY 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, submitted time logs. The district states that it performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. However, the analysis does not meet the requirements for a statistical analysis because the hours from the Data Collection sheets were estimates and, therefore, not verifiable. In addition, the 87 sites for FY 1996-97 and the 97 sites for FY 1997-98 were not randomly selected. This lack of randomness prevents the results of the samples from being projected to the total school sites for both years. Furthermore, the district states that the time claimed for each employee is less than the average and median times that are supported by statistical analysis. Since the analysis used by the district is invalid, a comparison to the actual hours charged to the mandate is also invalid. The actual hours claimed for each employee cannot be substantiated; therefore, the costs claimed for salaries, benefits, and related indirect costs are not allowable.

III. THE ADJUSTMENTS BY THE SCO ARE NOT FACTUALLY INCORRECT, CAPRICIOUS, OR CONTRARY TO LAW

A. Adjustments to Fiscal Year 1996-97 Reimbursement Claim

1. August 16, 1999, Adjustment

District Comment

> The SCO never provided any basis for the adjustment of the amount of $176,739. The amounts claimed by the "District" are the District's costs for salaries and benefits to perform the mandated activities. The SCO had no basis to adjust the claim and certainly no basis for denying 100% of this claim. The SCO's adjustment is arbitrary, capricious, and contrary to fact and law.

SCO Response

The adjustment made by the SCO during a desk review of the filed claim is not arbitrary, capricious, or contrary to fact and law.

Section V.B. of *Amended Parameters and Guidelines* states, "NOTE: No reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedures systems."

On November 26, 1997, the district filed its claim for reimbursement of costs reported for fiscal year 1996-97 **(Exhibit E).** The claim summary form (FORM EPED-1) reports salaries and benefits of $167,423 for teacher in-classroom instruction, which is an unallowable cost. The related indirect cost is $7,534 ($167,423 times the 4.5% indirect cost rate presented in the form). Consequently, the adjustment made by the SCO during a desk review should have been $174,957.

However, the SCO letter dated August 16, 1999, **(Exhibit H)** inadvertently calculated the indirect cost through the desk review to be $9,316 rather than $7,534, an overstatement of $1,782. Consequently, the SCO offset of $176,739 should have been $174,957. The difference was corrected during the SCO audit.

2. December 2, 2000, Adjustment

District Comment

> The adjustments made by the SCO on December 2, 2000 are arbitrary, capricious, and contrary to law. SCO's comments that claim are disallowed primarily due to the lack of documentation substantiating claimed costs". The SCO had no basis to adjust the claim and certainly no basis for denying 100% of this claim.

SCO Response

The SCO audit report is dated December 22, 2000, **(Exhibit O)** rather than December 2, 2000. The adjustments made by the SCO in its report are not arbitrary, capricious, or contrary to law. The district is responsible for supporting costs claimed. The district did not provide time records or other evidence supporting the validity of costs claimed consistent with *Amended Parameters and Guidelines*. Instead, the district supported costs claimed through year-end estimates, which are unsupported, and included activities not allowable (teachers in classroom instruction) and non-earthquake activities (fire, civil defense, and other campus disasters performed during emergency drills).

B. Adjustments to Fiscal Year 1996-97 Reimbursement Claim

District Comments

> The District provided documentation required by the Parameters and Guidelines to support its reimbursement claim for Fiscal Year 1996-97. The SCO improperly requested documentation that is not required by the Parameters and Guidelines nor used by the District to compute its claim.

SCO Response

The district did not provide documentation to substantiate its claimed costs. Documentation provided by the district did not provide the names of each employee or the specific date and time of the charges, as required by Section VI.B.1(a) of *Amended Parameters and Guidelines*. That section states that the support for salary and employee benefits claimed costs must include "a listing of each employee, description of their function, their hourly rate of pay and related employee benefit costs, and the number of hours devoted to their function as they relate to this mandate."

C. Adjustments to Fiscal Year 1997-98 Reimbursement Claim

District Comment

> The District provided documentation required by the Parameters and Guidelines to support its reimbursement claim for Fiscal Year 1996-97. The SCO improperly requested documentation that is not required by the Parameters and Guidelines nor used by the District to compute its claim.

SCO Response

The district did not provide documentation to substantiate its claimed costs. Documentation provided by the district did not provide the names of each employee or the specific date and time of the charges, as required by Section VI.B.1(a) of *Amended Parameters and Guidelines*. That section states that the support for salary and employee benefits claimed costs must include "a listing of each employee, description of their function, their hourly rate of pay and related

employee benefit costs and the number of hours devoted to their function as they relate to this mandate."

IV. AUDIT FOR THE FISCAL YEAR 1996-97 REIMBURSEMENT CLAIM WAS TIMELY

District Comment

Government Code Section 17558.5 imposed a limitation-period on audits of mandate reimbursement claims. Section 17558.5 requires that any audit be completed no later than two years after the end of the calendar year in which the claim was filed or last amended. The district's Fiscal Year 1996-97 reimbursement claim was filed on November 26, 1997. Therefore, the audit of the Fiscal Year 1996-97 must have been completed no later than December 31, 1999. The draft audit report, with respect to Fiscal Year 1996-97, was not timely issued and has no force or effect[1].

[1]The State Controller's Office completed review of the Fiscal Year 1996-97 reimbursement claim on September 15, 2000 and issued the written notification of adjustment to the claim required by Government Code section 17558.5, subdivision (b) on that date. Pursuant to that review, the State Controller's Office approved costs totaling $412,080 of the District's $588,819 reimbursement claim.

SCO Response

The SCO commenced an audit of FY 1996-97 within two years after the end of the calendar year in which the FY 1996-97 reimbursement claim was filed or last amended. The claim was filed on November 26, 1997; consequently, the SCO had until December 31, 1999, to commence an audit. The audit was started in October 1999.

Government Code Section 17558.5(a) states, "A reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter is subject to audit by the Controller no later than two years after the end of the calendar year in which the reimbursement claim is filed or last amended." This section refers to when the audit should be initiated rather than completed.

Furthermore, the initial adjustment made by the SCO on September 15, 2000, was the result of a desk review. The SCO did not waive its rights to perform an audit.

V. CONCLUSION

The State Controller's Office performed an audit of the reimbursement claims for FY 1996-97 and for FY 1997-98 for the Emergency Procedures Mandate set forth in Chapter 1659, Statues of 1984, filed by the San Diego Unified School District. The district did not provide the SCO with documentation that would substantiate costs claimed for both years. Instead the district made available Data Collection sheets that did not provide the names of the employees or the dates and times of the claimed activities. Contrary to the district's claim, the Data Collection sheets do not meet the requirements set by OMB Circular A-87. The analysis performed by the district on the information from the sample of Data Collection sheets does not meet the requirements for statistical sampling because

the samples were not randomly selected. Therefore, the comparisons to the hours actually claimed are invalid. Furthermore, based on interviews with seven principals or vice principals, the emergency procedures performed at the school sites were inclusive of all disasters, such as fire, civil defense, earthquake and other campus disasters; the schools did not identify the activities related only to earthquakes.

In conclusion, the Commission should find that: (1) the SCO correctly reduced the district's FY 1996-97 claim by $588,819; (2) the SCO correctly reduced the district's FY 1997-98 claim by $612,617; and (3) the audit report for the FY 1996-97 reimbursement claim was communicated in a timely manner.

VI. CERTIFICATION

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

Executed on July 16, 2002, at Sacramento, California, by:

Jim L. Spano, Chief
Compliance Audits Bureau
Division of Audits
State Controller's Office

+150
#8

San Diego Unified School District
Finance Division
Mandated Cost Unit
Chapter 1659/84 Emergency Procedures
FY 96/97 Data Collection

Please indicate with a ✓, which of the activities below your site participates in, which staff members are typically involved in the activity and the approximate amount of time spent on the activity.

Activity: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with support staff and teachers to review, draft, edit, and finalize site plans.

Staff:		Time spent per Year:
✓	Principal	15-20 hrs 2 x
✓	Vice Principal	
✓	Nurse	
✓	Counselor(s)	
✓	Teachers	
✓	Support Staff	
✓	Maintenance	
✓	Other parents	

Activity: Training all staff in the earthquake emergency plan and procedures. Please include inservice training time.

Staff:		Time spent per Year:
✓	Principal	6-10 hrs. 2 x
✓	Vice Principal	
✓	Nurse	
✓	Counselor(s)	
✓	Teachers	
✓	Support Staff	
✓	Maintenance	
✓	Other parents	

Activity: Preparing standard lesson plans for training students in earthquake emergency procedures.

Staff:		Time spent per Year:
✓	Principal	2 hrs
✓	Vice Principal	
✓	Teachers	
✓	Other nurse	

0 reid

Activity: Preparing a standard testing program to ensure that students are properly trained in the plan.

Staff:		Time spent per Year:
✓	Principal	3 hrs. drill twice this year in May Emergency drill.
✓	Vice Principal	
✓	Nurse	
✓	Counselor(s)	
✓	Teachers	
✓	Other parents	

0 reid

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to receive reimbursement. Your signature on this form certifies your participation in the activity and that you have reported actual time or provided a good faith estimate.

Employee Signature Dolores Cortez Site Alcott Elem. Date 6/1/97

Dolores Cortez

San Diego City Schools
Finance Division
Mandated Cost Unit
Chapter 1659/84 Emergency Procedures
FY97/98 Data Collection

Please indicate which of the activities below your site has completed this year, which staff members are typically involved in each activity and circle the approximate time spent on each activity.

ACTIVITY: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with both classified and certified staff to review, draft, edit and finalize site plans.

STAFF:	TIME SPENT FY97/98				
✓ Principal	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
NA Vice Principal	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
✓ Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
✓ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	10 hrs.
✓ Support Staff	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
✓ Maintenance	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.

ACTIVITY: Training all staff in the earthquake emergency plan and procedures. Include inservice training time.

STAFF:	TIME SPENT FY97/98				
✓ Principal	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
___ Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
✓ Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
✓ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
✓ Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

ACTIVITY: Preparing standard lesson plans for training students in earthquake emergency procedures.

STAFF:	TIME SPENT FY97/98				
___ Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

ACTIVITY: Preparing standard testing program to ensure that students are properly trained in the plan.

STAFF:	TIME SPENT FY97/98				
✓ Principal	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
___ Vice Principal	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
___ Nurse	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
___ Counselor(s)	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.
✓ Teachers	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	___ hrs.

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to received reimbursement. Your signature on this form certifies your participation in the activity or your knowledge of staff involved in the activity and that you are reporting actual time or providing a good faith estimate.

EMPLOYEE SIGNATURE: Laurie L. Casano DATE: 4/16/98

SITE: *Alcott Elementary*

nance Division
Mandated Cost Unit
Chapter 1659/84 Emergency Procedures
FY97/98 Data Collection

Please indicate which of the activities below your site has completed this year, which staff members are typically involved in each activity and circle the approximate time spent on each activity.

ACTIVITY: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with both classified and certified staff to review, draft, edit and finalize site plans.

STAFF:	TIME SPENT FY97/98				
1 Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
1 Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.

ACTIVITY: Training all staff in the earthquake emergency plan and procedures. Include inservice training time.

STAFF:	TIME SPENT FY97/98				
1 Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
27 Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
10 Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.

ACTIVITY: Preparing standard lesson plans for training students in earthquake emergency procedures.

STAFF:	TIME SPENT FY97/98				
___Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.

ACTIVITY: Preparing standard testing program to ensure that students are properly trained in the plan.

STAFF:	TIME SPENT FY97/98				
___Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
___Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.
27 Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___hrs.

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to received reimbursement. Your signature on this form, certifies your participation in the activity or your knowledge of staff involved in the activity and that you are reporting actual time or providing a good faith estimate.

EMPLOYEE SIGNATURE: _____ DATE: 4-1-98

SITE: *Carrie Elementary*

Finance Division
Mandated Cost Unit
Chapter 1659/84 Emergency Procedures
FY97/98 Data Collection

Please indicate which of the activities below your site has completed this year, which staff members are typically involved in each activity and circle the approximate time spent on each activity.

ACTIVITY: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with both classified and certified staff to review, draft, edit and finalize site plans.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	X hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	X hrs.
____Support Staff	.5 hr	1 hr.	1.5 hrs.	(2hrs.)	X hrs.
____Maintenance	.5 hr	(1 hr.)	1.5 hrs.	2hrs.	X hrs.

total 7

ACTIVITY: Training all staff in the earthquake emergency plan and procedures. Include inservice training time.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	2 hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	2 hrs.
____Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.

6

ACTIVITY: Preparing standard lesson plans for training students in earthquake emergency procedures.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.

2

ACTIVITY: Preparing standard testing program to ensure that students are properly trained in the plan.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	3 hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to received reimbursement. Your signature on this form certifies your participation in the activity or your knowledge of staff involved in the activity and that you are reporting actual time or providing a good faith estimate.

EMPLOYEE SIGNATURE: _____ DATE: May 1 '98

SITE: *Cubberley Elementary*

Finance Division
Mandated Cost Unit
Chapter 1659/84 Emergency Procedures
FY97/98 Data Collection

Please indicate which of the activities below your site has completed this year, which staff members are typically involved in each activity and circle the approximate time spent on each activity.

ACTIVITY: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with both classified and certified staff to review, draft, edit and finalize site plans.

STAFF:	TIME SPENT FY97/98				
___ Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
X Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	20 hrs.
___ Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
Y Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	6 hrs.
___ Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

ACTIVITY: Training all staff in the earthquake emergency plan and procedures. Include inservice training time.

STAFF:	TIME SPENT FY97/98				
___ Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
X Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	4 hrs.
___ Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

ACTIVITY: Preparing standard lesson plans for training students in earthquake emergency procedures.

STAFF:	TIME SPENT FY97/98				
___ Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
X Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	4 hrs.
___ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

ACTIVITY: Preparing standard testing program to ensure that students are properly trained in the plan.

STAFF:	TIME SPENT FY97/98				
___ Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
X Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.
___ Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	___ hrs.

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to received reimbursement. Your signature on this form certifies your participation in the activity or your knowledge of staff involved in the activity and that you are reporting actual time or providing a good faith estimate.

EMPLOYEE SIGNATURE: Kathy Murphy DATE: 4/3/98

SITE: *Bell Junior High School*

San Diego Unified School District
Finance Division
Mandated Cost Unit
Chapter 1659/84 Emergency Procedures
FY 96/97 Data Collection

96/97

Please indicate with a ✓, which of the activities below your site participates in, which staff members are typically involved in the activity and the approximate amount of time spent on the activity.

Activity: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with support staff and teachers to review, draft, edit, and finalize site plans.

Staff:		Time spent per Year:
	Principal	4
	Vice Principal	6
	Nurse	4 hours
	Counselor(s)	2
	Teachers	120 40@3
	Support Staff	20 10@2
	Maintenance	5
	Other	

Activity: Training all staff in the earthquake emergency plan and procedures. Please include inservice training time.

Staff:		Time spent per Year:
	Principal	2
	Vice Principal	1
	Nurse	1
	Counselor(s)	1
	Teachers	40 1 hr each
	Support Staff	10 1 hr each
	Maintenance	1
	Other	

Activity: Preparing standard lesson plans for training students in earthquake emergency procedures.

Staff:		Time spent per Year:
	Principal	0
	Vice Principal	0
	Teachers	40 1 hr each
	Other	

Activity: Preparing a standard testing program to ensure that students are properly trained in the plan.

Staff:		Time spent per Year:
✓	Principal	2
✓	Vice Principal	2
✓	Nurse	4
	Counselor(s)	
	Teachers	
	Other	

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to receive reimbursement. Your signature on this form certifies your participation in the activity and that you have reported actual time or provided a good faith estimate.

Signature Ed Au-Fall Site Mason Date 5/19/97

Principal

Mandated Cost Unit

Chapter 1659/84 Emergency Procedures
FY97/98 Data Collection

97/98

Please indicate which of the activities below your site has completed this year, which staff members are typically involved in each activity and circle the approximate time spent on each activity.

ACTIVITY: Preparing and implementing district earthquake emergency plans and procedures. Includes time spent meeting with both classified and certified staff to review, draft, edit and finalize site plans.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. x 40
____Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. x 6
____Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. x 3

ACTIVITY: Training all staff in the earthquake emergency plan and procedures. Include inservice training time.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. 40
____Support Staff	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. 6
____Maintenance	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. 3

ACTIVITY: Preparing standard lesson plans for training students in earthquake emergency procedures.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	1 hrs. 40

ACTIVITY: Preparing standard testing program to ensure that students are properly trained in the plan.

STAFF:	TIME SPENT FY97/98				
____Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	____hrs.
____Vice Principal	.5 hr	1 hr.	1.5 hrs.	2hrs.	____hrs.
____Nurse	.5 hr	1 hr.	1.5 hrs.	2hrs.	____hrs.
____Counselor(s)	.5 hr	1 hr.	1.5 hrs.	2hrs.	____hrs.
____Teachers	.5 hr	1 hr.	1.5 hrs.	2hrs.	____hrs.

Employee Certification: The State of California requires that school district personnel maintain a record of time spent on mandates in order for the district to received reimbursement. Your signature on this form certifies your participation in the activity or your knowledge of staff involved in the activity and that you are reporting actual time or providing a good faith estimate.

EMPLOYEE SIGNATURE: E. Eric Fall DATE: 4-27-98

SITE: *Mason Elementary* Principal

3F/54

Alcott Elementary School
and
Infant Development Program
1997-1998

DISASTER PREPAREDNESS/ EARTHQUAKE DRILL

Committee Members

Laurie Carano teacher
Cara Sonstegard ✓
Dolores Celia P
Bonnie Bear Nurse
Maureen Moffatt ✓
Susan Burkhard Special Ed Resource Teacher Specialist

Fari Akbarian teacher
Danette Dierdorff ✓
Elsie Rapp parent / Instr. Aide
Svea Carroll } teachers
Jon Stallo }
Dale Fleet }

ALCOTT SCHOOL
SITE DISASTER PLAN

PLANNING

- School Site Safety Committee
  Should include principal, teachers, secretary, nurse, parent, custodian

- Divide planning activity into manageable components.

- Disaster Plan
  School map with location of emergency centers, emergency assembly areas, emergency vehicle entrance, and reunion gate. There should also be a map for site staff indicating locations of emergency equipment and shutoff for water, gas, and electric.

DISASTER PLAN TEAMS: AN OPERATIONAL OVERVIEW

1. EMERGENCY OPERATIONS CENTER (E.O.C.)
   This team is run by the head administrator on the site. Its function is to coordinate and manage all other team operations in the event of a disaster.

2. EMERGENCY ASSEMBLY AREA (E.A.A.)
   ALL TEACHERS ARE INITIALLY A MEMBER OF THIS TEAM, however, some teachers may be summoned by EOC for duties on another team once at the EAA. The function of this team is to account for students and supervise students evacuated to the EAA until reunited with parents/guardians.

3. SWEEP/RESCUE TEAM
   This team operates under the overall direction of EOC and the immediate direction of team leaders. Its main functions are to rescue the injured and check and control for dangerous situations on the site resulting from the disaster. After sweep and rescue efforts are completed, this team may become a salvage and building survey team. (See Survey Team Activity for details.)

4. SECURITY TEAM
   This team operates under the overall direction of the EOC and under the immediate supervision of team leaders. Its main functions are to secure and/or patrol all entrances onto the site, prevent community members from entering school grounds without permission of EOC administrator, directing emergency vehicles and crews, and directing parents to the reunion gate.

5. REUNION GATE TEAM
   This team operates under the overall direction of the EOC and the immediate supervision of team leaders. Its main function is to reunite students with their parents/guardians and maintain records of all releases for EOC.

6. FIRST AID TEAM
   Like all other teams, this team is responsible to the overall directives of the EOC, but under the immediate supervision of school nurse and team leaders. Its main functions are to provide first aid according to triage procedures of injury severity and assist with sweep/rescue operations as directed by the EOC.

7. HISTORIAN/PUBLIC INFORMATION TEAM
   This team operates under the overall directions of the EOC and under the immediate supervisionn of the team leader. Its main function is to collect all communications for the EOC and to sign in media personnel.

WHEN DISASTER STRIKES
(Including teacher/staff responsibilities)

Teachers must discuss with their students the proper procedures they are to follow if an emergency ɥation occurs while they are not under the immediate supervision of an adult. Students must know what to do as they go to and from pull-out programs, running errands, and in the bathrooms. They must know that they are to drop and cover, and that when the evacuation or other signal is given, they should contact the closest adult for assistance and/or further instructions. This procedure also applies in the event of an emergency situation occurring during recess or lunch periods. In no event should students enter buildings without further instructions from an adult.

A. Inside School Buildings and Offices:

1. When earthquake movement or vibrations begin, teachers or persons in charge give the command "DROP." If possible, move students away from any glass windows, overhead hanging objects, light fixtures, book shelves, etc.

2. Invoke the "buddy" system (have neighbors look out for each other).

3. If appropriate furniture (large desks, tables, etc.) is in the room, students should assume DROP position under the furniture. Students should be instructed to hold on to the furniture with one hand while in the DROP position to prevent it from sliding away.

4. Remain in this position until movement stops. At that time the judgment of the adult in charge will determine if it is safe to exit to the Emergency Assembly Area. As a rule of thumb, it is usually safe to exit three to five minutes after the initial quake stops. It may be necessary to exit throughthe windows if the movement of the earthquake has rendered the door useless.

5. Before exiting, note any persons with serious injuries. DO NOT MOVE THEM. Reassure injured help is coming. "Red Flag" door, then lead other students safely to Emergency Assembly Area. Send runner with a note to notify EOC. "INJURED PERSON - RM # _____." Search/Rescue team will be dispatched to extract injured.

6. When exiting, be sure you take emergency back packs, duffle bags, water, and first responder kit, if you have been assigned one, to the Emergency Assembly Area. Adult should exit room first to ensure safe exit for students. First responder kits are in Room 1, Room 12, Nurse's Office, and Room 13.

7. Students in pull-out programs will be taken to the Emergency Assembly Area by the adult in charge andreturned to their classroom assembly area.

8. Masking tape name tags with child's name will be placed on each student and roll will be taken by adult in charge once the class is at the Emergency Assembly Area. Teachers will complete "Teacher Emergency Report Form." They will also send walking injured to the First Aid Area.

9. Teachers in the Emergency Assembly Area should display a large card with their identifying name, grade, and room number so that it is visible. This will hasten locating students for parents waiting at the reunion gate.

STAFF PERSONAL RESPONSIBILITIES

Responsibilities:

Make prior emergency arrangements for your family in the event of a severe earthquake or other disaster that requires your presence at Alcott.

Remain at Alcott School to assist students by insuring their safety and well-being until you are released by the site administrator or designee. Staff is required by government code to remain on site for as long as 72 hours.

Maintain personal emergency supplies.

Equipment/Supplies: (Could be kept in your car, except possibly meds.)

Change of clothing
Jacket
Sturdy shoes
Medicine(s)
Blanket
Water
Heavy gloves
Flashlight
Contact cleaning material
Glasses

FIRST AID TEAM (Triage Area)

Personnel: Team to be under supervision of school nurse when present.
- -School Nurse
- -Staff trained in first aid
- -Runners and stretcher bearers

Responsibilities:

School nurse:
- -Triages victims for medical needs
- -Directs non-medical personnel in first aid area

Team members:
- -Gathers first responder kits (Rooms 1, 12, 13, and Nurse's Office) and takes to first aid area
- -Sets up first aid area
- -Administers first aid
- -Records extent of injuries and treatment rendered
- -Sends report to EOC (Command Post)
- -Performs other duties assigned by school nurse

Equipment/Supplies: (may include but not limited to:)
- -First aid supplies
- -Stretchers
- -Blankets, sheets, plastic drop cloths
- -Wheelchair (if available)
- -Water (as much as possible)
- -Master student/staff rosters
- -Site plan and map
- -Clerical supplies: clipboards, pens, pencils, paper, pins, rubber bands, whistles, etc.
- -Red-yellow-black-green marker pens (for tagging victims) & tags
- -Report forms
- -Plastic bags and basin

MORGUE AREA

- -A designated area (can be indoors) isolated from all areas of activity for placement of the dead until coroner arrives.
- -Bodies should be tagged with identification (if possible) and covered with sheet (or towels or paper or plastic).
- -Family members should be kept in a holding area away from morgue until coroner arrives with further instructions.

NOTE: A person may need to be assigned to family holding area to assist in comforting distraught family members.

Personnel:
-Staff as assigned

Responsibilities:
-Locks all external gates, doors, and secures site
-Team member stationed at main gate to refer community/parents to appropriate areas
-Routes fire, police and rescue ambulance to area of need

Equipment/Supplies:
-Master keys
-Posted signs
-Two-way radio
-Site maps indicating major areas of disaster plan

CAMPUS/SITE SECURITY TEAM

Dang Nguyen, Bldg. Serv. Super I
Betty Matteson, Clerk

REUNION GATE TEAM

A designated gate by the park near the Emergency Assembly Area (E.A.A.) where students are released to parents/guardians. This gate should be separate from gate used for emergency vehicles.

Personnel:

- -Office clerk
- -Bus aide
- -Runners
- -Others, if needed

Responsibilites:

- -Begins process of reuniting students with their parent/guardians.
- -Obtains name of student from requesting individual.
- -Sends "Runner" to secure student and escort them to the reunion gate.
- -Has requesting individual fill out student release form (get name of adult, address, and telephone number).
- -Confirms that student recognizes the requesting individuals and that student feels safe in their custody.
- -Collects student name tag and releases student to requesting individual.
- -Keeps record of all students leaving site.
- -Keeps "Command Post" informed of student released.

NOTE: Parents/guardians or persons requesting students are NOT to enter site. Students pass through gate to requesting party when released. Unauthorized persons on site during disaster add to hysteria and disruption of body accountability.

Equipment/Supplies:

- -Master roster of students/staff
- -Clip boards
- -Site maps (especially of E.A.A.)
- -Clerical supplies: (pens, paper, clips, rubber bands, pencils, etc.)
- -Student release forms
- -Box to collect release forms after student released
- -Report forms for "Command Post" (to be sent periodically to E.O.C. so that whereabouts of students be known)

REUNION GATE

Julie James, I.A.
Mary McIntosh, Clerk
Gloria Hebeler, Clerk
Marylou Harrington, I.A.

10. **Historian/Public Information Team**

11. **Sanitation Team**

12. **Morgue Team**

13. **Emergency Vehicle Entrance** (See Map)

14. **Emergency Supply Storage Area**

    Supplies: Water Barrels, Masks, Shade Tarp, Resuscitation Tubes, Porta-Potty, Stretchers, Thermal Blankets

    Trauma Barrel Locations:

    Infant Program – Equipment Cargo Container
    First Aide Responder Kits – Rooms 112, 1, 13 & Nurse's Office.

15. **Fire Control Equipment** (See Map)

Revised – May 1998

3F/6:

NURSE EMERGENCY REPORT

Room	Grade	Adult/ Student Name	Condition	Where Transported

SCHOOL/SITE MAP

A site map should be a part of every disaster plan. The following locations should be noted:

-Emergency Operation Center (E.O.C. "Command Post")
-Emergency Assembly Area (E.A.A.) for students/staff
-Reunion Gate (Parent/Student)
-First-aid Area (Triage area)
-Emergency exit traffic patterns
-Emergency vehicle entrance
-Morgue area
-Utility shut-off locations
-Emergency supply storage areas
-Fire control equipment

NOTE: This map should be distributed to all site staff members, posted in all working area (including lounges), and sent to parents with a letter explaining the site's plan for student release in times of disaster.

3F/64

Team 1 - Auditorium Bldg. (Kitchen, Cafeteria); Adm. Bldg and Kindergarten Rooms
Team 2 - East side of all Classroom Bldgs. (18, 16, 14, Supply Rm., 12, 10, 8, 6A, Lib., 4,
Team 3 - West side of all Classrooms (Bung., 17, 15, 13, 11, 9, 7, 5, 3, 1 including all restrooms in breezeways and 6B & 6C)

Alcott Elementary School
and
Infant Development Program
1996-1997

DISASTER PREPAREDNESS/ EARTHQUAKE DRILL

Committee Members

Laurie Carano
Cara Sonstegard
Dolores Celia
Bonnie Bear
Maureen Moffatt
Susan Burkhard

Fari Akbarian
Danette Dierdorff
Elsie Rapp
Svea Carroll
Jon Stallo
Dale Fleet

3F/6

ALCOTT SCHOOL
SITE DISASTER PLAN

PLANNING

- School Site Safety Committee
  Should include principal, teachers, secretary, nurse, parent, custodian

- Divide planning activity into manageable components.

- Disaster Plan
  School map with location of emergency centers, emergency assembly areas, emergency vehicle entrance, and reunion gate. There should also be a map for site staff indicating locations of emergency equipment and shutoff for water, gas, and electric.

DISASTER PLAN TEAMS: AN OPERATIONAL OVERVIEW

1. EMERGENCY OPERATIONS CENTER (E.O.C.)
   This team is run by the head administrator on the site. Its function is to coordinate and manage all other team operations in the event of a disaster.

2. EMERGENCY ASSEMBLY AREA (E.A.A.)
   ALL TEACHERS ARE INITIALLY A MEMBER OF THIS TEAM, however, some teachers may be summoned by EOC for duties on another team once at the EAA. The function of this team is to account for students and supervise students evacuated to the EAA until reunited with parents/guardians.

3. SWEEP/RESCUE TEAM
   This team operates under the overall direction of EOC and the immediate direction of team leaders. Its main functions are to rescue the injured and check and control for dangerous situations on the site resulting from the disaster. After sweep and rescue efforts are completed, this team may become a salvage and building survey team. (See Survey Team Activity for details.)

4. SECURITY TEAM
   This team operates under the overall direction of the EOC and under the immediate supervision of team leaders. Its main functions are to secure and/or patrol all entrances onto the site, prevent community members from entering school grounds without permission of EOC administrator, directing emergency vehicles and crews, and directing parents to the reunion gate.

5. REUNION GATE TEAM
   This team operates under the overall direction of the EOC and the immediate supervision of team leaders. Its main function is to reunite students with their parents/guardians and maintain records of all releases for EOC.

6. FIRST AID TEAM
   Like all other teams, this team is responsible to the overall directives of the EOC, but under the immediate supervision of school nurse and team leaders. Its main functions are to provide first aid according to triage procedures of injury severity and assist with sweep/rescue operations as directed by the EOC.

7. HISTORIAN/PUBLIC INFORMATION TEAM
   This team operates under the overall directions of the EOC and under the immediate supervisionn of the team leader. Its main function is to collect all communications for the EOC and to sign in media personnel.

8. SANITATION TEAM

This team operates under the overall direction of the EOC and under the immediate supervision of the team leader. Its main function is to designate and maintain latrine areas and also to keep the assembly area clear.

9. MORGUE

This area should be away from all activity areas. The purpose of this area is to protect bodies until the County Coroner can examine and release them to families. (See "Morgue" in site plan.)

WHEN DISASTER STRIKES
(Including teacher/staff responsibilities)

Teachers must discuss with their students the proper procedures they are to follow if an emergency situation occurs while they are not under the immediate supervision of an adult. Students must know what to do as they go to and from pull-out programs, running errands, and in the bathrooms. They must know that they are to drop and cover, and that when the evacuation or other signal is given, they should contact the closest adult for assistance and/or further instructions. This procedure also applies in the event of an emergency situation occurring during recess or lunch periods. In no event should students enter buildings without further instructions from an adult.

A. Inside School Buildings and Offices:

1. When earthquake movement or vibrations begin, teachers or persons in charge give the command "DROP." If possible, move students away from any glass windows, overhead hanging objects, light fixtures, book shelves, etc.

2. Invoke the "buddy" system (have neighbors look out for each other).

3. If appropriate furniture (large desks, tables, etc.) is in the room, students should assume DROP position under the furniture. Students should be instructed to hold on to the furniture with one hand while in the DROP position to prevent it from sliding away.

4. Remain in this position until movement stops. At that time the judgment of the adult in charge will determine if it is safe to exit to the Emergency Assembly Area. As a rule of thumb, it is usually safe to exit three to five minutes after the initial quake stops. It may be necessary to exit throughthe windows if the movement of the earthquake has rendered the door useless.

5. Before exiting, note any persons with serious injuries. DO NOT MOVE THEM. Reassure injured help is coming. "Red Flag" door, then lead other students safely to Emergency Assembly Area. Send runner with a note to notify EOC. "INJURED PERSON - RM # _____." Search/Rescue team will be dispatched to extract injured.

6. When exiting, be sure you take emergency back packs, duffle bags, water, and first responder kit, if you have been assigned one, to the Emergency Assembly Area. Adult should exit room first to ensure safe exit for students. First responder kits are in Room 1, Room 12, Nurse's Office, and Room 13.

7. Students in pull-out programs will be taken to the Emergency Assembly Area by the adult in charge andreturned to their classroom assembly area.

8. Masking tape name tags with child's name will be placed on each student and roll will be taken by adult in charge once the class is at the Emergency Assembly Area. Teachers will complete "Teacher Emergency Report Form." They will also send walking injured to the First Aid Area.

9. Teachers in the Emergency Assembly Area should display a large card with their identifying name, grade, and room number so that it is visible. This will hasten locating students for parents waiting at the reunion gate.

10. Keep students together and calm and utilize comfort packs.

11. Teachers will remain in the Emergency Assembly Area with their class unless they have been assigned to an emergency team. Teachers who have to leave the area because of team responsibilities should pre-arrange to have a buddy teacher from their wing watch their class until they return from their duties.

12. Unassigned adults report to Emergency Operations Center.

13. Teachers will not release any students from the Emergency Assembly Area unless instructed by the Reunion Gate Team. If student has been requested at reunion gate, send student to gate with member of that team for processing.

14. DO NOT REENTER BUILDINGS; only sweep and rescue team members will be allowed in buildings before the all clear signal is given.

B. Outside School Buildings:

1. If possible, move away from buildings, poles, wires, walls, and trees. Get to open spaces.

2. Drop for the duration of the earth movements/vibrations. Wait three to five minutes after quake is over or until adult tells you to move to Emergency Assembly Area.

3. Do not strike matches or light any fires.

4. Do not touch any wires.

WHEN THE EARTHQUAKE IS OVER

A. Activate All Teams
B. Open All Communications
C. Evaluate School Site for Injured and Damages
D. Keep Constant Surveillance of School Site

STAFF PERSONAL RESPONSIBILITIES

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Responsibilities:

Make prior emergency arrangements for your family in the event of a severe earthquake or other disaster hat requires your presence at Alcott.

Remain at Alcott School to assist students by insuring their safety and well-being until you are released by the site administrator or designee. Staff is required by government code to remain on site for as long as 72 hours.

Maintain personal emergency supplies.

Equipment/Supplies: (Could be kept in your car, except possibly meds.)

Change of clothing
Jacket
Sturdy shoes
Medicine(s)
Blanket
Water
Heavy gloves
Flashlight
Contact cleaning material
Glasses

EMERGENCY OPERATION CENTER (Command Post) (E.O.C.)

Location on campus: Blacktop area - refer to map

Personnel: (may include, but not limited to, the following)
- -Principal/administrator and/or designee
- -Office secretary
- -Runners (at least 3)

Responsibilities of Administrator:
- -Accounts for the presence of all students and staff
- -Implements and coordinates emergency operations
- -Controls internal and external communications
- -Prepares reports (casualty, damage, etc.) for area/division superintendents

Equipment/Supplies:
- -Emergency roster and site map showing location of each teacher/staff station at the E.A.A. (Fire Drill location)
- -Master roster of staff and student names and room numbers
- -Two-way radio and/or bullhorn
- -Battery-operated radio
- -Emergency assignment list (i.e. sweep teams, etc.)
- -Site map and copy of site plan indicating location of Emergency Container
- -Clip boards with clerical items (paper, pens, pencils, etc.)
- -Report forms (casualty, damage, etc.)

EMERGENCY OPERATION CENTER STAFF
(Command Center)

a. Dolores Celia	Principal
b. Lois Stallo	Office Secretary
c. Deanne Rohde	Resource Teacher
d. Lindsey Linden	S.E. Resource Teacher
e.	Runners X 3
(non-classroom teachers or students)	
f.	Classroom Assistants
g.	
h.	

FIRST AID TEAM (Triage Area)

Personnel: Team to be under supervision of school nurse when present.
- -School Nurse
- -Staff trained in first aid
- -Runners and stretcher bearers

Responsibilities:

School nurse:
- -Triages victims for medical needs
- -Directs non-medical personnel in first aid area

Team members:
- -Gathers first responder kits (Rooms 1, 12, 13, and Nurse's Office) and takes to first aid area
- -Sets up first aid area
- -Administers first aid
- -Records extent of injuries and treatment rendered
- -Sends report to EOC (Command Post)
- -Performs other duties assigned by school nurse

Equipment/Supplies: (may include but not limited to:)
- -First aid supplies
- -Stretchers
- -Blankets, sheets, plastic drop cloths
- -Wheelchair (if available)
- -Water (as much as possible)
- -Master student/staff rosters
- -Site plan and map
- -Clerical supplies: clipboards, pens, pencils, paper, pins, rubber bands, whistles, etc.
- -Red-yellow-black-green marker pens (for tagging victims) & tags
- -Report forms
- -Plastic bags and basin

MORGUE AREA

- -A designated area (can be indoors) isolated from all areas of activity for placement of the dead until coroner arrives.
- -Bodies should be tagged with identification (if possible) and covered with sheet (or towels or paper or plastic).
- -Family members should be kept in a holding area away from morgue until coroner arrives with further instructions.

NOTE: A person may need to be assigned to family holding area to assist in comforting distraught family members.

EMERGENCY ASSEMBLY AREA (E.A.A.)

One designated area where all site staff and students are to assemble after evacuation of buildings.

Location: Blacktop - See map
(Area should be away from all buildings, in open space, preferably in a fenced area near a gate to be used for student release.)

Personnel: (Supervising Student Assembly Area)
- -Teachers
- -Classroom assistants
- -Runners

Responsibilities:
- -Assemble students/staff
- -Take roll of all present and note those missing
- -Tag (identify) all students
- -Display sign for each classroom with room numbers
- -Send Teacher Emergency Report Form of present and missing bodies to EOC
- -Maintain "crowd control" and monitor students in assembly area
- -Release students (record release on class roll) to "Reunion Gate" staff as requested for release to parent/guardian
- -Carry out instructions for EOC as directed

ALL STAFF MEMBERS ARE A PART OF THIS TEAM AND DIRECTLY RESPONSIBLE FOR THE STUDENTS IN THEIR CHARGE.

CAMPUS/SITE SECURITY TEAM

Personnel:

-Staff as assigned

Responsibilities:

-Locks all external gates, doors, and secures site
-Team member stationed at main gate to refer community/parents to appropriate areas
-Routes fire, police and rescue ambulance to area of need

Equipment/Supplies:

-Master keys
-Posted signs
-Two-way radio
-Site maps indicating major areas of disaster plan

CAMPUS/SITE SECURITY TEAM

a. Dang Nguyen, Bldg. Serv. Super. I
b. Pam Leffler, S.E.T
c. Betty Russell, S.E. Clerk

d.
e.

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SWEEP AND RESCUE TEAM

Personnel:

Depending on the size of school/site and staff, the number of persons assigned to this team will vary. Alcott has three teams of three.

Responsibilites:

-Custodian (in absence of site security team) secures campus gates and turns off all gas valves.
-All Sweep Team members report at once to "Command Post"/EOC.
-Receives information of location of impacted buildings containing possible injuries and trapped bodies.
-Proceeds in orderly and pre-established sweep pattern, checking all classrooms, offices, storage rooms, bathrooms, shops, auditoriums, etc., visually, vocally, and physically. Utilize Room Survey form and return to EOC.
-Extracts injured persons and takes to first aid area.
-Marks door of area searched to indicate "area clear," (white flag)
-While sweeping, note damage assessment.
-Report to EOC damage to site, and trapped and/or injured bodies.
-Extinguish fires that threaten lives (in absence of fire team).
-Rope off unsafe areas.
-After all staff/students accounted for, proceed with salvage activities as directed by EOC (i.e.: gather coats, ice, water, food, etc.)

Equipment/Supplies: (may include but not limited to the following:)

-Hard hats
-Master keys
-Tag and/or door markers
-Fire extinguishers
-Crowbar/ax
-Flashlights
-Ropes/blankets
-Wrench to turn off gas
-Heavy-duty gloves
-Goggles
-Two-way radio
-Site maps
-Shovels (pointed)
-Marker pens, paper and pens(s)
-Bolt cutters (if possible)

NOTE: ITEMS ARE STORED IN LARGE TRASH BARRELS IN AN EASY ACCESS LOCATION. SEE MAP.

k near the Emergency Assembly Area (E.A.A.) where students are released to
ould be separate from gate used for emergency vehicles.

reuniting students with their parent/guardians.
tudent from requesting individual.
o secure student and escort them to the reunion gate.
ndividual fill out student release form (get name of adult, address, and telephone

student recognizes the requesting individuals and that student feels safe in their custody.
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mar- Post" informed of student released.

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ng party when released. Unauthorized persons on site during disaster add to hysteria and
on of body accountability.

Supplies:
r roster of students/staff
boards
maps (especially of E.A.A.)
rical supplies: (pens, paper, clips, rubber bands, pencils, etc.)
udent release forms
ox to collect release forms after student released
Report forms for "Command Post" (to be sent periodically to E.O.C. so that whereabouts of students be
known)

UNION GATE

a. Sandy Clark, School Clerk
b. Julie James, I.A.
c. Mary Trombley, I.A.
d. Mary McIntosh, Clerk. Assist.
e. Gloria Hebeler, G.A.
f.

3F/78

EMERGENCY ORGANIZATION PLAN

1. EMERGENCY OPERATIONS CENTER (EOC)

Dolores Celia, Principal
Lois Stallo, Secretary
Deanne Rohde, Res. Tchr.
Lindsey Linden, SE Res. Tchr.

2. EMERGENCY ASSEMBLY AREA

All teachers initially members of this team.

3. SWEEP AND RESCUE TEAMS

Coordinators:

Dale Fleet, 5th Gr. Tchr.
Jon Stallo, 1st Gr. Tchr.
Svea Carroll, 5th Gr. Tchr.

4. SEARCH AND RESCUE TEAMS

TEAM 1	TEAM 2	TEAM 3
Jon Stallo, Tchr.	Svea Carroll, Tchr.	Dale Fleet, Tchr.
Elsie Rapp, I.A.	Toby Acevedo, S.E.T.	Kim Stadler, S.E.T.
Deanna Campbell, S.E.T.	Linda Earlston, I.A.	Mardi Ellis, I.A.
Josie Jurado, Tchrs	Mary Trombley, I.A.	Susan Natividad, I.A.

5. SITE SECURITY TEAM

Dang Nguyen, BSS I
Betty Russell, Clerk
Pam Leffler, S.E.T.

6. REUNION GATE TEAM

Julie Jame, I.A.
Mary McIntosh, Clerk
Sandy Clark, Sch. Clerk
Gloria Hebeler, G.A.
Mary Trombley, I.A.

7. FIRST AID TEAM

Bonnie Bear, Nurse
Maureen Moffatt, Nurse
Dee Murphy, Tchr.
Flo DeEsso, Health Aide
Virginia Hernandez, I.A.
Maggie Stern, Nurse

8. CIRCULATING

Anita Sampson, D.C.

9. RUNNERS

Michelle Ettari, B.S.
Susan Burkhard, R.S.
Cindi Aiken, P.E.
Patricia Knox, Psy.

10. RUNNERS

Jeanne Stutzer, Music Tchr.
Beth Alpert, LSH
Lori Emerson, P.E.

10. HISTORIAN/PUBLIC INFORMATION TEAM

11. SANITATION TEAM

12. MORGUE

13. EMERGENCY VEHICLE ENTRANCE (See map)

14. EMERGENCY SUPPLY STORAGE AREA

Trauma barrels location:

Infant Program - Equipment Cargo Container
First Aid Responder Kits - Room 12, Room 1, Room 13, Nurses's Office

15. FIRE CONTROL EQUIPMENT (See map)

3F/80

TEACHER EMERGENCY REPORT FORM

Teacher _____
Room # _____
Number of students present at school today _____
Number of students absent from school today _____
Assistants present _____ absent _____

.Complete and send form to Command Post/EOC.

Names of Missing	/	Suspected Location (Pull-Out, etc.)

Names of Injured	/	Actual Location

3F/81

NURSE EMERGENCY REPORT

Room	Grade	Adult/ Student Name	Condition	Where Transported

3F/87

ROOM SURVEY
ROOM #_____

*Completed by Sweep and Rescue Team

ADULTS/STUDENTS (provide numbers)

MINORLY INJURED	MODERATELY INJURED	SEVERELY INJURED	DEAD

BUILDING CONDITION (circle one or more)

OK FIRE DAMAGE WATER LEAKS ELECTRICAL DAMAGE GAS LEAKS

STRUCTURE DAMAGE (circle one)

OK MINOR MODERATE SEVERE

SCHOOL/SITE MAP

A site map should be a part of every disaster plan. The following locations should be noted:

- Emergency Operation Center (E.O.C. "Command Post")
- Emergency Assembly Area (E.A.A.) for students/staff
- Reunion Gate (Parent/Student)
- First-aid Area (Triage area)
-Emergency exit traffic patterns
-Emergency vehicle entrance
- Morgue area
-Utility shut-off locations
-Emergency supply storage areas
-Fire control equipment

NOTE: This map should be distributed to all site staff members, posted in all working area (including lounges), and sent to parents with a letter explaining the site's plan for student release in times of disaster.

3F/84

SCHOOL SITE MAP

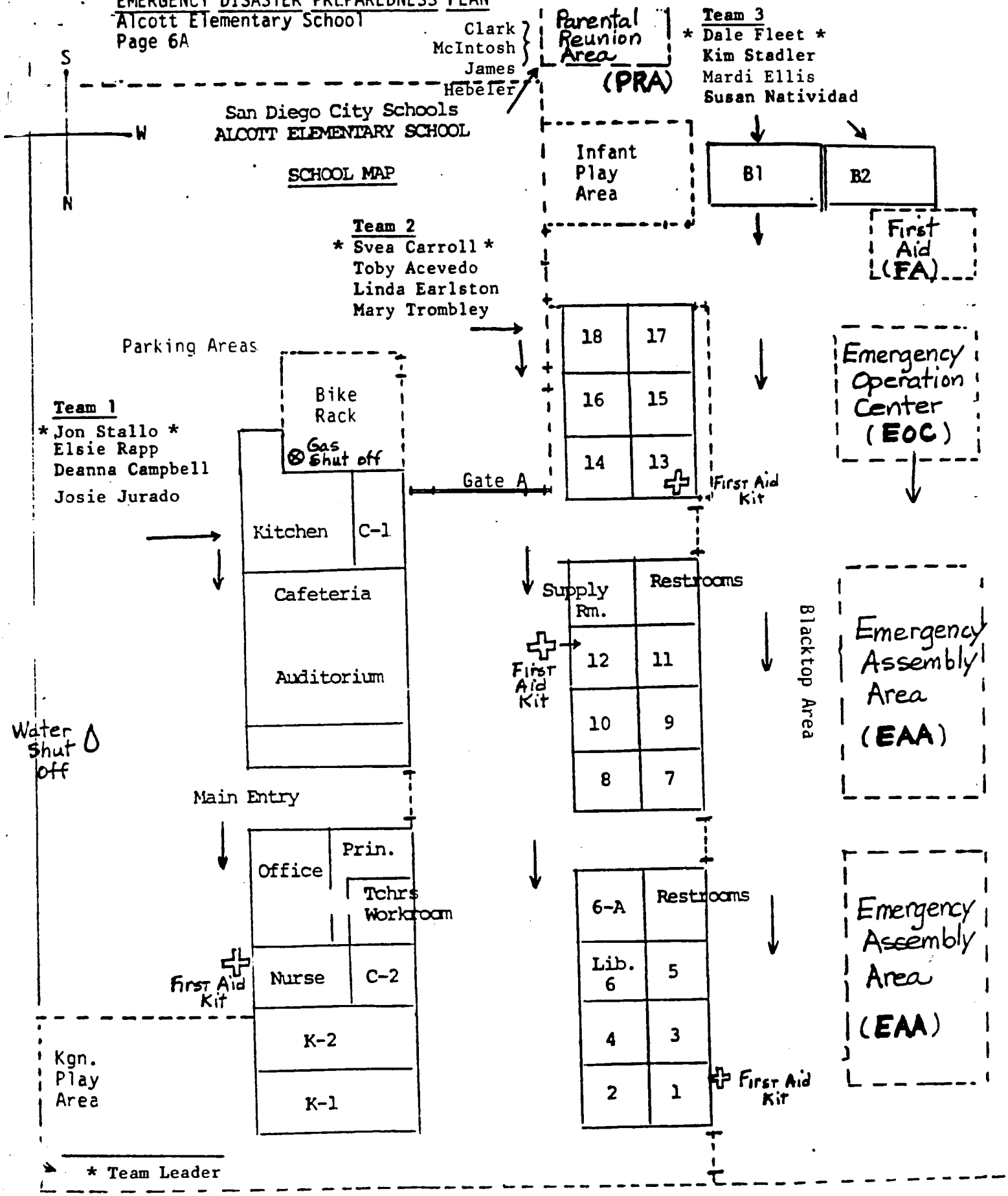
(This map should note emergency areas and emergency symbols)

This map should be:

1. Posted in all staff/student areas.
2. Attached to parent letter and sent home to all parent/guardians.
3. Included in site plan for all staff.
4. Reviewed at all site staff emergency plan orientation/inservices.

