Hearing Date: August 1, 2008
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ITEM 3

TEST CLAIM
FINAL STAFF ANALYSIS

Pupil Expulsions II (96-358-03, 03A, 03B, 98-TC-22, 01-TC-18)

Education Code Sections 48900, 48900.2, 48900.3, 48900.4, 48915, 48915.1, 48915.2, 48915.7, 48916, 48916.2,[1] 48917 (& former 48907.5), 48918

Statutes 1975, Chapter 1253, Statutes 1977, Chapter 965, Statutes 1978, Chapter 668, Statutes 1979, Chapter 1014, Statutes 1982, Chapter 318, Statutes 1983, Chapter 498, Statutes 1984, Chapter 23, Statutes 1984, Chapter 536, Statutes 1984, Chapter 622, Statutes 1985, Chapter 318, Statutes 1986, Chapter 1136, Statutes 1987, Chapter 383, Statutes 1987, Chapter 942, Statutes 1989, Chapter 1306, Statutes 1990, Chapter 1231, Statutes 1990, Chapter 1234,[2] Statutes 1992, Chapter 152, Statutes 1992, Chapter 909, Statutes 1993, Chapter 1255, Statutes 1993, Chapter 1256, Statutes 1993, Chapter 1257, Statutes 1994, Chapter 146, Statutes 1994, Chapter 1017, Statutes 1994, Chapter 1198, Statutes 1995, Chapter 95, Statutes 1995, Chapter 972, and Statutes 1996, Chapter 15
Filed on December 23, 1996

First Amendment to add Education Code Sections 48916.1 & 48918.5, and to delete 48916.2 and 48915.7, and to add Statutes 1995, Chapter 974, Statutes 1996, Chapter 915, Statutes 1996, Chapter 937, and Statutes 1996, Chapter 1052
Filed on June 6, 1996

Second Amendment to add Education Code Section 48900.7, and to add Statutes 1997, Chapter 405, and Statutes 1997, Chapter 637
Filed on March 2, 1998

Third Amendment to add Education Code Sections 48918 (as amended), 48919, 48919.5, and to add Statutes 1997, Chapter 417 and Statutes 1998, Chapter 489
Filed on June 28, 1999

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[1] In the June 1997 amendment to the *Pupil Expulsions II* test claim, claimant withdrew Education Code sections 48915.7 (repealed by Stats. 1995, ch. 974) and 48916.2 (added by Stats. 1995, ch. 15, repealed by its own terms). Based on claimant's withdrawal, the Commission does not have jurisdiction over those statutes.

[2] In a January 1997 letter regarding *Pupil Expulsions II*, claimant pled Statutes 1990, chapter 1234. The subject matter of this statute, however, was withdrawn by claimant in its letter of August 5, 1997, by stating: "there was no intent or interest in alleging reimbursement within the scope of these claims for special education pupils." Therefore, the Commission does not have jurisdiction over section 48917 as amended by Statutes 1990, chapter 1234.

Fourth Amendment to add Education Code Sections 48900, 48900.3, 48915, 48916.1, 48918, 48919, 48923, as added or amended by Statutes 1998, Chapter 489, Statutes 1999, Chapter 332, Statutes 1999, Chapter 646, Statutes 2000, Chapter 147, Statutes 2001, Chapter 116, and Statutes 2001, Chapter 484
Filed on June 3, 2002

Pupil Suspensions II (96-358-04, 04A, 04B, 98-TC-23, 01-TC-17)

Education Code Sections 48900, 48900.2, 48900.3, 48900.4, 48900.5, 48911

Statutes 1977, Chapter 965, Statutes 1978, Chapter 668, Statutes 1980, Chapter 73, Statutes 1982, Chapter 318, Statutes 1983, Chapter 498, Statutes 1983, Chapter 1302, Statutes 1984, Chapter 536, Statutes 1985, Chapter 318, Statutes 1985, Chapter 856, Statutes 1985, Chapter 907,[3] Statutes 1986, Chapter 1136, Statutes 1987, Chapter 134, Statutes 1987, Chapter 383, Statutes 1989, Chapter 1306, Statutes 1990, Chapter 1234, Statutes 1992, Chapter 909, Statutes 1992, Chapter 1360, Statutes 1994, Chapter 146, Statutes 1994, Chapter 1017, Statutes 1994, Chapter 1198 and Statutes 1995, Chapter 972
Filed on December 23, 1996

First Amendment to add Statutes 1996, Chapter 915 amending Education Code Section 48900
Filed on June 6, 1997

Second Amendment to add Statutes 1997, Chapters 405 and 637, adding or amending Education Code Sections 48900.7 and 48900
Filed on March 2, 1998

Third Amendment to add Statutes 1997, Chapter 637 adding Education Code Section 48900.8
Filed on June 28, 1999

Fourth Amendment to add Statutes 1999, Chapter 646 and Statutes 2001, Chapter 484, amending Education Code Sections 48900 and 48900.3
Filed on June 2, 2002

Educational Services Plan for Expelled Pupils (97-TC-09)

Education Code Sections 48915, 48916, 48916.1, 48926

Statutes 1995, Chapter 972, Statutes 1995, Chapter 974, Statutes 1996, Chapter 937, and Statutes 1996, Chapter 1052
Filed on December 29, 1997

First Amendment filed on December 3, 2001 to substitute Claimant

San Juan Unified School District, Claimant

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[3] In a January 1997 letter, claimant clarified the pleading on Statutes 1985, chapter 907, Statutes 1990, chapter 1234, and Statutes 1992, chapter 1360. But the subject matter of these statutes was withdrawn by claimant via its letter of August 5, 1997. Therefore, the Commission does not have jurisdiction over Statutes 1985, chapter 907, Statutes 1990, chapter 1234, and Statutes 1992, chapter 1360.

EXECUTIVE SUMMARY

Background and Analysis

The test claims and amendments were filed between 1996 and 2002 on Education Code[4] statutes that involve expelling and suspending pupils for various offenses and related activities.

Based on the statutory language, the *San Diego Unified School Dist.* case ((2004) 33 Cal.4th 859), and other cases, staff finds that the test claim is a reimbursable state mandate for expelling and immediately suspending pupils for new mandatory expulsion offenses (in Ed. Code, § 48915, subd. (c)) that were enacted after the original *Pupil Expulsion* (CSM 4455) decision. Other offenses (in § 48915, subd. (a)) are reimbursable only for recommending the pupil for expulsion, but not suspension or issuing the expulsion order.

Staff also finds that some new expulsion hearing procedures are reimbursable, especially for hearings involving allegations of sexual assault or sexual battery.

The last sections analyze numerous activities that are downstream to the expulsion (e.g., suspending enforcement, recommending a rehabilitation plan, ensuring an educational program, the appeal procedure, reviewing for readmission, and data maintenance and records). Staff finds that many of these activities are reimbursable if a pupil is expelled for any of the mandatory expulsion offenses (in Ed. Code, § 48915, subd. (c)).

Issues in Dispute

Claimant and the San Diego Unified School District (SDUSD), in comments on the draft staff analysis, disagree with staff in finding: (1) the state statute that requires expulsion for possession of an explosive is a federal mandate under the Gun-Free Schools Act of 1994 and its successor, No Child Left Behind; and (2) that issuing subpoenas in expulsion hearings is not reimbursable because it is discretionary.

Claimant also argues that the school official's extension of a suspension (§ 48911, subd. (g)) should be reimbursable because it is part of the requirement to provide safe schools, and that section 48919.5 should be reimbursable for a county office of education to use an administrative hearing panel to conduct expulsion appeal hearings because it is an alternative method of performing the mandate for hearing an appeal.

The Department of Finance, in comments on the draft staff analysis, disagrees that section 48923, subdivision (b), is a reimbursable mandate for the school district to adopt findings for an expulsion on remand from the county office of education when it determines that the school district's decision is not supported by the findings, but evidence supporting the required findings exists in the record of the proceedings. Finance argues that it is the school district's decision to not include the evidence that support the expulsion in the findings, so it should not be reimbursable on remand from the county office of education.

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

Conclusion

For the reasons discussed in the analysis, staff finds that the test claim statutes impose a reimbursable state-mandated program within the meaning of article XIII B, section 6, of the California Constitution and Government Code section 17514, for all of the following activities:

- Effective January 1, 1996 (the § 48911 suspension procedures[5] are part of these activities, as well as the § 48918 expulsion hearing procedures):
    - For the principal or superintendent to immediately suspend, pursuant to section 48911, and recommend expulsion, and for the governing board to order expulsion for a pupil who brandishes a knife at another person (§ 48915, subd. (c)(2), Stats. 1995 ch. 972).
    - For the principal or superintendent to immediately suspend, pursuant to section 48911, and the governing board to issue an expulsion order for a pupil who sells a controlled substance, as defined (§ 48915, subd. (c)(3), Stats. 1995 ch. 972).
    - For a principal or superintendent to immediately suspend a pupil pursuant to section 48911, and to recommend the pupil's expulsion, and for the governing board to order a pupil's expulsion for selling or furnishing a firearm unless the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal (§ 48915, subds. (c)(1) & (d), Stats. 1995, ch. 972).
    - For the principal or superintendent to immediately suspend, pursuant to section 48911, and recommend the pupil's expulsion, and for the governing board to order the pupil's expulsion for the first offense of a sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis (§ 48915, subd. (c)(3), Stats. 1995 ch. 972).

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[5] As discussed on pages 28-29, the suspension procedures are: Precede the suspension with an informal conference conducted by the principal or the principal's designee or the superintendent of schools between the pupil (defined to include "a pupil's parent or guardian or legal counsel" § 48925, subd. (e)) and, whenever practicable, the teacher, supervisor, or school employee who referred the pupil to the principal, the principal's designee, or the superintendent of schools. Inform the pupil of the reason for the disciplinary action and the evidence against him or her and give the pupil the opportunity to present his or her version and evidence in his or her defense. (§ 48911, subd. (b).)

At the time of the suspension, a school employee shall make a reasonable effort to contact the pupil's parent or guardian in person or by telephone. Whenever the pupil is suspended from school, the parent or guardian shall be notified in writing of the suspension. (§ 48911, subd. (d).)

A school employee shall report the suspension of the pupil including the cause therefore, to the governing board of the school district or to the school district superintendent in accordance with the regulations of the governing board. (§ 48911, subd. (e).)

- Also effective January 1, 1996:
    - For the principal or superintendent of schools to recommend expelling a pupil for possession of a controlled substance, as defined (except for the first offense of possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis) (§ 48915, subd. (a)(3), Stats. 1995, ch. 972). The section 48918 expulsion hearing procedures are part of this activity.
    - For a pupil expelled for any of the most serious offenses (in § 48915, subd. (c)), to refer the pupil to a program of study that meets the following criteria: (1) is appropriately prepared to accommodate pupils who exhibit discipline problems; (2) is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school; (3) is not housed at the schoolsite attended by the pupil at the time of suspension (§ 48915, subd. (d), Stats. 1995, ch. 972).
    - For a pupil expelled for any of the most serious offenses (in § 48915, subd. (c)), to provide a notice of the education alternative placement to the pupil's parent or guardian at the time of expulsion order. (§ 48918, subd. (j), Stats. 1995, ch. 974).
    - For the school district to amend its expulsion rules and regulations to provide for issuing subpoenas, as specified in subdivision (i) of section 48918.[6] This is a one-time activity (§ 48918, subd. (i), Stats. 1995, ch. 974, §§ 7.5 & 10).