SCHOOL SITE MAP SYMBOLS

#'s	
_____	Fire Extinguishers
_____	Fire Alarm
_____	Gas Shut-Off Valve
_____	Water Shut-Off Valve
_____	Fire Blanket
_____	First Aid Kit
_____	Disaster Kit
_____	Wrench



Team 1 - Auditorium Bldg. (Kitchen, Cafeteria); Adm. Bldg and Kindergarten Rooms
Team 2 - East side of all Classroom Bldgs. (18, 16, 14, Supply Rm., 12, 10, 8, 6A, Lib., 4, 2, including all restrooms in breezeways and 6B, 6C)
Team 3 - West side of all Classrooms (Bung, 17, 15, 13, 11, 9, 7, 5, 3, 1 including all restrooms in breezeways and 6B, 6C)

Mason Elementary School
OPENING OF SCHOOL MEETING AGENDA
8-30-96
1:00-3:00

1) WELCOME BACK/Introductions - Ed
*Gail Owashi, Linda Vergara, Susan Borkenhagen, Karolyn Spaeth, Robert Mathews, David Fink

2) Programs
•Mason Accountability Plan/Annual Action Plan Revision - Staci
•)16 Expectations/School Portfolios - Ed - To achieve a goal that all students are reading by third grade, the superintendent will ensure a 10% achievement growth in reading for Gr. 1, 2, and 3 as compared to 1995-96.
•Enriched English - Ed
•P.E. - Marci
•Study Skills - Staci
•Technology - Diane Trigg
•Library - Robin
•Student Center - Mitzi Belknap
•ACE Awards (11/20, 3/12, 7/2) - Staci
•Social Skills - Staci

3) Class Size Reduction - Ed - (Please be prepared to share furniture, equipment, materials)

4) Items to complete and turn in to Ed by September 20 (F.Y.I.)
•Weekly Schedule •Homework Plan •Sub Binder Locator Card

5) Procedures Enclosed - Ed
•Fire Drill
•Earthquake
•Site Security
•Personnel - employees
-arrival time & sign in daily
-leaving campus early
-procedures for after hours access (to enter the site after hours you need to have administrator approval and a "Security Alarm Entry Card")
•Year-round calendar
•Rainy Day Schedule
•Discipline Plan-out of classroom-referral forms-schoolwide classroom rules

6) Spring Open House/End of Year Exhibitions (Science or Social Studies Fair)

7) Literacy Kickoff September 19 - Staci

8) Announcements:

•Evaluation - Stull Bill
The meeting for those being evaluated this year will be Wednesday, September 25 at 2:00 in the lounge. The "alternative evaluation" (contract, P. 69) is encouraged. Teachers working together is encouraged. Focus is MAP, Literacy, Math, Science Fair

•MAD Science - after school program - 8 weeks - $55/child - 20 per class hands-on-science - Ed

•Technology Gold C Fundraising assemblies 9/5
•PTA Fundraising Dates F.Y.I.

1) Book Fair	September 16-19
2) Giftwrap	October 3 - 14
3) Holiday Shop	December 2 - 6

OPENING OF SCHOOL MEETING AGENDA

August 28, 1997
1:00 P.M.

1) WELCOME BACK/Introductions - Ed
Catherine Holm, Wendy Tompkins, Howard Fincher, Laura Healy, Cheryl Mangum, Cherie Pomerantz, Marilou Cayanan

2) 1997-98 Focus & Goals-Ed

3) Programs
- •MAP Assessment results/Annual Action Plan Revision - Staci
- •P.E. - Playground rules- Governance-Marci
- •Technology - Diane Trigg
- •Library / Grant- Staci
- •Prep time- Ed
- •Student Center-Mason Managers - Mitzi Belknap
- •Lion Reading Club - Staci

4) Staffing/Student Enrollment Update-Ed

5) Items to complete and turn in to Ed by September 19 (F.Y.I.)
•Weekly Schedule •Homework Plan •Sub Binder •Sub Binder Locator Card

6) Mason Handbook - Ed
- •Supervision Schedules - Staci
- •Rainy Day Schedule - Staci
- •Fire Drill
- •Earthquake
- •Site Security
- •Personnel - employees
  - -arrival time & sign in daily
  - -leaving campus early
  - -procedures for after hours access (to enter the site after hours you need to have administrator approval and a "Security Alarm Entry Card")
- •Year-round calendar -
- •Rainy Day Schedule -
- Your kids on campus -

7) Spring Open House/End of Year Exhibitions (Literacy or Social Studies Fair)

8) Announcements:
- •School Mini Grants - funded by XS budget - Staci
  Innovative, unique, increase student achievement
  5 - $1000 grants
- •Evaluation - Stull Bill
  The meeting for those being evaluated this year will be at Tuesday, September 16th at 2:30 in the lounge. The "alternative evaluation" (contract, P. 69) is encouraged. Teachers working together is encouraged. Focus is MAP, Literacy, Math
- •MAD Science - after school program -hands-on-science - Ed
  9/23-11/4, 2/3-3/24, 5/12-6/23
- •After School Enrichment Program - Monart, keyboarding, baseball - Ed 10/13-12/1
- •Children's Opera - Rip Van Winkle - sponsored by PTA - Ed June 6-July 13
- •PTA Fundraising Dates F.Y.I.
  1) GOLD C/Entertainment Books Sept. 8
  2) Giftwrap October 20-28
  3) Holiday Shop December 8 - 12
  4) Book Fair Mar. 16-20
  5) Jog-A-Thon TBD

OMB Cost Principles-States

EXCERPT ONLY

OMB Circular A-87 ✓

August 29, 1997

MEMORANDUM FOR THE RECORD
FROM: Norwood J. Jackson
Deputy Controller
Office of Federal Financial Management
SUBJECT: Recompilation of OMB Circular A-87
I certify that the attached document constitutes a recompilation of Office of Management and Budget Circular A-87, "Cost Principles for State, Local, and Indian Tribal Governments." The recompilation consists of the last complete revision of the Circular published at 60 FR 26484 (dated May 4, 1995, published May 17, 1995), as further amended at 62 FR 45934 (August 29, 1997).

OMB CIRCULAR A-87 (REVISED 5/4/95, As Further Amended 8/29/97)

CIRCULAR NO. A-87
Revised

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Cost Principles for State, Local, and Indian Tribal Governments

1. **Purpose**. This Circular establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and federally-recognized Indian tribal governments (governmental units).

2. **Authority**. This Circular is issued under the authority of the Budget and Accounting Act of 1921, as amended; the Budget and Accounting Procedures Act of 1950, as amended; the Chief Financial Officers Act of 1990; Reorganization Plan No. 2 of 1970; and Executive Order No. 11541 ("Prescribing the Duties of the Office of Management and Budget and the Domestic Policy Council in the Executive Office of the President").

3. **Background**. An interagency task force was established in 1987 to review existing cost principles for Federal awards to State, local, and Indian tribal governments. The task force studied Inspector General reports and recommendations, solicited suggestions for changes to the Circular from governmental units, and compared for consistency the provisions of other OMB cost principles circulars covering non-profit organizations and universities. A proposed revised Circular reflecting the results of those efforts was issued on October 12, 1988, and August 19, 1993. Extensive comments on the proposed revisions, discussions with interest groups, and related developments were considered in developing this revision.

4. **Rescissions**. This Circular rescinds and supersedes Circular A-87, issued January 15, 1981.

5. **Policy**. This Circular establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government. The principles are for determining allowable costs only. They are not intended to identify the circumstances or to dictate the extent of Federal and governmental unit participation in the financing of a particular Federal award. Provision for profit or other increment above cost is outside the scope of this Circular.

6. **Definitions**. Definitions of key terms used in this Circular are contained in Attachment A, Section B.

7. **Required Action**. Agencies responsible for administering programs that involve cost reimbursement contracts, grants, and other agreements with governmental units shall issue codified regulations to implement the provisions of this Circular and its Attachments by September 1, 1995.

8. **OMB Responsibilities**. The Office of Management and Budget (OMB) will review agency regulations and implementation of this Circular, and will provide policy interpretations and assistance to insure effective and efficient implementation. Any exceptions will be subject to approval by OMB. Exceptions will only be made in particular cases where adequate justification is presented.

9. **Information Contact**. Further information concerning this Circular may be obtained by contacting the Office of Federal Financial Management, Financial Standards and Reporting Branch, Office of Management and Budget, Washington, DC 20503, telephone 202-395-3993.

10. **Policy Review Date**. OMB Circular A-87 will have a policy review three years from the date of issuance.

11. **Effective Date**. This Circular is effective as follows:

For costs charged indirectly or otherwise covered by the cost allocation plans described in Attachments C, D and E, this revision shall be applied to cost allocation plans and indirect cost proposals submitted or prepared for a governmental unit's fiscal year that begins on or after September 1, 1995.

- For other costs, this revision shall be applied to all awards or amendments, including continuation or renewal awards, made on or after September 1, 1995.

Attachments

OMB CIRCULAR NO. A-87

COST PRINCIPLES FOR STATE, LOCAL AND INDIAN TRIBAL GOVERNMENTS

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rate proposal has been certified. Where it is necessary to establish a cost allocation plan or an indirect cost rate and the governmental unit has not submitted a certified proposal for establishing such a plan or rate in accordance with the requirements, the Federal Government may either disallow all indirect costs or unilaterally establish such a plan or rate. Such a plan or rate may be based upon audited historical data or such other data that have been furnished to the cognizant Federal agency and for which it can be demonstrated that all unallowable costs have been excluded. When a cost allocation plan or indirect cost rate is unilaterally established by the Federal Government because of failure of the governmental unit to submit a certified proposal, the plan or rate established will be set to ensure that potentially unallowable costs will not be reimbursed.

ATTACHMENT B

Circular No. A-87

SELECTED ITEMS OF COST

TABLE OF CONTENTS

approved by the cognizant Federal agency.

h. Support of salaries and wages. These standards regarding time distribution are in addition to the standards for payroll documentation.

(1) Charges to Federal awards for salaries and wages, whether treated as direct or indirect costs, will be based on payrolls documented in accordance with generally accepted practice of the governmental unit and approved by a responsible official(s) of the governmental unit.

(2) No further documentation is required for the salaries and wages of employees who work in a single indirect cost activity.

(3) Where employees are expected to work solely on a single Federal award or cost objective, charges for their salaries and wages will be supported by periodic certifications that the employees worked solely on that program for the period covered by the certification. These certifications will be prepared at least semi-annually and will be signed by the employee or supervisory official having first hand knowledge of the work performed by the employee.

(4) Where employees work on multiple activities or cost objectives, a distribution of their salaries or wages will be supported by personnel activity reports or equivalent documentation which meets the standards in subsection (5) unless a statistical sampling system (see subsection (6)) or other substitute system has been approved by the cognizant Federal agency. Such documentary support will be required where employees work on:

(a) More than one Federal award,

(b) A Federal award and a non-Federal award,

(c) An indirect cost activity and a direct cost activity,

(d) Two or more indirect activities which are allocated using different allocation bases, or

(e) An unallowable activity and a direct or indirect cost activity.

(5) Personnel activity reports or equivalent documentation must meet the following standards:

(a) They must reflect an after-the-fact distribution of the actual activity of each employee,

(b) They must account for the total activity for which each employee is compensated,

(c) They must be prepared at least monthly and must coincide with one or more pay periods, and

(d) They must be signed by the employee.

(e) Budget estimates or other distribution percentages determined before the services are performed do not qualify as support for charges to Federal awards but may be used for interim accounting purposes, provided that:

(i) The governmental unit's system for establishing the estimates produces reasonable approximations of the activity actually performed;

(ii) At least quarterly, comparisons of actual costs to budgeted distributions based on the monthly activity reports

are made. Costs charged to Federal awards to reflect adjustments made as a result of the activity actually performed may be recorded annually if the quarterly comparisons show the differences between budgeted and actual costs are less than ten percent; and

(iii) The budget estimates or other distribution percentages are revised at least quarterly, if necessary, to reflect changed circumstances.

(6) Substitute systems for allocating salaries and wages to Federal awards may be used in place of activity reports. These systems are subject to approval if required by the cognizant agency. Such systems may include, but are not limited to, random moment sampling, case counts, or other quantifiable measures of employee effort.

(a) Substitute systems which use sampling methods (primarily for Aid to Families with Dependent Children (AFDC), Medicaid, and other public assistance programs) must meet acceptable statistical sampling standards including:

(i) The sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in subsection (c);

(ii) The entire time period involved must be covered by the sample; and

(iii) The results must be statistically valid and applied to the period being sampled.

(b) Allocating charges for the sampled employees' supervisors, clerical and support staffs, based on the results of the sampled employees, will be acceptable.

(c) Less than full compliance with the statistical sampling standards noted in subsection (a) may be accepted by the cognizant agency if it concludes that the amounts to be allocated to Federal awards will be minimal, or if it concludes that the system proposed by the governmental unit will result in lower costs to Federal awards than a system which complies with the standards.

(7) Salaries and wages of employees used in meeting cost sharing or matching requirements of Federal awards must be supported in the same manner as those claimed as allowable costs under Federal awards.

i. Donated services.

(1) Donated or volunteer services may be furnished to a governmental unit by professional and technical personnel, consultants, and other skilled and unskilled labor. The value of these services is not reimbursable either as a direct or indirect cost. However, the value of donated services may be used to meet cost sharing or matching requirements in accordance with the provisions of the Common Rule.

(2) The value of donated services utilized in the performance of a direct cost activity shall, when material in amount, be considered in the determination of the governmental unit's indirect costs or rate(s) and, accordingly, shall be allocated a proportionate share of applicable indirect costs.

(3) To the extent feasible, donated services will be supported by the same methods used by the governmental unit to support the allocability of regular personnel services.

12. **Contingencies**. Contributions to a contingency reserve or any similar provision made for events the occurrence of which cannot be foretold with certainty as to time, or intensity, or with an assurance of their happening, are unallowable. The term "contingency reserve" excludes self-insurance reserves (see subsection

DELAINE EASTIN
State Superintendent of Public Instruction

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August 28, 1997

TO: County and District Superintendents
County and District Chief Business Officers
County and District Administrators of Categorical Programs

FROM: Robert W. Agee, Director
School Business Services Division

SUBJECT: Salaries and Wages Charged to Federal Programs, Pursuant to Office of Management and Budget Circular A-87

The Office of Management and Budget (OMB) has revised Circular A-87, *Cost Principles for State, Local, and Indian Tribal Governments*, which establishes the principles and standards for determining allowable costs to federal programs. OMB Circular A-87 applies to all local education agencies (LEAs) in California receiving federal funds, and was effective "for all awards or amendments, including continuation or renewal awards, made on or after September 1 1995." For all practical purposes, California's LEAs were subject to the revisions beginning with the 1996-97 fiscal year.

We urge you to obtain a copy of Circular A-87 (hereafter referred to as A-87) and to familiarize yourself with the requirements. Because so many of the educational programs offered by California's LEAs are enhanced by a mix of federal and state categorical funding, it is very important that all personnel involved in the education of California's children--educators, program administrators, school business office staff, etc.,-- be familiar with the requirements for substantiating costs associated with these programs. Attachment A provides information on how to obtain a copy of A-87.

The purpose of this letter is to provide you with our best advice on efficiently handling the salary and wage documentation requirements of A-87; we know there is confusion about the level of back-up documentation that must be maintained for supporting the costs of salaries and wages charged to federal programs. Also, we want to alert you to the need for corrective action for 1996-97 to ensure that adequate salary and wage documentation is maintained.

DOCUMENTING SALARY AND WAGE COSTS

Section 11 (h) of Attachment B of A-87 specifies the standards for documenting the costs of salaries and wages for federal reimbursement. These standards regarding time distribution are *in addition* to the standards for payroll documentation. Again, we urge you to familiarize yourself with this section of A-87, because those at the local level are in the best position to determine the applicability of the requirements to their own particular circumstances. We find that, in general, the level of detailed back-up support needed for accounting for the time spent by an employee is determined by whether an employee is funded from a single federal categorical program or cost objective, or funded from more than one federal categorical program or a mix of federal and state programs or cost objectives. (A-87 defines "cost objective" as a function, organizational subdivision, contract, grant, or other activity for which cost data are needed and for which costs are incurred. For purposes of supporting salary and wage expenditures, we consider a cost objective as allowing various funding sources to be pooled for a common objective, and then charging the expenditures to the pooled funding without identifying the expenditures to the

specific revenue sources.)

How an employee is funded determines if the documentation of the employee's time spent on federal programs can be done by a certification, or if the documentation needs to be more detailed, in the form of a personnel activity report or equivalent documentation. (Personnel activity reports are discussed in the section *How Salaries and Wages Are To Be Documented* beginning on page 4 of this letter.)

Employees Funded from a Single Federal Categorical Program or Cost Objective

1. If an employee is funded solely (100%) from a single federal categorical program or cost objective, the minimum requirement for documenting salary or wages is a semi-annual certification by the employee that he/she worked solely on that federal categorical or cost objective. The certification must be signed by the employee or by the supervisor having first hand knowledge of the work performed. [A-87, Section 11 (h) (3)]

2. Whenever a Schoolwide Program (SWP) is in place, LEAs may use Improving America's Schools Act (IASA) Title I funds in combination with other federal funds, and state and local general purpose funds, in order to upgrade the entire educational program in a school (Title 1, Part A, Subpart 1, Section 1114). An employee working solely on a SWP is considered to be funded from one cost objective, and a periodic certification is sufficient for time accounting.

   Note: California's School Based Coordinated Programs (SBCP) combine several state categorical programs in a manner similar to, *but not identical to*, SWP. Several statutory differences between the state law concerning SBCP and the federal law regarding SWP, such as in the area of governance, prevent the commingling of SBCP with SWP as a single cost objective at a particular school site. Currently, if an individual is partially funded by SWP and partially funded under SBCP, this individual must prepare a personnel activity report. (See discussion below about *Employees Funded From More Than One Categorical Program Source or Cost Objective.*) The California Department of Education (CDE) is looking into the possibility of seeking legislation to allow the SBCP to be combined with the SWP as a single cost objective, which would reduce the instances of employees having to prepare personnel activity reports.

Employees Funded From More Than One Categorical Program Source or Cost Objective

Whenever an employee works in more than one categorical program or cost objective, and at least one of the sources is federal, the distribution of the employee's salary must be supported by a personnel activity report (see section beginning on page 4 on *How Salaries and Wages Are To Be Documented*) or equivalent documentation. [A-87, Section 11 (h) (4)]

The requirement to document the employee's time with a personnel activity report or equivalent documentation is triggered by the following funding combinations:

- The employee is funded by more than one federal categorical program source, and the funding is not combined in a SWP

- The employee is funded by a mix of federal and state categorical program funding sources

- The employee is funded by a mix of federal categorical programs (other than SWP) and general purpose funding sources

A-87 allows for substitute systems which use sampling methods that meet statistical sampling standards for allocating salary and wages to be used in place of a personnel activity report [A-87, Section 11 (h) (6)]. Substitute systems must be approved by the cognizant Federal agency. At this time, California does not have statewide approval for a defined substitute system which could be adopted by the LEAs. CDE is

currently negotiating with the United States Department of Education (USDE), the cognizant agency, and until a plan is approved, LEAs should follow the guidance provided in this letter.

The key is that whenever federal funding is used to fund an employee's salary (unless the employee is 100% funded from only one federal source or in a Schoolwide Program, or covered under a Substitute System, as noted above), the time the employee spent working on federal projects must be documented with a personnel activity report or equivalent documentation.

To help you sort out when a certification or a personnel activity report is required, we have attached examples of different funding configurations to this letter, and included the documentation requirements in each case. (See Attachment B.)

HOW SALARIES AND WAGES ARE TO BE DOCUMENTED

A-87 requires Personnel Activity Reports or Equivalent Documentation to support the costs of salaries and wages charged to federal programs. [A-87, Section 11 (h) (4)]

The intent of a personnel activity report is to document the employee's certification of work actually performed in each categorical program or cost objective during the month. The personnel activity report may be as detailed as a time sheet that identifies the employee's activity on a daily basis by hours, or it may be as simple as a report of the total hours or percentage of hours spent in each categorical program or cost objective for the month. The level of detail can generally be determined by the diversity and variation of the employee's work activities. A-87 requires that personnel activity reports or equivalent documentation meet the following standards:

- Reflect an after-the-fact distribution of the actual activity of each employee,
- Account for the total activity for which each employee is compensated,
- Be prepared at least monthly and coincide with one or more pay periods,
- Be signed by the employee.

Budget estimates or other distribution percentages determined before the services are performed do not qualify as support for charges to federal awards but may be used for interim accounting purposes.

From the results of the personnel activity reports, a quarterly comparison of actual costs to budgeted distributions must be made. Then, at least quarterly, budgeted estimates or distributions are revised, if necessary, to reflect the results of the personnel activity reports. In this manner, program budgets are reconciled with the employee certifications of time spent on the programs.

We have attached a Sample Personnel Activity Report, based on a sample obtained from USDE, which may help you in designing your own instrument for capturing the required documentation. (See Attachment C.)

> **Note of caution:** this sample form will work well in those situations where an employee's time spent on federal programs is fairly predictable and doesn't vary much during the month. However, for those employees whose time is unpredictable and varies significantly from day to day, a more detailed personnel activity report than the attached sample may be appropriate. Keep in mind that hourly time accounting is the most acceptable method to auditors, and that the safest approach is always to provide more documentation, rather than less.

Due to the confusion over the new federal employee time reporting requirements, some LEAs may not be in compliance for the 1996-97 fiscal year. CDE suggests that the following corrective action plan be used for 1996-97:

1. Document by a memo that your LEA was unaware of or unclear as to the new time reporting requirements under A-87. Explain that a plan is in place to ensure compliance effective July 1, 1997. This memo should be signed by both the business official and the program administrator(s) and kept on file as part of your auditable records.

2. Determine which employees should have met the time documentation requirements in 1996-97. Employees who were wholly funded by a single federal categorical program or cost objective were required to file a semi-annual certification. However, employees who were funded by more than one federal categorical program or who were funded by a mix of federal and other funding sources were required to maintain personnel activity reports. For these employees, obtain the following documentation:

   - **Semi-annual certifications for single funded federal categorical employees:** Obtain two certifications from the employees, one covering the first half of the year, and the second covering the second half of the year, stating that the employees spent 100% of their time on the single federal program that funded the employees. If an employee is unavailable, have the employee's immediate supervisor prepare, sign and date the certifications. We suggest that LEAs do not backdate the certifications.

   - **Personnel activity reports for multi-funded employees:** Request that multi-funded employees prepare monthly personnel activity report estimates, using employee calendars or other documentation. These estimates should be prepared for at least the last three months of the school year. Have the employee sign a statement that these estimated monthly personnel activity reports were prepared to the best of their ability and recollection of the duties they actually performed for the time period covered. If an employee is not available to complete these estimates, the employee's immediate supervisor should do so, signing a statement that the estimated monthly personnel activity reports were prepared to the best of his/her ability and recollection of the duties the employee actually performed, and that the employee was not available to prepare and sign the estimates. Again, we suggest not backdating the certifications.

3. Based on the results of personnel activity reports for multi-funded employees, prepare a journal entry to properly distribute these expenditures (both salaries and benefits) to the affected programs. This journal entry is to correct budgeted allocations of salaries and benefits to reflect the actual time spent by employees who worked on the federal programs.

For the future, inform all employees of the time reporting requirements, and implement a plan to ensure that your LEA is in compliance with the requirements commencing with the 1997-98 fiscal year. Assign an employee to gather and periodically file the necessary time reporting documents.

Future CDE Efforts Regarding Time Accounting

CDE is confident that other concerns and issues about the requirements of A-87 will be raised in the future. Our immediate focus with this letter is to try to help you understand the requirements for documenting salaries and wages for federal programs, so that no LEA is put in the position of having to return funds because adequate back-up supporting documentation was not maintained. We will be working on other areas of continuing concern that will minimize the problems and paperwork LEAs may

encounter. We see the following as areas for us to pursue:

- Continue our negotiations with USDE, the cognizant agency, to devise an acceptable Substitute System (or systems) that LEAs could use in place of personnel activity reports or equivalent documentation,
- Seek state legislation to allow LEAs to combine state categorical programs, such as those under a SBCP, with the federal SWP, into a single cost objective, which could reduce the instances of employees having to prepare personnel activity reports to account for their time,
- Continue to respond to the need of LEAs for guidance and advice in the areas of time and cost accounting.

CONTACTS

If you have questions concerning OMB Circular A-87 and the requirements for documentation and accounting of employees' time for federal categorical programs, please contact the Office of Financial Accountability and Information Services at (916) 322-1770 or send an e-mail message via the Internet to:

faisinfo@smtp.cde.ca.gov

Please note that this letter has been posted to the Fiscal Crisis and Management Assistance Team bulletin board system and the California Department of Education Internet Web Site:

http://www.cde.ca.gov/fiscal/

RWA:JS:nj:97-1705.00

Attachments

Notice

To the extent that this letter contains guidelines in addition to recitation of the law, the guidelines are exemplary only and compliance with them is not mandatory.

Back Back to SFS Division Home Page

DELAINE EASTIN
State Superintendent of Public Instruction

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DATE: June 26, 1998

TO: County and District Superintendents
County and District Chief Business Officers
County and District Administrators of Categorical Programs

FROM: Janet Sterling, Director
School Business Services Division

SUBJECT: **Approved Substitute System for Time Accounting for Federal Programs**

We are pleased to announce that the United States Department of Education (USDE) has approved a substitute sampling system for time accounting for federal programs for the local educational agencies (LEAs) in California.

The substitute system can be used by California's LEAs, at their option, beginning July 1, 1998, for substantiating federal salary and wage charges for those employees working on *multiple funded activities or cost objectives.*

The substitute system is intended to simplify recordkeeping for LEAs that must substantiate salary and wage charges to federal programs through the use of personnel activity reports (PARs) or equivalent documentation. Without an approved substitute system, PARs must be prepared at least monthly for employees working on activities funded from multiple resources whenever federal funds are involved.

Under the substitute system approved for California, PARs may be less frequent. Specifically, the system allows LEAs to collect PARs from employees *every fourth month* (three times a year). The information from the PARs is used to estimate the percentage of time employees will spend on various federal programs in the next three months, and to reconcile the federal timekeeping estimates from the previous three months. This system works best when the composite workload produces an even distribution of salaries to accounts over the full 12-month period.

The following is a description of the substitute system process. The description assumes that the LEA begins the substitute recordkeeping process in July; however, LEAs may choose any month to begin the cycle. Because the starting month establishes the recordkeeping cycle for the year, we recommend LEAs choose a starting month that most accurately reflects their annual average labor cost experience.

- All multiple resource funded employees (i.e., those employees funded from more than one resource, at least one of which is federal) keep PARs for the full month of July to account for 100% of their time spent on activities for which they are compensated. From the PARs, labor distribution reports for July are generated which are used to support effort distribution and charges for incurred costs in July, and provide the basis for employee salary and fringe benefit allocations

for August, September and October.

- In November and again in March, employees keep PARs, which are used to:

  1) support effort and labor costs incurred in the months of November and March,
  2) compare with and adjust the budgeted effort distribution for the periods August through October and December through February,
  3) project salary and fringe benefit allocations for the periods December through February, and April through June.

- The same process is followed once more in July to support incurred labor cost allocations for that month and to compare and adjust the budgeted effort distribution for the period April through June. Further, the July PARs start another round of labor distribution estimates for the second year.

- After the first full year on the system, LEAs may shift from collecting PARs three times a year to two times a year, if the deviation between their total estimated and total actual time charges is constantly less than 10%. Thereafter, the twice-yearly PAR collection may be maintained as long as the deviation is constantly less than 10%.

- Written policies and procedures are essential to implementing an effective labor distribution system. Each LEA must develop their own instructions for:

  1) the completion of PARs (including information about how frequently PAR data must be recorded and what constitutes adequate documentation),
  2) the review and approval cycle that is required,
  3) the handling of completed forms,
  4) the internal review process that will be established to ensure compliance.

Generally, this information should be in sufficient detail to permit an understanding of how this system will operate from the point labor is expended, to the point it is recorded in the accounting records and charged to Federal awards.

LEAs must develop forms and management and employee instructional materials to meet their particular needs for time accounting. We suggest consulting your independent auditor for guidance specific to your LEA in this process. We expect LEAs to provide training before implementing the system, and we suggest doing a "trial run" before beginning the actual substitute system process.

We would appreciate receiving copies of LEAs' data collection documents and instructional materials. California is one of a very few states approved for such an innovative substitute system. We expect that follow-up reviews will be conducted with LEAs to assess the implementation and efficacy of the system, to determine if "fine-tuning" is necessary, and to gather information to help us share ideas and best practices with other LEAs and with other states.

Important Rules of the Road:

1. For purposes of this substitute system, a "multi-funded" or "multiple resource funded" employee means that the employee is funded from one of the following funding combinations:

a) the employee is funded by more than one federal categorical program source, and that funding is not combined in a Schoolwide Program (SWP)

b) the employee is funded by a mix of federal and state categorical program funding sources

c) the employee is funded by a mix of federal categorical programs (other than SWP) and general purpose funding sources.

2. Those employees funded solely (100%) from a single federal source must be *excluded* from the substitute system, because their data would distort the aggregate results of the multi-funded data. (These employees prepare semi-annual certifications.)

3. If LEAs use the substitute system, all multi-funded employees that are required to complete PARs must participate.

4. PARs completed by each participating multi-funded employee must cover the *entire month* that is being sampled.

The decision to use this substitute system for allocating salaries and wages to federal programs is totally at the option of each LEA. After examining this substitute system, LEAs may wish to continue their current methods of substantiating salary and wage charges to federal programs, rather than use the substitute system. Either way, we suggest that you refer to the information on the requirements for documenting salary and wage charges that was provided in our August 28, 1997 letter titled "Salaries and Wages Charged to Federal Programs, Pursuant to Office of Management and Budget (OMB) Circular A-87." That letter was sent to all county and district superintendents, chief business officers, and administrators of categorical programs.

▶ Note regarding CDE's interpretation of a "cost objective" in the August 28, 1997 letter:

OMB Circular A-87 defines "cost objective" as a function, organizational subdivision, contract, grant, or other activity for which cost data are needed and for which costs are incurred. On page 2 of our August 28, 1997 letter, we mentioned that we considered a "cost objective" as allowing various funding sources to be pooled for a common objective, and then charging the expenditures to the pooled funding without identifying the expenditures to the specific revenue sources. We know that Schoolwide Programs (SWPs) have been given the flexibility to combine certain federal, state and local funds as a single cost objective, thus allowing the employees working solely on a SWP to account for their time through periodic certifications, rather than through PARs.

There are other instances where we think it is unnecessary for every employee working in a project funded by a mix of federal, state and local resources to substantiate their federal time more often than semi-annually. For example, the salary of a cook working in a school cafeteria may be funded from a mix of federal funds (free or reduced priced meal reimbursement), state funds (additional reimbursement funds), and local funds (lunch sales). The cook spends all of his or her time in the preparation and serving of school lunches. It is not necessary for the *cook* to provide detailed documentation of the proportion of his or her time that should be charged to the federal portion of the funding, because the cook's time is all one cost objective--food service. The cook would certify semi-annually that 100 percent of his or her time was spent providing food service.

A similar example would be for an aide working in a child care center whose wages are paid from child development funds, which can include federal, state and local resources. The aide spends 100 percent of his or her time providing child care, which could, in this instance, be

considered one cost objective. The aide would certify semi-annually that 100 percent of his or her time was spent providing child care.

These are simplistic examples. More complex situations would require more detailed time accounting by the employees, rather than semi-annual certifications. Each LEA needs to determine the time accounting requirements based on its own unique circumstances, and must also ensure that their timekeeping efforts are compliant with the requirements of Circular A-87.

If you have questions about the substitute system, or the requirements for documenting and accounting of employees' time for federal categorical programs, please contact the Office of Financial Accountability and Information Services at (916) 322-1770 or send an e-mail message to:

faisinfo@cde.ca.gov

Please note that this letter and our August 28, 1997 letter are available on the California Department of Education Web Site:

http://www.cde.ca.gov/fiscal/

JS:NJe:98-1705

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State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (2/91)

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INCORRECT REDUCTION CLAIM FORM 01-4241-I-03
Claim No.

Local Agency or School District Submitting Claim

San Diego Unified School District (619) 725-7565

Contact Person | Telephone Number

Arthur M. Palkowitz
4100 Normal Street, Room 3159
San Diego, CA 92103-2682

Voice: 619-725-7565
Fax: 619-725-7569

Representative Organization to be Notified- Not applicable

This claim alleges an incorrect reduction of a reimbursement claim filed with the State Controller's Office pursuant to Section 17561 of the Government Code. This incorrect reduction claim is filed pursuant to section 17551(b) of the Government Code.

CLAIM IDENTIFICATION: Specify Statute or Executive Order

Emergency Procedures Chapter 1659 Statutes of 1984

Fiscal Year*	Amount of the Incorrect Reduction
1996-1997	$588,819.00
1997-1998	$612,617.00

*More than one fiscal year may be claimed

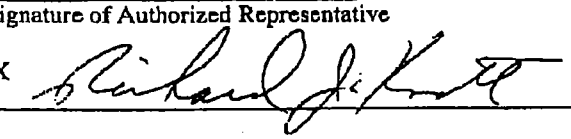
IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING AN INCORRECT REDUCTION CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative | Telephone No.

Richard J. Knott, Controller
4100 Normal Street
San Diego, CA 92103-2682

Voice: 619-725-7560

Signature of Authorized Representative | Date

X 

March 26, 2002

INCORRECT REDUCTION CLAIM OF SAN DIEGO UNIFIED SCHOOL DISTRICT

Chapter 1659, Statutes of 1984
Emergency Procedures

NARRATIVE OF THE INCORRECT REDUCTION CLAIM

San Diego Unified School District (the "District") filed claims for reimbursement of the costs that the District incurred during Fiscal Year 1996-97 and Fiscal Year 1997-98 for implementing the state-mandated program for emergency procedures set forth in Chapter 1659, Statutes of 1984 ("Chapter 1659/84"). The State Controller's Office ("SCO") incorrectly reduced the District's reimbursement claims 100% despite the fact that it was never disputed the activities were performed.

I. STATEMENT OF THE DISPUTE.

A. The Mandate.

Chapter 1659/84, among other things, added Education Code sections 35295, 35296 and 35297, which require school districts to establish an earthquake emergency procedure system in each school in the district. Section 35297 sets forth the minimum required components of the system, which include a plan for maintaining the safety and care of students and staff, a drop procedure, protective measures to be taken before, during and after an earthquake, and a program to assure that students and staff are aware of, and properly trained in, the emergency procedure system. On July 23, 1987, the Commission on State Mandates ("Commission") determined that Chapter 1659/84 imposed a reimbursable state mandate.

B. Parameters and Guidelines.

On March 23, 1989, the Commission adopted Parameters and Guidelines (the "Original Parameters and Guidelines") for Chapter 1659/84. The Original Parameters and Guidelines are attached as Exhibit A. The Original Parameters and Guidelines described the reimbursable activities at paragraph V as follows:

1. Emergency Procedures:

    a. The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of district employees directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instruction.

The reimbursable costs of providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

b. Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

2. Mass Care and Welfare Shelters:

All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

a. Salaries and related employee benefits of district employees assigned to facility supervision and security for the purpose of opening and closing the facility or portions of the facilities and to provide security at the facility during the period of the emergency.

b. Salaries and related employees benefits of district custodial employees to maintain and clean-up district facilities during the emergency or after for the purpose of making the facility ready for normal operation.

c. Utility cost incurred by the district directly related to the usage of district facilities for Mass Care and Welfare Shelters.

On February 28, 1991, the Commission adopted amended Parameters and Guidelines ("Amended Parameters and Guidelines") for Chapter 1659/84. The Amended Parameters and Guidelines are attached as Exhibit B. The Amended Parameters and Guidelines excluded one reimbursable activity -- time spent by district teachers in providing instruction on emergency procedures -- and added one reimbursable activity -- costs of consultants who provide emergency procedures instruction to other employees and students. The Amended Parameters and Guidelines did not change the provisions requiring reimbursement for supply costs.

C. The Controller's Claiming Instructions.

The SCO first issued its Claiming Instructions for Chapter 1659/84 in June, 1993 (Exhibit C). The original Claiming Instructions were revised in 1995, 1996 and 1998 (Exhibit D). The attached Claiming Instructions include a description of reimbursable components that are substantially the same as the description in the Amended Parameters and Guidelines.

D. The District's Claim.

Fiscal Year 1996-1997

On November 26, 1997, the District filed its claim for reimbursement of the costs that the District incurred during Fiscal Year 1996-97. A copy of the District's reimbursement claim is attached as Exhibit E. The District's costs for Fiscal Year 1996-97 were $588,819. The SCO approved the amount of $588,819. The District's claim is complete and contains all information required by the Claiming Instructions.

Fiscal Year 1997-1998

On December 16, 1998, the District filed its claim for reimbursement of the costs that the District incurred during Fiscal Year 1997-98. A copy of the District's reimbursement claim is attached as Exhibit F. The District's costs for Fiscal Year 1997-98 were $612,617. The SCO approved the amount of $612,607. The District's claim is complete and contains all information required by the Claiming Instructions.

E. The SCO's Notice of Claim Reduction.

Fiscal Year 1996-1997

On May 6, 1999, the SCO sent a letter approving $408,865.00 and excluding the $179,954.00. (Exhibit G). In a letter dated August 16, 1999 and after the desk review the amount excluded was changed to $176,739.00 (Exhibit H). On July 23, 2001 the SCO notified the District that $588,819.00 (entire amount) of the District's claim was disapproved as "COST NOT MANDATED." A copy of the SCO's notification letter is attached as Exhibit I.

Fiscal Year 1997-1998

On January 22, 1998, the SCO issued its warrant for $414,989.00 (Exhibit J) and on June 23, 1999 issued its warrant for $181,635.00 (Exhibit K). In a letter dated July 23, 2001 the SCO notified the District that $612,617.00 (the entire amount) was disapproved as "COST NOT MANDATED." A copy of the SCO's notification letter is attached as (Exhibit L).

CHRONOLOGY OF CLAIM AND PAYMENT ACTIONS

Claim Fiscal Year	Amount Claimed	Adjustment Amount	Amount Paid	Date of Action	Type of Action
1996/1997	$ 588,819	N/A	N/A	11/26/97	Claim Filed
1996/1997	$ 588,819	$ 179,954	$ 325,901	5/6/99	Remittance Advice
1996/1997	$ 588,819	$ 3,215	$ 3,215	8/16/99	Remittance Advice
1996/1997	$ 588,819	$ 588,819	-0-	8/23/01	Results of Review
1997/1998	$ 612,617	N/A	N/A	12/16/98	Claim Filed
1997/1998	$ 612,617	-0-	$ 414,989	1/22/98	Warrant Amount
1997/1998	$ 612,617	-0-	$ 181,635	6/23/99	Warrant Amount
1997/1998	$ 612,617	$ 612,617	-0-	7/23/01	Results of Review

Total Amount In Dispute $1,201,436

F. The District's Attempts to Resolve the Dispute.

On September 15, 2000 (Exhibit M) SCO sent a draft audit report to the "District" stating the entire amount is not allowed for the period July 1, 1996 through June 30, 1998 "primarily due to the lack of documentation substantiating claimed costs". The "District" responded by letter dated October 5, 2000 as Richard J. Knott, Controller disagreed with the conclusions that the "District" had "no documentation" to support the amount claimed (Exhibit N).

On December 22, 2000 SCO sent a letter (Exhibit O) to the "district" stating the entire amount is not allowed for the period July 1, 1996 through June 30, 1998 "primarily due to the lack of documentation substantiating claimed costs".

II. ADEQUATE DOCUMENTATION WAS SUBMITTED SUBSTANTIATING THE EMPLOYEES AND HOURS CHARGED TO THE MANDATE.

Chapter 1659/84 requires school districts to establish an earthquake emergency procedure system in each school in the district. (Education Code section 35296.) Among other things, the system must be ready for implementation at any time and must include protective measures to be taken before, during and following an earthquake. (Education Code section 35297, subdivisions (a) and (c).)

The "District" provided SCO time logs of the actual effort expended by the "District's" personnel on the mandated activities for the period indicated. The time logs (after-the-fact certifications) were completed by the individuals who performed the tasks or by a supervisory official having first hand knowledge of the activity performed by the employees.

After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective. The Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs. These methods are used to determine actual costs; they are not estimates. The "District" provided source documents as reliable and credible evidence personnel performed the mandated activities.

There can be no doubt the "District" school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. "District" provided copies of the plans from nearly all of the school sites for 1996-97 and 1997-98. The draft audit report incorrectly states these plans "were not developed during the audit period." The plans are prepared or reviewed and updated each year and the plans provided to the auditor were the plans in effect during the audit period. Thus, the district provided sufficient documentation to prove each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate.

In interviews with the auditor, the "District's" school principals or vice principals affirmed they conduct at least one general staff meeting, normally prior to the beginning of the school year, in which they discuss the emergency procedures with all staff members and each staff member reviews the emergency procedures and prepares for the evacuation drills. The principals and vice-principals provided samples of the meeting agendas for the meetings in which the emergency procedure plans were discussed, confirming the schools performed the reimbursable activities. Thus, the "District" provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans, an activity that is clearly reimbursable under the Parameters and Guidelines.

Each school site conducts an emergency evacuation drill as part of the plan implementation. These drills are not the "drop, cover, and hold" exercises that are periodically conducted by teachers in class, but are comprehensive drills conducted to test the emergency procedures, to provide an opportunity to make necessary changes to the procedures, and to ensure that staff members are properly trained on their individual duties under the procedures. "District" provided copies of the verifications signed by nearly 100 percent of the schools in which the school site verifies that the school conducted an emergency evacuation drill in each of the fiscal years. The auditor also received samples of drill logs maintained by the school sites selected by the auditor showing the date and times of the drills. Each school site evaluates their evacuation drill and makes appropriate changes to the emergency preparedness plans. These activities are reimbursable under the Parameters and Guidelines.

The "District's" method of determining the actual costs of performing the mandated activities is reasonable. In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, provided time logs. The district performed a statistical analysis of the time logs provided by these sites in order to

district performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.

Had the "District" used only the actual time reported by the 97 school sites for Fiscal Year 1997-98, the reimbursement claim would have been $390,387.32. However, the "District's" documents evidence that all school sites performed the reimbursable activities. Therefore, the statistical method used by the "District" to determine the actual costs of performing the reimbursable activities is reasonable and not excessive.

II. THE ADJUSTMENTS BY THE SCO ARE FACTUALLY INCORRECT, ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW.

A. Adjustments to Fiscal Year 1996-97 Reimbursement Claim.

1. *August 16, 1999 Adjustment*

The SCO never provided any basis for the adjustment of the amount of $176,739. The amounts claimed by the "District" are the "District's" costs for salaries and benefits to perform the mandated activities. The SCO had no basis to adjust the claim and certainly no basis for denying 100% of this claim. The SCO's adjustment is arbitrary, capricious, and contrary to fact and law.

2. *December 2, 2000 Adjustment*

The adjustments made by the SCO on December 2, 2000 are arbitrary, capricious, and contrary to law. SCO's comments that claim are disallowed "primarily due to the lack of documentation substantiating claimed costs". The SCO had no basis to adjust the claim and certainly no basis for denying 100% of this claim.

B. Adjustments to Fiscal Year 1996-97 Reimbursement Claim.

The District provided documentation required by the Parameters and Guidelines to support its reimbursement claim for Fiscal Year 1996-97. The SCO improperly requested documentation that is not required by the Parameters and Guidelines nor used by the District to compute its claim.

C. Adjustments to Fiscal Year 1997-98 Reimbursement Claim.

The District provided documentation required by the Parameters and Guidelines to support its reimbursement claim for Fiscal Year 1997-98. The SCO improperly requested documentation that is not required by the Parameters and Guidelines nor used by the District to compute its claim.

III. AUDIT FOR THE FISCAL YEAR 1996-97 REIMBURSEMENT CLAIM WAS NOT TIMELY ISSUED.

Government Code Section 17558.5 imposed a limitations-period on audit of mandate reimbursement claims. Section 17558.5 requires that any audit be completed no later than two years after the end of the calendar year in which the claim was filed or last amended. The district's Fiscal Year 1996-97 reimbursement claim was filed on November 26, 1997. Therefore, the audit of the Fiscal Year 1996-97 must have been completed no later than December 31, 1999. The draft audit report, with respect to Fiscal Year 1996-97, was not timely issued and has no force or effect.[1]

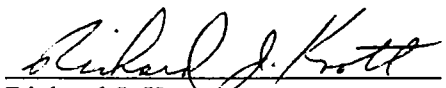
CONCLUSION

The District performed the mandated activities in a cost-effective manner and the SCO has never claimed the activities were not performed. The District provided sufficient documentation to support its claim. The SCO is required by law to pay the claims submitted by the District. (Government Code section 17561, subdivision (d)). The SCO's adjustment denied all reimbursement to the District for the costs of performing the mandated activities. The SCO's adjustment is arbitrary, capricious, and contrary to law and fact. The Commission should find (1) that the SCO incorrectly reduced the District's Fiscal Year 1996-97 claim by $588,819 (2) SCO incorrectly reduced the District's Fiscal Year 1997-98 claim by $612,617 (3) the audit report for 1996/1997 fiscal year reimbursement claim was not timely filed and has no force or affect.

CERTIFICATION

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

Executed on March 8, 2002, at San Diego, California, by:



Richard J. Knott
Controller

[1]The State Controller's Office completed review of the Fiscal Year 1996-97 reimbursement claim on September 15, 2000 and issued the written notification of adjustment to the claim required by Government Code section 17558.5, subdivision (b) on that date. Pursuant to that review, the State Controller's Office approved costs totaling $408,865 of the District's $588,819 reimbursement claim.

A. PARAMETERS AND GUIDELINES

PARAMETERS AND GUIDELINES
Chapter 1659, Statutes of 1984
Emergency Procedures, Earthquake and Disasters

I. SUMMARY OF MANDATE

Chapter 1659, Statutes of 1984, added Article 10.5 (sections 35295, 35296, and 35297) to Chapter 2 of part 21 of the Education Code which requires the governing body of each school district or private school and the county superintendent of schools of each county to establish an earthquake emergency procedure in each school building under its jurisdiction.

Chapter 1659, Statutes of 1984, added section 40041.5 to the Education Code and amended section 40042 of the Education Code to require that the governing board of any school districts shall grant the use of school buildings, grounds and equipment to public agencies, "including the American Red Cross," for mass care and welfare shelters during disasters or other emergencies affecting the public health and welfare, and eliminated the authority of the school districts to recover direct costs from the public agencies for the use of school facilities during local emergencies.

II. COMMISSION ON STATE MANDATES DECISION

The Commission on State Mandates, at its July 23, 1987, hearing determined that a reimbursable mandate exists in Chapter 1659, Statutes of 1984.

III. ELIGIBLE CLAIMANTS

All school districts that incur increased costs as a result of this mandate are eligible to claim reimbursement of those costs.

IV. PERIOD OF REIMBURSEMENT

Chapter 1659, Statutes of 1984, became effective January 1, 1985. Section 17557 of the Government Code states that a test claim must be submitted on or before November 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The test claim for this mandate was filed on November 26, 1986. Therefore, costs incurred on or after July 1, 1985, are eligible for reimbursement.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to section 17561(d)(3) of the Government Code, all claims for reimbursement of costs shall be submitted within 120 days of notification by the State Controller of enactment of the claims bills

If the total costs for a given fiscal year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

V. REIMBURSABLE COSTS

A. Scope of mandate

School Districts shall be reimbursed for the increased costs that result from their compliance with this mandate incurred in establishing emergency procedure systems and providing district facilities, grounds and equipment to public agencies for mass care and welfare shelters.

B. Reimbursable activities

For each claimant, the following cost categories are reimbursable:

1. Emergency Procedures:

   a. The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of district employees directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instruction.

      The reimbursable costs of providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

      Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

   b. Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

2. Mass Care And Welfare Shelters:

   All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

a. Salaries and related employee benefits of district employees assigned to facility supervision and security for the purpose of opening and closing the facility or portions of the facilities and to provide security at the facility during the period of the emergency.

b. Salaries and related employees benefits of district custodial employees to maintain and clean-up district facilities during the emergency or after for the purpose of making the facility ready for normal operation.

c. Utility cost incurred by the district directly related to the usage of district facilities for Mass Care and Welfare Shelters.

VI. CLAIM PREPARATION

A. Each claim must be filed in a timely manner in accordance with Section 7560 of the Government Code. Attach a statement showing the actual increased costs incurred to comply with the mandate which summarizes these costs as follows:

1. Emergency procedures

   Salaries

   Employee benefits

   Printing, postage and supplies

   Other

2. Mass Care and Welfare Shelters

   Salaries

   Employee benefit

   Utilities

   Other

B. A listing to support the following reimbursable items shall be provided:

1. Emergency procedures

   a. For those employees whose function is to prepare and implement emergency plans and to provide instruction, provide a listing of each employee, describe their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate.

2. Mass Care and Welfare Shelters

a. Provide a listing of employees assigned to supervision of facility or security, their hourly rate of pay, related employee benefit cost, reimbursable hours devoted to this mandate, function of employee, and total cost of each employee.

b. Provide a listing of custodial employees assigned for preparation and cleanup, their hourly rate of pay, related employee benefit cost, reimbursable hours devoted to this mandate, total cost of each employee.

c. Allowable indirect support costs.

Indirect costs may be claimed in the manner described by the State Controller in his claiming instructions.

VII. SUPPORTING DATA

For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs. These documents must be kept on file by the school district submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate, and made available on the request of the State controller or his agent.

VIII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENTS

Any offsetting savings the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, e.g., federal, state, etc.., shall be identified and deducted from this claim.

B. AMENDED PARAMETERS AND GUIDELINES

PARAMETERS AND GUIDELINES
Chapter 1659, Statutes of 1984
Emergency Procedures, Earthquake and Disasters

I. SUMMARY OF MANDATE

Chapter 1659, Statutes of 1984, added Article 10.5 (sections 35295, 35296, and 35297) to Chapter 2 of part 21 of the Education Code which requires the governing body of each school district or private school and the county superintendent of schools of each county to establish an earthquake emergency procedure in each school building under its jurisdiction.

Chapter 1659, Statutes of 1984, added section 40041.5 to the Education Code and amended section 40042 of the Education Code to require that the governing board of any school districts shall grant the use of school buildings, grounds and equipment to public agencies, "including the American Red Cross," for mass care and welfare shelters during disasters or other emergencies affecting the public health and welfare, and eliminated the authority of the school districts to recover direct costs from the public agencies for the use of school facilities during local emergencies.

II. COMMISSION ON STATE MANDATES DECISION

The Commission on State Mandates, at its July 23, 1987, hearing determined that a reimbursable mandate exists in Chapter 1659, Statutes of 1984.

III. ELIGIBLE CLAIMANTS

All school districts that incur increased costs as a result of this mandate are eligible to claim reimbursement of those costs.

IV. PERIOD OF REIMBURSEMENT

Chapter 1659, Statutes of 1984, became effective January 1, 1985. Section 17557 of the Government Code states that a test claim must be submitted on or before November 30 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. The test claim for this mandate was filed on November 26, 1986. Therefore, costs incurred on or after July 1, 1985, are eligible for reimbursement.

Actual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant

to section 17561(d)(3) of the Government Code, all claims for reimbursement of costs shall be submitted within 120 days of notification by the State Controller of enactment of the claims bill.

If the total costs for a given fiscal year do not exceed $200, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

V. REIMBURSABLE COSTS

A. Scope of mandate

School Districts shall be reimbursed for the increased costs that result from their compliance with this mandate incurred in establishing emergency procedure systems and providing district facilities, grounds and equipment to public agencies for mass care and welfare shelters.

B. Reimbursable activities

NOTE: No reimbursement can be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems.

Otherwise, for each claimant, the following cost categories are reimbursable:

1. Emergency Procedures:

a. The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of non-teacher district employees, including consultants, directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instruction.

The reimbursable costs incurred by non-teacher personnel in providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and

after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

b. Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

2. Mass Care And Welfare Shelters:

All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

a. Salaries and related employee benefits of district employees assigned to facility supervision and security for the purpose of opening and closing the facility or portions of the facilities and to provide security at the facility during the period of the emergency.

b. Salaries and related employees benefits of district custodial employees to maintain and clean-up district facilities during the emergency or after for the purpose of making the facility ready for normal operation.

c. Utility cost incurred by the district directly related to the usage of district facilities for Mass Care and Welfare Shelters.

VI. CLAIM PREPARATION

A. Each claim must be filed in a timely manner in accordance with Section 7560 of the Government Code. Attach a statement showing the actual increased costs incurred to comply with the mandate which summarizes these costs as follows:

1. Emergency procedures

   Salaries

   Employee benefits
   Printing, postage and supplies

   Other

2. Mass Care and Welfare Shelters

   Salaries

   Employee benefit

   Utilities

   Other

B. A listing to support the following reimbursable items shall be provided:

1. Emergency procedures

   a. For those employees whose function is to prepare and implement emergency plans and to provide instruction, provide a listing of each employee, describe their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate.

2. Mass Care and Welfare Shelters

   a. Provide a listing of employees assigned to supervision of facility or security, their hourly rate of pay, related employee benefit cost, reimbursable hours devoted to this mandate, function of employee, and total cost of each employee.

   b. Provide a listing of custodial employees assigned for preparation and cleanup, their hourly rate of pay, related employee benefit cost, reimbursable hours devoted to this mandate, total cost of each employee.

   c. Allowable indirect support costs.

      Indirect costs may be claimed in the manner described by the State Controller in his claiming instructions.

VII. Consultant Services

The reimbursable costs for consultant's providing instruction to students shall be limited to the scope of the mandate as stated in EC section 35297 which is described as the instruction of students in the elements of the School Building Master Plan. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services shall not exceed the salaries and wages, including benefits, that would be paid to a school district's employee performing the same services. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants hired by the claimant shall not be reimbursed in an amount higher that that received by State employees.

VIII. SUPPORTING DATA

For auditing purposes, all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs. These documents must be kept on file by the school district submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate, and made available on the request of the State controller or his agent.

IX. OFFSETTING SAVINGS AND OTHER REIMBURSEMENTS

Any offsetting savings the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, e.g., federal, state, etc., shall be identified and deducted from this claim.

X. REQUIRED CERTIFICATION

An authorized representative of the claimant will be required to provide a certification of claim, as specified in the State Controller's claiming instructions, for those costs mandated by the state contained herein.

C. CLAIMING INSTRUCTIONS

EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTERS

1. Summary of Chapter 1659, Statutes of 1984

Chapter 1659, Statutes of 1984, added Article 10.5 (Sections 35295, 35296 and 35297) to Chapter 2 of Part 21 of the Education Code. These sections require the governing body of each school district and the county superintendent of schools of each to establish an earthquake emergency procedure in each school building under its jurisdiction.

In addition, Chapter 1659, Statutes of 1984, added Section 40041.5 and amended Section 40042 to require that the governing board of a school district shall grant the use of school buildings, grounds and equipment to public agencies, "including the American Red Cross," for mass care and welfare shelters during disasters or other emergencies affecting the public health and welfare, and eliminated the authority of the school districts to recover direct costs from the public agencies for the use of school facilities during local emergencies.

On July 23, 1987, the Commission On State Mandates determined that Chapter 1659, Statutes of 1984, resulted in state-mandated costs on school districts and county offices of education which are reimbursable pursuant to Government Code Section 17561.

2. Eligible Claimants

Any school district (K-12) or county office of education which incurs increased costs as a result of this mandate is eligible to claim reimbursement of those costs.

3. Appropriations

Claims may only be filed with the State Controller's Office for programs that have been funded in the state budget in special legislation. To determine funding availability for the current fiscal year, refer to the schedule "Appropriations for State Mandated Cost Programs" in the "Annual Claiming Instructions for State Mandated Costs" issued in mid-September of each year to superintendents of schools.

4. Types of Claims

A. Reimbursement and Estimated Claims

An eligible claimant may file a reimbursement claim or an estimated claim as specified below. A reimbursement claim details the costs actually incurred for the previous fiscal year. An estimated claim shows the costs to be incurred for the current fiscal year.

- A claim for reimbursement or an estimate must exceed $200 per fiscal year. However, a county superintendent of schools, as fiscal agent for the school district, may submit a combined claim in excess of $200 on behalf of school districts within the county even if the individual district's claim does not exceed $200. The combined claim must show the individual claim costs for each school district. Once a combined claim is filed, all subsequent claims for the same mandate must be filed in a combined form. A school district may withdraw from the combined claim form by providing a written notice to the county superintendent of schools and to the Controller, at least 180 days prior to the deadline for filing the claim, if its intent is to file a separate claim.

B. Filing Deadline

Refer to Item 3 "Appropriations" to determine if the program is funded for the current fiscal year. If funding is available, an estimated claim may be filed as follows:

- An estimated claim must be filed with the State Controller's Office and postmarked by **November 30** of the fiscal year in which costs are to be incurred. Timely filed estimated claims will be paid before late claims.

After having received payment for the estimated claim, the claimant must file a reimbursement claim by November 30 of the following fiscal year. If the district fails to file a reimbursement claim, monies received must be returned to the State. If no estimate claim was filed, the district may file a reimbursement claim detailing the actual costs incurred for the fiscal year, provided there was an appropriation for the program for that fiscal year. See Item 3 above.

- A reimbursement claim must be filed with the State Controller's Office and postmarked by **November 30** following the fiscal year in which costs were incurred. If a claim is filed after the deadline but by November 30 of the succeeding fiscal year, the approved claim will be reduced by a late penalty charge of 10% but not to exceed $1,000. If the claim is filed more than one year after the deadline, the claim cannot be accepted.

5. Reimbursable Components

Eligible claimants will be reimbursed for increased costs incurred to prepare an earthquake emergency procedure system and providing district facilities, ground and equipment to public agencies for mass care and welfare shelters as follows:

A. Emergency Procedures

(1) The salaries and related employee benefits of employees with assigned responsibility to prepare the district's earthquake emergency disaster plans and procedures that are ready for implementation. The costs of non-teacher district employees, including consultants, directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The costs incurred by the district of employees attending these meetings to receive instructions.

The reimbursable costs incurred by non-teacher personnel in providing instruction to students shall be limited to the scope of the mandate as stated in Education Section 35297 which is described as the instruction of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and program to ensure that students are properly trained.

Assistance in developing an Earthquake Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

(2) Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

B. Mass Care and Welfare Shelters

All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

B. Mass Care and Welfare Shelters

All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

(1) Salaries and related employee benefits of district employees assigned to facility supervision and security for the purpose of opening and closing the facility or portions of the facilities and to provide security at the facility during the period of emergency.

(2) Salaries and related benefits of district custodial employees to maintain and clean-up district facilities during the emergency or after for the purpose of making the facility ready for normal operation.

(3) Utility cost incurred by the district directly related to the usage of district facilities for Mass Care and Welfare Shelters.

6. Reimbursement Limitations

A. No reimbursement shall be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems.

B. No salaries and related employee benefit costs shall be claimed for supervision, security, and custodial employees for any time which they would have normally worked at the school facility during the period of emergency.

C. Any offsetting savings the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, any reimbursement received for this mandate from any non-local source (e.g., federal, state grant, foundation, etc.) shall be identified and deducted so only net local costs are claimed.

7. Claim Forms and Instructions

The diagram "Illustration of Claim Forms," provides a graphical presentation of forms required to be filed with a claim. A claimant may submit a computer generated report in substitution for form EPED-1 and form EPED-2, provided the format of the report and data fields contained within the report are identical to the claim forms included in these instructions. The claim forms provided with these instructions should be duplicated and used by the claimant to file estimated and reimbursement claims. The State Controller's Office will revise the manual and claim forms as necessary.

A. Form EPED-2, Component/Activity Cost Detail

This form is used to segregate the detail costs by claim component. A separate form EPED-2 must be completed for each cost component being claimed. Costs reported on this form must be supported as follows:

(1) Salaries and Benefits

Identify the employee(s), and/or show the classification of the employee(s) involved, describe the mandated functions performed as these relate to preparing and implementing emergency plans and providing instruction, specify the actual number of hours devoted to the mandated functions, the productive hourly rate, and the related fringe benefits.

Source documents required to be maintained by the claimant may include, but are not limited to, employee time cards and/or cost allocation reports.

(2) Materials and Supplies

Only expenditures for printing, postage, and supplies which can be identified as a direct cost of the mandate can be claimed. List cost of materials which have been consumed or expended specifically for the purpose of this mandate.

Source documents required to be maintained by the claimant may include, but are not limited to, invoices, receipts, purchase orders, and other documents evidencing the validity of the expenditures.

(3) Contracted Services

The reimbursable costs for contracted services to provide instruction to students shall be limited to the scope of the mandated as stated in Education Code Section 35297 which is described as the instruction of students in the elements of the School Building Master Plan. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Give the name(s) of contractor(s) who performed the service, describe the activities performed by each named contractor, inclusive dates when services were performed and itemize all costs for services performed. The maximum reimbursable fee for contracted services shall not exceed the salaries and wages, including benefits, that would be paid to a school district employee performing the same services. Reasonable expenses may be reimbursed as identified on the monthly billings of consultant. However, travel expenses for contracted services hired shall not be reimbursed in an amount higher than received by a State employee. Attach consultant invoices with the claim.

Source documents required to be maintained by the claimant may include, but are not limited to, contracts, invoices, and other documents evidencing the validity of the expenditures.

For audit purposes, all supporting documents must be retained for a period of two years after the end of the calendar year in which the reimbursement claim was filed or last amended, whichever is later. Such documents shall be made available to the State Controller's Office on request.

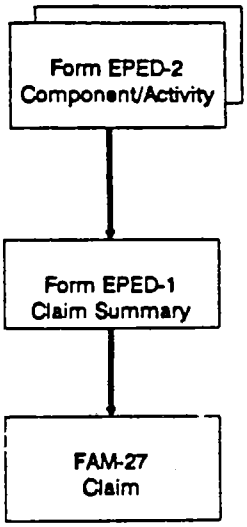
B. Form EPED-1, Claim Summary.

This form is used to summarize direct costs by component and compute the allowable indirect costs for the mandate. School districts and local offices of education may compute the amount of indirect costs utilizing the State Department of Education's Annual Program Cost Data Report J-380 or J-580 rate. The cost data on this form are carried forward to form FAM-27.

C. **Form FAM-27, Claim for Payment.**

This form contains a certification that must be signed by an authorized representative of the school district. All applicable information from form EPED-1 must be carried forward to this form in order for the State Controller's Office to process the claim for payment.

Illustration of Claim Forms



Form EPED-2 Component/Activity Cost Detail
Complete a separate form EPED-2, for each component in which costs are claimed.

1. Emergency Procedures

2. Mass Care and Welfare Shelters.

D. AMENDED CLAIMING INSTRUCTIONS

EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTERS

1. Summary of Chapter 1659, Statutes of 1984

Chapter 1659, Statutes of 1984, added Article 10.5 (Sections 35295, 35296 and 35297) to Chapter 2 of Part 21 of the Education Code. These sections require the governing body of each school district and the county superintendent of schools of each to establish an earthquake emergency procedure in each school building under its jurisdiction.

In addition, Chapter 1659, Statutes of 1984, added Section 40041.5 and amended Section 40042 to require that the governing board of a school district shall grant the use of school buildings, grounds and equipment to public agencies, "including the American Red Cross," for mass care and welfare shelters during disasters or other emergencies affecting the public health and welfare, and eliminated the authority of the school districts to recover direct costs from the public agencies for the use of school facilities during local emergencies. Sections 40041.5 and 40042 have been renumbered as sections 38132 and 38133 of the Education Code by Chapter 277, Statutes of 1996.

On July 23, 1987, the Commission On State Mandates determined that Chapter 1659, Statutes of 1984, resulted in state-mandated costs on school districts and county offices of education that are reimbursable pursuant to Government Code Section 17561.

2. Eligible Claimants

Any school district (K-12) or county office of education that incurs increased costs as a direct result of this mandate is eligible to claim reimbursement of those costs.

3. Appropriations

These claiming instructions are issued following the adoption of the program's parameters and guidelines by the Commission on State Mandates. To determine funding availability for the current fiscal year, refer to the schedule "Appropriations for State Mandated Cost Programs" in the *"Annual Claiming Instructions for State Mandated Costs"* issued in October of each year to superintendents of schools.

4. Types of Claims

A. Reimbursement and Estimated Claims

An eligible claimant may file a reimbursement claim or an estimated claim as specified below. A reimbursement claim details the costs actually incurred for the previous fiscal year. An estimated claim shows the costs to be incurred for the current fiscal year.

A claim for reimbursement or an estimate must exceed $200 per fiscal year. However, a county superintendent of schools, as fiscal agent for the school district, may submit a combined claim in excess of $200 on behalf of school districts within the county even if the individual district's claim does not exceed $200. The combined claim must show the individual claim costs for each school district. Once a combined claim is filed, all subsequent claims for the same mandate must be filed in a combined form. A school district may withdraw from the combined claim form by providing a written notice to the

county superintendent of schools and to the Controller, at least 30 days prior to the deadline for filing the claim, if its intent is to file a separate claim.

B. Filing Deadline

Refer to Item 3 " Appropriations" to determine if the program is funded for the current fiscal year. If funding is available, an estimated claim may be filed as follows:

An estimated claim must be filed with the State Controller's Office and postmarked by January 15 of the fiscal year in which costs are to be incurred. Timely filed estimated claims will be paid before late claims.

After having received payment for the estimated claim, the claimant must file a reimbursement claim by January 15 of the following fiscal year. If the district fails to file a reimbursement claim, monies received must be returned to the State. If no estimate claim was filed, the district may file a reimbursement claim detailing the actual costs incurred for the fiscal year, provided there was an appropriation for the program for that fiscal year. See item 3 above.

A reimbursement claim must be filed with the State Controller's Office and postmarked by January 15 following the fiscal year in which costs were incurred. If a claim is filed after the deadline but by January 15 of the succeeding fiscal year, the approved claim will be reduced by a late penalty charge of 10% but not to exceed $1,000. If the claim is filed more than one year after the deadline, the claim cannot be accepted.

5. Reimbursable Components

Eligible claimants will be reimbursed for increased costs incurred to establish emergency procedure systems and providing district facilities, ground and equipment to public agencies for mass care and welfare shelters as follows:

A. Emergency Procedures

(1) The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The costs of non-teacher district employees, including consultants, directly engaged in providing instruction to other employees and students of the district in earthquake and disaster procedures. The costs incurred by the district of employees attending these meetings to receive instructions.

The reimbursable costs incurred by non-teacher personnel in providing instructions to students shall be limited to the scope of the mandate as stated in Education Section 35297 that is described as the instructions of students in the elements of the School Building Master Plan by personnel specifically assigned to this task. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and program to ensure that students are properly trained.

Assistance in developing an Emergency Procedures System is available to school districts from the California State Office of Emergency Services and the Seismic Safety Commission.

(2) Printing, postage, and supply costs incurred by the district directly related to the establishment of an emergency procedure system.

B. **Mass Care and Welfare Shelters**

All costs relating to the use of school facilities, grounds and equipment by public agencies for Mass Care and Welfare Shelters. These costs include but are not limited to the following:

(1) Salaries and related employee benefits of district employees assigned to facility supervision and security for the purpose of opening and closing the facility or portions of the facilities and to provide security at the facility during the period of emergency.

(2) Salaries and related benefits of district custodial employees to maintain and clean-up district facilities during the emergency or after for the purpose of making the facility ready for normal operation.

(3) Utility cost incurred by the district directly related to the usage of district facilities for Mass Care and Welfare Shelters.

6. Reimbursement Limitations

A. No reimbursement shall be claimed for in-classroom teacher time spent on the instruction of students on emergency procedure systems.

B. No salaries and related employee benefit costs shall be claimed for supervision, security, and custodial employees for any time which they would have normally worked at the school facility during the period of emergency.

C. Any offsetting savings the claimant experiences as a direct result of this statute must be deducted from the costs claimed. In addition, any reimbursement received for this mandate from any non-local source (e.g., federal, state grant, foundation, etc.) shall be identified and deducted so only net local costs are claimed.

7. Claim Forms and Instructions

The diagram "Illustration of Claim Forms," provides a graphical presentation of forms required to be filed with a claim. A claimant may submit a computer generated report in substitution for form EPED-1 and form EPED-2, provided the format of the report and data fields contained within the report are identical to the claim forms included in these instructions. The claim forms provided with these instructions should be duplicated and used by the claimant to file estimated and reimbursement claims. The State Controller's Office will revise the manual and claim forms as necessary.

A. **Form EPED-2, Component/Activity Cost Detail**

This form is used to segregate the detail costs by claim component. A separate form EPED-2 must be completed for each cost component being claimed. Costs reported on this form must be supported as follows:

(1) Salaries and Benefits

Identify the employee(s), and/or show the classification of the employee(s) involved, describe the mandated functions performed as these relate to preparing and implementing emergency plans and providing instruction, specify the actual number of hours devoted to the mandated functions, the productive hourly rate, and the related fringe benefits.

Source documents required to be maintained by the claimant may include, but are not limited to, employee time cards and/or cost allocation reports.

(2) Materials and Supplies

Only expenditures for printing, postage, and supplies which can be identified as a direct cost of the mandate can be claimed. List cost of materials which have been consumed or expended specifically for the purpose of this mandate.

Source documents required to be maintained by the claimant may include, but are not limited to, invoices, receipts, purchase orders, and other documents evidencing the validity of the expenditures.

(3) Contracted Services

The reimbursable costs for contracted services to provide instruction to students shall be limited to the scope of the mandated as stated in Education Code Section 35297 which is described as the instruction of students in the elements of the School Building Master Plan. This includes, but is not limited to, drop procedures, and protective measures to be taken before, during, and after an earthquake; the preparation and dissemination to students of standard lesson plans on a district-wide basis; and the preparation of a standard testing program to ensure that students are properly trained.

Give the name(s) of contractor(s) who performed the service, describe the activities performed by each named contractor, inclusive dates when services were performed and itemize all costs for services performed. The maximum reimbursable fee for contracted services shall not exceed the salaries and wages, including benefits, that would be paid to a school district employee performing the same services. Reasonable expenses may be reimbursed as identified on the monthly billings of consultant. However, travel expenses for contracted services hired shall not be reimbursed in an amount higher than received by a State employee. Attach consultant invoices with the claim.

Source documents required to be maintained by the claimant may include, but are not limited to, contracts, invoices, and other documents evidencing the validity of the expenditures.

For audit purposes, all supporting documents must be retained for a period of two years after the end of the calendar year in which the reimbursement claim was filed or last amended, whichever is later. Such documents shall be made available to the State Controller's Office on request.

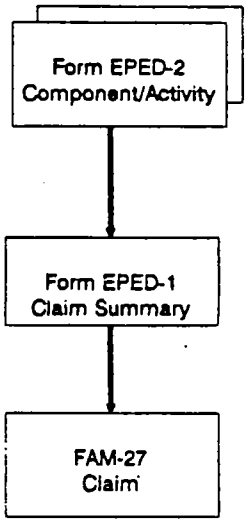
B. Form EPED-1, Claim Summary.

This form is used to summarize direct costs by component and compute the allowable indirect costs for the mandate. School districts and local offices of education may compute the amount of indirect costs utilizing the State Department of Education's Annual Program Cost Data Report J-380 or J-580 rate. The cost data on this form are carried forward to form FAM-27.

C. **Form FAM-27, Claim for Payment.**

This form contains a certification that must be signed by an authorized representative of the school district. All applicable information from form EPED-1 must be carried forward to this form in order for the State Controller's Office to process the claim for payment.

Illustration of Claim Forms



Form EPED-2 Component/Activity Cost Detail
Complete a separate form EPED-2, for each component in which costs are claimed.

1. Emergency Procedures

2. Mass Care and Welfare Shelters.

All supporting documents must be retained for a period of not less than three years from the date of the final payment for the claim.

B. Form ED-1, Claim Summary.

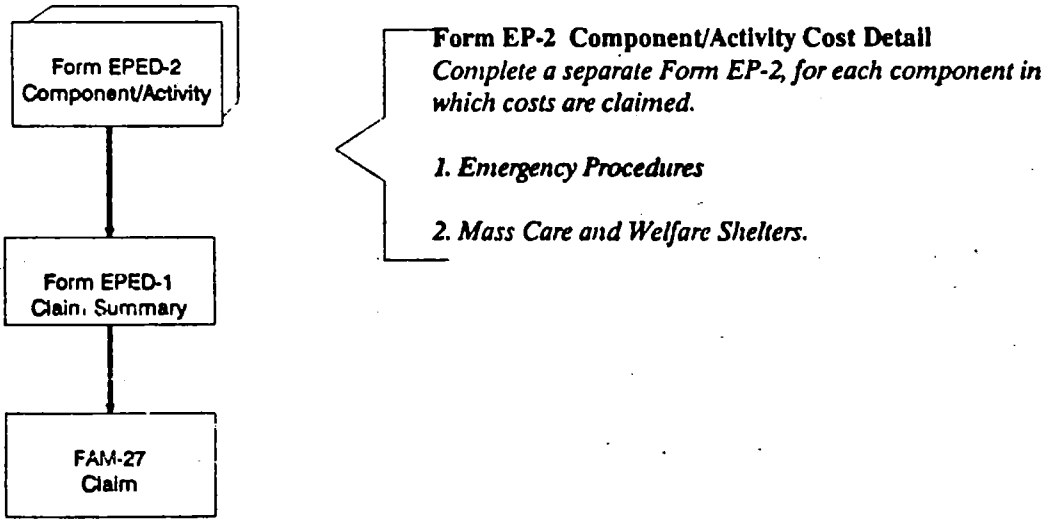
This form is used to summarize direct costs by claim component and computed allowable indirect costs for the mandate. Direct costs on this form are carried forward from Forms EPED-2.

The amount of indirect costs may be computed by using the Department of Education J-380 or J-580 rate applicable to the fiscal year of costs. Amounts from EPED-1 are carried forward to Form FAM-27.

C. Form FAM-27, Claim for Payment.

This form contains a certification that must be signed by an authorized representative of the county. All applicable information from Form EPED-1 must be carried forward onto this form in order for the State Controller's Office to process the claim for payment.

Illustration of Claim Forms



E. REIMBURSEMENT CLAIM 1996-1997

State of California — School Mandated Cost Manual

CLAIM FOR PAYMENT
Pursuant to Government Code Section 17561
EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTERS

For State Controller Use only
(19)Program Number 00075
(20) Data File ____/____/____
(21) Signature Present ☐

LABEL HERE

(01) Claimant Identification Number: S37165

(02) Mailing Address:
San Diego Unified School District
San Diego County
4100 Normal Street
San Diego California 92103

Reimbursement Claim Data

(22) EPED, (04)(1)(d)	563,463
(23) EPED, (04)(2)(d)	
(24) EPED, (06)	4
(25)	
(26)	
(27)	
(28)	
(29)	
(30)	
(31)	
(32)	
(33)	
(34)	
(35)	
(36)	
(37)	

Type of Claim	Estimated Claim	Reimbursement Claim
	(03) Estimated [x]	(09) Reimbursement [x]
	(04) Combined [ ]	(10) Combined [ ]
	(05) Amended [ ]	(11) Amended [ ]
Fiscal Year of Cost	(06) 1997/98	(12) 1996/97
Total Claimed Amount	(07) 590,000	(13) 588,819
Less: 10% Late Penalty,but not to exceed $1000 (if applicable)		(14)
Less: Estimate Payment Received		(15) 82,964
Net Claimed Amount		(16)
Due from State	(08) 590,000	(17) 505,855
Due to State		(18)

(38) CERTIFICATION OF CLAIM

In accordance with the provisions of Government Code 17561, I certify that I am the person authorized by the local agency to file claims with the State of California for costs mandated by Chapter 498, Statutes of 1983; and certify under penalty of perjury that I have not violated any of the provisions of Government Code Sections 1090 to 1096, inclusive.

I further certify that there were no applications for nor any grant or payments received, other than from the claimant, for reimbursement of costs claimed herein, and such costs are for new program or increased level of services of an existing program mandated by Chapter 498, Statutes of 1983.

The amounts for Estimated Claim and/or Reimbursement Claim are hereby claimed from the State for payment of estimated and/or actual costs for the mandated program of Chapter498, Statutes of 1983, set forth on the attached statements.

Signature of Authorized Representative — **Date**

Richard J. Knott — 11-20-97

Richard J. Knott — Deputy Controller
Type or Print Name — Title

(39) Name of Contact Person or Claim — Telephone Number
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Form FAM-27 (Revised 10/95) — Chapter1659/84

MANDATED COSTS
EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTER
CLAIM SUMMARY

FORM EPED-1

(01) Claimant: San Diego Unified School District

(02) Type of Claim: Reimbursement [x] Estimated [ ]

Fiscal Year: 1996/97

Claim Statistics

(03) Leave Blank

Direct Costs

(04) Reimbursable Components:	Cost Elements (a) Salaries and Benefits	(b) Supplies	(c) Contracted Services	(d) Total
1. Emergency Procedures **Teacher "in-classroom" instruction*	396,040 167,423			563,463
2. s Care and Welfare Shelters				
(05) Total Direct Cost				563,463

Indirect Cost

(06) Indirect Cost Rate	J-380 or J-580, as applicable For 1985/86, use J-41A or J-73A, as applicable	4.50%
(07) Total Indirect Costs:	Line (06) x [line (05)(d) - line (05)(c)]	25,356
(08) Total Direct and Indirect Costs:	[Line (05)(d)+ line (07)	588,819

Cost Reduction

(09) Less: Offsetting Savings, if applicable		
( ) Less: Other Reimbursements, if applicable		
(11) Total Claimed Amount:	{Line (08) - [line (09) + line (10)]}	588,819

MANDATED COSTS
EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTERS
COMPONENT/ACTIVITY COST DETAIL

FORM EPED-2

(01) Claimant: San Diego Unified School District

(02) Fiscal Year costs were incurred: 1996/97

(03) Reimbursable Component: Check a box to identify the cost being claimed. Check ONLY one box per form.

[x] Emergency Procedures [ ] Mass Care and Welfare Shelters

(04) Description of Expense: Complete columns (a) through (f).

(a) Employee Names, Job Classifications and Activities Perfomed and Description of Expenses	(b) Hourly Rate or Unit Cost	(c) Hours Worked or Quantity	Object Accounts (d) Salaries and Benefits	(e) Materials and Supplies	(f) Contracted Services
Prepare an earthquake emergency disaster plan and procedure. Provide training to employees in earthquake and disaster procedures.					
Teachers	27.44	12202.9	$334,846.48		
Principals and Vice Principals	42.56	331.25	$14,098.00		
Librarians	29.57	40.5	$1,197.59		
Counselors	30	301.15	$9,034.50		
Nurses	25.68	117.55	$3,018.68		
Instructional Aides	14.57	675.98	$9,849.03		
[illegible]/Secretaries	18.02	1127.46	$20,316.83		
M[illegible]enance	9.69	251	$2,432.19		
School Police	28.32	44	$1,246.08		
Teachers - In classroom instruction	***27.44***	***6101.43***	$167,423.24		
) **Total** [x] **Subtotal** [ ]		**Page: 1 of 1**	563,463		

F. REIMBURSEMENT CLAIM 1997-1998

State of California — School Mandated Cost Manual

CLAIM FOR PAYMENT
Pursuant to Government Code Section 17561
EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTERS

For State Controller Use only
(19) Program Number 00075
(20) Data File ____/____/____
(21) Signature Present ___

(01) Claimant Identification Number: S37165

LABEL HERE

(02) Mailing Address:
San Diego Unified School District
San Diego County
4100 Normal Street
San Diego California 92103

Reimbursement Claim Data

(22) EPED, (04)(1)(d)	$ 587,079.00
(23) EPED, (04)(2)(d)	
(24) EPED, (06)	4.
(25)	
(26)	
(27)	
(28)	
(29)	
(30)	
(31)	
(32)	
(33)	
(34)	
(35)	
(36)	
(37)	

Type of Claim	Estimated Claim	Reimbursement Claim
	(03) Estimated [X]	(09) Reimbursement [X]
	(04) Combined [ ]	(10) Combined [ ]
	(05) Amended [ ]	(11) Amended [ ]
Fiscal Year of Cost	(06) 1998/1999	(12) 1997/1998
Total Claimed Amount	(07) 620,000.00	(13) $ 612,617.00
Less: 10% Late Penalty, but not to exceed $1000 (if applicable)		(14) 0
Less: Estimate Payment Received		(15) $ 414,989.00
Net Claimed Amount		(16) $ 197,628.00
Due from State	(08) $ 620,000.00	(17) $ 197,628.00
Due to State		(18) $ -

(38) CERTIFICATION OF CLAIM

In accordance with the provisions of Government Code 17561, I certify that I am the person authorized by the local agency to file claims with the State of California for costs mandated by Chapter 498, Statutes of 1983; and certify under penalty of perjury that I have not violated any of the provisions of Government Code Sections 1090 to 1096, inclusive.

I further certify that there were no applications for nor any grant or payments received, other than from the claimant, for reimbursement of costs claimed herein; and such costs are for new program or increased level of services of an existing program mandated by Chapter 498, Statutes of 1983.

The amounts for Estimated Claim and/or Reimbursement Claim are hereby claimed from the State for payment of estimated and/or actual costs for the mandated program of Chapter498, Statutes of 1983, set forth on the attached statements.

Signature of Authorized Representative — Date

Richard J. Knott — 12/16/98

Type or Print Name — Deputy Controller (Title)

(39) Name of Contact Person or Claim — Telephone Number

Charlie Bimmerle — (619) 291-3181 Ext.

Form FAM-27 (Revised 10/95) — Chapter1659/84

MANDATED COSTS
EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTER
CLAIM SUMMARY

FORM EPED-1

(01) Claimant:	(02) Type of Claim:	Fiscal Year: 1997/98
San Diego Unified School District	Reimbursement [x]	
	Estimated [ ]	

Claim Statistics

(03) Leave Blank

Direct Costs	Cost Elements (a) Salaries and Benefits	(b) Supplies	(c) Contracted Services	(d) Total
(04) Reimbursable Components:				
1. Emergency Procedures	587,079			587,079
2. Mass Care and Welfare Shelters				0
(05) Total Direct Cost				587,079

Indirect Cost

(06) Indirect Cost Rate	J-380 or J-580, as applicable	4.35%
(07) Total Indirect Costs:	Line (06) x [line (05)(d) - line (05)(c)]	25,538
(08) Total Direct and Indirect Costs:	[Line (05)(d)+ line (07)	612,617

Cost Reduction

(09) *Less*: Offsetting Savings, if applicable		0
(10) *Less*: Other Reimbursements, if applicable		0
Total Claimed Amount:	{Line (08) - [line (09) + line (10)]}	612,617

Revised 9/93 Chapter 1059/84

MANDATED COSTS
EMERGENCY PROCEDURES: EARTHQUAKE AND DISASTERS
COMPONENT/ACTIVITY COST DETAIL

FORM EPED-2

Claimant: San Diego Unified School District

(02) Fiscal Year costs were incurred: 1997/98

(03) Reimbursable Component: Check a box to identify the cost being claimed. Check ONLY one box per form.

[x] Emergency Procedures [ ] Mass Care and Welfare Shelters

(04) Description of Expense: Complete columns (a) through (f).

(a) Employee Names, Job Classifications and Activities Perfomed and Description of Expenses	(b) Hourly Rate or Unit Cost	(c) Hours Worked or Quantity	Object Accounts (d) Salaries and Benefits	(e) Materials and Supplies	(f) Contracted Services
Prepare an earthquake emergency disaster plan and procedure Provide training to employees in earthquake and disaster procedures.					
Teachers / #6520	$36.78	13040	$479,611.20		
Principals and Vice Principals / #352	$58.68	704	$41,310.72		
Librarians / #43	$41.55	43	$1,786.65		
Counselors / #315	$41.89	315	$13,195.35		
Nurses / #116	$33.70	116	$3,909.20		
Instructional Aides / #733	$19.13	733	$14,022.29		
Clerks/Secretaries / #1173	$24.64	1173	$28,902.72		
enance / #270	$10.15	270	$2,740.50		
Sc l Police / #49	$32.66	49	$1,600.34		
) Total [X] Subtotal [ ] Page: 1 of 1			$587,079		

S37165

KATHLEEN CONNELL
CONTROLLER OF THE STATE OF CALIFORNIA
DIVISION OF ACCOUNTING AND REPORTING

MAY 6, 1999

BOARD OF TRUSTEES
SAN DIEGO CITY UN SCH DIST
SAN DIEGO COUNTY
4100 NORMAL STREET
SAN DIEGO CA 92103

DEAR CLAIMANT:

RE: EMERGENCY PROCEDURE CH 1659/84

WE HAVE REVIEWED YOUR 1996/1997 FISCAL YEAR REIMBURSEMENT CLAIM FOR THE MANDATED COST PROGRAM REFERENCED ABOVE. THE RESULTS OF OUR REVIEW ARE AS FOLLOWS:

AMOUNT CLAIMED		588,819.00
ADJUSTMENT TO CLAIM:		
NON-REIMBURSABLE ITEM	- 179,954.00	
LESS: TOTAL ADJUSTMENTS		- 179,954.00
CLAIM AMOUNT APPROVED		408,865.00
LESS PRIOR PAYMENT: SCHEDULE NO. MA61920E PAID 01-13-1997		82,964.00
AMOUNT DUE CLAIMANT		$ 325,901.00

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT FRAN STERNET AT (916) 323-8137 OR IN WRITING AT THE STATE CONTROLLER'S OFFICE, DIVISION OF ACCOUNTING AND REPORTING, P.O. BOX 942850, SACRAMENTO, CA 94250-5875. DUE TO INSUFFICIENT APPROPRIATION, THE BALANCE DUE WILL BE FORTHCOMING WHEN ADDITIONAL FUNDS ARE MADE AVAILABLE.

SINCERELY,

Jeff Yee

JEFF YEE,
MANAGER

H. STATE CONTROLLER'S OFFICE LETTER-AUGUST 16, 1999

S37165

KATHLEEN CONNELL
CONTROLLER OF THE STATE OF CALIFORNIA
DIVISION OF ACCOUNTING AND REPORTING

AUGUST 16, 1999

BOARD OF TRUSTEES
SAN DIEGO CITY UN SCH DIST
SAN DIEGO COUNTY
4100 NORMAL STREET
SAN DIEGO CA 92103

DEAR CLAIMANT:

RE: EMERGENCY PROCEDURE CH 1659/84

WE HAVE REVIEWED YOUR 1996/1997 FISCAL YEAR REIMBURSEMENT CLAIM FOR THE MANDATED COST PROGRAM REFERENCED ABOVE. THE RESULTS OF OUR REVIEW ARE AS FOLLOWS:

AMOUNT CLAIMED	588,819.00
LESS: TOTAL ADJUSTMENTS (DETAIL ON PAGE 2)	- 176,739.00
CLAIM AMOUNT APPROVED	412,080.00
LESS: TOTAL PRIOR PAYMENTS (DETAIL ON PAGE 2)	408,865.00
AMOUNT DUE CLAIMANT	$ 3,215.00

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT FRAN STERNET AT (916) 323-8137 OR IN WRITING AT THE STATE CONTROLLER'S OFFICE, DIVISION OF ACCOUNTING AND REPORTING, P.O. BOX 942850, SACRAMENTO, CA 94250-5875. THE PAYMENT WILL BE FORTHCOMING WITHIN 30 DAYS.

SINCERELY,

Jeff Yee

JEFF YEE,
MANAGER

S37165

ADJUSTMENT TO CLAIM:			
INDIRECT COSTS OVERSTATED	-	9,316.00	
NON-REIMBURSABLE ITEM	-	167,423.00	
LESS: TOTAL ADJUSTMENTS			- 176,739.00
PRIOR PAYMENTS:			
SCHEDULE NO. MA82703A			
PAID 06-23-1999		325,901.00	
SCHEDULE NO. MA61920E			
PAID 01-13-1997		82,964.00	
LESS: TOTAL PRIOR PAYMENTS			408,865.00

S37165

KATHLEEN CONNELL
CONTROLLER OF THE STATE OF CALIFORNIA
DIVISION OF ACCOUNTING AND REPORTING

JULY 23, 2001

BOARD OF TRUSTEES
SAN DIEGO CITY UN SCH DIST
SAN DIEGO COUNTY
4100 NORMAL STREET
SAN DIEGO CA 92103

DEAR CLAIMANT:

RE: EMERGENCY PROCEDURE CH 1659/84

WE HAVE REVIEWED YOUR 1996/1997 FISCAL YEAR REIMBURSEMENT CLAIM FOR THE MANDATED COST PROGRAM REFERENCED ABOVE. THE RESULTS OF OUR REVIEW ARE AS FOLLOWS:

AMOUNT CLAIMED		588,819.00
LESS: TOTAL ADJUSTMENTS (DETAIL ON PAGE 2)	-	588,819.00
CLAIM AMOUNT APPROVED		0.00
LESS: TOTAL PRIOR PAYMENTS (DETAIL ON PAGE 2)		412,080.00
AMOUNT DUE STATE	$	412,080.00

PLEASE REMIT A WARRANT IN THE AMOUNT OF $ 412,080.00 WITHIN 30 DAYS FROM THE DATE OF THIS LETTER, PAYABLE TO THE STATE CONTROLLER'S OFFICE, DIVISION OF ACCOUNTING AND REPORTING, P.O. BOX 942850, SACRAMENTO, CA 94250-5875 WITH A COPY OF THIS LETTER. FAILURE TO REMIT THE AMOUNT DUE WILL RESULT IN OUR OFFICE PROCEEDING TO OFFSET THE AMOUNT FROM THE NEXT PAYMENTS DUE TO YOUR AGENCY FOR STATE MANDATED COST PROGRAMS.

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT FRAN STUART AT (916) 323-0766 OR IN WRITING AT THE ABOVE ADDRESS.

SINCERELY,

Jeff Yee

JEFF YEE,
MANAGER

J. STATE CONTROLLER'S OFFICE LETTER-JAN. 22, 1998

P.O. BOX 942850, SACRAMENTO, CALIFORNIA 942[redacted]

THIS REMITTANCE ADVICE IS FOR INFORMATION PURPOSE ONLY.
THE WARRANT COVERING THE AMOUNT SHOWN WILL BE MAILED
DIRECTLY TO THE PAYEE.

BOARD OF TRUSTEES
SAN DIEGO CITY UN SCH DIST
SAN DIEGO COUNTY
4100 NORMAL STREET
SAN DIEGO CA 92103

WARRANT AMT: ***414,989.00

PAYEE: TREASURER, SAN DIEGO CITY UN SCH DIST
FUND NAME: GENERAL FUND

ISSUE DATE: 01/22/1998

CLAIM SCHEDULE NBR: MA71918E

REIMBURSEMENT OF STATE MANDATED COSTS
QUESTIONS? CALL TIM KING AT 916-323-8137
ACL : 6100-295-0001-1997 PROG : EMERGENCY PROCEDURE CH 1659/84

1997/1998 ESTIMATED PAYMENT	CLAIMED AMT:	590,000.00
TOTAL ADJUSTMENTS:		.00
TOTAL APPROVED CLAIMED AMT:		590,000.00
LESS PRIOR PAYMENTS:		.00
PRORATA PERCENT:	70.337094	
PRORATA BALANCE DUE:		175,011.00-
APPROVED PAYMENT AMOUNT:		414,989.00
PAYMENT OFFSETS -NONE		
	NET PAYMENT AMOUNT:	414,989.00

K. STATE CONTROLLER'S OFFICE LETTER-JUNE 23, 1999

ROLLER OF CALIFORNIA
BOX 942850, SACRAMENTO, CALIFORNIA 94250

4T1+2

THIS REMITTANCE ADVICE IS FOR INFORMATION PURPOSE ONLY.
THE WARRANT COVERING THE AMOUNT SHOWN WILL BE MAILED
DIRECTLY TO THE PAYEE.

WARRANT AMT: ***181,635.00

BOARD OF TRUSTEES
SAN DIEGO CITY UN SCH DIST
SAN DIEGO COUNTY
4100 NORMAL STREET
SAN DIEGO CA 92103

E: TREASURER, SAN DIEGO CITY UN SCH DIST
NAME: GENERAL FUND

ISSUE DATE: 06/23/1999 CLAIM SCHEDULE NBR: MA82704A

REIMBURSEMENT OF STATE MANDATED COSTS
IF YOU HAVE ANY QUESTIONS CALL JOEL HALL AT 916-324-9843
ACL : 6100-295-0001-1997 PROG : EMERGENCY PROCEDURE CH 1659/64

1997/1998 ACTUAL PAYMENT	CLAIMED AMT:	612,617.00
TOTAL ADJUSTMENTS:		.00
TOTAL APPROVED CLAIMED AMT:		612,617.00
LESS PRIOR PAYMENTS:		414,989.00-
PRORATA PERCENT:	91.907279	
PRORATA BALANCE DUE:		15,993.00-
APPROVED PAYMENT AMOUNT:		181,635.00
PAYMENT OFFSETS -NONE		
	NET PAYMENT AMOUNT:	181,635.00

Cash Receipt Log ✓
Fiscal Yr Summary of Cash Receipts ✓
Fiscal Yr Historical Log ✓ 9/98
Summary of Amounts Due ✓
Deferred Record Summary ✓
Deferred Record Detail by Mand e ✓
Mandate History Record

L. STATE CONTROLLER'S OFFICE LETTER-JULY 23, 2001

S37165

KATHLEEN CONNELL
CONTROLLER OF THE STATE OF CALIFORNIA
DIVISION OF ACCOUNTING AND REPORTING

JULY 23, 2001

BOARD OF TRUSTEES
SAN DIEGO CITY UN SCH DIST
SAN DIEGO COUNTY
4100 NORMAL STREET
SAN DIEGO CA 92103

DEAR CLAIMANT:

RE: EMERGENCY PROCEDURE CH 1659/84

WE HAVE REVIEWED YOUR 1997/1998 FISCAL YEAR REIMBURSEMENT CLAIM FOR THE MANDATED COST PROGRAM REFERENCED ABOVE. THE RESULTS OF OUR REVIEW ARE AS FOLLOWS:

AMOUNT CLAIMED		612,617.00
LESS: TOTAL ADJUSTMENTS (DETAIL ON PAGE 2)	-	612,617.00
CLAIM AMOUNT APPROVED		0.00
LESS: TOTAL PRIOR PAYMENTS (DETAIL ON PAGE 2)		612,617.00
AMOUNT DUE STATE	$	612,617.00

PLEASE REMIT A WARRANT IN THE AMOUNT OF $ 612,617.00 WITHIN 30 DAYS FROM THE DATE OF THIS LETTER, PAYABLE TO THE STATE CONTROLLER'S OFFICE, DIVISION OF ACCOUNTING AND REPORTING, P.O. BOX 942850, SACRAMENTO, CA 94250-5875 WITH A COPY OF THIS LETTER. FAILURE TO REMIT THE AMOUNT DUE WILL RESULT IN OUR OFFICE PROCEEDING TO OFFSET THE AMOUNT FROM THE NEXT PAYMENTS DUE TO YOUR AGENCY FOR STATE MANDATED COST PROGRAMS.

IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT FRAN STUART AT (916) 323-0766 OR IN WRITING AT THE ABOVE ADDRESS.

SINCERELY,

Jeff Yee

JEFF YEE,
MANAGER

M. STATE CONTROLLER'S OFFICE LETTER-SEPT. 15, 2000

KATHLEEN CONNELL

Controller of the State of California

September 15, 2000

Alan D. Bersin, Superintendent
San Diego Unified School District
4100 Normal Street, Room 3209
San Diego, CA 92103

Dear Mr. Bersin:

The State Controller's Office has completed an audit of claims by the San Diego Unified School District for the legislatively mandated Emergency Procedures, Earthquake and Disasters program, Chapter 1659, Statutes of 1984, for the period of July 1, 1996, through June 30, 1998.

The district was paid $1,008,697 for costs claimed during the audit period. However, the audit disclosed that the district had no documentation to support that the amount claimed and paid was eligible for reimbursement. A draft report documenting this finding is enclosed.

Within 15 working days of receiving this letter, please submit any comments your office may have concerning the draft report. In particular, your comments should address the accuracy of the data presented. The State Controller's Office may modify this report based on your comments and/or additional data that may develop as the audit process is completed. The final report will also incorporate your comments.

Your response should be sent to the attention of Jim L. Spano at the State Controller's Office, Division of Audits, Post Office Box 942850, Sacramento, California 94250-5874. If your comments are not received within the specified time, the report will be released as final.

This draft audit report is confidential. Access to and distribution of the report should be limited to those referenced in this letter.

If you have any questions, please contact Jim L. Spano, Chief, Compliance Audits Bureau, at (916) 323-5849.

Sincerely,

Walter Barnes

WALTER BARNES
Chief Deputy State Controller, Finance

WB/kmm

cc: Richard Knott, Controller
San Diego Unified School District

N. CLAIMANT'S LETTER-OCT. 5, 2000

SAN DIEGO CITY SCHOOLS

EUGENE BRUCKER EDUCATION CENTER
4100 Normal St., Room 3209, San Diego, CA 92103-2682

(619) 725-7560
Fax: (619) 725-7564
E-Mail: rknott@mail.sandi.net

FINANCE DIVISION
Richard J. Knott, Controller

October 5, 2000

Jim L. Spano, Chief
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Dear Mr. Spano:

SUBJECT: EMERGENCY PROCEDURES MANDATE, DRAFT AUDIT REPORT

San Diego Unified School District strongly disagrees with the conclusions in the draft Audit Report for the Emergency Procedures Mandate for the Fiscal Year 1996-97 and 1997-98 reimbursement claims. In particular, the district objects to the conclusion that the district had "no documentation" to support the amount claimed. The draft audit report ignores the substantial and conclusive documentation supporting these claims. In addition, the draft audit report for the district's Fiscal Year 1996-97 reimbursement claim was not timely issued and this claim cannot be adjusted.

I. Source Documents Fully Support the District's Reimbursement Claims

A. Time records maintained by the district are not "estimates."

The draft audit report states that the district's time records are "year-end estimates of hours supposedly spent on the mandate during the year." This statement is wrong. These time logs are not estimates but are after-the-fact certifications of the actual effort expended by the district's personnel on the mandated activities for the period indicated. The time logs were completed by the persons who performed the tasks or by a supervisory official having first hand knowledge of the activity performed by the employees. District personnel continually made this distinction to the auditor, but she failed to grasp the distinction.

After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective. The Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs. These methods are used to determine actual costs; they are not estimates.

B. The district provided source documents to prove that district personnel performed the mandated activities.

There can be no question that the school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. We provided copies of the plans from nearly all of the school sites for 1996-97 and 1997-98. The draft audit report incorrectly states

that these plans "were not developed during the audit period." The plans are prepared or reviewed and updated each year and the plans provided to the auditor were the plans in effect during the audit period. Thus, the district provided sufficient documentation to prove that each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate.