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[6] Section 48918, subdivision (i), states: (1) Before the hearing has commenced, the governing board may issue subpoenas at the request of either the superintendent of schools or the superintendent's designee or the pupil, for the personal appearance of percipient witnesses at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or the superintendent's designee or the pupil, issue subpoenas. All subpoenas shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. Enforcement of subpoenas shall be done in accordance with 11455.20 (originally § 11525) of the Government Code.

(2) Any objection raised by the superintendent of schools or the superintendent's designee or the pupil to the issuance of subpoenas may be considered by the governing board in closed session, or in open session, if so requested by the pupil before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas shall be final and binding.

(3) If the governing board, hearing officer, or administrative panel determines, in accordance with subdivision (f), that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing, a subpoena shall not be issued to compel the personal attendance of that witness at the hearing. However, that witness may be compelled to testify by means of a sworn declaration as provided for in subdivision (f).

(4) Service of process shall be extended to all parts of the state and shall be served in accordance with Section 1987 of the Code of Civil Procedure. All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties,

- Effective July 1, 1996:
    - To ensure that an educational program is provided to the pupil expelled for any of the most serious offenses in subdivision (c) of section 48915. The program must conform to the specifications in section 48916.1. (§ 48916.1, Stats. 1995, ch. 974.)
    - To recommend a rehabilitation plan to a pupil at the time of the expulsion order (§ 48916, subd. (b), Stats. 1995, ch. 974) when a pupil is expelled for any of the most offenses listed in subdivision (c) of section 48915.
    - For the one-time activity of adopting rules and regulations to establish the process for the required review of all expelled pupils for readmission. (§ 48916, subd. (c), Stats. 1995, chs. 972 & 974.)
    - To do the following when the governing board orders the pupil expelled for any of the most serious mandatory expulsion offenses (in § 48915, subd. (c)) (§ 48916, Stats. 1995, chs. 972 & 974):
        - Review the pupil for readmission (§ 48916, subd. (a)).
        - Order the expelled pupil's readmission or make a finding to deny readmission if "the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." (§ 48916, subd. (c).)
        - If readmission is denied, the governing board to make the determination to either continue the placement of the expelled pupil in the alternative education program, or to place the pupil in another program that may include, but need not be limited to, serving expelled pupils, including placement in a county community school (§ 48916, subd. (d)).
        - If readmission is denied, the governing board shall provide written notice to the expelled pupil and the pupil's parent or guardian describing the reasons for denying readmission to the regular school program. The written notice shall include the determination of the education program for the expelled pupil. (§ 48916, subd. (e)).
    - If the county superintendent of schools develops a plan for providing education services to all expelled pupils in the county, for school district governing boards to adopt the plan, effective July 1, 1996 (Stats. 1995, ch. 974).
    - Before allowing the expelled pupil to enroll in a school district that did not expel the pupil, for the receiving district's governing board to determine, pursuant to a hearing under Section 48918, whether an individual expelled from another school district for the offenses listed below poses a danger to either the pupils or employees of the school district (§ 48915.2, subd. (b), Stats. 1995, ch. 974). This activity only is only

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shall receive mileage in the same amount and under the same circumstances as prescribed for witnesses in civil actions in a superior court. Fees and mileage shall be paid by the party at whose request the witness is subpoenaed.

reimbursable for determinations of applicants who have been expelled by a district that has not entered into a voluntary interdistrict transfer agreement with the receiving district.

- Unlawful possession of any controlled substance [as specified] … including the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis. (§ 48915, subd. (a)(3).)
- Possessing, selling, or otherwise furnishing a firearm … [without permission as specified]. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. (§ 48915, subd. (c)(1).)
- Brandishing a knife at another person. (§ 48915, subd. (c)(2).)
- Committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined. (§ 48900, subd. (n) & 48915, subds. (c)(4) & (d), Stats. 1996, chs. 915 and 1052.)
- Possession of an explosive. (§ 48915, subd. (c)(5), Stats. 2001, ch. 116.)

- From July 1, 1996 until September 25, 1996, for school districts to maintain outcome data for pupils expelled for the most serious offenses in subdivision (c) of section 48915, as follows (§ 48916.1, Stats. 1995, ch. 974):
  - Maintain outcome data on those pupils who are expelled and who are enrolled in education programs operated by the school district, the county superintendent of schools, or as otherwise authorized pursuant to section 48916.1 (Stats. 1995, ch. 974). Outcome data shall include, but not be limited to, attendance, graduation and dropout rates of expelled pupils enrolled in alternative placement programs. Outcome data shall also include attendance, graduation and dropout rates, and comparable levels of academic progress, of pupils participating in independent study offered by the school district.
  - Maintain data as further specified by the Superintendent of Public Instruction, on the number of pupils placed in community day school or participating in independent study whose immediate preceding placement was county community school, continuation school, or comprehensive school, or who was not enrolled in any school.
  - Maintain data on the number of pupils placed in community day school whose subsequent placement is county community school, continuation school, or comprehensive school, or who are not enrolled in any school.
- Effective September 26, 1996, for the school district to maintain data on the following and report it to CDE for pupils expelled for the most serious offenses in section 48915, subdivision (c): (1) Whether the expulsion order was suspended. (2) The type of referral made after the expulsion. (3) The disposition of the pupil after the end of the period of expulsion. (§ 48916.1, subd. (e), Stats. 1996, ch. 937.)

- Effective September 26, 1996 until January 7, 2002, for school districts to maintain data on the following and report it to CDE for pupils expelled for the most serious offenses in section 48915, subdivision (c):
    - (A) The number of pupils recommended for expulsion. (B) The grounds for each recommended expulsion. (C) Whether the pupil was subsequently expelled. (D) Whether the expulsion order was suspended. (E) The type of referral made after the expulsion. (F) The disposition of the pupil after the end of the period of expulsion. (§ 48916.1, subd. (e), Stats. 1996, ch. 937.)
- Effective January 1, 1997:
    - For the principal or superintendent to suspend, pursuant to section 48911, and recommend expulsion, and for the governing board to order expulsion, for pupils who commit or attempt to commit a sexual assault or sexual battery, as defined[7] (§ 48915, subds. (c)(4) & (d), Stats. 1996, chs. 915 & 1052). The section 48911 suspension procedures listed on pages 28-29 are part of this activity, as well as the expulsion hearing procedures in section 48918.
    - For the principal or superintendent of schools to recommend expelling a pupil for assault or battery on any school employee. (§48915, subd. (a)(5), Stats. 1996, chs. 915 & 1052.) The expulsion hearing procedures in section 48918 are part of this activity.
    - For the one-time activity of amending the school district's rules and regulations to include the following procedures that apply when there is a recommendation to expel a pupil based on an allegation of sexual assault or attempted sexual assault, or sexual battery, as defined in subdivision (n) of section 48900:
        - A complaining witness shall be given five days' notice prior to being called to testify. (§ 48918, subd. (b), Stats. 1996, ch. 916.)
        - A complaining witness shall be entitled to have up to two adult support persons, including but not limited to, a parent, guardian, or legal counsel, present during his or her testimony (*Ibid.*).
        - If the complaining witness has one or more support persons, and one or more of the support persons is also a witness, to follow the provisions of Section 868.5 of the Penal Code[8] at the hearing (§ 48918, subd. (b), Stats. 1996, ch. 915).

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[7] A sexual assault is defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code and a sexual battery as defined in Section 243.4 of the Penal Code (§ 48900, subd. (n)).

[8] Penal Code section 868.5 entitles a prosecuting witness in certain crimes to have up to two support persons during the witness' testimony, one of which may accompany the witness to the stand. Section 868.5 also states:

> (b) If the person or persons so chosen are also prosecuting witnesses, the prosecution shall present evidence that the person's attendance is both desired by

- Prior to a complaining witness testifying, support persons shall be admonished that the hearing is confidential (*Ibid.*).
- Nothing shall preclude the person presiding over an expulsion hearing from removing a support person whom the presiding person finds is disrupting the hearing. If one or both of the support persons is also a witness, the provisions of Section 868.5 of the Penal Code shall be followed for the hearing (*Ibid.*).
- If the hearing is to be conducted at a public meeting, … a complaining witness shall have the right to have his or her testimony heard in a session closed to the public when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. (§ 48918, subd. (c), Stats. 1996, ch. 915.)
- Evidence of specific instances of a complaining witness' prior sexual conduct is presumed inadmissible and shall not be heard absent a determination by the person conducting the hearing that extraordinary circumstances exist requiring the evidence to be heard. Before the person conducting the hearing makes the determination on whether extraordinary circumstances exist requiring that specific instances of a complaining witness' prior sexual conduct be heard, the complaining

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the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. In the case of a juvenile court proceeding, the judge shall inform the support person or persons that juvenile court proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. In all cases, the judge shall admonish the support person or persons to not prompt, sway, or influence the witness in any way. Nothing in this section shall preclude a court from exercising its discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the witness.

(c) The testimony of the person or persons so chosen who are also prosecuting witnesses shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during that testimony. Whenever the evidence given by that person or those persons would be subject to exclusion because it has been given before the corpus delicti has been established, the evidence shall be admitted subject to the court's or the defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

witness shall be provided notice and an opportunity to present opposition to the introduction of the evidence. (§ 48918, subd. (h), Stats. 1996, ch. 915.)

- In the hearing on the admissibility of the evidence, the complaining witness shall be entitled to be represented by a parent, guardian, legal counsel, or other support person. Reputation or opinion evidence regarding the sexual behavior of the complaining witness is not admissible for any purpose. (§ 48918, subd. (h), Stats. 1996, ch. 915.)
- For the governing board to give the complaining witness five days notice before testifying, and admonishing the witness' support person(s) that the hearing is confidential. (§ 48918, subd. (b), Stats. 1996, ch. 915).
- For the governing board to allow the complaining witness to have closed session testimony when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. (§ 48918, subd. (c), Stats. 1996, ch. 915.)
- At the time that the expulsion hearing is recommended, the complaining witness is provided with a copy of the applicable disciplinary rules and advised of his or her right to: (1) receive five days' notice of the complaining witness's scheduled testimony at the hearing, (2) have up to two adult support persons of his or her choosing, present in the hearing at the time he or she testifies; (3) to have the hearing closed during the time they testify pursuant to subdivision (c) of section 48918. (§ 48918.5, subd. (a).)
- The expulsion hearing may be postponed for one schoolday in order to accommodate the special physical, mental, or emotional needs of a pupil who is the complaining witness. (§ 48918.5, subd. (b).)
- For the district to provide a nonthreatening environment for a complaining witness in order to better enable them to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each school district provides a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony. In the discretion of the person conducting the hearing, the complaining witness is allowed reasonable periods of relief from examination and cross-examination during which he or she may leave the hearing room. The person conducting the hearing may arrange the seating within the hearing room of those present in order to facilitate a less intimidating environment for the complaining witness. The person conducting the hearing may limit the time for taking the testimony of a complaining witness to the hours he or she is normally in school, if there is no good

cause to take the testimony during other hours. The person conducting the hearing may permit one of the complaining witness's support persons to accompany him or her to the witness stand. (§ 48918.5, subd. (c).)