In interviews with the auditor, the district's school principals or vice principals affirmed that they conduct at least one general staff meeting, normally prior to the beginning of the school year, in which they discuss the emergency procedures with all staff members and that each staff member reviews the emergency procedures and prepares for the evacuation drills. These principals and vice-principals provided samples of the meeting agendas for the meetings in which the emergency procedure plans were discussed. These documents confirm that the schools performed the reimbursable activities. Thus, the district provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans, an activity that is clearly reimbursable under the Parameters and Guidelines.

Each school site conducts an emergency evacuation drill as part of the plan implementation. These drills are not the "drop, cover, and hold" exercises that are periodically conducted by teachers in class, but are comprehensive drills conducted to test the emergency procedures, to provide an opportunity to make necessary changes to the procedures, and to ensure that staff members are properly trained on their individual duties under the procedures. We provided copies of the verifications signed by nearly 100 percent of the schools in which the school site verifies that the school conducted an emergency evacuation drill in each of the fiscal years. The auditor also received samples of drill logs maintained by the school sites selected by the auditor showing the date and times of the drills. Each school site evaluates their evacuation drill and makes appropriate changes to the emergency preparedness plans. These activities are reimbursable under the Parameters and Guidelines.

C. The district's method of determining the actual costs of performing the mandated activities is reasonable.

In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, provided time logs. The district performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analyses. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.

Had the district used only the actual time reported by the 97 school sites for Fiscal Year 1997-98, the reimbursement claim would have been $390,387.32. However, the district's documents evidence that all school sites performed the reimbursable activities. Therefore, the statistical method used by the district to determine the actual costs of performing the reimbursable activities is reasonable and not excessive.

II. The Fiscal Year 1996-97 Reimbursement Claim Cannot Be Disallowed

> Government Code Section 17558.5 imposed a limitations-period on audit of mandate reimbursement claims. Section 17558.5 requires that any audit be completed no later than two years after the end of the calendar year in which the claim was filed or last amended. The district's Fiscal Year 1996-97 reimbursement claim was filed on November 26, 1997. Therefore, the audit of the Fiscal Year 1996-97 must have been completed no later than December 31, 1999. The draft audit report, with respect to Fiscal Year 1996-97, was not timely issued and has no force or effect.[1]

Please correct the draft audit report to find that the costs claimed by the district are approved as claimed. If you need any further information, or would like to meet to resolve this matter, I can be reached at (619) 725-7560.

Sincerely,

Richard J. Knott
Controller

RJK: jv

c: Alan Bersin, Superintendent of Public Education
Terry Smith, Chief of Staff
Henry Hurley, Chief Administrative Officer
Jo Anne SawyerKnoll, General Counsel

[1] The State Controller's Office completed review of the Fiscal Year 1996-97 reimbursement claim on May 6, 1999, and issued the written notification of adjustment to the claim required by Government Code section 17558.5, subdivision (b) on that date. Pursuant to that review, the State Controller's Office approved costs totaling $408,865 of the District's $588,819 reimbursement claim.

O. STATE CONTROLLER'S OFFICE LETTER-DEC. 22, 2000

KATHLEEN CONNELL

Controller of the State of California

December 22, 2000

Alan D. Bersin, Superintendent
San Diego Unified School District
4100 Normal Street, Room 3209
San Diego, CA 92103-2682

Dear Mr. Bersin:

The State Controller's Office (SCO) has completed an audit of claims by the San Diego Unified School District for the legislatively mandated Emergency Procedures, Earthquake and Disasters Program, Chapter 1659, Statutes of 1984, for the period of July 1, 1996, through June 30, 1998.

The district claimed $1,201,436 in costs during the audit period. This amount was reduced to $1,024,697 by the SCO, Division of Accounting and Reporting, on August 16, 1999, based on a desk review it performed. The audit has determined that the entire amount is not allowed. The disallowance is primarily due to the lack of documentation substantiating claimed costs.

The district was paid $1,008,704 for costs claimed during the audit period. Since the entire claimed costs have been disallowed, the amount overpaid, totaling $1,008,704, should be returned to the State.

If you have any questions, please contact Jim L. Spano, Chief, Compliance Audits Bureau, at (916) 323-5849.

Sincerely,

KATHLEEN CONNELL
California State Controller

☐ SACRAMENTO 300 Capitol Mall, Suite 1850, Sacramento, CA 95814 (916) 445-2636
☐ Mailing Address: P.O. Box 942850, Sacramento, CA 94250
☐ LOS ANGELES 600 Corporate Pointe, Suite 1150, Culver City, CA 90230 (310) 342-5678

Declaration of Richard J. Knott

Incorrect Reduction Claim- SAN DIEGO UNIFIED SCHOOL DISTRICT
Chapter 1659, Statutes of 1984
Fiscal Years 1996-1997; 1997-1998
Emergency Procedures, Earthquakes and Disasters

I, Richard J. Knott, make the following declaration and statement:

1. I am currently Controller for the San Diego Unified School District (the "District") and employed as the Controller for the San Diego Unified School District (the "District") for 3 years.

2. The "District" provided SCO time logs of the actual effort expended by the "District's" personnel on the mandated activities for the period indicated. The time logs (after-the-fact certifications) were completed by the individuals who performed the tasks or by a supervisory official having first hand knowledge of the activity performed by the employees.

3. After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective. The Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs. These methods are used to determine actual costs; they are not estimates. The "District" provided source documents as reliable and credible evidence personnel performed the mandated activities.

4. There can be no doubt the "District" school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. "District" provided copies of the plans from nearly all of

the school sites for 1996-97 and 1997-98. The draft audit report incorrectly states these plans "were not developed during the audit period." The plans are prepared or reviewed and updated each year and the plans provided to the auditor were the plans in effect during the audit period. Thus, the district provided sufficient documentation to prove each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate.

5. In interviews with the auditor, the "District's" school principals or vice principals affirmed they conduct at least one general staff meeting, normally prior to the beginning of the school year, in which they discuss the emergency procedures with all staff members and each staff member reviews the emergency procedures and prepares for the evacuation drills. The principals and vice-principals provided samples of the meeting agendas for the meetings in which the emergency procedure plans were discussed, confirming the schools performed the reimbursable activities. Thus, the "District" provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans, an activity that is clearly reimbursable under the Parameters and Guidelines.

6. Each school site conducts an emergency evacuation drill as part of the plan implementation. These drills are not the "drop, cover, and hold" exercises that are periodically conducted by teachers in class, but are comprehensive drills conducted to test the emergency procedures, to provide an opportunity to make necessary changes to the procedures, and to ensure that staff members are properly trained on their individual duties under the procedures. "District" provided copies of the verifications signed by nearly 100 percent of the schools in which the school site verifies that the school

conducted an emergency evacuation drill in each of the fiscal years. The auditor also received samples of drill logs maintained by the school sites selected by the auditor showing the date and times of the drills. Each school site evaluates their evacuation drill and makes appropriate changes to the emergency preparedness plans. These activities are reimbursable under the Parameters and Guidelines.

7. The "District's" method of determining the actual costs of performing the mandated activities is reasonable. In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, provided time logs. The "District" performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analysis. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.

8. Had the "District" used only the actual time reported by the 97 school sites for Fiscal Year 1997-98, the reimbursement claim would have been $390,387.32. However, the "District's" documents evidence that all school sites performed the reimbursable activities. Therefore, the statistical method used by the "District" to determine the actual costs of performing the reimbursable activities is reasonable and not excessive.

The foregoing facts are known to me personally and if so required, I could testify to the statements made herein. I hereby declare under penalty of perjury under the laws of the State of

California that the foregoing is true and correct except as to matters, which are stated as information and belief that I believe them to be true.

EXECUTED March 8, 2002 in San Diego, California.

Richard J. Knott, Controller

Q. AUDIT REPORT

SAN DIEGO UNIFIED SCHOOL DISTRICT

Audit Report

Legislatively Mandated Emergency Procedures, Earthquake and Disasters Program

Chapter 1659, Statutes of 1984

July 1, 1996, through June 30, 1998

KATHLEEN CONNELL
California State Controller

December 2000

KATHLEEN CONNELL

Controller of the State of California

December 22, 2000

Alan D. Bersin, Superintendent
San Diego Unified School District
4100 Normal Street, Room 3209
San Diego, CA 92103-2682

Dear Mr. Bersin:

The State Controller's Office (SCO) has completed an audit of claims by the San Diego Unified School District for the legislatively mandated Emergency Procedures, Earthquake and Disasters Program, Chapter 1659, Statutes of 1984, for the period of July 1, 1996, through June 30, 1998.

The district claimed $1,201,436 in costs during the audit period. This amount was reduced to $1,024,697 by the SCO, Division of Accounting and Reporting, on August 16, 1999, based on a desk review it performed. The audit has determined that the entire amount is not allowed. The disallowance is primarily due to the lack of documentation substantiating claimed costs.

The district was paid $1,008,704 for costs claimed during the audit period. Since the entire claimed costs have been disallowed, the amount overpaid, totaling $1,008,704, should be returned to the State.

If you have any questions, please contact Jim L. Spano, Chief, Compliance Audits Bureau, at (916) 323-5849.

Sincerely,

KATHLEEN CONNELL
California State Controller

☐ SACRAMENTO 300 Capitol Mall, Suite 1850, Sacramento, CA 95814 (916) 445-2636
☐ Mailing Address: P.O. Box 942850, Sacramento, CA 94250
☐ LOS ANGELES 600 Corporate Pointe, Suite 1150, Culver City, CA 90230 (310) 342-5678

cc: Kathryn Radtkey-Gaither
Program Budget Manager
Education Systems Unit
Department of Finance
Charles Pillsbury
School Apportionment Specialist
Department of Finance
Janet Sterling, Director
School Fiscal Services Division
California Department of Finance
Rudy M. Castruita
County Superintendent of Schools
San Diego County Office of Education
Richard Knott, Controller
San Diego Unified School District

Contents

Audit Report

Summary

The State Controller's Office (SCO) performed an audit of the legislatively mandated Emergency Procedures, Earthquake and Disasters Program costs claimed by San Diego Unified School District for the period of July 1, 1996, through June 30, 1998 (fiscal years 1996-97 and 1997-98). The last day of fieldwork was January 6, 2000.

The district claimed $1,201,436 in costs during the audit period. This amount was reduced to $1,024,697 by the SCO, Division of Accounting and Reporting, on August 16, 1999, based on a desk review it performed. The audit has determined that the entire amount is not allowed. The disallowance is primarily due to the lack of documentation substantiating claimed costs.

The district was paid $1,008,704 for costs claimed during the audit period. Since the entire claimed costs have been disallowed, the amount overpaid, totaling 1,008,704, should be returned to the State.

Background

Chapter 1659, Statutes of 1984, requires the governing body of each school district and the county superintendent of schools of each county to establish an earthquake emergency procedure in each school building under its jurisdiction. In addition, the legislation requires the governing board of a school district to grant the use of school buildings, grounds, and equipment to public agencies for mass care and welfare shelters during disasters or other emergencies affecting public health and welfare. This law further eliminated the authority of school districts to recover direct costs from public agencies for the use of school facilities during local emergencies. On July 23, 1987, the Commission on State Mandates ruled that Chapter 1659, Statutes of 1984, imposed a state mandate upon school districts and county offices of education reimbursable under *Government Code* Section 17561.

Parameters and Guidelines, adopted by the Commission on State Mandates established the state mandate and defined criteria for reimbursement. In compliance with *Government Code* Section 17558, the SCO issued claiming instructions for each mandate requiring state reimbursement to assist school districts and local agencies in claiming reimbursable costs.

Objective, Scope, and Methodology

The objective of the audit was to determine whether costs claimed represent increased costs resulting from the legislatively mandated Emergency Procedures, Earthquake and Disasters program for the period of July 1, 1996, through June 30, 1998.

The SCO conducted the audit in accordance with *Government Auditing Standards*, issued by the Comptroller General of the United States. Authority to perform the audit is provided by *Government Code* Sections 12410 and 17561. The scope of the audit work was limited to planning and performing procedures to obtain reasonable assurance that claimed costs were allowable by law for reimbursement. Accordingly, transactions were examined, on a test basis, to make this determination. The auditors performed the following procedures:

- Traced the costs claimed to the supporting documentation to determine whether costs were properly supported and related to the state mandate;
- Reviewed costs claimed to determine if they were increased costs resulting from the state mandate;
- Confirmed that costs claimed were not funded by another source; and
- Reviewed costs claimed to determine that costs were not unreasonable or excessive.

Review of management controls was limited to gaining an understanding of the transaction flow and claim preparation process, as necessary, to develop appropriate auditing procedures.

Conclusion

The SCO audit disclosed instances of noncompliance with the requirements outlined above. Those instances are described in the accompanying Summary of Program Costs (Schedule 1) and in the Finding and Recommendation section of the report. San Diego Unified School District claimed $1,024,697 for the legislatively mandated Emergency Procedures Program. The audit has determined that the entire amount claimed is not allowed.

Consequently, the entire amount paid to the county, totaling $1,008,704 ($412,080 for FY 1996-97 and $596,624 for FY 1997-98), should be returned to the State.

Restricted Use

This report is intended for the information and use of San Diego Unified School District, the San Diego County Office of Education, the California Department of Education, the California Department of Finance, and the SCO, and is not intended to be and should not be used by anyone other than these specified parties. This restriction is not intended to limit distribution of this report, which is a matter of public record.

Views of Responsible Official

The SCO issued a draft audit report dated September 15, 2000. Richard J. Knott, Controller, San Diego Unified School District, responded by letter dated October 5, 2000, disagreeing with the conclusions in the draft audit report for the period of July 1, 1996, through June 30, 1998.

Mr. Knott objected to the conclusion that the district had "no documentation" to support the amount claimed. Additionally, Mr. Knott indicated that the draft audit report for the district's fiscal year 1996-97 reimbursement claim was not issued in a timely manner by the SCO; therefore, the claim for that particular year could not be adjusted. A copy of San Diego Unified School District's response to the draft audit report is attached.

WALTER BARNES
Chief Deputy State Controller, Finance

Finding and Recommendation

FINDING — Unsupported salaries, benefits, and related indirect costs

The district claimed $1,201,436 in salaries, benefits, and related indirect costs for the audit period. The SCO, Division of Accounting and Reporting, disallowed $176,739 in claimed costs based on its desk review completed August 16, 1999. Consequently, the net adjusted claimed cost total is $1,024,697 ($412,080 for FY 1996-97 and $612,617 for FY 1997-98).

During this audit, the district could not provide adequate documentation substantiating the employees and hours charged to the mandate. Therefore, the SCO disallowed the entire salaries, benefits, and related indirect costs claimed. The only documents provided by the district were: (1) J-200 Summary, which shows the authorized, excess, and vacant positions for each employee classification; (2) Emergency Procedures Plans, which were not developed during the audit period and encompassed all types of emergencies; and (3) Data Collection Sheets, which show year-end estimates of hours supposedly spent on the mandate during the year.

The hours claimed by the district consisted of the number of authorized positions, plus or minus excess or vacant positions, multiplied by estimated hours. The number of actual employees performing mandated activities was not provided. The district did not maintain workload data throughout the year or any other supportive documentation to substantiate either the estimated hours or whether the hours were spent for activities required under the mandate. Interviews with school site personnel indicated that claimed activities included non-reimbursable full disaster preparedness drills conducted during classroom hours.

The district provided the SCO auditor with Data Collection Sheets as support for the filed claims. These sheets could not be reconciled to the filed claims. The Data Collection Sheets are completed by principals and vice principals of individual schools within the district at the end of each fiscal year. These sheets show only year-end estimates of hours by position classification (not by employee) supposedly spent on the mandate. These sheets report the number of positions (for example, 25 teachers) that participated in the mandate during the fiscal year, multiplied by an estimated number of hours for each activity. No corroborating documentation was provided to the SCO auditor to confirm the information reported on these sheets. Additionally, all schools within the district did not submit Data Collection Sheets to the district.

Section V of the *Parameters and Guidelines* states, "School Districts shall be reimbursed for the increased costs that result from their compliance with this mandate...."

Section VI B of the *Parameters and Guidelines*, adopted by the Commission on State Mandates of March 23, 1989, states, "a statement showing the actual increased costs incurred to comply with the mandate shall include a listing for those employees whose function is to prepare and implement emergency plans and to provide instruction, provide a listing of each employee, describe their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate."

The entire claimed amount of $1,024,697 is unsupported. Since the district was only paid $1,008,704 in claims for the audit period, it should return the $1,008,704 to the State.

Recommendation

The district should return the overpayment of $1,008,704 to the State. In addition, the district should maintain supportive documentation relating to the legislatively mandated Emergency Procedures, Earthquake and Disaster program that: (1) identifies the employee; (2) describes each function fully to support that the function performed was a state mandated activity; and (3) specifies the actual number of hours devoted to each function.

District's Response

The district contends that time records maintained by the district are not estimates but are after-the-fact certifications of the actual effort expended by the district's personnel on the mandated activities for the period indicated. In addition, the district believes that it provided source documents to prove that district personnel performed the mandated activities and that the district's method of determining the actual costs of performing these activities is reasonable. Finally, the district argues that the SCO's audit of fiscal year 1996-97 was completed after the limitation period as imposed by *Government Code* Section 17558.5, and therefore has no force or effect.

Auditor's Comment

The finding has been updated to clarify the after-the-fact certifications.

The after-the-fact certifications (Data Collection Sheets) submitted by the district are only estimates of total year-end hours by position classification and do not identify employee names and actual hours spent performing mandate activities, as required by *Parameters and Guidelines* Section VI B. For example, the certification at one school indicates that 27 teachers trained all staff in the earthquake emergency plan and procedures; the certification did not identify the teacher's name or the training date.

Plans and drills concerning emergency preparedness are required by the *Education Code*. The district's school meeting agendas for emergency preparedness did not identify the type of instruction, if any, provided. Therefore, the district was not able to adequately substantiate district personnel performing activities reimbursable under this mandate.

Finally, the SCO commenced the audit on October 20, 1999, which is within the allowed timeframe under *Government Code* Section 17558.5. This section refers to the time when the audit is initiated, not when the audit is to be completed.

Based on the above, the audit disallowance remains as stated.

Schedule 1 —
Summary of Program Costs
July 1, 1996, through June 30, 1998

Cost Elements	Actual Costs Claimed	Allowable Per Audit	Audit Adjustments [1]
July 1, 1996, through June 30, 1998			
Salaries and benefits	$ 1,150,542	$ —	$ 1,150,542
Indirect costs	50,894	—	50,894
Claimed costs	1,201,436	—	1,201,436
Less: Claim adjustment based on SCO desk review [2]	(176,739)	—	(176,739)
Adjusted claimed costs	$ 1,024,697	—	$ 1,024,697
Less: Amount paid by the State		(1,008,704)	
Amount paid in excess of allowable costs		$ 1,008,704	
July 1, 1996, through June 30, 1997			
Salaries and benefits	$ 563,463	$ —	$ 563,463
Indirect costs	25,356	—	25,356
Claimed costs	588,819	—	588,819
Less: Claim adjustment based on SCO desk review [2]	(176,739)	—	(176,739)
Adjusted claimed costs	$ 412,080	—	$ 412,080
Less: Amount paid by the State		(412,080)	
Amount paid in excess of allowable costs		$ 412,080	
July 1, 1997, through June 30, 1998			
Salaries and benefits	$ 587,079	$ —	$ 587,079
Indirect costs	25,538	—	25,538
Claimed costs	$ 612,617	—	$ 612,617
Less: Amount paid by the State		(596,624)	
Amount paid in excess of allowable costs		$ 596,624	

[1] See Finding and Recommendation section.

[2] Reduced by the SCO, Division of Accounting and Reporting, on August 16, 1999, based on its desk review.

Attachment

Auditee's Response to Draft Audit Report

SAN DIEGO CITY SCHOOLS

EUGENE BRUCKER EDUCATION CENTER
4100 Normal St., Room 3209, San Diego, CA 92103-2682

(619) 725-7560
Fax: (619) 725-7564
E-Mail: rknott@mail.sandi.net

FINANCE DIVISION
Richard J. Knott, Controller

October 5, 2000

Jim L. Spano, Chief
State Controller's Office
Division of Audits
300 Capitol Mall, Suite 518
Sacramento, CA 95814

Dear Mr. Spano:

SUBJECT: EMERGENCY PROCEDURES MANDATE, DRAFT AUDIT REPORT

San Diego Unified School District strongly disagrees with the conclusions in the draft Audit Report for the Emergency Procedures Mandate for the Fiscal Year 1996-97 and 1997-98 reimbursement claims. In particular, the district objects to the conclusion that the district had "no documentation" to support the amount claimed. The draft audit report ignores the substantial and conclusive documentation supporting these claims. In addition, the draft audit report for the district's Fiscal Year 1996-97 reimbursement claim was not timely issued and this claim cannot be adjusted.

I. Source Documents Fully Support the District's Reimbursement Claims

A. Time records maintained by the district are not "estimates."

The draft audit report states that the district's time records are "year-end estimates of hours supposedly spent on the mandate during the year." This statement is wrong. These time logs are not estimates but are after-the-fact certifications of the actual effort expended by the district's personnel on the mandated activities for the period indicated. The time logs were completed by the persons who performed the tasks or by a supervisory official having first hand knowledge of the activity performed by the employees. District personnel continually made this distinction to the auditor, but she failed to grasp the distinction.

After-the-fact certifications are a recognized and acceptable means of determining labor costs for a cost objective. The Office of Management and Budget's OMB Circular A-87 and California Department of Education memoranda set forth several types of after-the-fact determinations that are acceptable for federal programs. These methods are used to determine actual costs; they are not estimates.

B. The district provided source documents to prove that district personnel performed the mandated activities.

There can be no question that the school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan. We provided copies of the plans from nearly all of the school sites for 1996-97 and 1997-98. The draft audit report incorrectly states

that these plans "were not developed during the audit period." The plans are prepared or reviewed and updated each year and the plans provided to the auditor were the plans in effect during the audit period. Thus, the district provided sufficient documentation to prove that each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate.

In interviews with the auditor, the district's school principals or vice principals affirmed that they conduct at least one general staff meeting, normally prior to the beginning of the school year, in which they discuss the emergency procedures with all staff members and that each staff member reviews the emergency procedures and prepares for the evacuation drills. These principals and vice-principals provided samples of the meeting agendas for the meetings in which the emergency procedure plans were discussed. These documents confirm that the schools performed the reimbursable activities. Thus, the district provided sufficient evidence that all school site personnel spend time preparing to implement district emergency and disaster plans, an activity that is clearly reimbursable under the Parameters and Guidelines.

Each school site conducts an emergency evacuation drill as part of the plan implementation. These drills are not the "drop, cover, and hold" exercises that are periodically conducted by teachers in class, but are comprehensive drills conducted to test the emergency procedures, to provide an opportunity to make necessary changes to the procedures, and to ensure that staff members are properly trained on their individual duties under the procedures. We provided copies of the verifications signed by nearly 100 percent of the schools in which the school site verifies that the school conducted an emergency evacuation drill in each of the fiscal years. The auditor also received samples of drill logs maintained by the school sites selected by the auditor showing the date and times of the drills. Each school site evaluates their evacuation drill and makes appropriate changes to the emergency preparedness plans. These activities are reimbursable under the Parameters and Guidelines.

C. The district's method of determining the actual costs of performing the mandated activities is reasonable.

In Fiscal Year 1996-97, 87 of the 165 school sites, or approximately 53 percent of the sites, provided time logs. In Fiscal Year 1997-98, 97 of the 169 school sites, or approximately 57 percent of the sites, provided time logs. The district performed a statistical analysis of the time logs provided by these sites in order to determine the actual time spent by all school site personnel on the mandate. The time claimed for each employee is less than the average and median times that are supported by the statistical analyses. For example, the average and median times for principals for Fiscal Year 1997-98 were 7.35 and 5 hours, respectively, and the time claimed for principals was 2 hours.

Had the district used only the actual time reported by the 97 school sites for Fiscal Year 1997-98, the reimbursement claim would have been $390,387.32. However, the district's documents evidence that all school sites performed the reimbursable activities. Therefore, the statistical method used by the district to determine the actual costs of performing the reimbursable activities is reasonable and not excessive.

II. The Fiscal Year 1996-97 Reimbursement Claim Cannot Be Disallowed

> Government Code Section 17558.5 imposed a limitations-period on audit of mandate reimbursement claims. Section 17558.5 requires that any audit be completed no later than two years after the end of the calendar year in which the claim was filed or last amended. The district's Fiscal Year 1996-97 reimbursement claim was filed on November 26, 1997. Therefore, the audit of the Fiscal Year 1996-97 must have been completed no later than December 31, 1999. The draft audit report, with respect to Fiscal Year 1996-97, was not timely issued and has no force or effect.[1]

Please correct the draft audit report to find that the costs claimed by the district are approved as claimed. If you need any further information, or would like to meet to resolve this matter, I can be reached at (619) 725-7560.

Sincerely,

Richard J. Knott
Controller

RJK: jv

c: Alan Bersin, Superintendent of Public Education
Terry Smith, Chief of Staff
Henry Hurley, Chief Administrative Officer
Jo Anne SawyerKnoll, General Counsel

[1] State Controller's Office completed review of the Fiscal Year 1996-97 reimbursement claim on May 6, 1999, and issued the written notification of adjustment to the claim required by Government Code section 17558.5, subdivision (b) on that date. Pursuant to that review, the State Controller's Office approved costs totaling $408,865 of the District's $588,819 reimbursement claim.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: Los Angeles Unified School District Claimant	CSM-4241 Chapter 1659, Statutes of 1984 Emergency Procedures, Earthquake and Disasters

DECISION

The attached Proposed Statement of Decision of the Commission on State Mandates is hereby adopted by the Commission on State Mandates as its decision in the above-entitled matter.

This Decision shall become effective on August 27, 7987.

IT IS SO ORDERED August 27, 1987.

Russell Gould, Acting Chairpersbn
Commission on State Mandates

WP 1698A

BEFORE THE
COMMISSION ON STATE MANDATES

Claim of: Los Angeles Unified School District Claimant	CSM-4241 Chapter 1659, Statutes of 1984 Emergency Procedures, Earthquake and Disasters

PROPOSED DECISION

This claim was heard by the Commission on State Mandates (commission) on July 23, 1987, in Sacramento, California, during a regularly scheduled meeting. Howard Kaplowitz, Head Accountant, appeared on behalf of the Los Angeles Unified School District. Michael Ricketts, Fiscal Policy Planning and Analysis Manager, appeared on behalf of the Department of Education. Car07 Miller of Education Mandated Costs Network also testified at the hearing. There were no other appearances.

Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the commission finds:

I.

NOTE

1. The finding of a reimbursable state mandate does not mean that all increased costs claimed will be reimbursed. Reimbursement, if any, is subject to commission approval of parameters and guidelines for reimbursement of the claim, and a statewide cost estimate; a specific appropriation by the Legislature for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller.

II.

FINDINGS OF FACT

1. The test claim was filed with the Commission on State Mandates on November 26, 1986, by Los Angeles Unified School District.

2. The subject of the claim is Chapter 1659, Statutes of 1984.

3. Chapter 1659, Statutes of 1984, added Article 10.5 (Sections 35295, 35296, and 35297) to Chapter 2 of part 21 of the Education Code which requires the governing body of each school district or private school and the county superintendent of schools of each county to establish an earthquake emergency procedure in each school building under its jurisdiction.

4. Chapter 1659, Statutes of 1984, added Section 40041.5 to the Education Code and amended Section 40042 of the Education Code to require that the governing board of any school district shall grant the use of school buildings, grounds and equipment to public agencies, "including the American Red Cross," for mass care and welfare shelters during disasters or other emergencies affecting the public health and welfare, and eliminated the authority of the school districts to recover direct costs from the public agencies for the use of school facilities during local emergencies.

5. This program which was optional is now required by Chapter 1659, Statutes of 1984 of any governing board of any school district, and the authority to charge for the direct costs of providing the program has been removed.

6. Government Code Section 17514 defines the term "costs mandated by the state" as any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

7. The Los Angeles Unified School District has demonstrated that it has incurred increased costs which are costs mandated by the state.

8. None of the requisites for denying a claim specified in Government Code Section 17556 were established.

III.

DETERMINATION OF ISSUES

1. The Commission has the authority to decide this claim under the provisions of Government Code Section 17551.

2. Chapter 1659, Statutes of 1984 imposed a reimbursable state mandate upon local school districts. The Los Angeles Unified School District has established that this statute has imposed a new program by requiring the governing board of any school district to establish an earthquake emergency procedure system, and by requiring the governing board of any school district to grant the use of school facilities, grounds and equipment for mass care and welfare shelters to public agencies in the event of a disaster or other emergency without the ability to recover direct costs from the user.

EXHIBIT C

22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028, 7 Lab.Cas. P 61,672

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CALIFORNIA DRIVE-IN RESTAURANT ASSOCIATION, et al., Respondents,
v.
MARGARETE L. CLARK, as Chief of the Division of Industrial Welfare, etc., et al., Appellants.

L. A. No. 18093.
Supreme Court of California
June 16, 1943.

HEADNOTES

(1) Administrative Law--Rules of Administrative Agencies--Interpretation.
Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies.

(2) Statutes § 87, 92--Repeal by Implication--Rule AgainstRepeal by Inconsistent Statute--Necessity for Clear Repugnancy.
The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon; and to overcome the presumption the two acts must be irreconcilable, clearly repugnant and so inconsistent that they cannot have concurrent operation.

See 23 **Cal.Jur.** 694; 25 **R.C.L.** 918.

(3) Statutes § 124--Construction--Circumstances Indicating Legislative Intent--Object to Be Accomplished.
The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent.

(4a , 4b) Labor § 17--Regulation of Tipping--Rules and Statutes.
Section 3 of Order 12-A of the Industrial Welfare Commission and Lab. Code, §§ 350-356, are not irreconcilable, but entirely harmonious, since the basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments, the subject of tipping being embraced only incidentally in furtherance of that general purpose, and the statute is concerned exclusively with tipping in respect to its relation to the public, the Legislature having expressly stated that its purpose was to prevent fraud upon the public.

(5) Labor § 17--Regulation of Tipping--Construction of Order.
Conceding that the effect of § 3 of Order 12-A of the Industrial Welfare Commission is to prohibit deduction of tips from employees' wages and that Lab. Code, §§ 350-356, impliedly authorizes their deduction, such prohibition should be strictly limited, and the section will not be violated in instances where the employer retains the entire amount of all tips received above the minimum wage, or deducts the tips from the amount of any wages it has agreed to pay in excess of a specified minimum.

(6) Labor § 17--Regulation of Tipping--Construction of Lab. Code, §§ 350-356.
That Lab. Code, §§ 350-356, authorize tipping is not a necessary conclusion, since the statute does not purport to legalize the retention or deduction of tips received by employees and is nothing more than a comprehensive regulation requiring that the public be informed of an employer's retention of tips.

(7) Labor § 17--Regulation of Tipping--Construction of Order.
Section 3 of Order 12-A of the Industrial Welfare Commission, given a liberal meaning to

effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage.

(8) Labor § 17--Regulation of Tipping--Purpose of Lab. Code, §§ 350-356.
If it be assumed that the Legislature in enacting Lab. Code, §§ 350-356, was endeavoring to avoid the difficulty encountered in reference to Stats. 1917, p. 257, still it did not purport to authorize deduction of tips from the minimum wage but merely regulated the retention of tips by employers regardless of whether such retention was or was not a violation of § 3 of Order 12-A of the Industrial Welfare Commission.

(9) Statutes § 180(2)--Aids to Construction--Contemporaneous Construction-- Executive or Departmental Construction.
While it is a rule of statutory interpretation that the construction given a statute by the administrative agency charged with its enforcement is a significant factor to be considered by the courts in ascertaining the meaning of the statute, where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction.

(10) Trial § 379--Findings--Conclusiveness.
A finding constituting a conclusion of law is not binding upon the appellate court.

(11) Labor § 17--Regulation of Tipping--Validity of Order.
Section 3 of Order 12-A of the Industrial Welfare Commission is not invalid as an unconstitutional interference with freedom of contract as between employer and employee, since in the field of regulation of wages and hours by legislative authority constitutional guarantees relating to freedom of contract must give way to reasonable police regulations, and the Legislature did not act arbitrarily or capriciously, but reasonable grounds appear for the policy established by § 3 of the order.

See 15 **Cal.Jur.** 575; 31 **Am.Jur.** 1080.

(12) Labor § 17--Regulation of Tipping--Validity of Order.
Section 3 of Order 12-A of the Industrial Welfare Commission does not create an improper discrimination in respect to employers or the employees affected. The particular evils at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed.

See 31 **Am.Jur.** 1038.

(13) Labor § 17--Regulation of Tipping--Validity of Order--Finding of Commission.
The fact that no finding by the Industrial Welfare Commission as a basis for Order 12-A appears in the order itself is not of importance, since § 6(a) of the minimum wage law (Stats. 1913, p. 632, as amended by Stats. 1921, p. 378) merely requires that the order shall specify "the minimum wage for women and minors in the occupation in question, maximum hours ... and the standard conditions of labor. ..."

(14a , 14b) Labor § 17--Regulation of Tipping--As Implied Power.
The adoption of § 3 of Order 12-A is within the implied power of the Industrial Welfare Commission, flowing from its power to fix minimum wages delegated to the commission.

(15) Administrative Law--Power of Administrative Agency to Adopt Rules and Regulations.
While an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or exceed the powers given to it by statutes, the authority of an administrative board or officer to adopt reasonable rules and regulations deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned, and is implied from the power granted.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Ballard, Judge. Reversed.

Action for injunction and declaratory relief. Judgment for plaintiffs reversed.

COUNSEL

Robert W. Kenny, Attorney General, Earl Warren, Attorney General, Burdette J. Daniels and Alberta Belford, Deputies *290 Attorney General, Leo L. Schaumer and E. A. Lackmann for Appellants.

Thorpe & Bridges, Gerald Bridges, Frank R. Johnston and E. R. Young for Respondents.

CARTER, J.

Plaintiffs, operators of drive-in restaurants, successfully challenged in the superior court the validity of a regulation of the Industrial Welfare Commission, designated Order 12-A. Defendants, the Chief of the Division of Industrial Welfare of the Department of Industrial Relations and the members of the Industrial Welfare Commission of the Division of Industrial Welfare of the Department of Industrial Relations, appeal from the judgment entered for plaintiffs.

Plaintiffs are independent owners of establishments serving food and beverages. Their patronage consists chiefly of motorists who are served while remaining in their vehicles, however, service may be obtained in the owner's restaurant buildings. Most of the employees are girls and women commonly referred to as "car hops." The employment arrangement contemplates that the tips received by the employees shall constitute their wages, except that the employers make up the difference if the tips received fall below the minimum wage for minors and adult females fixed by the Industrial Welfare Commission. Plaintiffs posted in their business establishments, the notices required by a statute of 1929, hereinafter set forth. In 1940, plaintiffs were advised by the Chief of the Division of Industrial Welfare that their employment arrangement violated Order 12-A, in that they could not consider the tips received by the minor and female adult employees in computing and paying the minimum wage, and that they would be required to comply with said order.

Order 12-A became effective on June 8, 1923. In section 1 it fixed a minimum wage of $16 per week to be paid to all female adult or minor employees in restaurants or other places where food and drinks were sold. Section 2 fixed the maximum amount the employer could deduct from the minimum wage for meals and lodging furnished the employee. Section 3, here in question, reads: "No employer may include tips or gratuities received by employees designated in section *291 1 hereof as part of the legal minimum wages fixed by said section of this Order." The remaining nine sections deal with hours of labor, working conditions, the employer's duty to keep records, and the like.

In 1929 (Stats. 1929, p. 1971), a statute was passed by the Legislature, now appearing in sections 350-356 of the Labor Code. Section 351 of the Labor Code reads:

"Every employer or agent who collects, takes, or receives any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or who deducts any amount from wages due an employee on account of such gratuity, or who requires an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer, shall keep posted in a conspicuous place at the location where his business is carried on, in a place where it can easily be seen by the patrons thereof, a notice, in lettering or printing of not less than 48-point black- face type, to the following effect:

"(a) If not shared by the employees, that any gratuities paid, given to, or left for employees by patrons go to and belong to the business or employer and are not shared by the employees thereof.

"(b) If shared by the employees, the extent to which gratuities are shared between employer and employees."

Section 352 specifies that the notice shall also state the extent to which employees are required to

accept gratuities in lieu of wages or permit them to be credited against their wages. The provisions apply to all businesses having one or more persons in service. A gratuity "includes any tip, gratuity, money, or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due such business for services rendered or for goods, food, drink, or articles sold or served to such patron."

A penalty is imposed for violation of the act, and it is declared that:

"The Legislature expressly declares that the purpose of this article is to prevent fraud upon the public in connection with the practice of tipping and declares that this article is passed for a public reason and cannot be contravened by a private agreement. As a part of the social public policy ***292** of this State, this article is binding upon all departments of the State." (Lab. Code, sec. 356.)

Whether the 1929 statute impliedly annulled section 3 of said Order 12-A must be determined in the light of the appropriate rules of statutory construction. (1) Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*Miller v. United States,* 294 U.S. 435 [55 St.Ct. 440, 79 L.Ed. 977].) (2) With reference to implied repeals of statutes this court stated in *Penziner v. West American Finance Co.,* 10 Cal.2d 160, 176 [74 P.2d 252]:

"The presumption is against repeals by implication, especially where the prior act has been generally understood and acted upon. To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. Where a modification will suffice, a repeal will not be presumed." (See 23 Cal.Jur. 694, et seq.) (3) The purpose and object sought to be accomplished by legislation is an important factor in determining the legislative intent. (*San Francisco v. San Mateo County,* 17 Cal.2d 814 [112 P.2d 595].)

(4a) Applying those rules to the instant case we find no repugnancy. The statute of 1929 and section 3 of Order 12-A rather than being irreconcilable are entirely harmonious. The basic policy underlying the order is the regulation of wages, hours and working conditions for minors and adult female employees in eating establishments. The subject of tipping is embraced only incidentally in the furtherance of that general purpose. Broadly, it was designed to deal with the industrial welfare of such employees, and the relation of their welfare to the general public interest. On the other hand the statute is concerned exclusively with tipping in respect to its relation to the public which patronizes not only restaurant establishments but many other businesses. The Legislature expressly stated that its purpose is "to prevent fraud upon the public," a policy underlying no part of the order. Section 3 of the order states that tips received by the designated employees may not be included in the minimum wage therein fixed. (5) If it be conceded that the effect ***293** of said section is to prohibit the deduction of tips from the employees' wages, and that the statute impliedly authorizes such deduction as asserted by plaintiffs, such prohibition should be strictly limited, and said section would not be violated in instances where the employer retained the entire amount of all tips received *above* the minimum wage, or deducted the tips from the amount of any wages he agreed to pay in excess of the specified minimum. It does not apply to male employees or persons employed in businesses other than those mentioned.

(6) Further, it is not necessary to conclude that the statute authorizes tipping. It does not purport to authorize or legalize the retention or deduction of the tips received by the employees. It is nothing more than a comprehensive regulation in respect to advising the public of the retention of tips by the employer whether such retention is legal or not, the essential requirement being that the public be informed of the practice. Fairly interpreted, the posting of the notice is required regardless of whether such retention or deduction is being made from the minimum legal wage fixed by section 3. (7) It may be said that section 3 given a liberal meaning to effectuate the ends in view, prohibits the retention by the employer of any amount of tips received by the employee below the minimum wage, because if the employer could retain such tips he would be, in effect, accomplishing indirectly that which he could not do directly, namely, including the tips in the legal wage. It would be a subterfuge for him to receive all the tips and pay the minimum wage. The end result would be counting the tips

as a part of the legal wage. That conclusion does not mean that section 3 and the statute are inconsistent to that extent. (4b) The purpose of the statute and section 3 are entirely different. The statute does not purport to cover the special field of tipping in regard to its effect on the minimum wage law. It is aimed at the protection of the public against fraud.

(8) For the same reasons the historical arguments advanced by plaintiffs are not persuasive. True, a statute was enacted in 1917 (Stats. 1917, p. 257) which made it unlawful for an employer to demand tips received by his employee in consideration of the latter's being hired or retained. That act, like the 1929 act, was broad in its scope and did not purport ***294** to affect tipping in relation to minimum wages. It was declared invalid in *In re Farb,* 178 Cal. 592 [174 P. 320, 3 A.L.R. 301], and thereafter the 1929 act was passed. Both of those statutes were aimed at the prevention of a fraud on the public and were not concerned with the effect on the inclusion of tips in minimum wages and the purpose of section 3 of said Order 12-A. If it be assumed that the Legislature in passing the 1929 statute was endeavoring to avoid the difficulty encountered with reference to the 1917 act in *In re Farb, supra,* still it did not purport to authorize the deduction of tips from the minimum wage. It was regulating the retention of tips by employers regardless of whether such retention was or was not a violation of section 3 of Order 12-A. The statute and the order were designed for fundamentally different purposes.

(9) Plaintiffs urge that because the predecessors in office of defendants did not enforce section 3 of Order 12-A, they must have considered it annulled by the 1929 statute, and some of the plaintiffs having been so advised by executive officers of defendants predecessors, the statute should be interpreted to annul said section 3. It is undoubtedly a rule of statutory interpretation that the construction given a statute by the administrative agency charged with the enforcement of it is a significant factor to be considered by the courts in ascertaining the meaning of such statute. (*Los Angeles County v. Superior Court,* 17 Cal.2d 707 [112 P.2d 10]; 23 Cal.Jur. 776-7.) But where there is no ambiguity and the interpretation is clearly erroneous, such administrative interpretation does not give legal sanction to a long continued incorrect construction. The administrative interpretation cannot alter the clear meaning of a statute. (*Los Angeles County v. Superior Court, supra;* 23 Cal.Jur. 776.) We have seen that the 1929 statute does not purport to legalize the deduction or retention of tips by an employer, nor does section 3 of Order 12-A prohibit tipping; it merely prohibits the inclusion of tips in the minimum wage for certain employees. The alleged implied nullification which is not favored in the law does not exist.

(10) The trial court found: "... that in adopting section 3 of Order 12A ... defendant ... acted in excess of its jurisdiction." That finding is not, as claimed by plaintiffs, binding upon this court, inasmuch as it is a conclusion of law. In ***295** support of it plaintiffs challenge the constitutionality of section 3, and the validity of the adoption of the order.

(11) Plaintiffs contend that section 3 is invalid because it is an unconstitutional interference with the freedom of contract as between employer and employee. (United States Const., Fourteenth Amendment; Cal.Const., art. I, secs. 1, 13; art. XX, sec. 18.) The main premise relied upon by plaintiffs is that section 3 prohibits an employer and his employee from agreeing that the former shall retain all tips received by the latter, citing *In re Farb, supra,* declaring unconstitutional the 1917 act (*supra.*), and denouncing such practice. It has heretofore been pointed out that the 1917 act was not aimed at and did not involve any restrictions on such contracts directly as a part and in aid of the minimum wage requirements. The 1917 act applied expressly to any and all employees without regard to whether a legal wage was fixed for them. For that reason we do not consider the Farb case as necessarily supporting plaintiffs' position. Furthermore, the reasoning of the Farb case is out of line with the later authorities upholding minimum wage legislation. (See *United States v. Darby,* 312 U.S. 100 [61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430]; *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 [57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330]; 31 Am.Jur., Labor, sec. 503; 130 A.L.R. 273; 132 A.L.R. 1443.) There is a distinct difference between a comprehensive prohibition of retention of tips by employers, and the prohibition of such practice as a part of an order fixing minimum wages.

It must be remembered that in the field of regulation of wages and hours by legislative authority, constitutional guarantees relating to freedom of contract must give way to reasonable police regulations. The Supreme Court of the United States in discussing the regulation of hours and wages

of women employees stated in *West Coast Hotel Co. v. Parrish, supra,* at 392:

"This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (***296** *Holden v. Hardy,* 169 U.S. 366 [18 S.Ct. 383, 42 L.Ed. 780]; in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison,* 183 U.S. 13 [22 S.Ct. 1, 46 L.Ed. 55]); in forbidding the payment of seamen's wages in advance (*Patterson v. Bark Eudora,* 190 U.S. 169 [23 S.Ct. 821, 47 L.Ed. 1002]); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas,* 211 U.S. 539 [29 S.Ct. 206, 53 L.Ed. 315]); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co. v. McGuire supra* [219 U.S. 549 (31 S.Ct. 259, 55 L.Ed. 328)]); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon,* 243 U.S. 426 [37 S.Ct. 435, 61 L.Ed. 830]); and in maintaining workmen's compensation laws (*New York Central R. Co. v. White,* 243 U.S. 188 [37 S.Ct. 247, 61 L.Ed. 667]; *Mountain Timber Co. v. Washington,* 243 U.S. 219 [37 S.Ct. 260, 61 L.Ed. 685]). In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co. v. McGuire, supra,* p. 570." And at page 399:

"The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. *Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.* Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." (Emphasis added.) Many other illustrations could be given. In the recent case of *Williams* v. [*Jacksonville*] *Terminal Co.,* 315 U.S. 386 [62 S.Ct. 659, 86 L.Ed. 914], the court had before it the question of whether the tips received by red caps could be counted as a part of the minimum wage under the Fair Labor Standards Act (29 U.S.C.A. 201 et seq.) It was held ***297** that they could and that legally speaking such tips were wages under the agreement between the employer and employee. However, the court was careful to point out that the Fair Labor Standards Act did not prohibit the inclusion of tips in the minimum wage, and it recognized that such a prohibition might well be valid. It stated at page 388:

"The Fair Labor Standards Act is not intended to do away with tipping. Nor does it appear that Congress intended by the general minimum wage to give the tipping employments an earnings-preference over the nonservice vocations. The petitioners do not dispute the railroad's contention that, during the entire period, each red cap received as earnings-cash pay plus tips-a sum equal to the required minimum wage. Nor is there denial of increased pay to the red caps on account of the minimum wage guarantee of the challenged plan as compared with the former tipping system. The guarantee also betters the mischief of irregular income from tips and increases wage security. *The desirability of considering tips in setting a minimum wage, that is whether tips from the viewpoint of social welfare should be counted as part of that legal wage, is not for judicial decision. We deal here only with the petitioners' assertion that the wages Act requires railroads to pay the red caps the minimum wage without regard to their earnings from tips."* (Emphasis added.)

The presumption is that the Legislature had adequate and reasonable basis for its police regulations and that a statute providing for such regulations is constitutional (5 Cal.Jur. 628, et seq.), and, as expressed in *West Coast Hotel Co. v. Parrish, supra,* the only question to be decided is whether it acted arbitrarily or capriciously. There may be others, but certain reasonable grounds appear for the policy established by section 3 of Order 12-A. As we have seen from the foregoing quotation from *Williams v. Terminal Co., supra,* that possibility is recognized where the court declared that whether the social welfare required that tips be not counted as part of the minimum wage was not for "judicial decision." It cited for that statement, Anderson, *Tips & Legal Minimum Wages,* XXXI American Labor Legislation Review 11, at page 13, where it was aptly said that if the tips received were to be counted as a part of the minimum ***298** wage "... the employee would be required to

report to her employer the amount of tips received each week, in order that he in turn could know the amount of wage he must pay to make up the $16.

"If this practice were followed the purpose of the minimum-wage law would soon be defeated. It would not be long before employers discovered which of their employees were costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate co-workers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to the employer a greater amount of tips than actually is received. The whole purpose of the minimum wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation. To prevent just this kind of abuse, most State minimum-wage orders for hotels and restaurants contain a provision that under no circumstances shall tips be counted as a part of the legal minimum wage." In order that the welfare of the employees be advanced and the benefits of the minimum wage law be preserved, it may well be said that section 3 has a reasonable basis. If the employees may be induced, and in effect coerced, by fear of dismissal by an employment contract requiring the tips to be counted as a part of the minimum wage, to report their tips as equal to the minimum wage even though they are not, the minimum wage requirement is seriously undermined. By indirect method they would be forced into a position of receiving less than the standard fixed. If the employer is permitted to retain the tips in an amount equal to the minimum wage, which as seen would be a violation of section 3, the same condition would exist. The fear of dismissal might well coerce the employees to turn over as tips ***299** a portion of their own funds when the tips received were not equal to the legal wage. The effectiveness of the minimum wage law would be thus impaired. With the employer prevented from retaining tips in the amount of the minimum legal wage, a salutary result would follow. The benefits of the minimum wage law would be preserved, and the dignity of the laborer and his social position would be advanced by relieving him of the necessity of resorting to the undignified conduct encouraged by the tipping practice.

The Legislature clearly sets forth the purpose sought to be obtained by the fixing of minimum wages as that adequate to supply the necessary cost of proper living and to maintain the health and welfare of the employees. (Lab. Code, sec. 1182.) We perceive that that purpose may be thwarted if tips may be included in the minimum wage.

The foregoing discussion does not mean that tips may not be considered wages under certain circumstances such as, computation of compensation under workmen's compensation laws. (*Hartford Acc. & Indem. Co. v. Industrial Acc. Com.*, 41 Cal.App. 543 [183 P. 234]; 29 Cal.L.Rev. 774; 75 A.L.R. 1223, and generally *Williams v. Terminal Co., supra.*) An employer may permit his employee to retain the tips and the arrangement may be that they shall be compensation, but section 3 is aimed at the evils above-mentioned in connection with *minimum wages,* and merely because tips may be termed wages under certain circumstances does not mean that they may be counted as part of the minimum wage where to do so would contravene the policy of section 3 and permit the evils there denounced.

(12) In their contention that section 3 is not uniform and is discriminatory (United States Const., Fourteenth Amendment; Cal.Const., art. I, sec. 21; art. IV, sec. 25), plaintiffs suggest that section 3 would not be violated if the employment contract called for all tips to be retained by the employer, citing *Settrie v. Falkner,* Commerce Clearing House Labor Law Service, 3d ed. sec. 60, 779. Apparently that case does not appear in the reporter system nor the Ohio Appellate Reports, but in any event we are not persuaded by its reasoning. Section 3 does present such a situation.

Section 3 creates no improper discrimination in respect to employers or the employees affected. The particular evils ***300** at which it is aimed are a part of the minimum wage policy and must be viewed in that light, hence it applies only to situations where such wages are fixed. A reasonable classification has been made. There are many instances where classifications with reference to wages

and hours have been upheld. (See *Matter of Application of* Martin, 157 Cal. 51 [106 P. 235, 26 L.R.A. N.S. 242], hours of employment in underground mines; *Matter of Application of* Miller, 162 Cal. 687 [124 P. 427], hours of labor for women but not men.) It is said in 31 Am.Jur., Labor, sec. 414:

"The relation of employer and employee has long been the basis for specific legislation, and statutes applicable only to such relation are not subject to the objection that they constitute class legislation. Moreover, the equal protection of the laws is not denied by the classification of occupations if such classification has a reasonable basis. Such classification may be based upon matters which are personal to the individuals who are acting as employees. For example, statutory regulations with reference to labor of women or children or both may be sustained as against the objection that they constitute an arbitrary discrimination because they do not extend to men. Moreover, the classification may be based not only on the character of the employees but upon the nature of the employer's business, since the character of the work may largely depend upon the nature and the incidents of the business in connection with which the work is done. A statute dealing with employees in a particular line of business does not create an arbitrary discrimination merely because the operation of the statute is not extended to other lines of business having their own circumstances and conditions, or to domestic service."

(13) It is contended that there was no finding by the Industrial Welfare Commission as a basis for its Order 12-A, and that such finding was necessary to the validity of said order; that is, that the wages fixed were adequate to supply the cost of proper living as specified in the minimum wage law at the time of its adoption. (Stats. 1913, p. 632, as amended.) That contention must necessarily be limited to the claim that such finding must appear in the order itself inasmuch as the appeal is on the judgment roll alone and hence all of the court's findings must be deemed to have been supported by the evidence. Plaintiffs, respondents herein, are bound by those ***301** findings. The trial court found that the order was adopted by the commission pursuant to and under the authority of the minimum wage laws; that on "June 8, 1923, the ... Commission promulgated Order 12-A for the hotel and restaurant industries. That *prior to the formulation and adoption* of said Order 12-A, and in the manner and form prescribed by statute, a conference denominated a wage board of the employers and employees of the said hotel and restaurant industries was called by said commission; that thereafter and prior to the adoption of said Order 12-A, and within the time and in the manner prescribed by law a public hearing was called and held upon said proposed Order 12-A, at which said meeting and wage board conference the employers and employees of said restaurant industry of the State of California were regularly represented.

"That at said public hearing and other meetings witnesses were sworn, testimony taken, and evidence received. It is further true that *every act and thing required by statute to be done by said Commission in the promulgation and adoption of said Order 12-A was done by said Commission within the time and in the manner and form required by statute."* (Emphasis added.) It was also found that the order was in full force and effect except as otherwise found in the findings referring to its constitutionality and implied repeal by the 1929 statute.

There have been decisions by the United States Supreme Court both ways upon the question of the necessity of findings by an administrative agency as a basis for a rule or regulation issued by it. In Panama Ref. Co. v. Ryan, 293 U.S. 388 [55 S.Ct. 241, 79 L.Ed. 446], findings were declared necessary to support a presidential order. The most recent holding by that court in Pacific States Box & Basket Co. v. White, 296 U.S. 176 [56 S.Ct. 159, 80 L.Ed. 138, 101 A.L.R. 853], is that no findings are necessary where the statute does not require them to support the order of the Department of Agriculture of the State of Oregon fixing the sizes for containers of horticultural products, although a violation of the order is a misdemeanor. That holding is a definite departure from the broad rule announced in *Panama Ref. Co. v. Ryan, supra.* (See 49 Harv.L.Rev. 827.) Other cases have considered the question. (See American Telephone & Telegraph Co. v. United States, 14 F.Supp. 121; Bayley v. Southland Gasoline Co., 131 F.2d 412; ***302** Twin City Milk Producers Assn. v. McNutt, 122 F.2d 564.) We have not been referred to and have been unable to find any case in California on the subject, and while some of the federal court cases indicate that the findings must appear in the order, plaintiffs have suffered no prejudice. The findings of the trial court show that if findings were required by the statute the commission made them. The mere fact that they do not appear on the face of the order is not therefore of importance. The statute did not require that the findings appear on the face

of the order. Section 6(c) of the act states merely that the order shall specify "the minimum wage for women and minors in the occupation in question, the maximum hours ... and the standard conditions of labor. ..." (Stats. 1913, p. 632, as amended Stats. 1921, p. 378.)

(14a) The adoption of section 3 of Order 12-A was within the power and authority delegated to the Industrial Welfare Commission by the Legislature. The Constitution authorizes the Legislature to provide a minimum wage for women and minors and for the comfort, health, safety and general welfare of employees, and to confer upon a commission the authority it deems necessary to carry out those purposes. (Cal. Const., art. XX, sec. 17 I/2.) The act under which Order 12-A was promulgated empowers the commission to fix "a minimum wage to be paid to women and minors engaged in any occupation, which shall not be less than a wage adequate to supply such women and minors the necessary cost of proper living and to maintain the health and welfare of such women and minors," and to establish the maximum working hours and the standard conditions of labor. (Stats. 1913, p. 632, sec. 6, as amended Stats. 1921, p. 378.) In our previous discussion of the constitutionality of section 3 we have shown that it had a direct relation to minimum wages and was a natural and important incident thereof. It is an incident of the establishment of minimum wages similar to the provisions in Order 12-A, which specify to what extent board and lodging furnished by the employer may be considered wages. The power to provide safeguards to insure the receipt of the minimum wage and to prevent evasion and subterfuge, is necessarily an implied power flowing from the power to fix a minimum wage delegated to the commission.

(15) It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute ***303** the source of its power. (*Boone v. Kingsbury,* 206 Cal. 148 [273 P. 797]; *California E. Com. v. Black-Foxe Military Inst.,* 43 Cal.App.2dSupp. 868 [110 P.2d 729]; *Hodge v. McCall,* 185 Cal. 330 [197 P. 86]; *Bank of Italy v. Johnson,* 200 Cal. 1 [251 P. 784].) However, "the authority of an administrative board or officer, ... to adopt reasonable rules and regulations which are deemed necessary to the due and efficient exercise of the powers expressly granted cannot be questioned. This authority is implied from the power granted." (*Bank of Italy v. Johnson, supra,* 20.) (See, also, *Crawford v. Imperial Irrigation Dist.,* 200 Cal. 318 [253 P. 725]; 21 Cal.Jur. 874.) (14b) In the instant case the power to adopt section 3 may be implied as a power to make effective the order fixing the minimum wage. The power to fix that wage does not confine the agency to that single act. It may adopt rules to make it effective. Plaintiffs cite *Adolph Coors Co. v. Corbett,* (Cal.App.) 123 P.2d 74, decided by the District Court of Appeal. A hearing was granted by this court in that case and thereafter it was dismissed. It is not a controlling authority.

The judgment is reversed.

Gibson, C. J., Shenk, J., Curtis, J., and Edmonds, J., concurred.
Traynor, J., and Schauer, J., did not participate herein.

Respondents' petition for a rehearing was denied July 15, 1943. Traynor, J., and Schauer, J., did not participate therein. ***304**

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California Drive-In Restaurant Ass'n v. Clark
22 Cal.2d 287, 140 P.2d 657, 147 A.L.R. 1028, 7 Lab.Cas. P 61,672

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17 Cal.3d 86, 550 P.2d 593, 130 Cal.Rptr. 321

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CULLIGAN WATER CONDITIONING OF BELLFLOWER, INC., Plaintiff and Respondent,
v.
STATE BOARD OF EQUALIZATION, Defendant and Appellant

L.A. No. 30464.
Supreme Court of California
June 4, 1976.

SUMMARY

In an action by a water conditioning company against the State Board of Equalization for recovery of use taxes paid under protest, the trial court entered judgment in favor of plaintiff. The court concluded that plaintiff's income from water conditioning contracts under which it furnished its customers with "exchange units" it had acquired without paying sales tax reimbursement thereon was service income and not a receipt from the lease of tangible personal property and thus was not taxable. (Superior Court of Los Angeles County, No. SEC 5658, W. James Turpit, Judge.)

The Supreme Court reversed with directions to enter judgment for defendant. The court held that the transactions in question were leases of "tangible personal property" within the meaning of Rev. & Tax. Code, § 6006, subd. (g), and therefore fell within that statute's definition of "sale," subject to use tax under Rev. & Tax. Code, § 6201, required to be collected by the lessor pursuant to Rev. & Tax. Code, § 6203, at the time rentals are paid. It was pointed out that the transactions contained the requisite elements of a "hiring" under Civ. Code, § 1925, of the "temporary possession and use" of the exchange water conditioning unit for "reward" as well as the requisite elements of a "lease," of the giving up of possession to the hirer so that he uses and controls the rented property. Preliminarily the court had held that the basis of the board's assessment against plaintiff was interpretation of existing regulations and that the proper test on review was whether the board had properly interpreted the relevant sections of the Sales and Use Tax Law and its own relevant regulations adopted pursuant to such law. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Sales and Use Taxes § 30--Collection and Enforcement--Judicial Review of Board of Equalization.
The appropriate test on review of a decision of the State Board of Equalization assessing a use tax delinquency against a water conditioning company based on its receipts from customers for furnishing of "exchange units" under water conditioning contracts was whether the board had properly interpreted the relevant sections of the Sales and Use Tax Law and its own relevant regulations adopted pursuant to such law rather than whether it had employed a classification that was arbitrary, capricious or without rational basis, where the basis of the assessment was not embodied in any formal regulation or even an interpretative ruling covering the water conditioning industry as a whole and directed to the industry's use of exchange units, but was nothing more than the board auditor's interpretation of existing regulations. (Disapproving language to the contrary in *Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 Cal.App.3d 576 [118 Cal.Rptr. 818], and *L.A.J., Inc.* v. *State Bd. of Equalization* (1974) 38 Cal.App.3d 549 [113 Cal.Rptr. 319].)

(2) Administrative Law § 35--Administrative Actions--Construction and Interpretation of Rules and Regulations.

The interpretation of a regulation, like the interpretation of a statute, is a question of law, and while an administrative agency's interpretation of its own regulation obviously deserves great weight, the ultimate resolution of such legal questions rests with the courts.

(3) Sales and Use Taxes § 21--Use Taxes--Transactions Subject to Tax-- Leases of Personal Property--What Constitutes Lease.

The State Board of Equalization properly determined that a water conditioning company's contracts under which it furnished its customers with "exchange units" it had acquired without paying sales tax reimbursement thereon, were leases of "tangible personal property" within the meaning of Rev. & Tax. Code, § 6006, subd. (g), and therefore fell within that statute's definition of "sale," subject to use tax under Rev. & Tax. Code, § 6201, required to be collected by the lessor pursuant to Rev. & Tax. Code, § 6203, at the time rentals were paid. The transaction contained the requisite elements of a "hiring" under Civ. Code, § 1925, of the "temporary possession and use" of the exchange water conditioning unit for "reward" as well as the requisite elements of a "lease," of the giving up of possession to the hirer so that he uses and controls the rented property, and, though "service" is involved in regenerating the units, the "real object" sought by the individual customer, within the meaning of Cal. Admin. Code, tit. 18, § 1501, is to obtain "the property produced by the service."

[See **Cal.Jur.2d, Rev.,** Sales and Use Taxes, § 16; **Am.Jur.2d,** Sales and Use Taxes, §§ 53, 54.]

COUNSEL

Evelle J. Younger, Attorney General, Ernest P. Goodman, Assistant Attorney General, and Philip C. Griffin, Deputy Attorney General, for Defendant and Appellant.

J. Kimball Walker for Plaintiff and Respondent.

Brookes, Brookes & Vogl, Valentine Brookes and Lawrence V. Brookes as Amici Curiae on behalf of Plaintiff and Respondent.

SULLIVAN, J.

Defendant State Board of Equalization (Board) appeals from a judgment granting plaintiff Culligan Water Conditioning of Bellflower, Inc. recovery of certain use taxes paid under protest.

The case was tried by the court, sitting without a jury, upon an agreed statement of facts. In substance the pertinent facts are as follows: Plaintiff is in the business of conditioning water at the point of use. Hard water contains calcium and magnesium, and these "hardness" ions cause it to be unsuitable in the home for doing the laundry or for washing and bathing. Plaintiff "softens" the water by removing "hardness" ions. This is accomplished at the point of use, in the home, by passing the water supply through a conditioning unit containing an ion-exchange material ***89*** which exchanges its more soluble sodium ions for the calcium and magnesium ions. After the ion-exchanger is spent, the unit is regenerated.

Plaintiff's residential business consists of two separate categories: (1) The sale or lease of "home-owned" automatic units; and (2) the furnishing of "exchange units" under a water conditioning contract. The "home-owned unit" is a softener complete within itself which continuously regenerates the ion-exchange material within the unit and regularly provides soft water once inserted in the customer's plumbing system. In connection with the sale or lease of this unit, plaintiff pays a sales tax and secures sales tax reimbursement from its customers. Such taxes are not in issue in the instant case.

It is the furnishing of the "exchange unit" under the water conditioning contract which is at the heart of the present controversy. This unit, once inserted in the customer's plumbing, also regularly provides soft water but unlike the "home-owned unit" cannot itself regenerate the ion-exchange material. Consequently this unit must be replaced periodically by plaintiff in order to provide soft water continuously. The householder contracts with plaintiff for water conditioning and does not purchase the installed equipment. Under its arrangement with the customer, plaintiff agrees to provide the exchange unit, to connect it to the customer's water system and to periodically replace

the ion-exchange material in the unit in order to maintain a continuous flow of softened water. The customer pays an initial charge for the necessary alterations to the plumbing system and a monthly or bi-monthly charge for the water conditioning depending upon the quantity of water and the degree of the hardness of the water. Plaintiff regularly removes the exchange material when exhausted, replaces it with new or regenerated material and regenerates the exhausted material at its plant. At all times, plaintiff retains ownership of, and full control over, the unit.[FN1]

FN1 A specimen of plaintiff's water conditioning contract is attached to, and made a part of, the agreed statement of facts. It is entitled "Culligan Annual Service Subscription" and contains provisions generally reflecting the arrangement described above. Plaintiff also advertises and bills its customers as a water conditioning service.

Prior to 1966 plaintiff operated in a prescribed franchise area in and about the City of Bellflower, California. About May 1, 1966, plaintiff acquired the assets of a Culligan franchise business known as Culligan of South Gate, Inc. Among the assets purchased were 2,000 portable ***90** exchange units. Since plaintiff paid no sales tax reimbursement upon the acquisition of these units, the tax auditor for the Board determined that the 2,000 units were acquired by plaintiff "ex-tax." Accordingly, the tax auditor determined that the service income from the equivalent number of service customers should be included in the measure of taxable sales as "taxable rentals." The Board therefore assessed a tax delinquency of $12,816.17, with accrued interest of $2,347.86, or a total assessment of $15,164.03, for the audit period from April 1, 1966, to December 31, 1968. Plaintiff paid this assessment under protest and filed a timely claim for refund on the ground that the income derived from the lease of these 2,000 units was income from a service business rather than from the rental of property and thus not subject to sales and use tax liability. The Board rejected the claim for refund and plaintiff filed the instant action.

Plaintiff acquired the 2,000 portable exchange units from its transferor (Culligan of South Gate) under a contract of sale whereby such transferor agreed to pay any sales tax due. Plaintiff paid no sales tax reimbursement on this transfer of the 2,000 units, but Culligan of South Gate had paid sales tax reimbursement on them at the time that South Gate had originally acquired the units and prior to the sale to plaintiff by South Gate. Plaintiff had paid sales tax reimbursement on all *other* portable exchange units at the time plaintiff originally acquired them and accordingly was not required to charge sales tax to its customers in connection with the units other than the 2,000.

The Board took the position that section 6006, subdivision (g), of the Revenue and Taxation Code[FN2] applied to the transactions involving the above-mentioned 2,000 exchange units and therefore assessed the tax as being due on a "lease of tangible personal property" in its audit for the period April 1, 1966, through December 31, 1968.[FN3] Attached to the agreed statement of facts and made a part thereof is a declaration of ***91** Thomas P. Putnam, assistant chief counsel of the Board, who, the parties agreed, if called as a witness would testify to the statements made in the declaration, it being further agreed, however, that the relevance and probative value of his testimony and the Board's position concerning the lease "are issues in this case."

FN2 Hereafter, unless otherwise indicated, all section references are to the Revenue and Taxation Code.

FN3 Section 6006 as it read at the time of the tax period covered by the assessment, provided in pertinent part as follows:"'Sale' means and includes:". . . . ."(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:". . . . ."(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement pursuant to Section 6052 or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:"(A) A

person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5."(B) A decedent from whom the lessor acquired the property by will or the laws of succession."Subdivision (g) was added to section 6006 in 1965. (See Stats. 1965, First Ex. Sess., ch. 2, § 2, p. 5444.)At the same time section 6010, defining "purchase" was amended by identical language to include "any lease of tangible personal property." (See § 6010, subd. (e), added by Stats. 1965, First Ex. Sess., ch. 2, § 6, p. 5445; see also Cal. Admin. Code, tit. 18, § 1660.)

Mr. Putnam stated that the Board and its staff considered the type of transaction here involved pertaining to the portable exchange units "to be a 'lease' within the meaning of the Sales and Use Tax Law and, unless the property is leased in substantially the same form as acquired by the lessor and he has previously paid sales tax reimbursement or use tax measured by his purchase price, as a 'sale' and 'purchase' within the meaning of that law, subject to tax measured by the payments made by his customers ...." He explained that this type of transaction was considered to fall within the definition of "hiring" in Civil Code section 1925 and that the periodic payments made by the customer were considered to be the measure of tax by reason of section 6011. He concluded as follows: "By reason of the interworking of Sections 6009, 6201, 6203, 6390, and 6401, the basic tax on leases is considered to be a use tax on the lessee, which the lessor must collect. If the lessee is exempt, then the tax is considered imposed on the lessor as a sales tax and Sections 6051 and 6012 become applicable.

"Regulation 1660 (18 Cal. Admin. Code, § 1660), a copy of which is attached, describes the position of the Board with respect to leases of tangible personal property in general."

The trial court adopted by reference as its findings of fact the agreed statement of facts and concluded that the income upon which the Board's assessment was made "is service income and not a receipt from the lease of tangible personal property and as such is not taxable under ***92** the Sales Tax Law," that the Board's position that the transaction in question constituted a lease of tangible personal property "is, on the facts of this case, an arbitrary, unreasonable and unwarranted extension of the interpretation of the words 'lease,' 'rental,' 'sale,' or 'purchase,'" and that plaintiff was entitled to a refund of the tax paid. Judgment was entered accordingly. This appeal followed.

(1, 2) Initially, we must determine the appropriate standard of review applicable to the assessment against plaintiff of use tax liability based on the receipts derived from the lease of the exchange units. The Board contends that the assessment, grounded on what it denominates an administrative classification, may be overturned only if such classification was arbitrary, capricious or without rational basis. However, it is clear from the record that the basis of the assessment was not embodied in any formal regulation or even interpretative ruling covering the water conditioning industry as a whole and directed to the industry's use of exchange units (see § 7051 and Gov. Code, § 11420 et seq.), but rather that the basis of the assessment was nothing more than the Board auditor's interpretation of two existing regulations, that is, the regulation governing the lease of tangible personal property (Cal. Admin. Code, tit. 18, § 1660) and the regulation governing service businesses (Cal. Admin. Code, tit. 18, § 1501).

If the Board had promulgated a formal regulation determining the proper classification of receipts derived from the rental of exchange units to condition water and the regulation had been challenged in the action for refund of the tax paid (§ 6933), the proper scope of reviewing such regulation would be one of limited judicial review as urged by the Board. (*Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization* (1973) 30 Cal.App.3d 1009, 1020-1021 [106 Cal.Rptr. 867]; *Mission Pak Co. v. State Bd. of Equalization* (1972) 23 Cal.App.3d 120, 124-125 [100 Cal.Rptr. 69]; see *Carmona* v. *Division of Industrial Safety* (1975) 13 Cal.3d 303, 309-310 [118 Cal.Rptr. 473, 530 P.2d 161]; *Pitts v. Perluss* (1962) 58 Cal.2d 824, 834-835 [27 Cal.Rptr. 19, 377 P.2d 83].) However, in the instant case the Board adopted no formal regulation of a general nature. Considering the particular facts of the transactions involved in the audit of plaintiff taxpayer and interpreting the statutes and regulations deemed applicable, the Board and its staff arrived at certain conclusions as to plaintiff's tax liability and assessed the tax accordingly. As we have set forth in the details of the record before us, the Board "took the position" that certain sections of the law and the regulations ***93** applied and

made its assessment in conformity with its view of the law. Thus the "position" taken by the Board with respect to plaintiff's exchange unit transaction was not the equivalent of a regulation or ruling of general application but, as the amicus points out to us and indeed as the very phraseology of the record indicates, was merely its litigating position in this particular matter.

In sum, our present task is to determine whether the Board in making the assessment in controversy has properly interpreted the relevant sections of the Sales and Use Tax Law and the Board's own relevant regulations adopted pursuant to such law. We recently summarized our proper function thusly: "The interpretation of a regulation, like the interpretation of a statute, is, of course, a question of law [citations], and while an administrative agency's interpretation of its own regulation obviously deserves great weight [citations], the ultimate resolution of such legal questions rests with the courts. [Citations.]" (*Carmona v. Division of Industrial Safety, supra*, 13 Cal.3d 303, 310; see also *Merrill* v. *Department of Motor Vehicles* (1969) 71 Cal.2d 907, 917 [80 Cal.Rptr. 89, 458 P.2d 33]; *Szabo Food Service, Inc.* v. *State Bd. of Equalization* (1975) 46 Cal.App.3d 268, 271 [119 Cal.Rptr. 911]; *King v. State Bd. of Equalization* (1972) 22 Cal.App.3d 1006, 1012 [99 Cal.Rptr. 802].)[FN4] (3) Therefore, giving the appropriate weight to the Board's interpretation, we must decide whether the receipts from plaintiff's customers using the 2,000 exchange units are taxable rentals for leases of tangible personal property within the meaning of the applicable provisions of the Sales and Use Tax Law and regulations promulgated thereunder.

FN4 In both *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization, supra*, 30 Cal.App.3d 1009, 1020-1021, and *Mission Pak Co. v. State Bd. of Equalization, supra*, 23 Cal.App.3d 120, 124-125, the taxpayer attacked the validity of a formal regulation promulgated by the Board and the Courts of Appeal properly held the applicable standard of review to be whether the regulation was arbitrary, capricious or had no reasonable or rational basis. However, in *Coast Elevator Co. v. State Bd. of Equalization* (1975) 44 Cal.App.3d 576, 586-587 [118 Cal.Rptr. 818], and *L.A.J., Inc.* v. *State Bd. of Equalization* (1974) 38 Cal.App.3d 549, 552 [113 Cal.Rptr. 319], it would appear that the taxpayer attacked the Board's interpretation of existing regulations, rather than the regulations themselves. Accordingly we disapprove any language in those opinions indicating that the proper scope of review of such litigating positions of the Board (announced either in tax bulletins or merely as the result of an individual audit) is to determine whether the Board's assessment was arbitrary, capricious or had no reasonable or rational basis. The proper scope of review in such cases is that enunciated in the text of this opinion.

It will be helpful to our determination of this question to set forth at this point the respective positions of the parties. It is the position of the ***94** Board that plaintiff's installation of the exchange units in its customers' residences under its water conditioning or service contract constitutes a lease of the exchange units. Plaintiff takes the position that such an arrangement does not constitute a lease since although having possession of the unit, the customer has neither use of it, nor dominion or control over it.[FN5] The Board rejoins that it is quite obvious that the customer *uses* the unit and by having control over the use of water in his house, simultaneously has dominion and control over the unit which softens it.

FN5 Plaintiff points to the following portion of the agreed statement of facts: "The exchange unit is under the dominion control, and use of the plaintiff [Culligan] at all times and plaintiff has the full right and power over the unit; the customer is not permitted to tamper with, change, control, or use the exchange unit in any way for his own purposes. At any time at will and as needed, the plaintiff (dealer) exchanges one tank for another .... The customer does not have the right, interest, the desire or the physical or technical ability to alter, control, or make use of the unit in any way other than which is provided for him under his contract by the plaintiff."

We start with the observation that if a lease of tangible personal property is a "sale" (§ 6006) and "purchase" (§ 6010) under the code and regulation (Cal. Admin. Code, tit. 18, § 1660), then the use

of the leased property in this state by the lessee is subject to a use tax (§§ 6009, 6201) which the lessor must collect from the lessee at the time rentals are paid (§ 6203) and is measured by the rentals payable (§ 6012). "Any lease of tangible personal property in any manner whatsoever for a consideration is a 'sale' as defined in section 6006, and a 'purchase' as defined in 6010 ..." (Cal. Admin. Code, tit. 18, § 1660) except where sales or use tax is paid upon acquisition of the tangible personal property which is leased in substantially the same form as acquired. (See fn. 3, *ante*.)

Since upon acquiring the 2,000 exchange units here in question, plaintiff neither "paid sales tax reimbursement pursuant to Section 6052 [nor] ... paid use tax measured by the purchase price of the property" (§ 6006, subd. (g)(5); see fn. 3, *ante*) any lease of the units by plaintiff in substantially the form acquired was subject to use tax collectable by plaintiff. Section 6006.3 provides: "'Lease' includes rental, hire and license. ..." Hiring is defined in Civil Code section 1925 as "a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time." As stated in *Entremont v. Whitsell* (1939) 13 Cal.2d 290, 295 [89 P.2d 392], "The chief characteristic of a renting or a leasing is the giving up of possession to the hirer, so that the hirer and not the owner uses and controls the rented property." (*Id.*, citing Civ. Code, § 1925.) ***95**

Contrary to plaintiff's claim, we are satisfied that on the record before us, plaintiff's customer in a general but very practical sense has the use of the exchange unit which is installed in his plumbing system and has dominion and control over it while it is there. Certainly the customer *uses* the exchange unit by having the water pass along the lead-in pipes, through the conditioning unit, and thereafter throughout the entire water system of his residence. He also has dominion and control over the unit. He may permit it to remain inactive simply by not using the water in his house, as he might do during long absences during the day or over many days while away from home, or during long hours of nonuse during the night. Or he or members of his family may activate the unit and avail themselves of its functioning by the simple act of turning on a faucet. The fact that plaintiff has an *owner's* control of the unit and the exclusive right to replace one unit with another so as to regenerate the exhausted material at its plant, does not derogate in any way from the customer's right to use and control the unit while it is on his premises.

Thus, we conclude that there are present the requisite elements of a "hiring," namely the "temporary possession and use" of the exchange water conditioning unit for "reward" (Civ. Code, § 1925) as well as the requisite elements of a "lease," namely "the giving up of possession to the hirer" so that he "uses and controls the rented property." (*Entremont v. Whitsell, supra*, 13 Cal.2d 290, 295.) We therefore agree with the position of the Board and conclude that on the present record plaintiff's furnishing of the exchange units in controversy under the provisions of its so-called annual service subscription constituted a lease of tangible personal property.

Nevertheless, plaintiff insists that even if the elements of a lease of tangible personal property are present, it is nonetheless unreasonable for the Board to so classify plaintiff's business because it is more properly classified as a service business.[FN6] Plaintiff urges that it provides a water conditioning service consisting of the processing, regeneration and installation of the ion-exchange material which requires the skill and labor of its employees and that the water conditioning exchange unit is merely the vehicle by which such service is provided. Additionally, plaintiff points out that the water conditioning contract is called a service ***96** contract, the bill is labelled a service bill and the water softening industry has always advertised and considered itself as a service industry. Finally, plaintiff claims that its business is more like businesses that have been characterized as service businesses, such as swimming pool cleaners which use chemicals to clean the pool, exterminators which use electronic devices, and linen suppliers who launder the linen, than like businesses commonly thought of as leasing tangible personal property.

> FN6 "Persons engaged in the business of rendering service are consumers, not retailers, of the tangible personal property which they use incidentally in rendering the service. Tax, accordingly, applies to the sale of property to them. ..." (Cal. Admin. Code, tit. 18, § 1501.)

The Board has set forth its general standard for classifying transactions involving the transfer of tangible personal property as follows: "The basic distinction in determining whether a particular transaction involves a sale of tangible personal property or the transfer of tangible personal property incidental to the performance of a service is one of the true objects of the contract; that is, *is the real object sought by the buyer the service per se or the property produced by the service.* ..." (Cal. Admin. Code, tit. 18, § 1501, italics added.) Service is defined as "performance of labor for the benefit of another." (Webster's New Internat. Dict. (2d ed., unabridged).) Essentially the crucial point of inquiry is whether the true object of the transaction is the finished article or the performance of labor. (*Albers v. State Board of Equalization* (1965) 237 Cal.App.2d 494, 497 [47 Cal.Rptr. 69].)

We think it quite clear that the true object of the water conditioning contract is the furnishing of the exchange unit which, by itself and without requiring any performance of human labor, softens the water. It is true that human labor or service is involved in regenerating the ion-exchange material, but realistically viewed the customer's purpose in entering into the contract is to obtain, not personal services, but a properly generated and efficiently functioning water conditioning unit. Plaintiff's contention that it is providing primarily a water softening service and that the transfer of the water conditioning unit is merely incidental to the provision of this service simply does not fit the facts - the water softening is done by the water conditioning unit, the service of plaintiff's employees of generating and installing being merely incidental to the function performed by the unit.

Finally plaintiff contends that its business is indistinguishable from various other businesses involving service and the use of tangible personal property which the Board has held not to be lease transactions and that its "water softening service is so analogous to such other cases as to require the same use tax treatment." We shall explain why we consider plaintiff's several arguments unpersuasive. ***97**

Plaintiff first points out that section 6006, subdivision (g)(2)[FN7] provides that the Sales and Use Tax Law does not apply to a linen supplier and argues that the "furnishing of soft water by [plaintiff] to a customer's home is almost identical in nature to the linen supply service." We do not see how this reference assists plaintiff, since the point plaintiff attempts to make contains its own complete answer, namely that the Legislature has seen fit to provide a statutory exemption for the linen industry. Indeed it would appear that if the exemption indicated in subsection (2) had not been enacted, the lease transactions now covered by the subsection would have fallen within the statutory definition of "sale."

> FN7 Section 6006, subdivision (g)(2) provides: "'Sale' means and includes:". . . . ."(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:". . . . ."(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles."

Second, plaintiff argues that the Board "has ruled in a number of other cases that income from similar businesses [is] not subject to sales tax." Plaintiff merely lists, without any development of the point other than a citation to certain sales tax rulings of the Board, the following four types of businesses: (1) swimming pool contractors who service pools with chemicals; (2) exterminators who use electronic devices; (3) security companies who utilize burglar alarms; and (4) community antenna television services. The tax rulings pertaining to the first two types of businesses antedated the 1965 amendments to the Sales and Use Tax Law defining "sale" and "purchase" as including "any lease of tangible personal property." (See fn. 3, *ante*.) These rulings were written at a time when such types of businesses were considered as consumers, rather than retailers, of the chemicals provided with the service; we do not apprehend that they dealt with the factual situation now presented to us, namely the lease of tangible personal property. With respect to the last two types of businesses, plaintiff, as we have already observed, has presented no facts whatsoever as to the methods of conducting the businesses involved, no discussion of the basis of the pertinent tax rulings referred to, and no analyses of plaintiff's position that these last two types of businesses are so

indistinguishable from plaintiff's business as to compel a similar tax treatment in the instant case.[FN8] ***98**

> FN8 Indeed, if it were necessary to analogize, we would think, as the Board itself suggests, that plaintiff's business appears similar to the situation involved in the leasing of automatic data processing equipment, where the taxable rental is deemed to include the incidental services required to be provided as part of the lease, namely the programming of the equipment, the training of operators, and the general maintenance of the equipment. (Cal. Admin. Code, tit. 18, § 1502, subd. (k).) In each instance, it would seem that the true object of the transaction is the equipment itself while any services involved are merely incidental to its functioning.

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment for defendant.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Richardson, J., concurred. ***99**

Cal.
Culligan Water Conditioning of Bellflower, Inc. v. State Bd. of Equalization
17 Cal.3d 86, 550 P.2d 593, 130 Cal.Rptr. 321

END OF DOCUMENT

34 Cal.4th 467, 99 P.3d 1015, 20 Cal.Rptr.3d 428, 94 Fair Empl.Prac.Cas. (BNA) 1693, 04 Cal. Daily Op. Serv. 9912, 2004 Daily Journal D.A.R. 13,516

Briefs and Other Related Documents
Judges and Attorneys

Supreme Court of California
Lesli Ann McCLUNG, Plaintiff and Appellant,
v.
EMPLOYMENT DEVELOPMENT DEPARTMENT et al., Defendants and Respondents.

No. S121568.
Nov. 4, 2004.

Background: A state Employment Development Department (EDD) auditor, who alleged she was sexually harassed by a lead auditor, sued EDD and the lead auditor for hostile work environment and failure to remedy hostile work environment under the California Fair Employment and Housing Act (FEHA). The Superior Court, Sacramento County, No. 98AS00092, Joe S. Gray, J., granted summary judgment for defendants. Plaintiff appealed. The Court of Appeal affirmed as to EDD and reversed as to lead auditor. The Supreme Court granted lead auditor's petition for review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Chin, J., held that:
(1) amendment to FEHA making nonsupervisory employees liable for sex harassment effectuated a change in the law, rather than merely clarifying it, and
(2) amendment imposing liability on nonsupervisory personnel did not apply retroactively.

Judgment of the Court of Appeal reversed and matter remanded.

Moreno, J., filed a concurring and dissenting opinion.

Opinion, 6 Cal.Rptr.3d 504, superseded.

West Headnotes

[1] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 k. Nature and scope in general. Most Cited Cases
(Formerly 92k67)

It is the province and duty of the judicial department, to say what the law is; those who apply the rule to particular cases, must of necessity expound and interpret that rule.

[2] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation

361VI(D) Retroactivity
361k278.16 k. Declaratory, clarifying, and interpretative acts. Most Cited Cases
(Formerly 92k188)

A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment, because the true meaning of the statute remains the same.

[3] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.2 k. Nature and scope. Most Cited Cases
(Formerly 92k188)

A statute has "retrospective effect" when it substantially changes the legal consequences of past events.

[4] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 k. Nature and scope in general. Most Cited Cases
(Formerly 92k67)

The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body. West's Ann.Cal. Const. Art. 6, § 1.

[5] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)1 In General
92k2340 k. Nature and scope in general. Most Cited Cases
(Formerly 92k50)

92 Constitutional Law KeyCite Citing References for this Headnote
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2457 k. Interpretation of statutes. Most Cited Cases
(Formerly 92k67)

Subject to constitutional constraints, the Legislature may enact legislation, but the judicial branch interprets that legislation. West's Ann.Cal. Const. Art. 4, § 1; Art. 6, § 1.

[6] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers

92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2457 k. Interpretation of statutes. Most Cited Cases
(Formerly 92k67)

Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. West's Ann.Cal. Const. Art. 6, § 1.

[7] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial authority and duty. Most Cited Cases

It is the duty of the court, when a question of law is properly presented, to state the true meaning of the statute finally and conclusively. West's Ann.Cal. Const. Art. 6, § 1.

[8] KeyCite Citing References for this Headnote

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective application. Most Cited Cases

Supreme Court's decision in *Carrisales v. Department of Corrections* interpreted the California Fair Employment and Housing Act (FEHA) finally and conclusively as not imposing personal liability on a nonsupervisory coworker for sex harassment, and thus, for purposes of determining the status of the law when state employee's cause of action against her coworker accrued, Legislature's subsequent amendment imposing personal liability on nonsupervisory personnel had to be interpreted as effectuating a change in the law, rather than as a mere clarification of it. West's Ann.Cal.Gov.Code § 12940(j)(3).

[9] KeyCite Citing References for this Headnote

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(1) k. Highest appellate court. Most Cited Cases

The decisions of the California Supreme Court are binding upon and must be followed by all the state courts of California.

[10] KeyCite Citing References for this Headnote

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k91 Decisions of Higher Court or Court of Last Resort
106k91(.5) k. In general. Most Cited Cases

Courts exercising inferior jurisdiction must accept the law declared by courts of superior

jurisdiction; it is not their function to attempt to overrule decisions of a higher court.

[11] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases

If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration.

[12] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases

A legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute.

[13] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2351 k. Construction of statutes in general. Most Cited Cases
(Formerly 92k53)

The Legislature has no authority to interpret a statute; interpretation is a judicial task.

[14] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers
92XX(B) Legislative Powers and Functions
92XX(B)2 Encroachment on Judiciary
92k2351 k. Construction of statutes in general. Most Cited Cases
(Formerly 92k53)

Although the Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive, the Legislature has no authority simply to say what the statute meant.

[15] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction
361k220 k. Legislative construction. Most Cited Cases

A declaration that a statutory amendment merely clarified the law cannot be given an obviously absurd effect, and the court cannot accept the legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms.

[16] KeyCite Citing References for this Headnote

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1002 Constitutional and Statutory Provisions
78k1006 k. Retrospective application. Most Cited Cases

78 Civil Rights KeyCite Citing References for this Headnote
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective application. Most Cited Cases

Because the Supreme Court had already finally and definitively interpreted sex harassment provision in the California Fair Employment and Housing Act (FEHA), the Legislature had no power to decide that a later amendment merely declared existing law. West's Ann.Cal.Gov.Code § 12940.

[17] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k174 k. In general. Most Cited Cases

A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.

[18] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(4) k. Erroneous construction; conflict with statute. Most Cited Cases

It is the courts' duty to construe statutes, even if this requires the overthrow of an earlier erroneous administrative construction.

[19] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 k. In general. Most Cited Cases
(Formerly 361k263)

Generally, statutes operate prospectively only.

[20] KeyCite Citing References for this Headnote

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2485 Inquiry Into Legislative Judgment
92k2488 k. Policy. Most Cited Cases
(Formerly 92k70.3(3))

A statute's retroactivity is, in the first instance, a policy determination for the legislature and one to which courts defer absent some constitutional objection to retroactivity.

[21] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express retroactive provisions. Most Cited Cases
(Formerly 361k263, 361k262)

A statute may be applied retroactively only if it contains express language of retroactively or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application.

[22] KeyCite Citing References for this Headnote

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective application. Most Cited Cases

361 Statutes KeyCite Citing References for this Headnote
361VI Construction and Operation
361VI(D) Retroactivity
361k278.24 Validity of Particular Retroactive Statutes
361k278.36 k. Labor and employment. Most Cited Cases
(Formerly 92k190)

Amendment to California Fair Employment and Housing Act (FEHA) provision, imposing liability on nonsupervisory personnel for sex harassment, did not apply retroactively to alleged sex harassment in the workplace occurring before amendment; any inference that Legislature intended retroactive application was weak, and creating retroactive liability posed constitutional concerns. West's Ann.Cal.Gov.Code § 12940(j)(2, 3).

See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 760C; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2003) ¶ 10:495 et seq. (CAEMPL Ch. 10-E); Cal. Jur. 3d, Labor, § 74 et seq.; Cal. Civil Practice (Thomson/West 2003) Employment Litigation, § 5:47 et seq.

[23] KeyCite Citing References for this Headnote

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k994 k. Avoidance of constitutional questions. Most Cited Cases
(Formerly 92k48(1))

Courts are required to construe statutes to avoid constitutional infirmities.

[24] KeyCite Citing References for this Headnote

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k975 k. In general. Most Cited Cases
(Formerly 92k46(1))

Before a court entertains the question whether retroactive application of a statute implicates constitutional concerns, the court must be confronted with a statute that explicitly authorized the imposition of liability for preenactment conduct.

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CHIN, J.

**1017 [1] *469 "It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, *470 must of necessity expound and interpret that rule." (*Marbury v. Madison* (1803) 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60.)

This basic principle is at issue in this case. In *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083 (*Carrisales*), we interpreted Government Code section 12940 (hereafter section 12940), part of the California Fair Employment and Housing Act (FEHA). Later, the Legislature amended that section by adding language to impose personal liability on persons *Carrisales* had concluded had no personal liability. (§ 12940, subd. (j)(3).) Subdivision***431** (j) also contains a statement that its provisions "are declaratory of existing law ...." (§ 12940, subd. (j)(2).) Based on this statement, plaintiff argues that the amendment**1018** did not *change,* but merely *clarified,* existing law. Accordingly, she argues, the amendment applies to this case to impose personal liability for earlier actions despite our holding in *Carrisales* that no personal liability attached to those actions.

We disagree. Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, as we did in *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature's power. We also conclude this change in the law does not apply retroactively to impose liability for actions not subject to liability when performed.

I. FACTS AND PROCEDURAL BACKGROUND

In January 1998, plaintiff Lesli Ann McClung filed a complaint against the Employment Development Department and Manuel Lopez, alleging claims of hostile work environment and failure to remedy a hostile work environment under the FEHA, as well as another cause of action not relevant here. The superior court granted summary judgment for defendants, and plaintiff appealed.

The Court of Appeal affirmed the judgment in favor of the Employment Development Department, but reversed it as to Lopez. In so doing, it held that Lopez was plaintiff's coworker, not supervisor. It also recognized that we had held in *Carrisales, supra,* 21 Cal.4th at page 1140, 90 Cal.Rptr.2d 804, 988 P.2d 1083, that the FEHA does not "impose personal liability for harassment on nonsupervisory coworkers." Nevertheless, it found Lopez personally liable for harassment under the FEHA. It applied an amendment to the FEHA that imposes personal liability ***471** on coworkers (§ 12940, subd. (j)(3)), even though the amendment postdated the actions underlying this lawsuit. It found that the preexisting statement in section 12940, subdivision (j)(2), that subdivision (j)'s provisions "are declaratory of existing law," "supports the conclusion that [the amendment] merely clarifies the meaning of the prior statute." Ultimately, it concluded that whether "the amendment merely states the true meaning of the statute or reflects the Legislature's purpose to achieve a retrospective change, the result is the same: we must give effect to the legislative intent that the personal liability amendment apply to all existing cases, including this one." "For Lopez," said the Court of Appeal, "the Supreme Court's interpretation of individual liability under FEHA can be said to have come and gone."

We granted Lopez's petition for review to decide whether section 12940, subdivision (j)(3), applies to this case.

II. DISCUSSION

A. Background

The FEHA "declares certain kinds of discrimination and harassment in the workplace to be 'unlawful employment practice[s].' (§ 12940.)" (*Carrisales, supra,* 21 Cal.4th at p. 1134, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) In *Carrisales,* we interpreted the FEHA as imposing "on the *employer* the duty to take all reasonable steps to prevent this harassment from occurring in the first place and to take immediate***432** and appropriate action when it is or should be aware of the conduct," but as not imposing "personal liability for harassment on nonsupervisory coworkers." (*Carrisales, supra,* at p. 1140, 90 Cal.Rptr.2d 804, 988 P.2d 1083, citing § 12940, former subd. (h)(1).) Later, effective January 1, 2001, the Legislature amended the subdivision of section 12940 that we interpreted in *Carrisales* (now subdivision (j)). (Stats.2000, ch. 1049, §§ 7.5, 11.) As amended, section 12940, subdivision (j)(3), provides in relevant part: "An employee of an entity subject to this subdivision is personally liable for any harassment prohibited by this section that is perpetrated by the employee...." It seems clear, and no one disputes, that this provision imposes on nonsupervisory coworkers the personal liability that *Carrisales* said the FEHA had not imposed. Subdivision (j) also states that its ***1019** provisions "are declaratory of existing law ...." (§ 12940, subd. (j)(2).)

[2] [3] We must decide whether the amendment to section 12940 applies to actions that occurred before its enactment. If the amendment merely clarified existing law, no question of retroactivity is presented. "[A] statute that merely *clarifies,* rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment" "because the true meaning of the statute remains the same." ***472** (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, 62 Cal.Rptr.2d 243, 933 P.2d 507 (*Western Security Bank*).) In that event, personal liability would have existed at the time of the actions, and the amendment would not have changed anything. But if the amendment changed the law and imposed personal liability for earlier actions, the question of retroactivity arises. "A statute has retrospective effect when it substantially changes the legal consequences of past events." (*Ibid.*) In this case, applying the amendment to impose liability that did not otherwise exist would be a retroactive application because it would "attach[ ] new legal consequences to events completed before its enactment." (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (*Landgraf*).) Specifically, it would "increase a party's liability for past conduct...." (*Id.* at p. 280, 114 S.Ct. 1483; accord, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839, 123 Cal.Rptr.2d 40, 50 P.3d 751

(*Myers*).)

Accordingly, two separate questions are presented here: (1) Did the amendment extending liability in subdivision (j)(3) change or merely clarify the law? (2) If the amendment did change the law, does the change apply retroactively? We consider the former question first. Because we conclude the amendment did, indeed, change the law, we also consider the latter question.

B. Whether the Amendment Changed the Law

[4] "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Cal. Const., art. III, § 3.) "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) Thus, "The judicial power is conferred upon the courts by the Constitution and, in the absence of a constitutional provision, cannot be exercised by any other body." (*Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326, 109 P.2d 935.)

[5] [6] [7] The legislative power rests with the Legislature. (Cal. Const., art. IV, § 1.) Subject to constitutional constraints, the Legislature may enact legislation. ***433 (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691, 97 Cal.Rptr. 1, 488 P.2d 161.) But the judicial branch *interprets* that legislation. "Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507; see also *People v. Cruz* (1996) 13 Cal.4th 764, 781, 55 Cal.Rptr.2d 117, 919 P.2d 731.) Accordingly, "it is the duty of this court, when ... a question of law is properly presented, to state the true meaning of the statute finally and conclusively...." (*Bodinson Mfg. Co. v. California E. Com., supra,* 17 Cal.2d at p. 326, 109 P.2d 935.)

[8] [9] [10] *473 In *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, we interpreted the FEHA finally and conclusively as not imposing personal liability on a nonsupervisory coworker. This interpretation was binding on lower state courts, including the Court of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.) "The decisions of this court are binding upon and must be followed by all the state courts of California.... Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court." (*Ibid.*)

[11] [12] [13] [14] [15] [16] It is true that if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what **1020 an earlier Legislature intended is entitled to consideration. (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507.) But even then, "a legislative declaration of an existing statute's meaning" is but a factor for a court to consider and "is neither binding nor conclusive in construing the statute." (*Ibid.*; see also *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 52, 276 Cal.Rptr. 114, 801 P.2d 357; *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8, 185 Cal.Rptr. 582.) This is because the "Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean." (*Del Costello v. State of California, supra,* at p. 893, fn. 8, 185 Cal.Rptr. 582, cited with approval in *People v. Cruz, supra,* 13 Cal.4th at p. 781, 55 Cal.Rptr.2d 117, 919 P.2d 731.) A declaration that a statutory amendment merely clarified the law "cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 214, 187 P.2d 702.) Because this court had already finally and definitively interpreted section 12940, the Legislature had no power to decide that the later amendment merely declared existing law.

On another occasion, the Legislature similarly enacted legislation overruling a decision of this court—which was within its power—but also purported to state that the new legislation merely

declared what the law always was—which was beyond its power. In *People v. Harvey* (1979) 25 Cal.3d 754, 159 Cal.Rptr. 696, 602 P.2d 396, we interpreted Penal Code section 1170.1 as not permitting a certain consecutive sentence enhancement. The Legislature promptly amended the statute to permit the enhancement. (Stats.1980, ch. 132, § 2, p. 306.) It also declared that its ***434** intent was "to clarify and reemphasize what has been the legislative intent since July 1, 1977." (Stats.1980, ch. 132, § 1, subd. (c), p. 305.) The judicial response was swift and emphatic. The courts concluded that, although the Legislature may amend a ***474** statute to overrule a judicial decision, doing so *changes* the law; accordingly, they refused to apply the amendment retroactively. (*People v. Savala* (1981) 116 Cal.App.3d 41, 55–61, 171 Cal.Rptr. 882; *People v. Harvey* (1980) 112 Cal.App.3d 132, 138–139, 169 Cal.Rptr. 153; *People v. Cuevas* (1980) 111 Cal.App.3d 189, 198–200, 168 Cal.Rptr. 519; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 866, 168 Cal.Rptr. 257; *People v. Fulton* (1980) 109 Cal.App.3d 777, 783, 167 Cal.Rptr. 436; *People v. Matthews* (1980) 108 Cal.App.3d 793, 796, 167 Cal.Rptr. 8; see *People v. Wolcott* (1983) 34 Cal.3d 92, 104, fn. 4, 192 Cal.Rptr. 748, 665 P.2d 520.) As one of these decisions explained, this court had "finally and conclusively" interpreted the statute, and a "legislative clarification in the amended statute may not be used to overrule this exercise of the judicial function of statutory construction and interpretation. The amended statute defines the law for the future, but it cannot define the law for the past." (*People v. Cuevas, supra,* at p. 200, 168 Cal.Rptr. 519.)