- For the person conducting the expulsion hearing to immediately advise the complaining witnesses and accused pupils to refrain from personal or telephonic contact with each other during the pendency of any expulsion process. (§ 48918.5, subd. (d), Stats. 1996, ch. 915.)

- For school districts to do the following when a pupil is recommended for an expulsion involving allegations of sexual assault or attempted sexual assault, as defined, or sexual battery, as defined in section 48900, subdivision (n):
  - At the time the expulsion hearing is recommended, provide the complaining witness with a copy of the applicable disciplinary rules and to advise the witness of his or her right to: (1) receive five days' notice of the complaining witness's scheduled testimony at the hearing, (2) have up to two adult support persons of his or her choosing present in the hearing at the time he or she testifies; and (3) "have the hearing closed during the time they [sic] testify pursuant to subdivision (c) of section 48918." (§ 48918.5, subd. (a), Stats. 1996, ch. 915.)
  - If the complaining witness has one or more support persons, and one or more of the support persons is also a witness, to follow the provisions of Section 868.5 of the Penal Code at the hearing. (§ 48918, subd. (b), Stats. 1996, ch. 915.) The section 868.5 procedures include: (1) Only one support person may accompany the witness to the witness stand, although the other may remain in the room during the witness' testimony. (2) For the prosecution to present evidence that the support person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness; (3) For the governing board, on the prosecution's showing in (2), to grant the request for the support person unless information presented by the defendant or noticed by the district establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. (4) The governing board shall inform the support person or persons that the proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. (5) For the governing board to admonish the support person or persons to not prompt, sway, or influence the witness in any way. (6) For the testimony of their support person or persons who are also prosecuting witnesses to be presented before the testimony of the prosecuting witnesses. (7) For the prosecuting witnesses to be excluded from the courtroom during that testimony. (8) When the evidence given by the support person would be subject to exclusion because it has been given before the corpus delicti[9] has

[9] The corpus delicti is the basic element or fact of a crime.

been established, for the evidence to be admitted subject to the governing board or defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

- Provide a nonthreatening environment for a complaining witness in order to better enable him or her to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each school district shall provide a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony." (§ 48918.5, subd. (c), Stats. 1996, ch. 915.)
- Immediately advise the complaining witnesses and accused pupils to refrain from personal or telephonic contact with each other during the pendency of any expulsion process. (§ 48918.5, subd. (d), Stats. 1996, ch. 915.)

- Effective January 1, 1998, for school districts to identify by offense, in all appropriate official records of a pupil, each suspension (but not expulsion) of that pupil for any of the most serious mandatory offenses (in § 48915, subd. (c)) (§ 48900.8, Stats. 1997, ch. 637).
- Effective January 1, 1999, for the school district to amend its expulsion rules and regulations as follows (§ 48918, subd. (a), Stats. 1998, ch. 498). This is a one-time activity.
  - If compliance by the governing board with the time requirements for the conducting of an expulsion hearing under subdivision (a) of section 48918 is impracticable due to a summer recess of governing board meetings of more than two weeks, the days during the recess period shall not be counted as schooldays in meeting the time requirements. The days not counted as schooldays in meeting the time requirements for an expulsion hearing because of a summer recess of governing board meetings shall not exceed 20 schooldays, as defined in subdivision (c) of Section 48915, and unless the pupil requests in writing that the expulsion hearing be postponed, the hearing shall be held no later than 20 calendar days prior to the first day of school for the school year.
- Effective January 1, 2000:
  - For a school district to perform the following one-time activities: (1) updating the school district rules and regulations regarding notification to the pupil regarding the opportunity to be represented by legal counsel or a nonattorney adviser, and (2) revising the pupil notification to include the right to be represented by legal counsel or a nonattorney advisor (§ 48918, subd. (b)(5), Stats. 1999, ch. 332). These activitie are reimbursable when the pupil commits any of the offenses specified in subdivision (c) or subdivision (a) of section 48915.
  - For a county board of education to remand an expulsion matter to a school district for adoption of the required findings if the school district's decision is not supported by the findings required by section 48915, but evidence supporting the required findings exists in the record of the proceedings (§ 48923, subdivision (b), Stats. 2000, ch. 147). This activity is reimbursable for any expulsion.

- For a school district, when adopting the required findings on remand from the county board of education, to: (1) take final action on the expulsion in a public session (not hold another hearing) and; (2) provide notice to the pupil or the pupil's parent or guardian of the following: the expulsion decision, the right to appeal to the county board, the education alternative placement to be provided during the expulsion, and the obligation of the parent or guardian to inform a new school district in which the pupil may enroll of the pupil's expulsion (§ 48918, subd. (j)); and (3) maintain a record of each expulsion and the cause therefor (§ 48918, subd. (k)). (§ 48923, subdivision (b), Stats. 2000, ch. 147.) This activity is only reimbursable when the district governing board orders the pupil expelled for any of the most serious mandatory expulsion offenses (listed in § 48915, subd. (c)).

- Effective January 1, 2002, for a principal or superintendent to immediately suspend, pursuant to section 48911, a pupil who possess an explosive at school or at a school activity off school grounds (§ 48915, subds. (c) & (d), Stats. 2001, ch. 116). The section 48911 suspension procedures listed on pages 28-29, as well as the section 48918 expulsion hearing procedures, are part of this activity.

Staff also finds that the remaining test claim statutes over which the Commission has jurisdiction do not constitute reimbursable state-mandates within the meaning of article XIII B, section 6.

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and partially approve the test claim for the activities listed above.