[17] [18] Plaintiff points out that *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, itself postdated the acts alleged in this case and argues that before that decision, nonsupervisory coworkers had been personally liable under the statute. However, "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." (*Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 312–313, 114 S.Ct. 1510, 128 L.Ed.2d 274; accord, *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 216, 115 S.Ct. 1447, 131 L.Ed.2d 328.) This is why a judicial decision generally applies retroactively. (*Rivers v. Roadway Express, Inc., supra,* at pp. 311–312, 114 S.Ct. 1510; *People v. Guerra* (1984) 37 Cal.3d 385, 399, 208 Cal.Rptr. 162, 690 P.2d 635.) It is true that two administrative decisions had previously interpreted the statute differently than we did. (See *Carrisales, supra,* at pp. 1138–1139, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) But we merely concluded that those decisions ****1021** had misconstrued the statute (*ibid.*); we did not, and could not, amend the statute ourselves. (See *People v. Guerra, supra,* at p. 399, fn. 13, 208 Cal.Rptr. 162, 690 P.2d 635.) It is the courts' duty to construe statutes, " even though this requires the overthrow of an earlier erroneous administrative construction." (*Bodinson Mfg. Co. v. California E. Com., supra,* 17 Cal.2d at p. 326, 109 P.2d 935; see also *Rivers v. Roadway Express, Inc., supra,* at pp. 312–313 & fn. 12, 114 S.Ct. 1510 [explaining that a United States Supreme Court decision interpreting a statute stated what the statute had always meant, even if the decision overruled earlier federal appellate court decisions that had interpreted the statute differently].)

Our conclusion that the amendment to section 12940, subdivision (j)(3), changed rather than clarified the law does not itself decide the question whether it applies to this case. It just means that applying the amended section to this case would be a retroactive application. "The fact that application of [the statute] to the instant case would constitute a ***475** retroactive rather than a prospective application of the statute is, of course, just the beginning, rather than the conclusion, of our analysis." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1206, 246 Cal.Rptr. 629, 753 P.2d 585.) We turn now to the question ****435** whether the amendment applies retroactively.

C. Whether the Amendment Applies Retroactively

[19] "Generally, statutes operate prospectively only." (*Myers, supra,* 28 Cal.4th at p. 840, 123 Cal.Rptr.2d 40, 50 P.3d 751; see also *Evangelatos v. Superior Court, supra,* 44 Cal.3d at pp. 1206–1208, 246 Cal.Rptr. 629, 753 P.2d 585.) "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' " (*Landgraf, supra,* 511 U.S. at p. 265, 114 S.Ct. 1483, fns. omitted; see also *Myers, supra,* at pp. 840–841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "The presumption

against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." (*Landgraf, supra,* at p. 270, 114 S.Ct. 1483.)

[20] [21] This is not to say that a statute may never apply retroactively. "[A] statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity." (*Myers, supra,* 28 Cal.4th at p. 841, 123 Cal.Rptr.2d 40, 50 P.3d 751.) But it has long been established that a statute that interferes with antecedent rights will not operate retroactively unless such retroactivity be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." (*United States v. Heth* (1806) 3 Cranch 399, 7 U.S. 399, 413, 2 L.Ed. 479; accord, *Myers, supra,* at p. 840, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "[A] statute may be applied retroactively only if it contains express language of retroactivity *or* if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers, supra,* at p. 844, 123 Cal.Rptr.2d 40, 50 P.3d 751.)

[22] We see nothing here to overcome the strong presumption against retroactivity. Plaintiff and Justice Moreno argue that the statement in section 12940, subdivision (j)(2), that the subdivision's provisions merely declared existing law, shows an intent to apply the amendment retroactively. They cite our statement that "where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection ***476** thereto.' " (*Western Security Bank, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507, quoting ****1022** *California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d at p. 214, 187 P.2d 702.)

Neither *Western Security Bank, supra,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, nor *California Emp. etc. Com. v. Payne, supra,* 31 Cal.2d 210, 187 P.2d 702, holds that an erroneous statement that an amendment merely declares existing law is sufficient to overcome the strong presumption against retroactively applying a statute that responds to a judicial interpretation. In *California Emp. etc. Com. v. Payne,* the amendment at issue does not appear to have been adopted in response to a judicial decision. In *Western Security Bank, supra,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, the only judicial action that had interpreted the statute before the Legislature amended it was a ****436** Court of Appeal decision that never became final. After considering all of the circumstances, we specifically held that the amendment at issue "did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal effect of past actions, [the amendment] does not act retrospectively; it governs this case." (*Id.* at p. 252, 62 Cal.Rptr.2d 243, 933 P.2d 507.) Here, by contrast, as we have explained, *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083, was a final and definitive judicial interpretation of the FEHA. The amendment at issue here *did* change the law.

Moreover, the language of section 12940, subdivision (j)(2), namely, that "The provisions of this subdivision are declaratory of existing law," long predates the Legislature's overruling of *Carrisales, supra,* 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083. That language was added to the section in reference to a different, earlier, change to the statute. (Stats.1987, ch. 605, § 1, p.1945.) Any inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself,* that the amendment's provisions declared existing law.

Plaintiff and the Court of Appeal also cite statements in the legislative history to the effect that the proposed amendment would only "clarify" the law's original meaning. But these references may have been intended only to demonstrate that clarification was necessary, not as positive assertions that the law always provided for coworker liability. We see no indication the Legislature even thought about giving, much less expressly intended to give, the amendment retroactive effect to the extent the amendment did change the law. Specifically, we see no clear and unavoidable intent to have the statute retroactively impose liability for actions not subject to liability when taken. "Requiring clear intent assures that [the legislative body] itself has affirmatively considered the potential unfairness of

retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (*Landgraf, supra,* 511 U.S. at pp. 272–273, 114 S.Ct. 1483.)

[23] [24] Retroactive application would also raise constitutional implications. Both this court and the United States Supreme Court have expressed concerns that ***477** retroactively creating liability for past conduct might violate the Constitution, although it appears neither court has so held. (*Landgraf, supra,* 511 U.S. at p. 281, 114 S.Ct. 1483 ["Retroactive imposition of punitive damages would raise a serious constitutional question"]; *Myers, supra,* 28 Cal.4th at pp. 845–847, 123 Cal.Rptr.2d 40, 50 P.3d 751; but see also *Landgraf,* at p. 272, 114 S.Ct. 1483 [describing "the *constitutional* impediments to retroactive civil legislation" as "now modest"].) "An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit [ies].' [Citations.] That rule reinforces our construction of the [statute] as prospective only." (*Myers, supra,* at pp. 846–847, 123 Cal.Rptr.2d 40, 50 P.3d 751.) "Before we entertained that [constitutional] question, we would have to be confronted with a statute that explicitly authorized" the imposition of liability "for preenactment conduct." (*Landgraf, supra,* at p. 281, 114 S.Ct. 1483.) The amendment here contains no such explicit authorization.

For all of these reasons, we conclude that section 12940, subdivision (j)(3), does not apply**1023 retroactively to conduct predating its enactment.

***437 III. CONCLUSION

We reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with this opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR and BROWN, JJ.

Concurring and Dissenting Opinion by MORENO, J.

We held in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 90 Cal.Rptr.2d 804, 988 P.2d 1083 that the California Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.) does not impose on nonsupervisory coworkers personal liability for harassment. The Legislature later amended Government Code section 12940, subdivision (j), to impose such personal liability. The statute as amended states that its provisions "are declaratory of existing law." (Gov.Code, § 12940, subd. (j)(2).) FN1

> FN1. All further statutory references are to the Government Code, unless otherwise specified.

I agree with the majority that the Legislature could not, by amending the statute, clarify its meaning in a manner inconsistent with our decision in *Carrisales.* Thus, the amendment must be deemed to have changed, rather than merely clarified, the law. But unlike the majority, I conclude that by purporting to clarify its original intent, the Legislature clearly intended to apply this statutory change retroactively. We must honor this legislative intent, unless prevented from doing so by constitutional concerns.

The majority correctly recognizes that a statute may apply retroactively. As we stated in ***478** *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840–841, 123 Cal.Rptr.2d 40, 50 P.3d 751, "[g]enerally, statutes operate prospectively only"; "unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature ... must have intended a retroactive application' [citation].... Under this formulation a statute's retroactivity is, in the first instance, a policy determination for the Legislature and one to which courts defer absent 'some constitutional objection' to retroactivity. [Citation.]"

The majority, however, "see[s] nothing here to overcome the strong presumption against retroactivity." (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 435, 99 P.3d at p. 1021.) I disagree. The statute at issue, subdivision (j)(2) of section 12940, states that its provisions "are declaratory of existing law...." In *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244, 62 Cal.Rptr.2d 243,

933 P.2d 507, we recognized the importance of such legislative language: "[E]ven if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a 'clarification,' the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. [Citation.] ... Thus, where a statute provides that it clarifies or declares existing law, '[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment.' "

We made the same point half a century earlier in *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213, 187 P.2d 702, in which the Legislature had amended a statute to add a requirement of an "intent to evade the provisions of this act," further stating that the amendment "is hereby declared to be merely a clarification of the original intention of the legislature rather than a substantive change and ***438** such section shall be construed for all purposes as though it had always read as hereinbefore set forth." Despite the Legislature's statement, it was clear that the amendment changed, rather than merely clarified, the law, as no such intent to evade had previously been required. Accordingly, we held that "the language of the 'clarification' provision in this case cannot be given an obviously absurd effect, and the court cannot accept the Legislative statement that an unmistakable change in the statute is nothing more than a clarification and restatement of its original terms." (*Id.* at p. 214, 187 P.2d 702.) We recognized, however, that the Legislature's statement indicated a clear **1024 intent that the amendment apply retroactively: "It does not follow, however, that the 'clarification' provision ... is ineffective for any purpose. It is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto." (*Ibid.*)

*479 In the present case, as in *Western Security Bank* and *California Emp.*, we cannot give effect to the Legislature's statement that the amendment to section 12940, subdivision (j) was declaratory of existing law, but we can give effect to the Legislature's clear expression of its intent that this amendment be given retroactive effect.

The majority notes that the statutory language stating that the provisions of subdivision (j) of section 12940 are declaratory of existing law was originally added to the statute in reference to a 1987 amendment. The majority concludes from this that "[a]ny inference the Legislature intended the 2000 amendment to apply retroactively is thus far weaker than if the Legislature had asserted, *in the 2000 amending act itself,* that the amendment's provisions declared existing law." (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 436, 99 P.3d at p. 1022.) Again, I do not agree.

A statute that is amended is "re-enacted as amended." (Cal. Const., art. IV, § 9.) "The amendment of a statute ordinarily has the legal effect of reenacting (thus enacting) the statute as amended, including its unamended portions." (*People v. Scott* (1987) 194 Cal.App.3d 550, 554, 239 Cal.Rptr. 588.) As amended, section 12940, subdivision (j) clearly states that its provisions are declaratory of existing law. The circumstance that the same statement had been made in reference to an earlier amendment of the same statute does not lessen the plain meaning of this statutory language. In general, we take it that the Legislature means what it says. In the present case, it is difficult to imagine how the Legislature could have more clearly expressed its intention that the 2000 amendment to subdivision (j) of section 12940, like the earlier amendment, was declaratory of existing law.

Because the Legislature clearly indicated its intent that the amendment to the statute be applied retroactively, we must honor that intent unless there is a constitutional objection to doing so.

The high court addressed the constitutional concerns posed by retroactive application of statutes at some length in *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229. The court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." ***439** (*Id.* at p. 265, 114 S.Ct. 1483, fn. omitted.) The court noted that "the antiretroactivity principle finds expression in several provisions of our Constitution," including the ex post facto clause,

the provision prohibiting the impairment of obligations of contracts, the Fifth Amendment's takings clause, the prohibition of bills of attainder, and the due process clause. (*Id.* at p. 266, 114 S.Ct. 1483.)

***480** The court was careful to make clear, however, that these concerns do not necessarily prohibit retroactive application of statutes: "The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope. Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." ****1025** (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 267–268, 114 S.Ct. 1483, fn. omitted.)

Further, courts must defer to a legislative judgment that a statute should be applied retroactively: "In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments." (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 272, 114 S.Ct. 1483.) Accordingly, the high court declared, "the constitutional impediments to retroactive civil legislation are now modest." (*Ibid.,* italics omitted.)

Significantly, defendant Lopez does not cite any authority establishing that retroactive application of the amendment to section 12940, subdivision (j) would violate the Constitution. Rather, he simply asserts that "to impose personal liability ... retroactively should require a 'clear and unavoidable' statement from the Legislature favoring retroactivity...." As explained above, I conclude that the provision stating that the amendment is declaratory of existing law constitutes such a clear statement of intent to apply the amendment retroactively.

Neither does the majority cite any authority establishing that retroactive application of the amendment to section 12940, subdivision (j) would violate the Constitution. Rather, the majority asserts that retroactive application would "raise constitutional implications," while acknowledging that "[b]oth this court and the United States Supreme Court have expressed concerns that retroactively creating liability for past conduct *might* violate the Constitution, *although it appears neither court has so held.* [Citations.]" (Maj. opn., *ante,* 20 Cal.Rptr.3d at p. 436, 99 P.3d at p. 1022, italics added.)

I discern no constitutional impediment to giving effect to the Legislature's clear intent to apply the amendment to section 12940, subdivision (j) retroactively. As noted above, the amendment changed the law by imposing upon nonsupervisory coworkers personal liability under the FEHA for harassment, but this did not subject such nonsupervisory coworkers to liability for ***481** harassment for the first time. As we noted in *Carrisales,* "our conclusion [that nonsupervisory coworkers could not be held personally liable under the FEHA] does not necessarily prevent a harasser from being personally liable to the victim under some other statute or theory of tort. All we hold is that the ****440** *FEHA* does not cover harassment short of an unlawful employment practice. The FEHA's noncoverage does not immunize anyone, including a coworker, from the consequences of conduct that is otherwise tortious." (*Carrisales v. Department of Corrections, supra,* 21 Cal.4th 1132, 1136, 90 Cal.Rptr.2d 804, 988 P.2d 1083.) And we have recognized "that employment discrimination, including sexual harassment ... can cause emotional distress [and] that such distress is a compensable injury under traditional theories of tort law...." (*Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 48, 276 Cal.Rptr. 114, 801 P.2d 357, fn. omitted.)

Given the "modest" constitutional impediments to retroactive civil legislation (*Landgraf v. USI Film Products, supra,* 511 U.S. 244, 272, 114 S.Ct. 1483), and the circumstance that harassment by nonsupervisory coworkers was tortious prior to the statutory amendment imposing liability for such conduct under the FEHA, I conclude that there is no constitutional obstacle to the retroactive imposition of personal liability for harassment on nonsupervisory coworkers, as the Legislature intended.

Cal.,2004.
McClung v. Employment Development Dept.
34 Cal.4th 467, 99 P.3d 1015, 20 Cal.Rptr.3d 428, 94 Fair Empl.Prac.Cas. (BNA) 1693, 04 Cal. Daily Op. Serv. 9912, 2004 Daily Journal D.A.R. 13,516

Briefs and Other Related Documents (Back to top)

- 2004 WL 1505474 (Appellate Brief) Petitioner's Reply Brief (May 20, 2004) Original Image of this Document (PDF)
- 2004 WL 1505476 (Appellate Brief) Respondent's Opening Brief on the Merits (May 3, 2004) Original Image of this Document (PDF)
- 2004 WL 1263741 (Appellate Brief) Petitioner's Opening Brief on the Merits (Apr. 2, 2004)
- S121568 (Docket) (Dec. 23, 2003)

Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Baxter, Hon. Marvin R.**
State of California Supreme Court
San Francisco, California 94102
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Chin, Hon. Ming W.**
State of California Supreme Court
San Francisco, California 94102
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- **George, Hon. Ronald M.**
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- **Gray, Hon. Joe S.**
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- **Kennard, Hon. Joyce L.**
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- **Werdegar, Hon. Kathryn Mickle**
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188 Cal.App.4th 794, 116 Cal.Rptr.3d 33, 260 Ed. Law Rep. 877, 10 Cal. Daily Op. Serv. 12,281, 2010 Daily Journal D.A.R. 14,831

Briefs and Other Related Documents
Judges and Attorneys

Court of Appeal, Third District, California.
CLOVIS UNIFIED SCHOOL DISTRICT et al., Plaintiffs and Appellants,
v.
John CHIANG, as State Controller, etc., Defendant and Appellant.

No. C061696.
Sept. 21, 2010.
As Modified on Denial of Rehearing Oct. 14, 2010.

Background: School districts and community college districts brought action against State Controller's Office for declaratory and writ relief challenging auditing rules used in reducing state-mandated reimbursement claims for employee salary and benefit costs. The Superior Court, Sacramento County, No. 06CS00748 and 07CS00263, Lloyd G. Connelly, J., invalidated the Contemporaneous Source Document Rule (CSDR) as applied to Intradistrict Attendance Program and Collective Bargaining Program, granted no relief as to CSDR as applied to the School District of Choice Program (SDC) and the Emergency Procedures, Earthquake Procedures and Disasters Program (EPEPD), and upheld the Health Fee Rule. Plaintiffs appealed.

Holdings: The Court of Appeal, Butz, J., held that:
(1) CSDR implemented, interpreted, or made specific the regulatory Parameters and Guidelines (P&Gs) applied to state-mandated reimbursement claims;
(2) declaratory and traditional mandate relief was appropriate form of relief for use of CSDR as underground regulation; and
(3) amount of optional student fee was deducted from amount reimbursed to community college districts for state-mandated costs.

Reversed in part with directions and affirmed in part.

West Headnotes

[1] KeyCite Citing References for this Headnote

118A Declaratory Judgment
118AIII Proceedings
118AIII(A) In General
118Ak255 k. Limitations and laches. Most Cited Cases

250 Mandamus KeyCite Citing References for this Headnote
250III Jurisdiction, Proceedings, and Relief
250k143 Time to Sue, Limitations, and Laches
250k143(1) k. In general. Most Cited Cases

360 States KeyCite Citing References for this Headnote
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

School districts' and community college districts' action against State Controller's Office, for declaratory and writ relief challenging audits that reduced state-mandated reimbursement claims for employee salary and benefit costs based on an auditing rule which was an invalid underground regulation in violation of the state Administrative Procedure Act (APA), was subject to the three-year statute of limitations for lawsuits based on statutory liability, since state-mandated reimbursement was a statutory liability. West's Ann.Cal.C.C.P. § 338(a); West's Ann.Cal.Gov.Code §§ 11340 et seq., 17500 et seq.

[2] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak382 Nature and Scope
15Ak382.1 k. In general. Most Cited Cases

An Administrative Procedure Act (APA) regulation has two principal characteristics: it must apply generally; and it must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. West's Ann.Cal.Gov.Code § 11342.600.

[3] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak382 Nature and Scope
15Ak382.1 k. In general. Most Cited Cases

For a regulation to "apply generally," as required to be subject to the Administrative Procedure Act (APA), the rule need not apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. West's Ann.Cal.Gov.Code § 11342.600.

[4] KeyCite Citing References for this Headnote

360 States
360IV Fiscal Management, Public Debt, and Securities
360k121 k. Administration of finances in general. Most Cited Cases

State Controller's Office's Contemporaneous Source Document Rule (CSDR) applied generally, as required to be a regulation subject to the Administrative Procedure Act (APA), where the CSDR was applied generally to the auditing of reimbursement claims, and the Controller's auditors had no discretion to judge on a case-by-case basis whether to apply the CSDR. West's Ann.Cal.Gov.Code § 11342.600.

[5] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

State Controller's Office's Contemporaneous Source Document Rule (CSDR) implemented, interpreted, or made specific the regulatory Parameters and Guidelines (P&Gs) applied to state-mandated reimbursement claims for the School District of Choice (SDC) Program in effect before May 27, 2004, and thus was a regulation subject to the Administrative Procedure Act (APA), since there were substantive differences between the CSDR and the P&Gs then in effect; the CSDR barred the use

of employee time declarations and certifications as source documents or equivalents even though the P&Gs had nothing to say on that subject, and the CSDR did not countenance the use of documented estimates even though such estimates were allowable under the P&Gs. West's Ann.Cal.Gov.Code §§ 11342.600, 17557, 17558.5(a); West's Ann.Cal.Educ.Code § 48209.9 (Repealed).

[6] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

State Controller's Office's Contemporaneous Source Document Rule (CSDR) implemented, interpreted, or made specific the regulatory Parameters and Guidelines (P&Gs) applied to state-mandated reimbursement claims for the Emergency Procedures, Earthquake Procedures and Disasters Program (EPEPD), and thus was a regulation subject to the Administrative Procedure Act (APA), since there were substantive differences between the CSDR and the P&Gs then in effect; unlike the P&Gs, the CSDR barred the use of employee time declarations and certifications as source documents, and the CSDR did not countenance the use of documented estimates. West's Ann.Cal.Gov.Code §§ 11342.600, 17557, 17558.5(a); West's Ann.Cal.Educ.Code §§ 35925–35927, 40041.5, 40042 (Repealed).

[7] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

State Controller's Office's Contemporaneous Source Document Rule (CSDR) implemented, interpreted, or made specific the regulatory Parameters and Guidelines (P&Gs) applied to state-mandated reimbursement claims for the Intradistrict Attendance Program, and thus was a regulation subject to the Administrative Procedure Act (APA), since there were substantive differences between the CSDR and the P&Gs then in effect; unlike the P&Gs, the CSDR barred the use of time studies or employee time declarations and certifications as source documents. West's Ann.Cal.Gov.Code §§ 11342.600, 17557, 17558.5(a); West's Ann.Cal.Educ.Code § 35160.5.

[8] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

State Controller's Office's Contemporaneous Source Document Rule (CSDR) implemented, interpreted, or made specific the regulatory Parameters and Guidelines (P&Gs) applied to state-mandated reimbursement claims for the school district Collective Bargaining Program, and thus was a regulation subject to the Administrative Procedure Act (APA), since there were substantive differences between the CSDR and the P&Gs then in effect; unlike the P&Gs, the CSDR required source documents. West's Ann.Cal.Gov.Code §§ 3540 et seq., 11342.600, 17557, 17558.5(a).

[9] KeyCite Citing References for this Headnote

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak204 k. State officers and boards. Most Cited Cases

118A Declaratory Judgment KeyCite Citing References for this Headnote
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak210 k. Schools and school districts. Most Cited Cases

250 Mandamus KeyCite Citing References for this Headnote
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k79 k. Establishment, maintenance, and management of schools. Most Cited Cases

Declaratory and accompanying traditional mandate relief was an appropriate form of relief, for school districts' challenge to State Controller's Office's policy of using an underground regulation to conduct audits in violation of the Administrative Procedure Act (APA), even though the underground regulation was later incorporated into valid regulations, where the dispute related to audit determinations under the invalid regulation which did not become final prior to the applicable statute of limitations, and there was no adequate administrative remedy because the Commission on State Mandates consistently refused to rule on underground regulation claims. West's Ann.Cal.Gov.Code § 11350.

[10] KeyCite Citing References for this Headnote

157 Evidence
157I Judicial Notice
157k47 k. Administrative rules and regulations. Most Cited Cases

In appeal from trial court's partial grant of declaratory and writ relief against underground regulations used by State Controller's Office in reducing state-mandated reimbursement claims for employee salary and benefit costs, Court of Appeal would not take judicial notice of a subsequent amendment of the regulatory Parameters and Guidelines (P&Gs) applied to the reimbursement claims, which brought the underground regulations into compliance with the Administrative Procedure Act (APA) after the time period at issue in the lawsuit. West's Ann.Cal.Gov.Code §§ 11340 et seq., 17500 et seq.

[11] KeyCite Citing References for this Headnote

157 Evidence
157I Judicial Notice
157k48 k. Official proceedings and acts. Most Cited Cases

In appeal from trial court's partial grant of declaratory and writ relief against underground regulations used by State Controller's Office in reducing school districts' and community college districts' state-mandated reimbursement claims for employee salary and benefit costs, Court of Appeal would not take judicial notice of the Commission on State Mandates Incorrect Reduction Claim caseload summary or the Controller's list of final audit reports for California school districts and community college districts. West's Ann.Cal.Gov.Code § 17558.7(a).

[12] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

Under the statutes requiring reimbursement to local government for state-mandated costs, the amount of an optional student health fee was deducted from the amount reimbursed to community

college districts for the state-mandated cost of the Health Fee Elimination Program, even when districts chose not to charge their students those fees. West's Ann.Cal.Gov.Code §§ 17514, 17556(d); West's Ann.Cal.Educ.Code § 76355(a)(1); § 72246 (Repealed).

See Cal. Jur. 3d, State of California, § 104; 9 Witkin, Summary of Cal. Law (10th ed. 2005) Taxation, § 121.

[13] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

To the extent a local agency or school district has the authority to charge for a state-mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost. West's Ann.Cal. Const. Art. 13B, § 6; West's Ann.Cal.Gov.Code §§ 17514, 17556(d).

[14] KeyCite Citing References for this Headnote

360 States
360III Property, Contracts, and Liabilities
360k111 k. State expenses and charges and statutory liabilities. Most Cited Cases

State Controller's Office had the authority to rely on the Government Code, rather than only on the Parameters and Guidelines (P&Gs) adopted by the Commission on State Mandates, to uphold an audit rule excluding the amount of optional fees from the amount recoverable as state-mandated costs. West's Ann.Cal.Gov.Code §§ 17514, 17556(d).

****36*** Lozano Smith, Gregory A. Wedner and Sloan R. Simmons, Sacramento, for Plaintiffs and Appellants.

Richard L. Hamilton for California School Boards Association and Its Education Legal Alliance, as Amicus Curiae on behalf of Plaintiffs and Appellants Clovis Unified School District, Fremont Unified School District, Newport–Mesa Unified School District, Norwalk–La Mirada Unified School District, Riverside Unified School District, San Juan Unified School District and Sweetwater Union High School District.

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BUTZ, J.

***797** This declaratory relief and writ of mandate action concerns the validity of two auditing rules used by defendant State Controller's Office (Controller). The Controller used these rules in reducing state-mandated reimbursement claims for employee salary and benefit costs submitted from plaintiff school districts and community college districts (hereafter plaintiffs).

Contemporaneous Source Document Rule (CSDR)

The first auditing rule is referred to by plaintiffs as the Contemporaneous Source Document Rule (CSDR). The Controller used this rule to reduce reimbursement claims for the following four state-mandated school district programs during the challenged period straddling fiscal years 1998 to 2003: (1) the School District of Choice Program (SDC); (2) the Emergency Procedures, Earthquake Procedures and Disasters Program (EPEPD); (3) the ***798** Intradistrict Attendance Program; and (4) the Collective Bargaining Program. We conclude this rule was an invalid underground regulation under the state Administrative Procedure Act (APA) during this period. (Gov.Code, § 11340 et seq.) FN1 Consequently, we overturn the Controller's audits for these four programs during this period to the extent they were based on this rule.

FN1. Undesignated statutory references are to the Government Code.

Health Fee Elimination Program: Health Fee Rule

The second auditing rule is the Health Fee Rule, which the Controller used to reduce reimbursement claims for state-****37** mandated health services provided by the plaintiff community college districts pursuant to the Health Fee Elimination Program. We uphold the validity of this rule.

The trial court: (1) invalidated the CSDR as applied to the Intradistrict Attendance and Collective Bargaining Programs (from which the Controller appeals); (2) hinted at the CSDR's invalidity as applied to the SDC and EPEPD Programs but did not grant relief thereon, apparently deeming the administrative remedy sufficient (from which the school districts appeal); and (3) upheld the validity of the Health Fee Rule (from which the community college districts appeal). We shall affirm the judgment regarding the Intradistrict Attendance Program, the Collective Bargaining Program, and the Health Fee Rule, but reverse the judgment, with directions, regarding the SDC and EPEPD Programs.

Because the issues raised in this appeal are almost entirely legal ones subject to our independent review (see *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 434, 268 Cal.Rptr. 244, disapproved on a different ground in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 927 P.2d 296 (*Tidewater*) [whether an auditing rule is an APA regulation is a question of law]), it is unnecessary to set forth a factual background at this stage. Instead, we will proceed straight to our discussion. First, we will briefly summarize the process of state-mandated reimbursement and the concept of underground regulation. Then we will turn our attention to the programs and remedies at issue, weaving in the pertinent facts as we go.

DISCUSSION

I. State-mandated Reimbursement Process

In 1979, California's voters adopted article XIII B, section 6, of the state Constitution, which specifies that if the state imposes any "new program ***799*** or higher level of service" on any local government (including a school district), the state must reimburse the locality for the costs of the program or increased level of service.

In 1984, the Legislature enacted statutes to govern the state mandate process. (§ 17500 et seq.) Under these statutes, the Commission on State Mandates (the Commission) determines, pursuant to a "test claim" process, whether a state program constitutes a reimbursable state mandate. (§§ 17551, subd. (c), 17553.)

Once the Commission determines that a state mandate exists, it adopts regulatory "[P]arameters and [G]uidelines" (P & G's) to govern the state-mandated reimbursement. (§ 17557.) The Controller, in turn, then issues nonregulatory "[C]laiming [I]nstructions" for each Commission-determined mandate; these instructions must derive from the Commission's test claim decision and its adopted P & G's. (§ 17558.) Claiming Instructions may be specific to a particular mandated program, or general to all such programs.

The Controller may audit a reimbursement claim filed by a local agency or school district within three years of the claim's filing or last amendment. (§ 17558.5, subd. (a).)

If the Controller reduces a specific reimbursement claim via an audit, the claimant may file an "[I]ncorrect [R]eduction [C]laim" with the Commission. (§ 17558.7, subd. (a).)

II. The Concept of Invalid Underground Regulation

[1] ☑ In their petitions for writ of mandate and complaints for declaratory relief, the school districts (comprising Clovis, ****38*** Fremont, Newport–Mesa, Norwalk–La Mirada, Riverside, Sweetwater, and San Juan; hereafter collectively, School Districts) allege that the CSDR constitutes an invalid, unenforceable underground regulation under the APA as applied by the Controller in auditing salary and benefit costs in reimbursement claims for the SDC, EPEPD, Intradistrict

Attendance, and Collective Bargaining Programs during the applicable periods roughly encompassing the fiscal years 1998 to 2003.[FN2]

FN2. Because of the large number of school districts and program audits involved, as well as the slightly varying fiscal years at issue corresponding to these districts and program audits, we will use the general phrasing "applicable periods roughly encompassing the fiscal years 1998 to 2003" to describe the audits at issue. The parties are well aware of the particular audits being challenged for this period. Regardless, the School Districts must meet the applicable three-year statute of limitations that governs lawsuits based on statutory liability (like state-mandated reimbursement) for any audits of the four programs that have been determined on the basis of the invalidated CSDR. (Code Civ. Proc., § 338; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 504, fn. 5, 272 Cal.Rptr. 886.) San Juan School District filed its petition and complaint on March 2, 2007. The rest of the School Districts, together, filed their petition and complaint on May 23, 2006. The trial court consolidated these two petitions and complaints on March 27, 2007.

The School Districts made challenges to other programs as well, but these challenges are not at issue on appeal.

***800** In their petition for writ of mandate and complaint for declaratory relief (actually appended to the School Districts' petition and complaint), the community college districts (comprising San Mateo, Santa Monica, State Center, and El Camino; hereafter collectively, College Districts) allege that the Health Fee Rule constitutes an invalid, unenforceable underground regulation under the APA as applied by the Controller in auditing reimbursement claims for the Health Fee Elimination Program or, alternatively, that the Controller's auditing actions in this respect were beyond its lawful authority.

The basic legal principles that apply to these allegations are as follows:

" 'If a rule constitutes a "regulation" within the meaning of the APA (other than an "emergency regulation" ...) it may not be adopted, amended, or repealed except in conformity with "basic minimum procedural requirements" ' " that include public notice, opportunity for comment, agency response to comment, and review by the state Office of Administrative Law. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333, 42 Cal.Rptr.3d 47, 132 P.3d 249 (*Morning Star*).) "These requirements promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking." (*Ibid.*)

Any regulation " 'that substantially fails to comply with these requirements may be judicially declared invalid' " and is deemed unenforceable. (*Morning Star, supra,* 38 Cal.4th at p. 333, 42 Cal.Rptr.3d 47, 132 P.3d 249; § 11350, subd. (a).)

[2] A "regulation" under the APA "means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (§ 11342.600.) As we will later explain more fully, an APA regulation has two principal characteristics: It must apply generally; and it must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. (*Morning Star, supra,* 38 Cal.4th at pp. 333–334, 42 Cal.Rptr.3d 47, 132 P.3d 249; ***39** *Tidewater, supra,* 14 Cal.4th at p. 571, 59 Cal.Rptr.2d 186, 927 P.2d 296.)

*801 III. The CSDR as Applied to the SDC, EPEPD, Intradistrict Attendance, and Collective Bargaining Programs

We will start with the SDC Program. We do so because, of these four programs, the Commission's APA-valid, pre-May 27, 2004 P & G's for the SDC Program most closely resemble the Controller's CSDR.[FN3] If we conclude, nevertheless, that the CSDR is an underground regulation that violates the APA in this context, we will have to conclude similarly for these three other programs. It is undisputed that the Controller's CSDR was not enacted in compliance with APA procedure.

FN3. On May 27, 2004, the Commission validly amended its SDC P & G's to adopt this CSDR language.

As we shall explain, we conclude that the CSDR, as applied to the (pre-May 27, 2004) SDC Program, is an underground, unenforceable regulation under the APA. Accordingly, the CSDR is invalid as applied to the School Districts' SDC Programs for the applicable periods roughly encompassing the fiscal years 1998 to 2003 (see fn. 2, *ante*), and invalid in parallel fashion to the three other programs as well.

The Commission determined, in the mid–1990's, that the SDC Program imposed a reimbursable state-mandated program on school districts by establishing the right of parents/guardians of students, who were prohibited from transferring to another school district, to appeal to the county board of education. (See former Ed.Code, § 48209.9, inoperative July 1, 2003.)

From August 24, 1995, until May 27, 2004, the Commission's P & G's for the SDC Program set forth the following two requirements for school districts seeking SDC staté-mandated reimbursement for employee salary and benefit costs: (1) "Identify the employee(s) and their job classification, describe the mandated functions performed and specify the actual number of hours devoted to each function, the productive hourly rate and the related benefits. The average number of hours devoted to each function may be claimed if supported by a documented time study"; and (2) "For auditing purposes, all costs claimed must be traceable to source documents (e.g., employee time records, invoices, receipts, purchase orders, contracts, etc.) and/or worksheets that show evidence of and the validity of such claimed costs."

The Commission's SDC P & G's divide the subject of reimbursable costs into three categories: employee salaries and benefits; materials and supplies; and contracted services. The examples set forth in these P & G's for "source ***802** documents" align with these three categories: "employee time records" for employee salaries and benefits; "invoices," "receipts" and "purchase orders" for materials and supplies; and "contracts" for contracted services. At issue in this appeal for the SDC, EPEPD, Intradistrict Attendance, and Collective Bargaining Programs are just the cost category of employee salaries and benefits.

From the initial issuance of the Commission's SDC P & G's in 1995 until May 27, 2004, the Controller's SDC-specific Claiming Instructions substantively aligned with the SDC P & G's.

However, in September 2003, the Controller revised its general Claiming Instructions (that apply to state-mandated reimbursement claims in general) to set ***40** forth, for the first time, what has become known as the CSDR. The CSDR states:

"To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

"Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, 'I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct based upon personal knowledge.' Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents."

Substantial evidence showed that prior to the use of the CSDR in Controller audits, school districts

obtained SDC state-mandated reimbursement for employee salary and benefit costs based on (1) declarations and certifications from the employees that set forth, after the fact, the time they had spent on SDC-mandated tasks; or (2) an annual accounting of time determined by the number of mandated activities and the average time for each activity. After the Controller began using the CSDR in its auditing of SDC reimbursement claims, the Controller deemed these declarations, certifications, and accounting methods insufficient, and reduced the ***803*** reimbursement claims accordingly. (Substantial evidence also showed that the Controller, in 2000, began applying a CSDR requirement in field audits of SDC reimbursement claims, before the CSDR was expressed in the Controller's general Claiming Instructions in September 2003 or adopted in the Commission's SDC P & G's on May 27, 2004.)

The question is whether the Controller's CSDR constituted an underground, unenforceable regulation that the Controller used in auditing the School Districts' SDC Program for the fiscal years 1998 to 2003, because the CSDR constituted a state agency regulation that was not adopted in conformance with the APA prior to its valid adoption in the Commission's SDC P & G's on May 27, 2004. We answer this question "yes."

[3] " ' *A regulation subject to the APA* ... has *two principal identifying characteristics.* [Citation.] *First,* the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] *Second,* the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure." ' " (*Morning Star, supra,* 38 Cal.4th at pp. 333–334, 42 Cal.Rptr.3d 47, 132 P.3d 249, quoting *Tidewater, supra,* 14 Cal.4th at p. 571, 59 Cal.Rptr.2d 186, 927 P.2d 296, italics added.)

[4] As to the first criterion—whether the rule is intended to apply generally—substantial evidence supports the trial ****41*** court's finding that the CSDR was "applie[d] generally to the auditing of reimbursement claims ...; the Controller's auditors ha[d] no discretion to judge on a case [-]by[-]case basis whether to apply the rule." (The trial court made this finding in the context of ruling on the Intradistrict Attendance and Collective Bargaining Programs, but this finding is a general one that applies equally to the SDC Program. The trial court did not apply this general finding to the SDC Program only because the court reasoned that the CSDR was not an APA-violative underground regulation in the SDC context, as the Commission later adopted the CSDR into its SDC P & G's (see fn. 3, *ante*). As we shall explain later, we reject this reasoning involving subsequent adoption.)

[5] The CSDR also meets the second criterion of being a regulation: It implements, interprets, or makes specific the law enforced or administered by the Controller. The Controller argues, to the contrary, that the CSDR "merely restates" the source document requirement found in the pre-May 27, 2004 Commission P & G's for the SDC Program, and that "source documents" are, by their sourceful nature, contemporaneous. As we explain, we reject this argument.

Admittedly, the pre-May 27, 2004 SDC P & G's stated that, "[f]or auditing purposes, all costs claimed must be traceable to source documents (e.g., ***804*** employee time records, invoices, receipts, purchase orders, contracts, etc.) and/or worksheets that show evidence of and the validity of such claimed costs." However, the Controller's CSDR, in contrast to these P & G's, did not equate "source documents" with "worksheets," but relegated "worksheets" to the second-class status of "corroborating documents" that can only serve as evidence that corroborates "source documents." This is no small matter either. This is because, prior to the Controller using the CSDR to audit reimbursement claims, the School Districts, in making these claims, had used employee declarations and certifications and average time accountings to document the employee time spent on SDC-mandated activities; and such methods can be deemed akin to worksheets.

More significantly, the CSDR expressly states that employee declarations and certifications are only corroborating documents, *not* source documents; the pre-May 27, 2004 SDC P & G's had nothing to say on this subject. In effect, then, the CSDR bars the use of employee time declarations and certifications as source documents or source document-equivalent worksheets, in contrast to the pre-

May 27, 2004 P & G's.

Along similar lines, the pre-May 27, 2004 SDC P & G's also stated that the "average number of [employee] hours devoted to each [mandated] function may be claimed if supported by a documented time study"; the record showed that such a time study is a documented estimate. The CSDR, which recognizes only actual costs traceable and supported by contemporaneous source documents, does not countenance such estimation.

Nor may the Controller point to the examples of the source documents listed in the pre-May 27, 2004 SDC P & G's and argue they show the contemporaneous nature of source documents: "employee time records, invoices, receipts, purchase orders, contracts, etc." First, this argument ignores the source document-equivalent of "worksheets" set forth in these P & G's, as discussed above. And, second, while the CSDR lists "employee time records," "invoices," and "receipts" as source documents, it specifies that "purchase orders," "contracts" (and "worksheets") are only ***42** corroborating documents, not source documents.

Finally, the School Districts that had used employee declarations and certifications and average time accountings to document time for reimbursement claims also note that it is *now* physically impossible to comply with the CSDR's requirement of contemporaneousness that "[a] source document is a ***805** document *created at or near the same time the actual cost was incurred* for the event or activity in question." [FN4] (Italics added.)

> FN4. As a related aside, it is interesting to note that the Controller's SDC-specific Claiming Instructions that were in place during the pre–2004 P & G's stated that, "[f]or audit purposes, all supporting documents must be retained [by claimant] [only] for a period of two years after the end of the calendar year in which the reimbursement claim was filed or last amended, whichever is later"; but the Controller had three years in which to conduct a reimbursement audit "after the date that the actual reimbursement claim is filed or last amended, whichever is later." (§ 17558.5, subd. (a).)

Given these substantive differences between the Commission's pre-May 27, 2004 SDC P & G's and the Controller's CSDR, we conclude that the CSDR implemented, interpreted or made specific the following laws enforced or administered by the Controller: the Commission's pre-May 27, 2004 P & G's for the SDC Program (§ 17558) [the Commission submits regulatory P & G's to the Controller, who in turn issues nonregulatory Claiming Instructions based thereon]; and the Controller's statutory authority to audit state-mandated reimbursement claims (§ 17561, subd. (d)(2)).

Consequently, the CSDR meets the two criteria for being an APA regulation. And because the CSDR, as applied to the SDC Program, was not adopted as a regulation in compliance with the APA rule-making procedures until its May 27, 2004 incorporation into the SDC P & G's, this CSDR is an underground and unenforceable regulation as applied to the audits of the School Districts' SDC Programs for the applicable periods roughly encompassing the fiscal years 1998 to 2003. (See fn. 2, *ante*.) These audits are invalidated to the extent they used this CSDR.

[6] [7] [8] As we noted at the outset of this part of the opinion, if we were to conclude (as we now have done) that the CSDR is an underground regulation that violates the APA in the SDC Program context presented here, we would have to conclude similarly for the EPEPD, Intradistrict Attendance, and Collective Bargaining Programs too. This is because the Commission's P & G's for these latter three programs less resembled the Controller's CSDR than did the Commission's pre-May 27, 2004 P & G's for the SDC Program. We now turn to the EPEPD, Intradistrict Attendance, and Collective Bargaining Programs, which we will describe briefly in order.

The EPEPD Program was found to be a reimbursable state-mandated program in 1987. This program requires school districts to establish earthquake procedures for each of its school buildings, and to allow use of its buildings, grounds and equipment for mass care and welfare shelters during public disasters or emergencies. (Former Ed.Code, §§ 35925–35927, 40041.5, 40042.)

***806** From 1991 until June 2, 2003, the Commission's P & G's for the EPEPD Program required school districts seeking state-mandated reimbursement for employee salary and benefit costs: (1) to "provide a listing of each employee ... and the number of hours devoted to their [mandated] function"; and (2) "[f]or auditing purposes, all costs claimed may be ***43** traceable to source documents and/or worksheets that show evidence of the validity of such costs." The Controller's EPEPD-specific Claiming Instructions, since 1996, have stated that "Source documents required to be maintained by the [reimbursement] claimant may include, but are not limited to, employee time cards and/or cost allocation reports." (The Commission, in like fashion to what it did with the SDC Program, incorporated the CSDR into its P & G's for the EPEPD Program, effective June 2, 2003.)

These pre-June 2, 2003 P & G's for the EPEPD Program parallel the pre-May 27, 2004 P & G's for the SDC Program, but even less resemble the Controller's CSDR than did those SDC P & G's. For the reasons set forth above involving the SDC Program, then, we conclude that the Controller's CSDR is an underground, unenforceable regulation as applied to the audits of the School Districts' EPEPD Programs for the applicable periods roughly encompassing the fiscal years 1998 to 2003. (See fn. 2, *ante.*) These audits are invalidated to the extent they used this CSDR.

The Intradistrict Attendance Program, in 1995, was found to be a reimbursable state-mandated program. This program establishes a policy of open enrollment within a school district for district residents. (Former Ed.Code, § 35160.5.)

Since 1995, the Commission's P & G's for the Intradistrict Attendance Program have required school districts seeking state-mandated reimbursement for employee salary and benefit costs: (1) to "[i]dentify the employee(s) and their job classification ... and specify the actual number of hours devoted to each [mandated] function.... The average number of hours devoted to each function may be claimed if supported by a documented time study"; and (2) "[f]or auditing purposes, all costs claimed must be traceable to source documents and/or worksheets that show evidence of the validity of such costs." For the 1998 to 2003 period of fiscal years at issue, the Controller's Intradistrict Attendance Program-specific Claiming Instructions substantively mirrored P & G's No. (1) above (except for the "average number of hours" provision), and stated as to source documents: "Source documents required to be maintained by the claimant may include, but are not limited to, employee time records that show the employee's actual time spent on this mandate." (In early 2010, the Commission incorporated the Controller's CSDR into the Intradistrict Attendance Program P & G's; see fn. 5, *post.*)

***807** Applying the same reasoning we have applied above with respect to the SDC and the EPEPD Programs, we conclude that the Controller's CSDR is an underground, unenforceable regulation as applied to the audits of the School Districts' Intradistrict Attendance Programs for the applicable periods roughly encompassing the fiscal years 1998 to 2003. (See fn. 2, *ante.*) These audits are invalidated to the extent they used this CSDR.

That leaves the Collective Bargaining Program, which was found to be a reimbursable state-mandated program in 1978 (by the Commission's predecessor, the State Board of Control). This program requires school district employers to collectively bargain with represented employees, and to publicly disclose the major provisions of their agreements prior to final adoption. (§ 3540 et seq.)

If the Commission's pre-May 27, 2004 P & G's for the SDC Program most closely resemble the Controller's CSDR, the P & G's for the Collective Bargaining Program bear the least resemblance. As pertinent, the Collective Bargaining Program P & G's require school districts seeking reimbursement***44** for employee salary and benefit costs to simply "[s]upply workload data requested ... to support the level of costs claimed" and "[s]how the classification of the employees involved, amount of time spent, and their hourly rate"; nothing is said about "source documents." The Controller's Collective Bargaining Program-specific Claiming Instructions substantively mirror those of the Intradistrict Attendance Program, stating that source documents include employee time records that show the employee's actual time spent on the mandated function. (And as with the Intradistrict Attendance Program, the Commission, in early 2010, incorporated the Controller's CSDR into the Collective Bargaining Program P & G's; see fn. 5, *post.*)

Consequently, employing the same reasoning we have employed above, we conclude that the Controller's CSDR is an underground, unenforceable regulation as applied to the audits of the School Districts' Collective Bargaining Programs for the applicable periods roughly encompassing the fiscal years 1998 to 2003. (See fn. 2, *ante.*) These audits are invalidated to the extent they used this CSDR.

IV. Declaratory and Related Writ of Mandate Relief

The trial court declared that the Controller's CSDR, as applied to the audits of the Intradistrict Attendance and Collective Bargaining Programs for the 1998 to 2003 period of fiscal years, was an invalid and void underground regulation under the APA. Correspondingly, the trial court issued a peremptory writ of mandate (traditional mandamus) invalidating these CSDR-based audits to the extent they were not final audit determinations for more than ***808*** three years before the School Districts filed their respective lawsuits on May 23, 2006 (Clovis et al.) and March 2, 2007 (San Juan). This three-year period is the applicable three-year statute of limitations under Code of Civil Procedure section 338, subdivision (a), for enforcing a statutory liability like state-mandated reimbursement. We are affirming this part of the trial court's judgment.

However, the trial court refused to provide, in parallel fashion, declaratory and writ of mandate relief for the CSDR-based audits involving the SDC and EPEPD Programs. The School Districts contend the trial court erred in this respect. We agree.

In refusing to provide this relief, the trial court reasoned that, since the Commission had incorporated the Controller's CSDR into the Commission's regulatory P & G's for the SDC and EPEPD Programs, there was no longer an actual and ongoing controversy upon which to grant declaratory and related mandate relief concerning the CSDR's invalidity as an underground regulation in this context; and the Commission could administratively determine, pursuant to the Incorrect Reduction Claim process, the past audits that had used the CSDR before its incorporation into the SDC and EPEPD P & G's. This is where we part company with the trial court.

Our departure is based on section 11350 of the APA and the legal principles set forth in *Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 271 Cal.Rptr. 270 (*Native Salmon*) and its progeny.

Section 11350 of the APA specifies that "[a]ny interested person may obtain a judicial declaration as to the validity of any regulation ... by bringing an action for declaratory relief...." (§ 11350, subd. (a).)

In *Native Salmon,* the plaintiffs sought declaratory relief against the state forestry department, alleging that it was department policy, with respect to timber harvest plans: (1) to delay responses to public comments, and (2) to not evaluate the cumulative***45*** impact of logging activities in the plans. The *Native Salmon* court concluded that declaratory relief was appropriate in this context, stating: "[Plaintiffs] ... challenge not a specific [administrative] order or decision [which is generally subject to review only pursuant to a writ of *administrative* mandate, rather than traditional mandate], or even a series thereof, but an overarching, quasi-legislative policy set by an administrative agency. Such a policy is subject to review in an action for declaratory relief.... [¶] ... [R]eview of specific, discretionary administrative decisions [must not be confused] with review of a generalized agency policy. Declaratory relief directed to *policies* of administrative agencies is not an unwarranted control of discretionary, specific agency decisions." ***809*** (*Native Salmon, supra,* 221 Cal.App.3d at p. 1429, 271 Cal.Rptr. 270; accord, *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1566, 55 Cal.Rptr.2d 465; see also *Simi Valley Adventist Hospital v. Bontá* (2000) 81 Cal.App.4th 346, 354–355, 96 Cal.Rptr.2d 633.)