STAFF ANALYSIS

Claimant

San Juan Unified School District

Chronology

12/23/96	*Pupil Expulsions II* and *Pupil Suspensions II* test claims filed by claimant
12/30/96	Commission staff requests additional documentation on both test claims
1/21/97	Claimant provides requested documentation on both test claims
6/6/97	Claimant files first amendment to both test claims
7/30/97	Commission staff convenes informal conference on both test claims
8/4/97	Department of Finance (Finance) submits letter indicating intent to oppose test claims, at least in part, and requests time extension to file comments
8/11/97	Claimant submits letter indicating no intent to seek reimbursement of suspension and expulsion procedures for special education pupils
9/25/97	Commission, at hearing, finds test claims to be disputed
11/13/97	Finance submits comments on *Pupil Suspensions II* test claim
11/14/97	Finance submits comments on *Pupil Expulsions II* test claim
11/20/97	Claimant submits letters on both test claims regarding Finance's comments
12/29/97	*Educational Services Plan for Expelled Pupils* test claim filed by Kern County Superintendent of Schools (San Juan claimant substituted 12/03/01)
2/9/98	Finance submits comments on *Educational Services Plan for Expelled Pupils* test claim
2/26/98	Commission, at hearing, finds *Educational Services Plan for Expelled Pupils* test claim to be disputed
3/02/98	Claimant files second amendment to both test claims
4/27/98	Finance submits comments on both test claim amendments
5/11/98	Claimant files rebuttal comments to Finance's comments
6/28/99	Claimant files third amendment to both test claims
10/29/99	Finance submits comments on both test claims
07/17/00	Claimant requests informal conferences on the test claims
7/27/01	Commission Executive Director consolidates *Pupil Expulsions II* and *Pupil Suspensions II* and *Educational Services Plan for Expelled Pupils* test claims
9/26/01	Commission staff convenes informal conference on all three test claims
10/17/01	Commission staff sends a stipulation and agreement to waive procedural requirements

11/5/01	Claimants San Juan Unified School District and Kern County Superintendent of Schools notify Commission staff that they will not sign stipulation
12/3/01	Claimant San Juan Unified School District submits letter "accepting sponsorship" of the *Educational Services Plan for Expelled Pupils* test claim (filed by Kern County Superintendent of Schools)
12/10/01	Claimant representative submits request to substitute San Juan Unified School District for the *Educational Services Plan for Expelled Pupils* test claim
6/3/02	Claimant files fourth test claim amendments on the *Pupil Suspensions II* and *Pupil Expulsions II* test claims
7/25/02	Claimant submits declaration from San Diego County Office of Education for the *Pupil Suspensions II* and *Pupil Expulsions II* test claims
8/14/02	Claimant submits declaration from Bakersfield City School District for the *Educational Services Plan for Expelled Pupils* test claims
8/2/04	California Supreme Court issues decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859
5/26/05	Commission adopts new decision for the *Pupil Expulsions* test claim
7/27/05	Commission staff holds a pre-hearing on *Pupil Suspensions* and *Pupil Expulsions* and *Educational Services Plan for Expelled Pupils* test claims
7/28/06	Commission adopts amended parameters and guidelines for *Pupil Suspensions* and *Pupil Expulsions* and *Pupil Expulsions Appeals* test claims
4/18/08	Commission staff issues draft staff analysis
4/25/08	Commission staff posts draft staff analysis on its website: www.csm.ca.gov.
5/19/08	Claimant submits comments on draft staff analysis
5/21/08	San Diego Unified School District submits comments on draft staff analysis
7/11/08	Department of Finance submits comments on the draft staff analysis
7/18/08	Commission staff issues final staff analysis and proposed Statement of Decision

Background

The Test Claim Statutes

The test claim statutes add or amend Education Code sections that govern the grounds and procedures for handling pupil expulsions[10] suspensions,[11] rehabilitations, readmissions, and

[10] An expulsion means "removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel, as those terms are used in Section 46300." (§ 48925, subd. (b).) As discussed below, however, a school district must refer a pupil to an educational program, and ensure an educational program is provided to an expelled pupil. (§§ 48916.1, 48915, subds. (d) & (f).)

expulsion appeals, as well as county office of education plans for educational services to expelled pupils.

Section 48915 classifies pupil expulsions into three categories of offenses: (1) the most serious acts in subdivision (c) for which the principal or superintendent must immediately suspend pursuant to section 48911, and recommend the pupil for expulsion, and for which the governing board must order expulsion;[12] (2) those acts in subdivision (a) for which a pupil must be recommended for expulsion unless the principal or superintendent finds that expulsion is inappropriate due to the circumstances;[13] and (3) the less serious acts in subdivisions (b) and (e) for which a pupil may be expelled if either (i) other means of correction are not feasible or have repeatedly failed to bring about the proper conduct, or (ii) due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.[14] Section 48915, subdivision (d), requires expelled pupils to be referred to programs of study that meet specified conditions.

Whenever the principal or superintendent recommends a pupil for expulsion, the pupil is entitled to a hearing pursuant to the procedures in section 48918.[15]

Section 48900 details 18 separate grounds for pupil suspension or expulsions (a number that has varied with the test claim filing and its amendments). This section prohibits a pupil suspension or expulsion, "unless the superintendent or the principal of the school … determines that the pupil has committed an act as defined …." Subsequent sections add more grounds for suspensions or expulsions: 48900.2 (sexual harassment), 48900.3 (hate violence), 48900.4 (harassment, threats, or intimidation) and 48900.7 (terroristic threats).

The test claim also alleges section 48900.5, which states that "suspension shall be imposed only when other means of correction fail to bring about the proper conduct." This section also authorizes suspension for a first offense based on any of the grounds listed in section 48900 if the principal or superintendent of schools makes a determination as specified.

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[11] A suspension means "removal of a pupil from ongoing instruction for adjustment purposes." The statutory definition also includes what suspension "does not mean." (§ 48925, subd. (d).)

[12] Subdivision (d) of section 48915 requires expulsion for the subdivision (c) offenses, which are: possessing a firearm without permission, brandishing a knife at another person, unlawfully selling a controlled substance, committing or attempted commission of a sexual assault or sexual battery, or possession of an explosive (§ 48915, subd. (c)).

[13] Those offenses are: causing serious physical injury to another person, except in self defense, possessing a knife, explosive, or other dangerous object of no reasonable use to the pupil, possession of a controlled substance (except first offense of possession for one ounce or less of marijuana), robbery or extortion, or assault or battery or threat thereof on a school employee (§ 48915, subd. (a)).

[14] Other offenses are listed, all referring to those in section 48900 et seq. for which suspension or expulsion may be imposed.

[15] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 870. The principal or superintendent is required to recommend expulsion for the offenses in subdivisions (c) and (a) of section 48915.

Section 48911 details the procedure for effecting a suspension, and section 48900.8 requires identification in official pupil records of each suspension or expulsion of that pupil for specified offenses.

Sections 48915.1, 48915.2, 48916, 48916.1, and 48916.5 were also pled. Section 48915.1 specifies the hearing procedure and criteria for an expelled pupil to enroll in another school district, except for pupils expelled for offenses in section 48915, subdivisions (a) or (c). Section 48915.2 prohibits a pupil expelled for offenses in section 48915, subdivisions (a) or (c), from enrolling in any other school or school district during the expulsion except for specified programs under specified conditions.

Section 48916 covers readmission procedures after expulsion, and section 48916.1 outlines the educational program requirements for expelled pupils. Section 48916.5 authorizes a school district to require a pupil expelled for reasons related to controlled substances to enroll in a drug rehabilitation program (with parental consent).

Section 48917 specifies how expulsion orders may be suspended, and that assignment of the pupil to a school, class, or rehabilitation program is a condition of the expulsion order's suspension of enforcement.

Section 48918 states that school districts "shall establish rules and regulations governing procedures for the expulsion of pupils" which must include notice, a hearing, and other procedural protections. Section 48918.5 states procedures required for expulsions based on allegations of sexual assault or attempted sexual assault, or sexual battery. Section 48919 specifies procedures for appealing a school board's expulsion decision to the county board of education, and requires county boards of education to adopt rules and regulations to govern procedures for expulsion appeals. Section 48919.5 outlines procedures for a county board of education to use a hearing officer or impartial administrative panel to hear expulsion appeals.

Section 48923 authorizes, upon making certain findings, a county board of education to remand an expulsion matter to the school district or grant a new hearing. It also states that the county board "shall enter an order either affirming or reversing the [expulsion] decision of the governing board."

Section 48926 requires counties that operate community schools (pursuant to section 1980) to develop a plan for providing education services to expelled pupils in the county, in conjunction with the county's school district superintendents. Adoption by the county board of education and each of the county's school districts is required. The plan is to include specified criteria, and must be submitted to the Superintendent of Public Instruction, and updated triennially.

Prior Commission Decisions

Pupil Suspensions (CSM 4456): After its October 1996 hearing, the Commission adopted in December 1996 the *Pupil Suspensions from School* Statement of Decision, on Education Code sections 48900, 48900.2, 48900.3, 48900.4, and 48911 (as added or amended between 1977 and 1994).[16] The Commission found that many of the sections are not reimbursable because they

[16] This test claim, filed March 9, 1994 and April 7, 1995, alleged the following Statutes and chapters: Statutes 1977, chapter 668, Statutes 1978, chapter 73, Statutes 1980, chapter 318, Statutes 1982, chapter 498, Statutes 1983, chapter 536, Statutes 1984, chapter 318, Statutes 1985,

were enacted to extend the federal requirements of procedural due process to California public school pupils facing suspension. Pupil suspension procedures in section 48911, subdivisions (b) and (e), however, were found to impose requirements outside the scope of federal due process and thus were found reimbursable. The reimbursable activities are attendance at the pre-suspension conference and a report of the cause of each suspension to the district office.

Pupil Expulsions (CSM 4455): The *Pupil Expulsions* test claim was heard by the Commission on October 31, 1996, with supplemental hearings held on December 19, 1996 and March 27, 1997. In a Statement of Decision adopted May 29, 1997, effective May 4, 1998, and corrected August 10, 1998, the Commission found that Education Code sections 48900, 48900.2, 48900.3, 48900.4, 48915, 48915.1, 48915.2, 48915.7, 48916, 48918 (added or amended between 1975 and 1994) impose a partially reimbursable mandate on school districts.[17] The decision was challenged by the San Diego Unified School District. In *San Diego Unified School Dist. v. Commission on State Mandates*, the California Supreme Court described the Commission's actions as follows:

> In August 1998, after holding hearings on the District's claim (as amended in April 1995, to reflect legislation that became effective in 1994) the Commission issued a "Corrected Statement of Decision" in which it determined that Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession constituted a "new program or higher level of service," and found that because costs related to some of the resulting hearing provisions set forth in Education Code section 48918 (primarily various notice, right of inspection, and recording provisions) exceeded the requirements of federal due process, those additional hearing costs constituted reimbursable state-mandated costs. As to the vast majority of the remaining hearing procedures triggered by Education Code section 48915's requirement of suspension and a mandatory recommendation of expulsion for firearm possession—for example, procedures governing such matters as the hearing itself and the board's decision; a statement of facts and charges; notice of the right to representation by counsel; written findings; recording of the hearing; and the making of a record of the expulsion—the Commission found that those procedures were enacted to comply with federal due process requirements, and

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chapter 856, Statutes 1986, chapter 1136, Statutes 1987, chapter 134, Statutes 1987, chapter 383, Statutes 1989, chapter 1306, Statutes 1992, chapter 909, Statutes 1994, chapter 146, Statutes 1994, chapter 1017, Statutes 1994, chapter 1198.