[9] [10] [11] Similarly, here, the School Districts have challenged "an overarching, quasi-legislative policy set by an administrative agency" (*Native Salmon, supra,* 221 Cal.App.3d at p. 1429, 271 Cal.Rptr. 270) rather than a specific, discretionary administrative decision: i.e., the Controller's policy of using the (underground) CSDR to conduct audits in the SDC and EPEPD Programs for the

period straddling the fiscal years 1998 to 2003. Declaratory and accompanying traditional mandate relief is appropriate in this context; this is an ongoing controversy limited by the three-year statute of limitations noted above.[FN5]

FN5. The Controller had requested that, at a minimum, we stay this appeal in light of the Commission's pending decision to incorporate the Controller's CSDR into the Commission's P & G's for the Intradistrict Attendance and Collective Bargaining Programs, as the Commission has done for the SDC and EPEPD Programs. In a subsequent request for judicial notice, the Controller has now noted that the Commission, on January 29, 2010, amended its P & G's for the Intradistrict Attendance and Collective Bargaining Programs to adopt the CSDR for each program. We deny this request for judicial notice. This is because the central issue in the present appeal concerns the Controller's policy of using the CSDR *during the 1998 to 2003 fiscal years,* when the CSDR was an underground regulation. This issue is not resolved by the Commission's *subsequent* incorporation of the CSDR into its Intradistrict Attendance and Collective Bargaining Programs' P & G's.

Also, we deny the School Districts' request for judicial notice of the Commission's Incorrect Reduction Claim caseload summary and the Controller's list of final audit reports for California school districts and community college districts.

And there is no adequate administrative remedy. The trial court made a finding—supported by substantial evidence—that the Commission "consistently refuses to rule on underground regulation claims on the basis of an opinion that it lacks jurisdiction to decide such claims." (The trial court made this finding in discussing the Intradistrict Attendance and Collective Bargaining Programs, but the finding applies equally to the SDC and EPEPD Programs.)

We conclude that declaratory and accompanying traditional mandate relief applies not only to the Intradistrict Attendance and Collective Bargaining Programs, but also to the SDC and EPEPD Programs for the fiscal years at issue. [FN6]

FN6. In light of our resolution, we need not consider the School Districts' alternative claim that the Controller's CSDR constitutes an unlawful retroactive rule, or the School Districts' additional claim that regardless whether an actual controversy exists for purposes of declaratory relief, the requested writ relief is not moot.

***810 V. Health Fee Elimination Program**

[12] In 1986, and again in 1989 (after statutory amendment), the Commission determined**46 that the Health Fee Elimination Program imposed a reimbursable state-mandated cost on those community college districts that provide health services, by requiring those districts to maintain in the future the level of service they had provided in the 1986–1987 fiscal year (termed, the "maintenance of effort" requirement); this "maintenance of effort" had to take place even if the districts, as they were and are permitted to do under the relevant statute, eliminated their nominal statutory student health fee ($7.50 per semester maximum (former Ed.Code, § 72246, Stats.1984, 2d Ex.Sess., ch. 1, p. 6642)); $10 per semester maximum (current Ed.Code, § 76355, subd. (a)(1)).[FN7]

FN7. As Education Code section 76355, subdivision (a)(1) states: "The governing board of a district maintaining a community college may require community college students to pay a fee in the total amount of not more than ten dollars ($10) for each semester, seven dollars ($7) for summer school, seven dollars ($7) for each intersession of at least four weeks, or seven dollars ($7) for each quarter for health supervision and services, including direct or indirect medical and hospitalization services, or the operation of a student health center or centers, or both." (An inflationary adjustment is provided for in subdivision (a)(2) of this section.)

The College Districts contend that the Controller's Claiming Instruction for the Health Fee Elimination Program is an underground regulation under the APA and beyond the Controller's authority. Specifically, the College Districts argue that the Controller's Health Fee Rule misapplies the Commission's Health Fee Elimination Program P & G's by automatically reducing reimbursement claims by the amount that districts are statutorily authorized to charge students for health fees, even when a district chooses not to charge its students those fees.

Since 1989, the Commission's Health Fee Elimination Program P & G's have stated in pertinent part:

"Any offsetting savings the claimant experiences as a direct result of this statute [i.e., the health fee statutes—formerly Ed.Code, § 72246; now Ed.Code, § 76355] must be deducted from the [reimbursement] costs claimed. In addition, reimbursement for this mandate received from any source, e.g., federal, state, etc., shall be identified and deducted from this claim. This shall include the amount of $7.50 per full-time student per semester, $5.00 per full-time student for summer school, or $5.00 per full-time student per quarter, as authorized by Education Code section 72246[, subdivision] (a). This shall also include payments (fees) received from individuals other than students who are not covered by Education Code Section 72246 for health services."

***811** The Controller's Health Fee Rule (i.e., its Health Fee Elimination Program-specific Claiming Instruction) states in pertinent part:

"Eligible claimants will be reimbursed for health service costs at the level of service provided in the 1986/87 fiscal year. The reimbursement will be reduced by the amount of student health fees authorized per the Education Code [section] 76355."

The College Districts maintain that the Controller's Health Fee Rule constitutes an invalid, underground regulation—i.e., one not adopted pursuant to the APA—because it meets the two-part test of a "regulation": (1) the Controller generally applies it; and (2) the rule implements, interprets or makes specific the Commission's Health Fee Elimination Program P & G's. ***47** (*Morning Star, supra,* 38 Cal.4th at pp. 333–334, 42 Cal.Rptr.3d 47, 132 P.3d 249.)

There is no quibble with part (1)—general application. The real issue is with part (2) of the test—defining a "regulation" as implementing, interpreting, or making specific the Health Fee Elimination Program P & G's. The College Districts argue that those P & G's require that the mandate claimant have actually "experience[d]" or "received" an amount of health service money for that amount to be deducted from the reimbursement claim. That is, if a college district does not charge its students a health service fee, as the district is statutorily permitted to do, then the district has not "experienced" or "received" that fee, and that amount cannot be deducted. The College Districts note that the Health Fee Rule, by contrast, states flatly that "reimbursement will be reduced by the amount of student health fees authorized per the Education Code [section] 76355."

The College Districts' argument carries some weight, especially when viewed solely within the prism of comparing the Health Fee Elimination Program P & G's to the Health Fee Rule semantically. But the argument falters when exposed to the broader context of the nature of state-mandated costs and common sense.

As for the nature of state-mandated costs, section 17514 defines "costs mandated by the state" to mean "any *increased costs* which a local agency or school district is *required to incur* after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution." (Italics added.) And section 17556 reflects this definition by stating that costs are not deemed mandated by the state to the extent the "local agency or school district *has the authority* to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." (§ 17556, subd. (d), italics added.)

[13] *812 The College Districts point out, though, in a series of overlapping arguments, that sections 17514 and 17556 govern the *Commission's* determination of whether a program is a state-mandated program, not the *Controller's* determination as to audit reductions; and the Commission has already found the Health Fee Elimination Program to be a state-mandated program. This observation, however, does not diminish the basic principle underlying the state mandate process that sections 17514 and 17566, subdivision (d) embody: To the extent a local agency or school district "has the authority" to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost.[FN8] (SEE *COnnell v. superiOr court* (1997) 59 cal.app.4th 382, 401, 69 Cal.Rptr.2d 231 ["the plain language of [section 17556, subdivision (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program"]; see *Connell,* at pp. 397–398, 69 Cal.Rptr.2d 231.)

> FN8. In light of sections 17514 and 17556, subdivision (d), the Commission found the Health Fee Elimination Program to be a reimbursable state-mandated program to the extent the cost to community college districts of maintaining their level of health services at the 1986–1987 level, as required by the Health Fee Elimination Program mandate, is not covered by the nominal health fee authorized by section 76355, subdivision (a)(1) ($10 maximum per semester per student).

And this basic principle flows from common sense as well. As the Controller succinctly**48 puts it, "Claimants can choose not to require these fees, but not at the state's expense."

[14] The College Districts also argue that the Controller lacks the authority to rely on these Government Code sections to uphold its Health Fee Rule. The argument is that, since the Health Fee Rule is a claiming instruction, its validity must be determined *solely* through the Commission's P & G's. To accept this argument, though, we would have to ignore, and so would the Controller, the fundamental legal principles underlying state-mandated costs. We conclude the Health Fee Rule is valid.

DISPOSITION

We direct the trial court to issue a peremptory writ of mandate that invalidates the Controller's audits of the School Districts' SDC and EPEPD Program reimbursement claims for the applicable periods identified in footnote 2, *ante,* encompassing the fiscal years 1998 to 2003, to the extent those audits were based on the CSDR and did not become final audit determinations prior to the applicable three-year statute of limitations. If it chooses to do so, the Controller may re-audit the relevant reimbursement claims based on the documentation requirements of the P & G's and claiming *813 instructions when the mandate costs were incurred (i.e., not using the CSDR). In all other respects, the judgment is affirmed.

The parties shall each bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

We concur: SCOTLAND, P.J., and NICHOLSON, J.

Cal.App. 3 Dist.,2010.
Clovis Unified School Dist. v. Chiang
188 Cal.App.4th 794, 116 Cal.Rptr.3d 33, 260 Ed. Law Rep. 877, 10 Cal. Daily Op. Serv. 12,281, 2010 Daily Journal D.A.R. 14,831

Briefs and Other Related Documents (Back to top)

• 2010 WL 4358573 (Appellate Petition, Motion and Filing) State Controller's Petition for Rehearing

(Oct. 6, 2010) Original Image of this Document (PDF)
• 2010 WL 438315 (Appellate Brief) Combined Application for Permission to File Amicus Curiae Brief and Proposed Amicus Curiae Brief of the California School Boards Association and Its Education Legal Alliance in Support of Plaintiffs/Respondents and Cross-Appellants Clovis Unified Sch ool District, et al. School Districts (Jan. 25, 2010) Original Image of this Document (PDF)
• 2010 WL 438312 (Appellate Brief) State Controller's Reply Brief (Jan. 11, 2010) Original Image of this Document (PDF)
• 2010 WL 438313 (Appellate Brief) Clovis Unified School District et al.'s Appellants' Reply Brief (Jan. 10, 2010) Original Image of this Document (PDF)
• 2010 WL 438314 (Appellate Brief) San Mateo County Community College District et al.'s Appellants' Reply Brief (Jan. 10, 2010) Original Image of this Document (PDF)
• 2009 WL 5243436 (Appellate Brief) State Controller's Combined Responding Brief to Clovis Unified School District et al.'s and Community College Districts' Opening Briefs (Nov. 30, 2009) Original Image of this Document (PDF)
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• 2009 WL 3071755 (Appellate Brief) State Controller's Opening Brief (Sep. 1, 2009) Original Image of this Document (PDF)

Judges and Attorneys (Back to top)

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Judges

• **Butz, Hon. M. Kathleen**
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Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• **Connelly, Hon. Lloyd George Jr.**
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Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

• **Nicholson, Hon. George W.**
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Briefs and Other Related Documents
Judges and Attorneys

Supreme Court of California
Pauline FAIRBANKS et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Farmers New World Life Insurance Co. et al., Real Parties in Interest.

No. S157001.
April 20, 2009.

Background: Insureds, on behalf of themselves and others similarly situated, brought action against life insurer alleging, inter alia, unfair and deceptive practices under Consumer Legal Remedies Act (CLRA), in connection with marketing of policies. The Superior Court, Los Angeles County, No. BC305603, Anthony J. Mohr, J., granted insurer's "no-merit" motion to dismiss CLRA cause of action. Insureds petitioned for writ of mandate. The Court of Appeal denied petition. The Supreme Court granted insured's petition for review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:
(1) life insurance is not a "good" covered by the CLRA, and
(2) life insurance is not a "service" covered by the CLRA.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

217 Insurance
217I In General; Nature of Insurance
217k1007 Types of Insurance
217k1011 k. Life. Most Cited Cases

217 Insurance KeyCite Citing References for this Headnote
217XIII Contracts and Policies
217XIII(A) In General
217k1711 Nature of Contracts or Policies
217k1716 k. Particular types of insurance. Most Cited Cases

"Life insurance" is a contract of indemnity under which, in exchange for the payment of premiums, the insurer promises to pay a sum of money to the designated beneficiary upon the death of the named insured. West's Ann.Cal.Ins.Code §§ 22, 101.

[2] KeyCite Citing References for this Headnote

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General
29Tk139 Persons and Transactions Covered Under General Statutes
29Tk145 k. Goods or services. Most Cited Cases

Life insurance is not a "good" covered by the Consumers Legal Remedies Act (CLRA), because it is not a tangible chattel. West's Ann.Cal.Civ.Code § 1761(a).

[3] KeyCite Citing References for this Headnote

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk139 Persons and Transactions Covered Under General Statutes
29Tk145 k. Goods or services. Most Cited Cases

Life insurance is not a "service" covered by the Consumers Legal Remedies Act (CLRA), because an insurer's contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel; omission from CLRA of the word "insurance," which appeared in model law, indicates legislative intent that CLRA should not cover insurance. West's Ann.Cal.Civ.Code § 1761(b).

See Cal. Civil Practice (Thomson Reuters/West 2008) Business Litigation, § 51:3; Annot., Coverage of insurance transactions under state consumer protection statutes (1989) 77 A.L.R.4th 991; Cal. Jur. 3d, Consumer and Borrower Protection Laws, § 129.

[4] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.6 k. Words used. Most Cited Cases

The use of differing language in otherwise parallel statutory provisions supports an inference that a difference in meaning was intended.

[5] KeyCite Citing References for this Headnote

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases

A judicial decision is not authority for a point that was not actually raised and resolved.

[6] KeyCite Citing References for this Headnote

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity. Most Cited Cases

A liberal construction mandate affects statutory construction only when the statutory language is

ambiguous and the intent of the enacting body is in doubt; it cannot be invoked when the meaning of the statutory language is not otherwise uncertain.

[7] KeyCite Citing References for this Headnote

217 Insurance
217II Regulation in General
217II(C) State Agencies and Regulation
217k1022 k. In general. Most Cited Cases

Proposition 103, which added statutory provision making the business of insurance "subject to the laws of California applicable to any other business," does not apply to life insurance. West's Ann.Cal.Ins.Code § 1861.03(a).

[8] KeyCite Citing References for this Headnote

217 Insurance
217II Regulation in General
217II(C) State Agencies and Regulation
217k1022 k. In general. Most Cited Cases

Assuming that statutory provision making the business of insurance "subject to the laws of California applicable to any other business," applies to the insurance industry generally, its effect is merely to preclude courts from exempting insurance from general laws that would otherwise apply to it. West's Ann.Cal.Ins.Code § 1861.03(a).

[9] KeyCite Citing References for this Headnote

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk139 Persons and Transactions Covered Under General Statutes
29Tk144 k. Subject matter of transaction in general. Most Cited Cases

Statutory provision making the business of insurance "subject to the laws of California applicable to any other business," does not subject insurance businesses to the Consumers Legal Remedies Act (CLRA), since the CLRA is not an otherwise applicable general law; the CLRA applies only to transactions for the sale or lease of consumer "goods" or "services" as those terms are defined in the act. West's Ann.Cal.Ins.Code § 1861.03(a); West's Ann.Cal.Civ.Code § 1761.

[10] KeyCite Citing References for this Headnote

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk139 Persons and Transactions Covered Under General Statutes
29Tk144 k. Subject matter of transaction in general. Most Cited Cases

The ancillary services that insurers provide to actual and prospective purchasers of life insurance do not bring life insurance policies within the coverage of the Consumers Legal Remedies Act (CLRA). West's Ann.Cal.Civ.Code § 1761(b).

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Horvitz & Levy, Mitchell C. Tilner and Robert H. Wright, Encino, for American Council of Life Insurers, American Insurance Association, Association of California Insurance Companies, Association of California Life and Health Insurance Companies, Pacific Association of Domestic Insurance Companies and Personal Insurance Federation of California as Amici Curiae on behalf of Real Parties in Interest.

KENNARD, J.

***59 **202** Enacted in 1970, the Consumers Legal Remedies Act (Civ.Code, § 1750 et seq.) prohibits specified unfair and deceptive ***281** acts and practices in a "transaction intended to result or which results in the sale or lease of goods or services to any consumer" (*id.*, § 1770, subd. (a)). The question we decide here is whether life insurance is a service subject to the act's remedial provisions. We conclude that it is not. As this is consistent with the Court of Appeal's decision, we affirm its judgment.

I

In November 2003, plaintiff Pauline Fairbanks filed a complaint in superior court, on behalf on herself and all others similarly situated, naming as defendants both Farmers Group, Inc., and Farmers New World Life Insurance Company (collectively, Farmers). Michael Cobb was named as an additional plaintiff in the third amended complaint, which is the pleading at issue here.

Plaintiffs Fairbanks and Cobb have alleged that they are California residents who have purchased Farmers' policies of universal life insurance and flexible premium universal life insurance. Fairbanks is a Farmers agent; Cobb, apparently, is not. Plaintiffs sought to bring this action as a class action on behalf of all persons who purchased similar Farmers policies between November 3, 1984, and December 31, 1996.

***60** Plaintiffs have alleged that Farmers engaged in various deceptive and unfair practices**203** in the marketing and administration of its universal life insurance and flexible premium universal life insurance policies. Among the causes of action that plaintiffs alleged was a claim for violation of the Consumers Legal Remedies Act. As to that claim, the trial court granted Farmers' motion for judgment on the pleadings. The trial court concluded that the Consumers Legal Remedies Act did not apply because the life insurance policies that Farmers issued to plaintiffs were neither "goods" nor "services" as defined in that act.

Plaintiffs sought review of the trial court's ruling by petitioning the Court of Appeal for a writ of mandate. After issuing an order to show cause, the Court of Appeal denied the petition. Like the trial court, the Court of Appeal concluded that life insurance is not subject to the protections of the Consumers Legal Remedies Act. We granted plaintiffs' petition for review. FN1

> FN1. Although the parties have framed the issue as whether insurance in general is a service for purposes of the Consumers Legal Remedies Act, and although both the trial court and the Court of Appeal took that broad view of the issue, we have narrowed the issue to focus only on life insurance.

II

In *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 376, 149 Cal.Rptr. 360, 584 P.2d 497, this court remarked that "insurance is technically neither a 'good' nor a 'service' within the meaning of the [Consumers Legal Remedies Act]." Because the issue was not presented there, that statement was dictum. Nevertheless, federal district courts have relied upon it in concluding that annuities, which are included within the Insurance Code's definition of life insurance (Ins.Code, § 101), are neither goods nor services the sale of which is subject to regulation under the Consumers Legal Remedies Act. (*Estate of Migliaccio* (C.D.Cal.2006) 436 F.Supp.2d 1095, 1108–1109; *Bacon ex rel. Moroney v. American Intern. Group, con ex rel. Moroney v. American Intern. Group* (N.D.Cal.2006) 64 Fed. Rules Serv.3d 142, 2006 WL 305970.)

The Consumers Legal Remedies Act defines "goods" as "tangible chattels bought ***282** or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not *61 severable from the real property." (Civ.Code, § 1761, subd. (a).) It defines "services" as "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." (*Id.*, § 1761, subd. (b).)

[1] [2] [3] Life insurance is a contract of indemnity under which, in exchange for the payment of premiums, the insurer promises to pay a sum of money to the designated beneficiary upon the death of the named insured. (*Estate of Barr* (1951) 104 Cal.App.2d 506, 508, 231 P.2d 876; see Ins.Code, §§ 22, 101.) Because life insurance is not a "tangible chattel," it is not a "good" as that term is defined in the Consumers Legal Remedies Act. (Civ.Code, § 1761, subd. (a).) Neither is life insurance a "service" under the act. An insurer's contractual obligation to pay money under a life insurance policy is not work or labor, nor is it related to the sale or repair of any tangible chattel. Accordingly, we agree with the Court of Appeal that the life insurance policies at issue here are not services as defined in the Consumers Legal Remedies Act.

Because the statutory language is unambiguous, there is no need to consider legislative history (*People v. Castenada* (2000) 23 Cal.4th 743, 747, 97 Cal.Rptr.2d 906, 3 P.3d 278), and we do so only from an abundance of caution. The legislative history of the Consumers Legal Remedies Act confirms our conclusion that it does not apply to life insurance. The California Legislature adapted this act largely from a model law, the National Consumer Act, proposed by the National Consumer Law Center at Boston College. (Assem. Com. on Judiciary, analysis of Assem. Bill No. 292 (1970 Reg. Sess.) Apr. 20, 1970, p. 1; see Reed, **204 *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act* (1971) 2 Pacific L.J. 1, 11.) The model law expressly applied to insurance because it defined "services" as including "(a) work, labor, and other personal services, [¶] (b) privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like, and [¶] (c) *insurance.*" (Nat. Consumer Act (Nat. Consumer L. Center 1970) § 1.301, subd. (37), pp. 23–24, italics added.) Our Legislature omitted the reference to insurance in the definition of "services," however, thereby indicating its intent *not* to treat all insurance as a service under the Consumers Legal Remedies Act. (See *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal.App.4th 251, 268, 15 Cal.Rptr.3d 244 [when a statute is modeled on a uniform act, deviation from the uniform act's language is presumed to be deliberate and to reflect a different intent]; *62 *Berry v. American Express Publishing, Inc.* (2007) 147 Cal.App.4th 224, 230–231, 54 Cal.Rptr.3d 91 [deleting a specific provision from a proposed law generally reflects an intent that the law not be construed to include the omitted provision]; *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 604, 51 Cal.Rptr.2d 897 [same].)

[4] This intent is further confirmed by comparing the Consumers Legal Remedies Act's definition of "services" with the definition of the same word in the Unruh Act (Civ.Code, § 1801 et seq.). In 1970, when the Legislature was in the process of ***283** drafting and enacting the

Consumers Legal Remedies Act, the Unruh Act defined "services" this way: " 'Services' means work, labor and services, for other than a commercial or business use, including services furnished in connection with the sale or repair of goods as defined in Section 1802.1 or furnished in connection with the repair of motor vehicles ... or in connection with the improvement of real property *or the providing of insurance* ...." (Civ.Code, § 1802.2, added by Stats.1959, ch. 201, § 1, pp. 2092–2093.) We presume the Legislature was aware of this Unruh Act definition when it set about defining the same word in the Consumers Legal Remedies Act, and the language of the two definitions is similar in many respects, but the express reference to insurance in the Unruh Act definition is conspicuously absent from the definition in the Consumers Legal Remedies Act. The use of differing language in otherwise parallel provisions supports an inference that a difference in meaning was intended. (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 896, 80 Cal.Rptr.3d 690, 188 P.3d 629.) Even under the quoted Unruh Act definition of services, moreover, insurance itself is not specifically included, but only "services furnished ... in connection with ... the providing of insurance." (Civ.Code, § 1802.2.) Thus, the Unruh Act definition of "services" provides additional evidence that the Legislature did not consider insurance itself to be a service for purposes of consumer protection legislation.

The legislative history that has been brought to our attention does not explain why the Legislature omitted an express reference to insurance from the definition of "services" in the Consumers Legal Remedies Act. We do know, however, that the act's final wording "was the product of intense negotiations between consumer and business groups, and represented a compromise between the two." (*Berry v. American Express Publishing, Inc., supra,* 147 Cal.App.4th at p. 230, 54 Cal.Rptr.3d 91, citing Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act, supra,* 2 Pacific L.J. 1, 8.) The omission or exclusion of insurance from the definition of "services" may have been one element of the compromise. It is also possible that the Legislature was influenced by the existence of a separate legislative scheme, the Unfair Trade Practices Act (Ins.Code, § 790 et seq.; *see id.,* § 1620.2), for deterring unfair and deceptive practices in the insurance ***63** industry. (See generally *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58.)

Plaintiffs do not here argue that life insurance policies are goods within the meaning of the Consumers Legal Remedies Act. They do contend, however, that life insurance is a service under that law. In support of that contention, they rely first on a broad dictionary***205** definition of "service" as including a "benefit" and a "contribution to the welfare of others." (Merriam–Webster OnLine Dict. <http:// www. merriam- webster. com/ dictionary/ service> [as of Apr. 20, 2009].) Insurance, or the providing of insurance, may well be a service within the meaning of these broad dictionary definitions. (See, e.g., *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 54, 86 Cal.Rptr.2d 855, 980 P.2d 407 [referring to insurance as a " 'quasi-public' service"]; *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 820, 169 Cal.Rptr. 691, 620 P.2d 141 [quoting a commentator's characterization of insurance as " 'a vital service' "].) When the Legislature has provided a statutory definition for a term, however, courts must apply that definition when interpreting the statute rather than ****284** general dictionary definitions. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 808, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) As we have concluded, life insurance does not fit within the statutory definition of "services."

Next, plaintiffs rely on decisions from other jurisdictions holding that insurance comes within the meaning of "service" as defined in similar consumer protection statutes. As the Court of Appeal pointed out, however, the statutes in those other states are differently worded and have broader application than the Consumer Legal Remedies Act. For example, plaintiffs rely on *McCrann v. Klaneckey* (Tex.App.1984) 667 S.W.2d 924, which concluded that insurance is a service under Texas's Deceptive Trade Practices Act (Tex. Bus. & Com.Code Ann., § 17.50). Plaintiffs point out that the Texas statute defined "services" as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods" (Tex. Bus. & Com.Code Ann., § 17.45, subd. (2)), a definition almost identical to the definition of "services" in the Consumers Legal Remedies Act. But plaintiffs fail to note that *McCrann* relied on the earlier decision in *Dairyland County Mutual Insurance Co. of Texas v. Harrison* (Tex.App.1979) 578 S.W.2d 186, which in turn relied on another provision of Texas's Deceptive Trade Practices–Consumer Protection Act, which "provide[d] for the maintenance of an action by one who has been adversely affected by 'the use or employment

by any person of an act or practice in violation of Article 21.21, Texas Insurance Code....' " (*Dairyland County Mutual Insurance Co. of Texas v. Harrison, supra,* at p. 190.) It was this express incorporation of statutes regulating insurance that persuaded the Texas appellate court that the Texas consumer protection law applied to insurance. (*Ibid.*) California's Consumers Legal Remedies Act has ***64** no similar provision expressly incorporating laws regulating insurance, and thus the Texas courts' decisions provide no persuasive support for plaintiffs' argument here.

Likewise distinguishable is the Colorado Supreme Court's decision in *Showpiece Homes Corp. v. Assurance Co. of America* (Colo.2001) 38 P.3d 47, holding that insurance was subject to regulation under the Colorado Consumer Protection Act. In reaching that conclusion, the Colorado high court noted that the Colorado law regulated goods, services, and property, that it did not define "goods" or "services," and that it contained a definition of "property" that included "intangible property." (*Showpiece Homes Corp. v. Assurance Co. of America, supra,* at p. 57.) The Colorado high court concluded that insurance was subject to regulation under the Colorado law either as intangible property or as services under a broad dictionary definition of that term. (*Id.* at pp. 57–58.) California's Consumers Legal Remedies Act is unlike the Colorado law because it does not apply to intangible property or goods, and because it contains a restrictive definition of "services" that excludes life insurance. For this reason, the Colorado decision provides no persuasive authority for plaintiffs' contention here.

[5] Plaintiffs point that in *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 119 Cal.Rptr.2d 190, the Court of Appeal evidently assumed that the Consumers Legal Remedies Act applies to life insurance. The case is of no assistance to plaintiffs, however, because a judicial decision is not authority for a point that was not actually raised and resolved. (*Miklosy v. Regents of University of California, supra,* 44 Cal.4th at p. 900, fn. 7, 80 Cal.Rptr.3d 690, 188 P.3d 629; ****206** *****285** *People v. Knoller* (2007) 41 Cal.4th 139, 154–155, 59 Cal.Rptr.3d 157, 158 P.3d 731.)

[6] Next, plaintiffs rely on Civil Code section 1760, which states that the provisions of the Consumers Legal Remedies Act "shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." A liberal construction mandate affects statutory construction only when the statutory language is ambiguous and the intent of the enacting body is in doubt, however; it cannot be invoked when, as here, the meaning of the statutory language is not otherwise uncertain. (See, e.g., *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1323, 57 Cal.Rptr.3d 644, 156 P.3d 1100; *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 856, 28 Cal.Rptr.3d 316, 111 P.3d 294; *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 472, 14 Cal.Rptr.2d 514, 841 P.2d 1034.)

[7] [8] [9] ***65** Plaintiffs argue that their position is supported by Insurance Code section 1861.03, subdivision (a), which provides: "The business of insurance shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act ... and the antitrust and unfair business practices laws." The quoted provision was added by Proposition 103, which the voters passed at the November 8, 1988 General Election. (See *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 239–240, 32 Cal.Rptr.2d 807, 878 P.2d 566.) Proposition 103 does not apply to life insurance, and we have previously declined to decide whether Insurance Code section 1861.03, subdivision (a), applies to all lines of insurance. (*Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 282, 41 Cal.Rptr.2d 220, 895 P.2d 56.) Assuming for the sake of argument that this provision does apply to the insurance industry generally, its effect is merely to preclude courts from exempting insurance from general laws that would otherwise apply to it. The Consumers Legal Remedies Act is not an otherwise applicable general law, however. Rather than applying to all businesses, or to business transactions in general, the Consumers Legal Remedies Act applies only to transactions for the sale or lease of consumer "goods" or "services" as those terms are defined in the act. Insurance Code section 1861.03, subdivision (a), does not override the limitations that the Legislature incorporated into that statutory scheme.

Finally, plaintiffs contend that if life insurance policies by themselves are not services as defined in the Consumers Legal Remedies Act, the work or labor of insurance agents and other insurance company employees in helping consumers select policies that meet their needs, in assisting policyholders to keep their policies in force, and in processing claims are services that are sufficient to bring life insurance within the reach of the Consumers Legal Remedies Act. We disagree.

[10] As Farmers points out, ancillary services are provided by the sellers of virtually all intangible goods—investment securities, bank deposit accounts and loans, and so forth. The sellers of virtually all these intangible items assist prospective customers in selecting products that suit their needs, and they often provide additional customer services related to the maintenance, value, use, redemption, resale, or repayment of the intangible item. Using the existence of these ancillary services to bring intangible goods within the coverage of the Consumers Legal Remedies Act would defeat the apparent legislative intent in limiting the definition of ***286 "goods" to include only "tangible chattels." (Civ.Code, § 1761, subd. (a).) We conclude, accordingly, that the ancillary services that insurers provide to actual and prospective purchasers of life insurance do not bring the policies within the coverage of the Consumers Legal Remedies Act.

***66 DISPOSITION**

The Court of Appeal's judgment is affirmed.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, MORENO, CORRIGAN, JJ.

Cal.,2009.
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- 2008 WL 6137835 (Appellate Brief) Real Parties in Interest's Response Brief to Amicus Curiae Briefs Filed in Support of Petitioners (Sep. 9, 2008) Original Image of this Document (PDF)
- 2008 WL 3993648 (Appellate Brief) Amicus Curiae Brief of United Policyholders in Support of Petitioners Fairbanks, et al.; and Application to File Amicus Curiae Brief (Jul. 14, 2008) Original Image of this Document (PDF)
- 2008 WL 4143634 (Appellate Brief) Application of Consumer Attorneys of California for Permission to File an Amicus Brief in Support of Petitioners (Jul. 10, 2008) Original Image of this Document (PDF)
- 2008 WL 5640032 (Appellate Brief) Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of American Council of Life Insurers, American Insurance Association, Association of California Insurance Companies, Association of California Life and Health Insurance Companies , Pacific Association of Domestic Insurance Companies, and Personal Insurance Federation of California in Support of Defendants and Real Parties in Interest Farmers New World Life Insurance Company and Farmers Group, Inc. (Jul. 9, 2008) Original Image of this Document (PDF)
- 2008 WL 4143633 (Appellate Brief) Brief of Amicus Curiae Consumer Attorneys of California in Support of Petitioners (Jul. 8, 2008) Original Image of this Document with Appendix (PDF)
- 2008 WL 2337468 (Appellate Brief) Petitioners' Reply Brief On the Merits (May 8, 2008)
- 2008 WL 1862578 (Appellate Brief) Real Parties in Interest's Answer Brief on the Merits (Mar. 14, 2008)
- 2008 WL 795434 (Appellate Brief) Petitioners' Opening Brief on the Merits (Jan. 14, 2008)
- S157001 (Docket) (Oct. 2, 2007)

Judges and Attorneys (Back to top)

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Judges

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San Francisco, California 94102
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- **Chin, Hon. Ming W.**
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- **Corrigan, Hon. Carol A.**
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- **George, Hon. Ronald M.**
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- **Kennard, Hon. Joyce L.**
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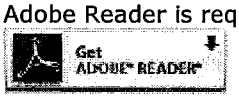

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Supreme Court of the United States
UNITED STATES et al., Petitioners,
v.
Nicholas J. LARIONOFF, Jr., et al.

No. 76-413.
Argued April 27, 1977.
Decided June 13, 1977.

A class action under the Tucker Act was brought by seven enlisted members of the United States Navy who alleged that their agreements to extend their enlistments, made at various times from 1968 to 1970, entitled each of them to payment of a reenlistment bonus. The United States District Court for the District of Columbia, 365 F.Supp. 140, awarded the relief prayed, and cross appeals were filed. The Court of Appeals, 175 U.S.App.D.C. 32, 533 F.2d 1167, affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that respondents and other similarly situated, who agreed to extend their enlistments at a time when a statute provided for a Variable Re-enlistment Bonus (VRB), in addition to the Regular Re-enlistment Bonus (RRB), for members of the armed forces whose ratings were classified as a "critical military skill" were entitled to VRB's determined according to the award level in effect at the time they agreed to extend their enlistments, even though the Navy eliminated their ratings from the "critical military skill" list before they began serving their extended enlistments, and the statutes authorizing the RRB and VRB were repealed and a new Selective Re-enlistment Bonus substituted before one respondent began to serve his extended enlistment.

Affirmed.

Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger, Mr. Justice Blackmun, and Mr. Justice Rehnquist joined.

West Headnotes

[1] KeyCite Citing References for this Headnote

34 Armed Services
34I In General
34k17 Enlistment
34k18.5 k. Reenlistment. Most Cited Cases
(Formerly 34k23.3(1), 34k18)

Respondent enlisted members of the United States Navy and others similarly situated, who agreed to extend their enlistments at a time when a statute provided for a Variable Re-enlistment Bonus (VRB), in addition to the Regular Re-enlistment Bonus (RRB), for members of the armed forces whose ratings were classified as a "critical military skill" were entitled to VRB's determined according to the award level in effect at the time they agreed to extend their enlistments, even though the Navy eliminated their ratings from the "critical military skill" list before they began serving their extended enlistments, and the statutes authorizing the RRB and VRB were repealed and a new Selective Re-enlistment Bonus substituted before one respondent began to serve his extended enlistment. 37 U.S.C.A. §§ 308, 906.

[2] KeyCite Citing References for this Headnote

34 Armed Services
34I In General
34k5 Persons in the Armed Services, and Militia Called Into Service of the United States
34k5(6) k. Pay and Allowances. Most Cited Cases
(Formerly 34k23)

A soldier's entitlement to pay is dependent upon statutory right.

[3] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak413 k. Administrative Construction. Most Cited Cases

In construing administrative regulations, the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

[4] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak385 Power to Make
15Ak386 k. Statutory Basis. Most Cited Cases

In order to be valid, regulations must be consistent with the statute under which they are promulgated.

[5] KeyCite Citing References for this Headnote

34 Armed Services
34I In General
34k17 Enlistment
34k18 k. In General. Most Cited Cases
(Formerly 34k23.3(1))

Implementing regulations requiring that the amount of the Variable Re-enlistment Bonus awarded an enlisted armed forces member who extended his enlistment be determined by reference to the award level in effect at the time he began to serve his extension enlistment, rather than at the time he agreed to the extension, are invalid as contrary to Congress' purpose, as manifested by the legislative history, in enacting the VRB program as an inducement to selected members of the armed forces to extend their period of service.

[6] KeyCite Citing References for this Headnote

34 Armed Services
34I In General
34k17 Enlistment
34k18.5 k. Reenlistment. Most Cited Cases
(Formerly 34k18)

Whether a member of the armed services reenlists or agrees to extend his enlistment, the Variable Re-enlistment Bonus could only be effective as a selective incentive to extension of service if, at the time he made his decision, the member could count on receiving it if he elected to remain in the service. 37 U.S.C.A. §§ 308, 906.

[7] KeyCite Citing References for this Headnote

34 Armed Services
34I In General
34k5 Persons in the Armed Services, and Militia Called Into Service of the United States
34k5(6) k. Pay and Allowances. Most Cited Cases
(Formerly 34k23)

Congress may prospectively reduce the pay of members of the armed forces, even if that reduction deprives members of benefits they had expected to be able to earn; however, it is quite a different matter for Congress to deprive a service member of pay due for services already performed, but still owing.

[8] KeyCite Citing References for this Headnote

34 Armed Services
34I In General
34k17 Enlistment
34k18.5 k. Reenlistment. Most Cited Cases
(Formerly 34k23.3(1), 34k18)

Nothing in either the language or legislative history of the statute repealing the Regular Re-enlistment Bonus and the Variable Re-enlistment Bonus system and establishing a new bonus system showed any intention on the part of Congress to affect the rights of those service members who had extended their enlistments and became entitled to receive Variable Re-enlistment Bonuses. 37 U.S.C.A. § 308.

****2151** Syllabus FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***864** Respondent enlisted members of the United States Navy and others similarly situated, who agreed to extend their enlistments at a time when a statute provided for a Variable Re-enlistment Bonus (VRB), in addition to the Regular Re-enlistment Bonus (RRB), for members of the Armed Forces whose ratings were classified as a "critical military skill" held entitled to VRB's determined according to the award level in effect at the time they agreed to extend their enlistments, notwithstanding that the Navy eliminated their ratings from the "critical military skill" list before they began serving their extended enlistments, and that the statutes authorizing the RRB and VRB were repealed and a new Selective Re-enlistment Bonus (SRB) substituted before one of the respondents began to serve his extended enlistment. Pp. 2154-2161.

(a) Implementing regulations requiring that the amount of the VRB to be awarded to an enlisted member who extended his enlistment be determined by reference to ****2152** the award level in effect at the time he began to serve his extended enlistment, rather than at the time he agreed to the extension, are invalid as being contrary to Congress' purpose, as manifested by the legislative history, in enacting the VRB program as an inducement to selected service members to extend their period of service. Whether a service member re-enlists or agrees to extend his enlistment, the VRB

could only be effective as a selective incentive to extension of service if at the time he made his decision the service member could count on receiving it if he elected to remain in the service. Pp. 2154-2159.

(b) There is nothing in either the language or legislative history of the statute repealing the RRB and VRB system and establishing a new bonus system to show any intention on the part of Congress to affect the rights of those service members who had extended their enlistments and became entitled to receive VRB's. Pp. 2159-2161.

175 U.S.App.D.C. 32, 533 F.2d 1167, affirmed.

***865** Keith A. Jones, Washington, D.C., for the petitioners.

Stephen Daniel Keeffe, Washington, D.C., for the respondents.

Mr. Justice BRENNAN delivered the opinion of the Court.

Seven enlisted members of the United States Navy brought this class action in the District Court for the District of Columbia under the Tucker Act, 28 U.S.C. s 1346(a)(2), alleging that their agreements to extend their enlistments, made at various times from 1968 to 1970, entitled each of them to payment of a re-enlistment bonus. The District Court ordered that the bonuses be paid, 365 F.Supp. 140 (1973), and the Court of Appeals for the District of Columbia Circuit affirmed. 175 U.S.App.D.C. 32, 533 F.2d 1167 (1976). We granted certiorari, 429 U.S. 997, 97 S.Ct. 522, 50 L.Ed.2d 607 (1976). We affirm.

I

From early in our history, Congress has provided by statute for payment of a re-enlistment bonus to members of the Armed Services who re-enlisted upon expiration of their term of service, or who agreed to extend their period of service before its expiration.[FN1] Prior to the enactment of Pub.L. No. 89-132, 79 Stat. 547 (1965), this bonus was determined for an enlistee's first re-enlistment or extension of enlistment by multiplying his monthly pay at the time of expiration of the initial period ***866** of service by the number of years specified in the re-enlistment agreement. See former 37 U.S.C. ss 308(a), (b).

FN1. The Court of Appeals opinion traces the history of this policy from 1795 to the present. 175 U.S.App.D.C., at 37-38, and n. 16, 533 F.2d, at 1172-1173, and n. 16.

The perceived defect of this system was that "it failed to vary the monetary incentive for reenlistment according to the needs of the armed services for personnel with particular skills." 175 U.S.App.D.C., at 38, 533 F.2d, at 1173. Consequently, Congress enacted former 37 U.S.C. s 308(g), which authorized the services to provide, in addition to the Regular Re-enlistment Bonus (RRB) just described, a Variable Re-enlistment Bonus (VRB) to members of the Armed Services whose particular skills were in short supply. The VRB was to be a multiple, no greater than four, of the RRB.[FN2]

FN2. Former 37 U.S.C. s 308(g), 79 Stat. 547, provided as follows:"(g) Under regulations to be prescribed by the Secretary of Defense, or the Secretary of the Treasury with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members. An amount paid under this subsection does not count against the limitation prescribed by subsection (c) of this section on the total amount that may be paid under this section."Under the Department of Defense regulations implementing the VRB program,

multiples of one to four times the RRB were assigned depending on the relative urgency of the services' need for particular skills, as measured by personnel shortages and the cost of training replacement personnel. Department of Defense Directive 1304.14, PP IV.D.1.a, b (Sept. 3, 1970); Department of Defense Instruction 1304.15, PP IV.D, V.A.1, 2 (Sept. 3, 1970).Under 37 U.S.C. s 906, "(a) member of the (Armed Forces) who extends his enlistment . . . is entitled to the same pay and allowances as though he had reenlisted."

**2153 This program was in effect when respondent Nicholas J. Larionoff enlisted in the Navy for four years on June 23, *867 1969.[FN3] Shortly after his enlistment, Larionoff chose to participate in a Navy training program, completion of which would qualify him for the service rating "Communications Technician Maintenance" (CTM). At that time, as Larionoff was aware,[FN4] the CTM rating was classified by Navy regulations as a "critical military skill," whose holders were eligible upon re-enlistment or extension of enlistment for payment of a a VRB in the amount of four times the RRB, the highest allowable rate. Before entering the training program, which entailed a six-year service obligation, Larionoff entered a written agreement to extend his enlistment "in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service." Larionoff successfully completed the program and was advanced to the CTM rating, expecting to receive a VRB upon entering the period of his extended enlistment on June 23, 1973.[FN5]

FN3. Except as noted below with specific reference to respondent Johnnie S. Johnson, the facts relating to Larionoff are typical of those concerning the other named respondents.

FN4. Larionoff was informed of the existence of the VRB program, and its applicability to the CTM program, by a Navy "classifier" who interviewed him to determine what field within the service he should enter. Several of the other named respondents were also told of the existence of the VRB program, and in some instances the amount of the VRB they could expect to receive was calculated for them by Navy personnel, without any indication that the amount might be reduced. 175 U.S.App.D.C., at 35, 36, and nn. 6, 11, 533 F.2d, at 1170, 1171, and nn. 6, 11. These facts, contained in affidavits filed by respondents, are undisputed; while an affidavit introduced by the Government states that "it is not the policy of the Department of the Navy to promise specific eligibility for Variable Reenlistment Bonus, nor is any official authorized to make such a promise in counselling with a prospective enlistee," there is no dispute that in particular cases individual service members might, inadvertently or otherwise, be left with the impression that a VRB had been promised.

FN5. Under former 37 U.S.C. s 308(g), the VRB was paid "in equal yearly installments in each year of the reenlistment period."

*868 On March 24, 1972, however, the Navy announced that effective July 1, 1972, the CTM rating would no longer be considered a "critical military skill" eligible for a VRB. When Larionoff, through his congressional representatives, inquired into his continued eligibility for a VRB, he was informed that since the CTM rating was no longer listed, he would not receive the expected bonus. Accordingly, in March 1973, respondents filed this lawsuit, and in September of that year the District Court certified a class and granted summary judgment for respondents, ordering payment of the disputed VRB's.

[1] (1) While the Government's appeal of this order was pending in the Court of Appeals, Congress repealed the statutes authorizing both the RRB and the VRB, and substituted a new Selective Re-enlistment Bonus (SRB), effective June 1, 1974. Armed Forces Enlisted Personnel Bonus Revision Act of 1974, 88 Stat. 119, 37 U.S.C. s 308 (1970 ed., Supp. V). The Government concedes

that this action had no effect on six of the named respondents; like Larionoff, they were scheduled to begin serving their extended enlistments prior to the effective date of the Act, and therefore should have received their VRB's, if at all, while the program was still in effect.[FN6] Respondent**2154 Johnnie S. Johnson, however, first enlisted in the Navy in August 1970, and did not begin serving his extended enlistment until August 1974. The Court of Appeals was thus confronted with two questions: (1) whether Larionoff and those in his position were entitled to receive VRB's despite the Navy's elimination of their rating from the eligible list in the period after their agreement to extend their enlistments but before they began serving those extensions; and (2) whether Johnson and others in his situation were entitled to receive VRB's despite the repeal of the VRB program in the same *869 period. The Court of Appeals held that both were entitled to receive VRB's.

FN6. But see n. 23, infra.

II

A

[2] (2) Both the Government and respondents recognize that "(a) soldier's entitlement to pay is dependent upon statutory right," Bell v. United States, 366 U.S. 393, 401, 81 S.Ct. 1230, 1235, 6 L.Ed.2d 365 (1961), and that accordingly the rights of the affected service members must be determined by reference to the statutes and regulations governing the VRB, rather than to ordinary contract principles.[FN7] In this case, the relevant statute, former 37 U.S.C. s 308(g), provided:

FN7. Indeed, this is implicitly recognized in the contracts executed by the named respondents, which state that they agree to extend their enlistments "in consideration of the pay, allowances, and benefits which will accrue to me during the continuance of my service," rather than stating any fixed compensation.

"Under regulations to be prescribed by the Secretary of Defense, . . . a member who is designated as having a critical military skill and who is entitled to (an RRB) upon his first reenlistment may be paid an additional amount not more than four times the amount of (the RRB)."

The regulations governing individual eligibility were set forth in Department of Defense Instruction 1304.15, P V.B.1 (Sept. 3, 1970).[FN8]

FN8. This regulation provided:"B. Individual Eligibility for Receipt of Awards"1. Variable Reenlistment Bonus. An enlisted member is eligible to receive a Variable Reenlistment Bonus if he meets all the following conditions:"a. Is qualified and serving on active duty in a military specialty designated under provisions of paragraph V.A.2. above for award of the Variable Reenlistment Bonus. Members paid a Variable Reenlistment Bonus shall continue to serve in the military specialty which qualified them for the bonus unless the Secretary of a Military Department determines that a waiver of this restriction is necessary in the interest of the Military Service concerned."b. Has completed at least 21 months of continuous active service other than active duty for training immediately prior to discharge, release from active duty, or extension of enlistment."c. Is serving in pay grade E-3 or higher."d. Reenlists in a regular component of the Military Service concerned within three (3) months (or within a lesser period if so prescribed by the Secretary of the Military Department concerned) after the date of his discharge or release from compulsory or voluntary active duty (other than for training), or extends his enlistment, so that the reenlistment or enlistment as extended provides a total period of continuous active service of not less than sixty-nine (69) months."(1) The reenlistment or extension of enlistment must be a first reenlistment or extension for which a reenlistment bonus is payable."(2) No reenlistment or extension accomplished for any purpose other than continued active service in the designated military specialty shall qualify a member for receipt of the Variable Reenlistment Bonus."(3) Continued active service in a designated military specialty shall include normal skill progression as defined in the respective

Military Service classification manuals."e. Has not more than eight years of total active service at the time of reenlistment or extension of enlistment."f. Attains eligibility prior to the effective date of termination of awards in any military specialty designated for termination of the award. Member must attain eligibility prior to the effective date of a reduction of award level to be eligible for the higher award level. Eligibility attained through any modification of an existing service obligation, including any early discharge granted pursuant to 10 U.S.C. 1171, must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award in the military specialty."g. Meets such additional eligibility criteria as may be prescribed by the Secretary of the Military Department concerned."Instruction 1304.15 has been canceled by Department of Defense Instruction 1304.22 (June 1975).

***870 **2155** The Government contends that these eligibility criteria are to be applied as of the time the enlisted member completes service of his original enlistment and enters into the extended ***871** enlistment. This is a reasonable construction, since the statute requires that the VRB not be paid until that time. See n. 5, supra. At that time, it is argued, respondents did not satisfy two related criteria prescribed by P V.B.1, although it is conceded they met the others. First, they were not then "serving . . . in a military specialty designated" as a critical military skill, P V.B.1.a, since the CTM rating was by that time no longer so designate; second, they had not "(a)ttain(ed) eligibility prior to the effective date of termination of awards" for the CTM rating. P V.B.1.f.

The Government also relies upon the regulations governing the amount of the award to be received. Under Department of Defense Directive 1304.14, P IV.F (Sept. 3, 1970):

"When a military skill is designated for reduction or termination of award an effective date for reduction or termination of awards shall be established and announced to the field at least 90 days in advance. All awards on or after that effective date in military skills designated for reduction of award level will be at the level effective that date and no new awards will be made on or after the effective date in military skills designated for termination of awards." FN9 (Emphasis added.)

FN9. Directive 1304.14 has been canceled by Department of Defense Directive 1304.21 (June 1975).

Similarly, Department of Defense Instruction 1304.15, supra, P VI.A, stated:

"Members serving in a military specialty designated for reduction or termination of award under the provisions of subsection IV.F. of (Directive 1304.14, supra) will receive the award level effective on the date of their reenlistment or extension of enlistment, except at provided in paragraph V.B.l.f. above." FN10

FN10. The reference is apparently to the last sentence of P V.B.l.f, supra, n. 8, which provided: "Eligibility attained through any modification of an existing service obligation . . . must have been attained prior to the date the authority approving the modification was notified of the prospective termination or reduction of award . . . ." The Court of Appeals interpreted this provision as intended to prevent service members from qualifying for a soon-to-be-reduced benefit level by agreeing to extend their enlistments in the interval between the announcement of the reduction in award level and the effective date of the change, and hence an implicit recognition that in the absence of such a provision service members in that position would be entitled to the higher benefit level. 175 U.S.App.D.C., at 41-42, 533 F.2d, at 1176-1177. The Government argues, however, that the purpose of P V.B.l.f was to reach the much smaller group of service members who would be in a position both to agree to extend their enlistment and to begin serving the extension within the relevant period. Tr. of Oral Arg. 15-16.

***872** The Government argues that these regulations, read together, establish that respondents were entitled to receive only the VRB in effect for their service rating at the time the period of their original enlistment ended, and the extended enlistment began.

[3] (3) These regulations, as the Court of Appeals pointed out and the Government freely concedes, contain a number of ambiguities. See 175 U.S.App.D.C., at 40-42, 533 F.2d, at 1175-1177. We need not tarry, however, over the various ambiguous terms and complex interrelations of the regulations. In construing administrative regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." Bowles v. Seminole Rock Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945). See also INS v. Stanisic, 395 U.S. 62, 89 S.Ct. 1519, 23 L.Ed.2d 101 (1969). The Government represents, and respondents do not seriously dispute, that throughout the period in which the VRB program was in effect, the Navy interpreted the Department of Defense regulations ****2156** as entitling an enlisted member who extends his enlistment to the VRB level, if any, in effect at the time he began to serve the extended enlistment.[FN11] Since this interpretation***873** is not plainly inconsistent with the wording of the regulations, we accept the Government's reading of those regulations as correct.

FN11. This has apparently been the practice regardless of whether that level was higher or lower than that in effect when the service member agreed to extend his enlistment. Id., at 45.

B

[4] [5] (4, 5) This, however, does not end our inquiry. For regulations, in order to be valid must be consistent with the statute under which they are promulgated. [FN12] We are persuaded that insofar as they required that the amount of the VRB to be awarded to a service member who extended his enlistment was to be determined by reference to the award level in effect at the time he began to serve the extension, rather than at the time he agreed to it, the relevant regulations were contrary to the manifest purposes of Congress in enacting the VRB program, and hence invalid.[FN13]

FN12. "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . (only) the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129, 134, 56 S.Ct. 397, 400, 80 L.Ed. 528 (1936). See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668 (1976); Dixon v. United States, 381 U.S. 68, 74, 85 S.Ct. 1301, 1305, 14 L.Ed.2d 223 (1965).

FN13. This argument was clearly raised in the briefs in the Court of Appeals, Brief for Plaintiffs-Appellees (Cross-Appellants) 13, Larionoff v. United States, Nos. 74-1211 and 74-1212, and in this Court, Brief for Respondents 15-18. We therefore do not regard the somewhat inconclusive colloquy at oral argument, see Tr. of Oral Arg. 29-33, as abandoning it.

The legislative history of the VRB statute makes those congressional purposes crystal clear. As noted above, the re-enlistment bonus scheme in effect before 1965, which relied entirely on the RRB, was criticized for providing the same re-enlistment incentive to all members of the Armed Services, regardless of the need for their skills. The Defense Department desired greater flexibility in calibrating re-enlistment incentives to its manpower needs. The additional expenditures***874** for the VRB were expected to save money in the long run, since payment of the higher re-enlistment bonus would enable the Armed Forces to retain highly skilled individuals whose training had required a

considerable investment.[FN14] Members of Congress in the floor debates clearly recognized the wisdom of offering such incentives.[FN15]

FN14. H.R.Rep.No.549, 89th Cong., 1st Sess., 47 (1965); S.Rep.No.544, 89th Cong., 1st Sess., 14 (1965); U.S.Code Cong. & Admin.News 1965, p. 2745.

FN15. See, e. g., remarks of Rep. Morton, 111 Cong.Rec. 17206 (1965); remarks of Rep. Bennett, ibid.; remarks of Rep. Dole, id., at 17209; remarks of Sen. Russell, id., at 20034.

The VRB was thus intended to induce selected service members to extend their period of service beyond their original enlistment. Of course, the general pay raise for the military included in the same Act was also intended to have a similar effect, by making a military career generally more attractive.[FN16] But the VRB was expected to be a very specific sort of incentive, not only because it was aimed at a selected group of particularly desirable service members, but also because it offered an incentive "at just the time that it will be most effective, when an individual decides whether or not to reenlist." Remarks of Rep. Nedzi, 111 Cong.Rec. 17201 (1965). The then Secretary of Defense, Robert S. McNamara, made the same point to the House Armed Services Committee, in contrasting the VRB to "proficiency pay," which provides increased pay to service members with critical skills:

FN16. See, e. g., H.R.Rep.No.549, supra, at 5-6; S.Rep.No.544, supra, at 1-4.

**2157 "We believe a more efficient way to provide additional reenlistment incentives to selected first termers in especially high demand is by using a variable reenlistment bonus. Monetary rewards are thereby concentrated at the first reenlistment decision point, obtaining the greatest return per dollar spent on the retention of personnel. " Hearings on Military Pay Bills before the House Committee*875 on Armed Services, 89th Cong., 1st Sess., 2545 (June 7, 1965) (House Hearings). (Emphasis added.)

The then Assistant Secretary of Defense, Norman S. Paul, also distinguished the VRB from ordinary pay, stating that with the VRB the military hoped "to cure a separate specific problem by specific means, rather than overall pay." Hearings on Military Pay Increase before the Senate Committee on Armed Services, 89th Cong., 1st Sess., 41 (July 29, 1965). (Senate Hearings). The timing of the VRB was crucial to this intention:

"At the end of his first term of reenlistment (sic) he is trying to make up his mind whether to stay in the military. And we think that the added bonus may push him over the line into staying with us, which is what we want to see happening." Id., at 40.[FN17]

FN17. The argument that the VRB would be particularly effective as an inducement to re-enlist because it would be provided at the "decision point" is a constant theme through the hearings, the committee reports, and the floor debates. See House Hearings 2545-2584 (statements of Secy. McNamara), 2671 (colloquy of Rep. Stratton and Gen. Greene); Senate Hearings 19 (statement of Secy. McNamara), 26, 40, 44 (statements of Asst. Secy. Paul); H.R.Rep.No.549, supra, at 47; S.Rep.No.544, supra, at 14; 111 Cong.Rec. 17201 (1965) (remarks of Rep. Nedzi).

[6] (6) It is true that in discussing the VRB, Congress focused on the service member who reaches the end of his enlistment, and is faced with the decision "whether or not to reenlist." (Emphasis added.) Remarks of Rep. Nedzi, supra. But, as Congress has recognized in providing that "(a) member of the (Armed Forces) who extends his enlistment . . . is entitled to the

same pay and allowances as though he had reenlisted," 37 U.S.C. s 906, precisely the same reasoning applies to the decision to extend enlistment as to the decision to re-enlist. In either case, the VRB could only be effective as a selective incentive to extension of service if at the time he made his ***876** decision the service member could count on receiving it if he elected to remain in the service.

This is very apparent when the VRB program is examined from the perspective of an individual who is at the point of deciding whether or not to extend an enlistment due to expire at some future date. At the time he makes this decision, he is aware that his rating or expected rating is classified as a critical military skill eligible for a VRB at a particular level. Under the plan as envisioned by Congress, and as applied by the Navy in the case of re-enlistments, the incentive operates "at just the time it will be most effective," because the service member knows that if he remains in the service, he will receive a VRB at the prescribed level. But under the contested regulations, the service member has no such reassurance. Whether or not his rating is eligible for a VRB now, it may not be at the future date on which his first enlistment expires.[FN18] His "incentive" to extend his enlistment is the purely hypothetical possibility that he might receive a VRB if there is a personnel shortage in his skill on that date. On the other hand, if he nevertheless extends his enlistment, and if the VRB level for his rating is increased in the interval before his ****2158** original term expires, he will receive a higher award than that which sufficed to induce his decision to remain in the service from the standpoint of Congress' purposes, a totally gratuitous award. [FN19]

FN18. Indeed, as the Court of Appeals pointed out, 175 U.S.App.D.C., at 43-44, n. 32, 533 F.2d, at 1178-1179, n. 32, because the regulations governing the VRB program required the various services to undertake an annual review of the military specialties in which personnel shortages existed for the purpose of adjusting VRB award levels, Department of Defense Directive 1304.14, P IV.F.1, the service member, by his very decision to extend his enlistment, would contribute to the likelihood that by the time his initial enlistment expired, his skill would no longer be in short supply and the VRB he had expected would therefore have been reduced or eliminated.

FN19. The effects of the challenged regulations would, of course, be less than clear to the service member deciding whether or not to extend his enlistment, and, given the complexity and ambiguity of the regulations, and the resulting possibility that they could be misconstrued by Navy recruiters as well as by the enlistees themselves, it would not be surprising if many service members, like some of the respondents here, see n. 4, supra, came to believe that by extending their enlistments they had acquired a vested right to a VRB. To the extent that such beliefs had been fostered, upholding the regulations would perpetrate a considerable injustice.

***877** The clear intention of Congress to enact a program that "concentrates monetary incestives at the first re-enlistment decision point where the greatest returns per retention dollar can be expected," Senate Hearings 26 (statement of Asst. Secy. Paul), could only be effectuated if the enlisted member at the decision point had some certainty about the incentive being offered. Instead, the challenged regulations provided for a virtual lottery. [FN20] We therefore hold that insofar as the Defense Department regulations required that the amount of the VRB to be paid to a service member who was otherwise eligible to receive one be determined by the award level as of the time he began to serve his extended enlistment, they are in clear conflict with the congressional intention in enacting the VRB program, and hence invalid. Because Congress intended to provide at the re-enlistment decision point a promise of a reasonably certain and specific bonus for extending service in the Armed Forces, Larionoff and the members of his class are entitled, as the Court of Appeals held, to payment of VRB's determined according to the award levels in effect at the time they agreed to extend their enlistments.

FN20. Of course, the enlisted service member agreeing to extend his enlistment could not

have been entirely certain of the amount of his future VRB. First, the VRB was calculated according to a formula based on the amount of the RRB, which in turn depended on the re-enlistee's basic pay upon entering the re-enlistment period. At the time he agreed to extend his enlistment, the service member could not have been sure what that amount would be; Congress could alter military pay scales, or the member might be promoted or demoted, and hence his pay might change, in the interval. Second, the VRB, by both statute and regulation, was not actually paid until the service member began serving his extended enlistment, and even then was ordinarily paid in yearly installments. If for some reason the enlistee did not complete service of his extension, remaining installments were not paid, and overpayments were recouped. Department of Defense Directive 1304.14, P IV.G. Finally, receipt of any VRB at all depended on the service member's completing the requirements for eligibility before expiration of the original enlistment. See Department of Defense Instruction 1304.15, P V.B.1, n. 8. Thus, the VRB as applied to service members extending their enlistments, as opposed to those re-enlisting, was always somewhat contingent. But there is a significant difference between this sort of contingency, which was inherent in the nature of the program and in any event involved marginal effects on the amount of the award or the occurrence of rather speculative events, and the sort of uncertainty the contested regulations inject into the program, which rendered the primary determinant of the VRB entirely unpredictable at the time the decision to extend enlistment was made.

***878** III

This brings us to the further question of respondent Johnson's entitlement to a VRB. At the time he agreed to extend his enlistment, the VRB program was in effect and his CTM rating was classified as a critical military skill. Before he began serving the extended enlistment period, however, Congress repealed the RRB and VRB system, and substituted the new SRB. 88 Stat. 119, 37 U.S.C. s 308 (1970 ed., Supp. V). The Government contends that since the VRB had been abolished before Johnson became eligible to receive one, he is not entitled to receive a bonus. The Court of Appeals rejected this argument.[FN21]

FN21. The decision of the Court of Appeals on this point is in conflict with the decisions in Collins v. Rumsfeld, 542 F.2d 1109 (CA9 1976), cert. pending sub nom. Saylors v. United States, No. 76-677; and Carini v. United States, 528 F.2d 738 (CA4 1975), cert. pending, No. 75-1695.

****2159** What we have said above as to Larionoff goes far toward answering this question. The intention of Congress in enacting the VRB was specifically to promise to those who ***879** extended their enlistments that a VRB award would be paid to them at the expiration of their original enlistment in return for their commitment to lengthen their period of service.[FN22] When Johnson made that commitment, by entering an agreement to extend his enlistment, he, like Larionoff, became entitled to receive at some future date a VRB at the award level then in effect (provided that he met the other eligibility criteria). Thus, unless Congress intended, in repealing the VRB program in 1974, to divest Johnson of the rights he had already earned, and constitutionally could do so, the prospective repeal of the program could not affect his right to receive a VRB, even though the date on which the bonus was to be paid had not yet arrived.

FN22. As noted, n. 20, supra, the precise amount of the award remained somewhat uncertain, and the award was contingent on the enlisted member's meeting certain eligibility conditions.

[7] ☑ (7) Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to

earn. Cf. Bell v. United States, 366 U.S. 393, 81 S.Ct. 1230, 6 L.Ed.2d 365 (1961); United States v. Dickerson, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940). It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light. Cf. Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); Perry v. United States, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935). In view of these problems, we would not lightly conclude, in the absence of a clear expression of congressional intent, that in amending 37 U.S.C. s 308 and establishing a new bonus system, Congress intended to affect the rights of those service members who had extended their enlistments and become entitled to receive VRB's.

[8] (8) Nothing in the language of the 1974 Act or its legislative history expresses such an intention. The Act makes no reference*880 whatever to service members who have become entitled to payment of a VRB by extending their enlistments. There is no prohibition of further payments of VRB's to those already entitled to them; FN23 the Act simply replaces the old s 308 with a new one that authorizes SRB's rather than RRB's and VRB's. Nor does the legislative history express any intention to effect such a prohibition. No paramount power of the Congress or important national interest justifying interference with contractual entitlements is invoked.

FN23. The Government's concession that the 1974 Act does not affect respondents other than Johnson implicitly admits that the Act permits such payments. Three other named respondents entered their two-year extension periods after June 1, 1973. Since the VRB was paid in yearly installments, n. 5, supra, these three would presumably still have installments due on their VRB after the Act became effective on June 1, 1974.

The Courts of Appeals that have upheld the Government's position have relied on two indications of a congressional intent to affect the rights of Johnson and his class. First, the 1974 Act expressly preserves the right of all service members on active duty as of the effective date of the Act to receive upon re-enlistment the RRB's they would have been entitled to before passage of the Act. Pub.L.No.93-277, s 3, 88 *881 Stat. 121.FN24 The failure to include a similar saving**2160 clause as to VRB's, it is argued, indicates that Congress intended to abolish them entirely. But the saving clause for RRB's does not merely preserve them for those who had already extended their enlistments, but assures RRB's upon re-enlistment to any service member then on active duty. The failure to enact a similar provision as to VRB's indicates only that Congress did not intend that VRB's be paid to those service members who re-enlisted after the effective date of the Act, and has no bearing on those who had already extended their enlistments and become entitled to VRB's.

FN24. This section provides:"Notwithstanding section 308 of title 37, United States Code, as amended by this Act, a member of a uniformed service on active duty on the effective date of this Act, who would have been eligible, at the end of his current or subsequent enlistment, for the reenlistment bonus prescribed in section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, shall continue to be eligible for the reenlistment bonus under that section as it existed on the day before the effective date of this Act. If a member is also eligible for the reenlistment bonus prescribed in that section as amended by this Act, he may elect to receive either one of those reenlistment bonuses. However, a member's eligibility under section 308(a) or (d) of that title, as it existed on the day before the effective date of this Act, terminates when he has received a total of $2,000 in reenlistment bonus payments, received under either section 308(a) or (d) of that title as it existed on the day before the effective date of this Act, or under section 308 of that title, as amended by this Act, or from a combination of both."

Second, reference is made to a portion of the Conference Report on the Act, indicating a congressional "understanding" that service members, like Johnson, who had already entered two-year extensions of enlistment could become eligible for an SRB by canceling the extension and replacing it with a four-year extension. H.R.Conf.Rep.No.93-985, pp. 4-5 (1974).FN25 This, it is argued, indicates

that Congress had ***882*** considered the possible unfairness that eliminating the VRB could work on members such as Johnson, and felt that it had made sufficient provision for them by making them eligible, upon a further extension of their commitment, for an SRB. But the Report does not refer to the possible unfairness of eliminating the VRB payable to those service members with whom it deals; rather, it refers to the Navy's concern that language in the legislative history might cast doubt on a commitment the Navy had made "to a man with a four-year enlistment and a two-year extension that he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment." Id., at 4. The Report removes any doubts about the validity of that commitment. The only relevance of the Report to the problem before us is that it demonstrates that Congress was responsive to the "concern that the language of the bill might be interpreted to require it to abrogate an understanding" between the Armed Forces and enlistees, ibid., making it less rather than more likely that Congress intended the 1974 Act to abrogate Johnson's entitlement to a VRB by implication.

> FN25. The relevant portion of the Conference Report referred to in the text states:"Clarification of interpretation of bill language"The House committee in reporting the bill indicated its intention that bonuses not be authorized for personnel for existing obligated service. There was brought to the attention of the conferees a problem that would exist, particularly in the Navy nuclear-power field, under the House interpretation of the language of the bill. In cases where commitment has been made to a man with a four-year enlistment and a two-year extension he can cancel the two-year extension and reenlist for four years and receive a reenlistment bonus for the four-year reenlistment. The Navy expressed great concern that the language of the bill might be interpreted to require it to abrogate an understanding it had with enlistees and would operate in such a way as to cause serious retention problems in its most critical career field. The conferees, therefore, want it understood that while it normally does not expect bonuses to be paid for services for which there was an existing obligation, it is consistent with the conferees' understanding that full entitlement to SRB will be authorized for personnel who have already agreed to an extension period prior to the enactment of the legislation if they subsequently cancel this extension prior to its becoming operative and reenlist for a period of at least two years beyond the period of the canceled extension. Nothing in the bill should operate to deny the Chief of Naval Operations the authority to extend SRB entitlement to nuclear-power operators, if they subsequently can cancel any outstanding extension period prior to its becoming operative and reenlist for a period of at least two years beyond the period of the canceled extension."

Affirmed.

****2161*** Mr. Justice WHITE, with whom the Chief Justice, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join, dissenting.

Like the Court, I accept the Government's interpretation of the relevant Navy Department regulations, but I do not agree ***883*** with the majority's view that because Congress intended by the VRB legislation irrevocably to promise a re-enlistment bonus to those who agreed in advance to re-enlist the regulations are invalid. As I see it, the legislation was not part of the re-enlistment agreement, which was executed in consideration of the pay, allowances, and benefits that would accrue during a continuance of the re-enlistee's service. Those who executed re-enlistment agreements had no vested right in any particular level of pay, in any particular allowance or benefit, or in any particular total package of pay, allowances, or benefits. In this respect, I am in essential agreement with Judge Haynsworth's opinion for the Court of Appeals for the Fourth Circuit in Carini v. United States, 528 F.2d 738 (1975), which concluded that cancellation of the VRB prior to the beginning of a re-enlistment period was not forbidden by law. I respectfully dissent.

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431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48

Briefs and Other Related Documents (Back to top)

- 1977 WL 189372 (Appellate Brief) Reply Brief for the Petitioners (Apr. 20, 1977)
- 1977 WL 189371 (Appellate Brief) Brief for Respondents (Apr. 06, 1977)
- 1977 WL 189370 (Appellate Brief) Brief for the Petitioners (Mar. 03, 1977)

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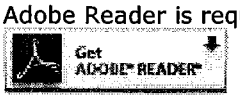

29 Cal.4th 1019, 63 P.3d 220, 130 Cal.Rptr.2d 662, 68 Cal. Comp. Cases 129, 14 A.D. Cases 8, 25 NDLR P 140, 03 Cal. Daily Op. Serv. 1477, 2003 Daily Journal D.A.R. 1919

Supreme Court of California
FRANCISCO COLMENARES, Plaintiff and Appellant,
v.
BRAEMAR COUNTRY CLUB, INC., Defendant and Respondent.

No. S098895.
Feb. 20, 2003.

SUMMARY

A terminated employee brought an action against his former employer for disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (a)). The trial court entered summary judgment in favor of defendant, finding that plaintiff failed to make a prima facie showing of physical disability. (Superior Court of Los Angeles County, No. BC206527, Ronald E. Cappai, Judge.) The Court of Appeal, Second Dist., Div. One, No. B142962, affirmed. Declining to apply the Prudence K. Poppink Act (Poppink Act), effective Jan. 1, 2001, which states that a person is physically disabled when the disability "limits a major life activity" (Gov. Code, § 12926, subd. (k)(1)(B)(i)), the court held that, at the time of plaintiff's termination in 1997, the applicable test for determining disability under FEHA was whether the person's disability "substantially" limited a major life activity, a test derived from federal law (42 U.S.C. § 12102(2)(A)). Since plaintiff conceded he did not meet this more stringent test, the court held, he could not establish a claim for disability.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that the Court of Appeal erred in holding that, at the time of plaintiff's termination, the more stringent federal test applied to determining disability under FEHA. The court held that, at the time of plaintiff's termination, a plaintiff seeking to establish a disability under FEHA had to show (1) that he or she had a physiological disease or condition affecting a body system, and (2) that the disease or condition limited (as opposed to substantially limited) the plaintiff's ability to participate in major life activities. Although the Poppink Act was enacted after plaintiff's cause of action arose, it merely clarified existing law on the requisite degree of limitation, which, both before and after passage of that act, required a showing of a limitation, not a substantial limitation. (Opinion by Kennard, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 5--Operation and Effect--Retroactivity--Clarification.
When a statute merely clarifies, rather than changes, existing law it does not operate retrospectively. Even a material change in statutory language may demonstrate legislative intent only to clarify the statute's meaning. If the legislative intent is to clarify, an amendment has no retrospective effect because the true meaning of the statute remains the same.

(2a , 2b, 2c) Civil Rights § 3.5--Employment--Fair Employment and Housing Act--Disability--Degree of Limitation on Ability to Perform.
On review of a summary judgment in favor of an employer in an action by a terminated employee

for disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subd. (a)), the Court of Appeal erred in affirming the judgment on the ground that, at the time of plaintiff's termination in 1997, the applicable test for determining disability under FEHA was whether the person's disability "substantially" limited a major life activity, a test derived from federal law (42 U.S.C. § 12102(2)(A)), and that since plaintiff conceded he did not meet this test, he could not establish a claim for disability. In 1997, when plaintiff's cause of action for wrongful termination arose, a plaintiff seeking to establish physical disability under the FEHA had to show: (1) that he or she had a physiological disease or condition affecting a body system; and (2) that the disease or condition limited (as opposed to substantially limited, as required under federal law) the plaintiff's ability to participate in major life activities. Although the Prudence K. Poppink Act (Poppink Act), effective Jan. 1, 2001, providing that a person is physically disabled when the person has a physical condition that "limits a major life activity" (Gov. Code, § 12926, subd. (k)(1)(B)(i)), was enacted after plaintiff's cause of action arose, it merely clarified existing law on the requisite degree of limitation. Both before and after passage of the Poppink Act, FEHA required a showing of a limitation, not a substantial limitation. (Disapproving *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031 [101 Cal.Rptr.2d 353]; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614 [86 Cal.Rptr.2d 497]; *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431 [71 Cal.Rptr.2d 573]; *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709 [70 Cal.Rptr.2d 531]; and *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805 [59 Cal.Rptr.2d 339] to the extent they hold or suggest the federal law's substantial limitation test applies to claims of physical disability brought under FEHA.)

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 762A; West's Key Number Digest, Civil Rights ⚿ 173.1.]

(3) Courts § 38--Decisions--Stare Decisis.
Language used in any opinion is to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.

(4) Administrative Law § 30--Legislation or Rulemaking--Compliance With Enabling Statute.
An agency invested with quasi-legislative power to adopt regulations has no discretion to promulgate regulations that are inconsistent with the governing statute, in that they alter or amend the statute or enlarge or impair its scope.

(5) Statutes § 44--Construction--Aids--Administrative Construction--Fair Employment and Housing Commission.
Courts give substantial weight to the Fair Employment and Housing Commission's construction of the statutes under which it operates, as the entity charged with implementing the Fair Employment and Housing Act (Gov. Code, § 12935).

(6) Summary Judgment § 26--Appellate Review--Scope of Review.
An order granting summary judgment is reviewed de novo by the Court of Appeal.

COUNSEL

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Eve L. Hill and Paula D. Pearlman for Western Law Center for Disability Rights as Amicus Curiae on behalf of Plaintiff and Appellant. ***1022**

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Pillsbury Winthrop, Shawn Hanson and Katherine S. Ritchey for Standard Insurance Company as Amicus Curiae on behalf of Defendant and Respondent.

Pillsbury Winthrop and George S. Howard, Jr., for the Employers Group and the California Employment Law Council as Amici Curiae on behalf of Defendant and Respondent.

The Legal Aid Society-Employment Law Center, Claudia Center and Patricia A. Shiu for Patrice L. Goldman as Amici Curiae.

KENNARD, J.

The Fair Employment and Housing Act (FEHA) prohibits employment discrimination based on a physical disability. (Gov. Code, § 12940, subd. (a); [FN1] see *Esberg v. Union Oil, Co.* (2002) 28 Cal.4th 262, 267 [121 Cal.Rptr.2d 203, 47 P.3d 1069].) In 1997, defendant Braemar Country Club (Braemar) terminated plaintiff Francisco Colmenares, who had been in its employ for 25 years. Colmenares sued, alleging in part discrimination based on physical disability (a bad back), in violation of the FEHA. (§ 12900 et seq.) In May 2000, the trial court granted Braemar's motion for summary judgment on the basis that Colmenares had failed to make a prima facie showing of physical disability. Colmenares appealed.

FN1 Unless otherwise indicated, further undesignated statutory references are to the Government Code.

On January 1, 2001, while the case was before the Court of Appeal, the Prudence Kay Poppink Act (Poppink Act) took effect. The Poppink Act states that "under the law of this state" a person is physically disabled when he or she has a physiological condition that " *limits* a major life activity" (§ 12926, subd. (k)(1)(B)(i), italics added). In contrast, federal law requires that a disability " *substantially limits* one or more ... major life activities" of an individual. (42 U.S.C. § 12102(2)(A), italics added; 29 C.F.R. § 1630.2(g) (2002).) The Court of Appeal refused to apply the Poppink Act to Colmenares because his termination preceded its effective date and at the ***1023** time of termination, according to the Court of Appeal, the FEHA applied the federal law's narrower definition of physical disability. Because Colmenares had conceded that his back injury did not *substantially* limit his ability to perform his job, the Court of Appeal concluded that he could not establish a claim for disability discrimination. The Court of Appeal affirmed the trial court's judgment.

Two months later, another division of the same Court of Appeal decided *Wittkopf v. County of Los Angeles* (2001) 90 Cal.App.4th 1205, review granted October 10, 2001, S103311. There, as here, the plaintiff's claim of discrimination based on physical disability arose before the January 1, 2001, effective date of the Poppink Act. Disagreeing with the Court of Appeal here, the *Wittkopf* court held that to come within the FEHA's definition of physical disability a plaintiff need only show that the physical impairment limits a major life activity. *Wittkopf* noted that both before and after the Poppink Act the FEHA's definition of physical disability requires only a mere limitation and not a substantial one. Therefore, *Wittkopf* held that the Poppink Act had merely clarified existing law on the degree of limitation required and the statute as clarified has no true retrospective effect. We granted review to resolve the conflict between *Wittkopf* and the Court of Appeal's decision in this case.

I.

We recite the facts as set out in the record before the trial court when it granted defendant's motion for summary judgment. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66 [99 Cal.Rptr.2d 316, 5 P.3d 874].) In 1972, plaintiff Colmenares began working for defendant Braemar as a general laborer. In 1981, Colmenares injured his back at work. Thereafter, under doctor's orders, Colmenares was given only light duties. In 1982, Braemar promoted him to foreman in charge of a golf course maintenance crew, a position that took his physical limitations into consideration. Performance reviews for Colmenares from 1986, 1987 and 1990 rated his performance as good, and

he received raises. Beginning in 1995, a new supervisor began giving Colmenares unfavorable performance reviews. In July 1997, Braemar reassigned Colmenares from supervising a course maintenance crew to supervising a clubhouse construction project that involved heavy labor. In September 1997, Braemar fired Colmenares for "deficiencies in his work performance."

In December 1997, Colmenares filed an administrative complaint with the Department of Fair Employment and Housing, alleging that in 1995 Braemar began requiring him to perform "heavier work" and two years later fired him ***1024** because of his bad back. Having exhausted his administrative remedies, Colmenares in March 1999 filed a complaint in superior court alleging, as here relevant, that his termination violated the FEHA because it was based on his physical disability, namely, a "chronic back injury."

Braemar moved for summary judgment on the ground that Colmenares had no "legally cognizable disability" because his back condition did not "substantially" limit a major life activity. Braemar relied on Colmenares's deposition testimony in which he conceded that his back condition did not *substantially* limit his ability to work as a foreman. Colmenares, however, argued that under the FEHA he need only establish *some* limitation, not the *substantial* limitation standard of federal law, of his ability to perform major life activities. (§ 12926, subd. (k)(1)(B); Cal. Code Regs., tit. 2, § 7293.6, subd. (c)(1)(A)(2).) The trial court disagreed, ruling that California followed federal law in requiring that a disability "substantially" limits major life activities. (42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g)(1) (2002).) Finding that Colmenares had "fail[ed] to meet his burden" to produce evidence that his back condition substantially limited his work activities, the trial court granted Braemar's motion for summary judgment. Colmenares appealed.

The Court of Appeal affirmed. (1)**(See fn. 2)** It construed the FEHA, before its amendment by the Poppink Act, as requiring the physical disability to *substantially* limit one or more major life activities (the test under federal law), and it held that the Poppink Act's broader standard, requiring only that the disability "limits a major life activity," could not be applied retrospectively to Colmenares, whose 1997 firing occurred before that act took effect on January 1, 2001. [FN2]

> FN2 When a statute "merely *clarifies*, rather than changes, existing law [it] does not operate retrospectively." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [62 Cal.Rptr.2d 243, 933 P.2d 507].) Even a material change in statutory language may demonstrate legislative intent only to clarify the statute's meaning. (*Ibid.*) If the legislative intent is to clarify, an amendment has "no retrospective effect because the true meaning of the statute remains the same." (*Ibid.*) Here, there was no change at all in the statutory language; section 12926 used the term "limits" before and after the Legislature's enactment of the Poppink Act. Thus, notwithstanding extensive briefing by the parties and by amici curiae on the retroactivity of the Poppink Act, it is analytically unnecessary here for us to address the retroactivity of that act.

II.

Since 1973 California has prohibited employment discrimination based on "physical handicap." (Stats. 1973, ch. 1189, § 6, p. 2501 [enacting Lab. Code, former § 1420]; see *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1056 [22 Cal.Rptr.2d 287, 856 P.2d 1143] (*Cassista*).) In ***1025** 1980, that prohibition and the definition of physical handicap to include "impairment of sight, hearing, or speech, or impairment of physical ability" were incorporated into the newly enacted FEHA. (Stats. 1980, ch. 992, § 4, p. 3144 [enacting Lab. Code, former § 1413, subd. (h)].) The FEHA did not define impairment. That same year, the Fair Employment and Housing Commission (FEHC), the entity charged with implementing the FEHA (§ 12935), adopted a regulation drawn from a federal regulation (45 C.F.R. § 84.3(j)(1) (1980)) implementing the federal Rehabilitation Act of 1973. (Pub. L. No. 93-112 (Sept. 26, 1973) 87 Stat. 357; 45 C.F.R. § 84, Appen. A (1992).) Instead of defining "impairment," the term used in the California statutes (first in the Labor Code and then in the FEHA), the FEHC's 1980 regulation embraced federal law and defined "physical handicap" as a condition that "substantially limits one or more major life activities." (Former Cal. Admin. Code, tit. 2, § 7293.6, subd. (j)(1).)

In 1990, Congress enacted the Americans with Disabilities Act (ADA). (42 U.S.C. § 12101 et seq.) In 1992, the California Legislature significantly amended the FEHA. Among other things, it substituted the term "physical disability" for "physical handicap" (former § 12920, as amended by Stats. 1992, ch. 913, § 19, p. 4297), and it generally modeled the definition of "physical disability" (former § 12926, subd. (k), as amended by Stats. 1992, ch. 913, § 21.3, p. 4308) on that in the ADA. (See *Cassista, supra,* 5 Cal.4th at pp. 1059-1060.) As relevant here, there was one notable difference between the FEHA and the ADA: While the federal act described a disabled individual as one whose disability " *substantially limits* one or more major life activities" (42 U.S.C. § 12102(2)(A), italics added), the 1992 amendment to the FEHA defined physical disability as an impairment that merely "[*l*] *imits* an individual's ability to participate in major life activities." (Stats. 1992, ch. 913, § 21.3, p. 4308, amending § 12926, subd. (k), italics added.) That definition, the Legislature stated at the time of the 1992 amendment to the FEHA, "shall have the same meaning as the term 'physical handicap' ... construed in American National Ins. Co. v. Fair Employment & Housing Com. [(1982)] 32 Cal.3d 603 [186 Cal.Rptr. 345, 651 P.2d 1151]." (Stats. 1992, ch. 913, § 21.3, p. 4308.) There, this court held that a physical handicap was not confined to a major physical ailment or defect; instead, we construed "physical handicap" to be "a condition of the body" that has the "disabling effect" of making " 'achievement unusually difficult.' " (*American National Ins. Co. v. Fair Employment & Housing Com., supra,* 32 Cal.3d at p. 609.)

When the 1992 Legislature made the just-described amendments to the FEHA, it also amended various *non-FEHA* statutes by defining "disability" in those statutory schemes using the more stringent federal test of "substantial limits." Thus, it inserted the federal definition of disability, including the ***1026** requirement that a disability must substantially limit a major life activity, into provisions prohibiting disability discrimination by and against holders of state-issued occupational or professional licenses (Bus. & Prof. Code, § 125.6), by business establishments providing accommodations, facilities and services and subject to the Unruh Civil Rights Act (Civ. Code, § 54), by entities employing, training or credentialling teachers (Ed. Code, § 44337), by any state-funded program (Gov. Code, § 11135), and with respect to state civil service employment (Gov. Code, § 19231). (Stats. 1992, ch. 913, §§ 2, 4, 12, 18, 28, pp. 4283, 4286, 4293, 4297, 4328.) These changes were consistent with the 1992 Legislature's stated intent "to strengthen California law where it is weaker" than the ADA, that is, in the non-FEHA statutes, "and to retain California law when it provides more protection for individuals with disabilities than" the ADA, that is, in the FEHA. (Stats. 1992, ch. 913, § 1, p. 4282.)

Notwithstanding the Legislature's 1992 amendment of the FEHA to specify that physical disability required only a limitation, as opposed to the federal law's *substantial* limitation, of a person's ability to participate in major life activities, the FEHC did not immediately replace its 1980 *regulatory* definition of physical disability modeled on the federal law's more stringent definition. (Former Cal. Admin. Code, tit. 2, § 7293.6, subd. (j)(1), Register 80, No. 25 (June 21, 1980); former Cal. Admin. Code, tit. 2, § 7293.6, subd. (i)(1), Register 86, No. 45 (Nov. 8, 1986); former Cal. Admin. Code, tit. 2, § 7293.6, subd. (i)(1), Register 88, No. 18 (Apr. 30, 1988).) [FN3] Not until September 1995 did the FEHC adopt a regulation that conformed to the Legislature's 1992 amendment of the FEHA. The 1995 regulation incorporated by reference the statutory definition of physical disability (Cal. Code Regs., tit. 2, § 7293.6, subd. (a)(1)) and defined a physically disabling disease or condition as one that "[l]imits an individual's ability to participate in major life activities." (Cal. Code Regs., tit. 2, § 7293.6, subd. (e)(1)(A)(2).) In this case, Colmenares's dismissal occurred in 1997.

FN3 We take judicial notice of these regulations at plaintiff's request. (Evid. Code, § 451, subd. (b).)

In September 2000, the Legislature enacted the Poppink Act, which took effect on January 1, 2001. As relevant here, the act amended the FEHA's definition of physical disability. (§ 12926, subd. (k), as amended by Stats. 2000, ch. 1049, § 5.) The FEHA, in section 12926, subdivision (k), had previously provided that a " '[p]hysical disability' includes ... [h]aving" a "disease, disorder, condition, cosmetic disfigurement, or anatomical loss" (hereafter disease or condition) that both "[a]ffects one

or more" of certain ***1027** enumerated "body systems" and "[l]imits an individual's ability to participate in major life activities." (Stats. 1992, ch. 913, § 21.3, pp. 4307-4308.) The Poppink Act changed the FEHA's requirement that a physical disease or condition limit "major life activities" to the singular "a major life activity." [FN4] The act explained that such a qualifying disease or condition "limits a major life activity if it makes the achievement" of the activity "difficult." [FN5] (§ 12926, subd. (k)(1)(B)(ii).)

FN4 Because the issue is not before us, we express no opinion as to the significance of this change in the statute's language.

FN5 The Poppink Act also added these two provisions: "(i) 'Limits' shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity. [¶] ... [¶] (iii) 'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working." (§ 12926, subd. (k)(B)(i) & (iii).)

Of particular relevance here is that the FEHA in section 12926 used the term "limits," not the federal law's "substantially limits" language, *before and after* its amendment by the Poppink Act. In this regard, the act declared: "[T]he Legislature has determined that the definition[] of 'physical disability' ... under the law of this state require[s] a 'limitation' upon a major life activity, but do[es] not require, as does the [federal ADA], a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act." (§ 12926.1, subd. (c).) Further, the Legislature declared that "[n]otwithstanding any interpretation of law in Cassista v. Community Foods[, Inc.] (1993) 5 Cal.4th 1050," it intended state law "to require a 'limitation' rather than a 'substantial limitation' of a major life activity." (§ 12926.1, subd. (d).)

Not only did the Poppink Act of 2000 leave unchanged the "limits" test in the FEHA, it also amended other, non-FEHA, statutes to delete the term "substantial" from the limitation test these statutes had used since 1992. Legislative committee analyses explained that the Poppink Act "standardizes" the definition of physical disability "in California civil rights laws, *clarifying* that California's disability protections are broader than federal protections." (Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended Apr. 5, 2000, italics added; accord, Assem. Com. on Appropriations, Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended Apr. 5, 2000.) Thus, the Poppink Act *deleted* from the Unruh Civil Rights Act (Civ. Code, § 54, subd. (b)) and from the state civil service scheme (Gov. Code, § 19231) the requirement that a disability must *substantially* limit a major life activity, thereby conforming those statutes to the "limits" test of the FEHA. (Assem. Com. on Labor and Employment, Analysis of Assem. Bill No. 2222 (1999-2000 Reg. Sess.) as amended Apr. 5, 2000; State Personnel Bd., Bill Analysis of ***1028** Assem. Bill No. 2222 (1999-2000 Reg. Sess.) and related bill Sen. Bill No. 2025 (1999-2000 Reg. Sess.) Apr. 5, 2000; Civ. Code, §§ 51, subd. (e), 51.5, subd. (d), 54, subd. (b); Gov. Code, § 19231, as amended by Stats. 2000, ch. 1049, §§ 2-4 & 9.) (2a) This pattern of Legislative action compels our conclusion that in 2000 the Legislature intended not to make a retroactive change, but only to clarify the degree of limitation required for physical disability under the FEHA.

III.

Here, the Court of Appeal concluded that until January 1, 2001, when the Poppink Act took effect, California law protected as physically disabled only those "whose disabilities *substantially limited* a major life activity," the test under federal law. It reached that conclusion in reliance on certain language in our 1993 decision in *Cassista, supra,* 5 Cal.4th 1050. *Cassista* does contain language that, at first glance, appears to support the Court of Appeal's conclusion here. But a closer look reveals that the comment in question, made in passing, was unnecessary to resolve the issue in that case and therefore was mere dictum.

In *Cassista*, the plaintiff alleged that she was denied a job because of her obesity. (*Cassista,*

supra, 5 Cal.4th at p. 1054.) The sole issue before this court was whether the plaintiff's obesity was a physical handicap or disability under the FEHA, which, as amended in 1992, required "a 'physiological' disorder that affects one or more of the basic bodily 'systems' *and* limits the claimant's ability 'to participate in major life activities.' " (At p. 1059, italics added.) Because the plaintiff had not offered any evidence that her obesity resulted from "a physiological condition or disorder affecting" a body system, the first of the two statutory requirements, we concluded that she did not meet the FEHA's definition of physical disability. (At p. 1066.) We did not address the second statutory requirement for disability, that is, the extent to which the plaintiff's ability to participate in major life activities must be impaired. When *Cassista* went on to comment on that requirement, its pronouncement became mere dictum, thus lacking in precedential force.

Cassista was decided in 1993, shortly after the Legislature in 1992 had significantly amended the FEHA by replacing the phrase "physical handicap" with "physical disability" and recasting the definition of "physical disability" (*ante*, at pp. 1024-1025). In describing the continuity between the statutory schemes before and after the 1992 amendment, *Cassista* stated that the definition of physical disability as amended in 1992 and the "long-standing interpretation of '[physical] handicap' " contained in the implementing regulations were "in harmony" because "[e]ach requires an actual or ***1029** perceived physiological disorder, disease, condition, cosmetic disfigurement or anatomical loss affecting one or more the body's major systems and *substantially limiting* one or more major life activities." (*Cassista, supra,* 5 Cal.4th at p. 1060, italics added.) This sentence is misleading; the statutory definition of physical disability enacted in 1992 did not require the physical limitation to be substantial.

The Court of Appeal here specifically relied on the italicized language from *Cassista* in holding that Colmenares was required to show that his back injury *substantially limited* his ability to work. But, as we have explained, that comment in *Cassista* was dictum: Not at issue in *Cassista* was the extent to which the plaintiff's ability to participate in major life activities must be impaired. (3) " 'Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.' " (*People v. Scheid* (1997) 16 Cal.4th 1, 17 [65 Cal.Rptr.2d 348, 939 P.2d 748], quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 [39 Cal.Rptr. 377, 393 P.2d 689].)

A close look at *Cassista* reveals that in three other passages it accurately described physical disability under the FEHA as a condition that "limits," as opposed to "substantially limits," participation in major life activities. (*Cassista, supra,* 5 Cal.4th at pp. 1052, 1059, 1061.) Thus, by 1997 when Colmenares was fired, the law as described in *Cassista* required only that the physical condition limit, not substantially limit, participation in major life activities.

In 1995, the FEHC adopted a new regulation that tracked the language of the Legislature's 1992 amendment to the FEHA by defining "physical disability" as a physiological disease or condition that "affects" a body system and "[l]imits an individual's ability to participate in major life activities." (Cal. Code Regs., tit. 2, § 7293.6, subd. (e).) (4) An agency invested with quasi-legislative power to adopt regulations has no discretion to promulgate regulations that are inconsistent with the governing statute, in that they " 'alter or amend the statute or enlarge or impair its scope.' " (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 300 [105 Cal.Rptr.2d 636, 20 P.3d 533].) By issuing new regulations in 1995, the FEHC brought its regulatory definition of physical disability into alignment with the FEHA's statutory definition, which had been in effect since January 1, 1993. (5) We "give substantial weight to the FEHC's construction of the statutes under which it operates." (*Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1118 [95 Cal.Rptr.2d 514, 997 P.2d 1169].) ***1030**

Since adopting new regulations in 1995 that, among other things, mirrored the broad test of physical disability set forth in the Legislature's 1992 amendment to the FEHA (requiring limitation, not substantial limitation, of major life activities), the FEHC has applied that test in two precedential decisions. (*Dept. of Fair Empl. & Hous. v. Silver Arrow Express, Inc.* (1997) No. 97-12, FEHC Precedential Decs. 1996-1997, CEB 2, pp. 7-8, 11 [finding employer regarded as physically disabled an employee who had heart and back conditions that prevented him from lifting, pulling or pushing loads weighing over 25 pounds and thus *limited* his ability to participate in major life activities]; *Dept.*

of Fair Empl. & Hous. v. Seaway Semiconductor (2000) No. 00-03-P, FEHC Precedential Decs. 2000-2002, CEB 1, pp. 15-16 & fn. 4 [finding to be physically disabled an employee who had a thyroid condition that limited her ability to participate in major life activities, which the FEHC described as a "less onerous standard than the federal definition" requiring that "an impairment ' *substantially* limit' a major life activity"].)

The FEHC, authorized by the Legislature to issue precedential opinions (§ 12935, subd. (h)), publishes those decisions, making them available to the public as notice of its interpretation of the statutory scheme. (See *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1025 [56 Cal.Rptr.2d 109, 920 P.2d 1314] [precedential decisions of Unemployment Insurance Appeals Board].) (2b) We presume the Legislature was aware that beginning in 1995 the FEHC was construing in its regulations, and applying in its precedential decisions, the FEHA's statutory definition of physical disability, as set forth in the 1992 amendment to the FEHA, to require only that a disabling condition limit (not substantially limit) the individual's participation in major life activities. (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235, fn. 7 [5 Cal.Rptr.2d 782, 825 P.2d 767].) Thus, in 2000 when the Legislature passed the Poppink Act, which explained when a physical disability "limits" a major life activity under the FEHA (see *ante,* at pp. 1026-1027 & fn. 5), the Legislature knew that the FEHC, in implementing the FEHA, was already applying the "limits" test, which is broader than the federal "substantially limits" standard.

To summarize, when the Legislature in 1992 amended the FEHA, it defined physical disability as a physiological condition that "limits" major life activities. In 2000, when the Legislature passed the Poppink Act, which amended the FEHA, it retained that "limits" language. At that time, the Legislature clarified in express terms that a physical disability under the FEHA does *not* require the federal test's *substantial limitation* of a major life activity. (§ 12926.1, subd. (c).) Thus, before and after passage of the Poppink Act the FEHA's test was "limits," not substantial limits. Moreover, the ***1031** legislative history of the Poppink Act supports the view that the Legislature merely clarified the existing "limits" test in the FEHA and, contrary to the conclusion of the Court of Appeal here, did not retrospectively change that test. (*Western Security Bank v. Superior Court, supra,* 15 Cal.4th at p. 243 ["such a legislative act has no retrospective effect because the true meaning of the statute remains the same"].) [FN6]

FN6 We disapprove the following cases to the extent they hold or suggest the federal law's *substantial limitation* test applies to claims of physical disability brought under the FEHA: *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1039-1040 [101 Cal.Rptr.2d 353] (holding that applicant for deputy sheriff who was unable to see the color red was not substantially limited in life activity of working, and, therefore, was not physically disabled under the FEHA); *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 629 [86 Cal.Rptr.2d 497] (holding that employee opposing a summary judgment motion who offered evidence of "only minor limitations" but not of substantial limitations, did not have a physical disability under the FEHA); *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 442 [71 Cal.Rptr.2d 573] (asserting that in 1992 "the Legislature intended to conform California's employment discrimination statutes to the ADA"); *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 721 [70 Cal.Rptr.2d 531] (suggesting the substantial limitation test must be met to prove physical disability under the FEHA); and *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813 [59 Cal.Rptr.2d 339] (stating "a covered *disability* under the FEHA ... incorporates the definition of disability listed in the Americans with Disabilities Act ....").

IV.

In petitioning for review, Colmenares raised a second issue: Did the trial court err in granting summary judgment in light of the evidence presented supporting Colmenares's allegations of disability discrimination and failure to accommodate? Braemar replies that even if the summary judgment was erroneously granted under the "substantial limitation" test, it was nonetheless entitled to summary judgment on an alternative ground it raised below.

(6) An order granting summary judgment is reviewed de novo by the Court of Appeal (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 [110 Cal.Rptr.2d 370, 28 P.3d 116]), and therefore we remand the case to that court to determine whether summary judgment was proper on any ground advanced below by Braemar, which as the moving party bore the burden of persuasion on its motion for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

Conclusion

(2c) We hold that in 1997, when Colmenares's cause of action for wrongful termination arose, a plaintiff seeking to establish physical disability under the FEHA had to show: (1) a physiological disease or condition affecting a body system; and (2) the disease or condition limited (as opposed ***1032** to substantially limited, as required under federal law) the plaintiff's ability to participate in major life activities.

The judgment is reversed, and the cause is remanded to the Court of Appeal for proceedings consistent with this opinion.

George, C. J., Baxter, J., Werdegar, J., Chin, J., Brown, J., and Moreno, J., concurred. ***1033**

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29 Cal.4th 1019, 63 P.3d 220, 130 Cal.Rptr.2d 662, 68 Cal. Comp. Cases 129, 14 A.D. Cases 8, 25 NDLR P 140, 03 Cal. Daily Op. Serv. 1477, 2003 Daily Journal D.A.R. 1919

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- 2002 WL 985328 (Appellate Brief) APPELLANT'S REPLY BRIEF ON THE MERITS (Feb. 19, 2002)
- 2002 WL 977254 (Appellate Brief) RESPONDENT'S ANSWER BRIEF ON THE MERITS (Jan. 30, 2002)
- 2001 WL 1700643 (Appellate Brief) APPELLANT'S OPENING BRIEF ON THE MERITS (Dec. 03, 2001)
- S098895 (Docket) (Jul. 06, 2001)

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