[17] The *Pupil Expulsions* (CSM 4455) test claim alleged the following: Statutes 1975, chapter 1253, Statutes 1977, chapter 965, Statutes 1978, chapter 668, Statutes 1979, chapter 1014, Statutes 1982, chapter 318, Statutes 1983, chapter 498, Statutes 1984, chapter 23, Statutes 1984, chapter 536, Statutes 1984, chapter 622, Statutes 1985, chapter 318, Statutes 1986, chapter 1136, Statutes 1987, chapter 383, Statutes 1987, chapter 942, Statutes 1989, chapter 1306, Statutes 1990, chapter 1234, Statutes 1992, Chapter 152, Statutes 1992, chapter 909, Statutes 1993, chapter 1255, Statutes 1993, chapter 1256, Statutes 1993, chapter 1257, Statutes 1994, chapter 146, Statutes 1994, chapter 1198, and Statutes 1994, chapter 1017.

> hence fell within the exception set forth in Government Code section 17556, subdivision (c), and did not impose a reimbursable state mandate. The Commission further found that with respect to Education Code section 48915's *discretionary* expulsions, there was no right to reimbursement for costs incurred in holding expulsion hearings, because such expulsions are not *mandated* by the state, but instead represent a choice by the principal and the school board.[18]

In the *Pupil Expulsions* (CSM 4455) decision, the Commission also found the following:

- Section 48916 was reimbursable for activities related to readmission to a district school.
- For determining whether a pupil expelled by another district would pose a potential danger to pupils or employees of the receiving district and whether to admit, deny admission, or conditionally admit the applicant during or after the expulsion. This is limited to applicants who have been expelled by a district that has not entered into a voluntary interdistrict transfer agreement with the receiving district. (§ 48915.1)
- Section 48915.1 is reimbursable for responding to a receiving district's request for recommendation, but only (from Jan. 1994 to present) if the expulsion was for possession of a firearm.
- For districts without an interdistrict transfer agreement, notice and record keeping activities, as well as allowing a pupil or parent or guardian to inspect and obtain copies of specified documents to be used at the admission hearing are reimbursable.

<u>*San Diego Unified School Dist .v. Commission on State Mandates* case</u>

In October 1999, the San Diego Unified School District (claimant in the original Pupil Expulsions decision) filed a petition for writ of mandate to overturn the Commission's findings on Education Code sections 48915 and 48918 in the *Pupil Expulsions* (CSM 4455) test claim. The California Supreme Court heard the case in 2004, summarizing its decision as follows:

> We conclude that Education Code section 48915, insofar as it compels suspension and mandates a recommendation of expulsion for certain offenses, constitutes a "higher level of service" under article XIII B, section 6, and imposes a reimbursable state mandate for *all* resulting hearing costs-even those costs attributable to procedures required by federal law. … [¶]…[¶] We also conclude that *no* hearing costs incurred in carrying out those expulsions that are *discretionary* under Education Code section 48915-including costs related to hearing procedures claimed to exceed the requirements of federal law-are reimbursable. …[T]o the extent that statute makes expulsions discretionary, it does not reflect a new program or a higher level of service related to an existing program. Moreover, even if the hearing *procedures* set forth in Education Code section *48918* constitute a new program or higher level of service, we conclude that *this* statute does not trigger any right to reimbursement, because the hearing provisions that assertedly exceed federal requirements are merely incidental to

[18] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 872-873. [Emphasis in original.]

> fundamental federal due process requirements and the added costs of such procedures are de minimis. For these reasons, we conclude such hearing provisions should be treated, for purposes of ruling upon a request for reimbursement, as part of the nonreimbursable underlying *federal* mandate and not as a state mandate.[19]

Based on the Supreme Court's remand in the *San Diego Unified School Dist.* case, the Commission adopted an Amended Statement of Decision in May 2005.

At its July 2006 hearing, the Commission adopted amended and consolidated parameters and guidelines for *Pupil Suspensions, Expulsions and Expulsion Appeals*, as well as parameters and guidelines on *Pupil Expulsions from School: Additional Hearing Costs for Mandated Recommendations of Expulsion for Specified Offenses.*

Pupil Expulsion Appeals (CSM 4463): The *Pupil Expulsion Appeals* test claim was heard by the Commission on October 31, 1996 and March 27, 1997. In a Statement of Decision adopted March 27, 1997, the Commission found that Education Code sections 48919, 48920, 48921, 48922, 48923, and 48924 (as added or amended by Stats. 1975, ch. 965, Stats. 1978, ch. 668, & Stats. 1983, ch. 498) impose a partially reimbursable state mandate on school districts. Specifically, the Commission found that the following activities are reimbursable state mandates on county boards of education under article XIII B, section 6:

- Notifying appellants of the procedures for conducting the appeal hearing, as part of the county board of education's notice to the pupil regarding the appeal. (§ 48919, 4th par.)
- Reviewing the appeal and record of the expulsion. (§§ 48921-48922.)
- Conducting an initial hearing on an appeal and rendering a decision, limited to appeals which result in a hearing de novo. (§§ 48919, 2d par. & 48923.)
- Preserving the record of the appeal. (§ 48919, 4th par.)
- Notifying appellants of the final order of the county board, in writing, either by personal service, or by certified mail. (§ 48924.)
- Adopting rules and regulations establishing procedures for expulsion appeals. (§ 48919, 4th par.)

Also, the Commission found the following activities are reimbursable state mandates on school districts when a pupil appeals an expulsion for possession of a firearm, knife, or explosive:[20]

- Providing copies of supporting documents and records, other than the transcript, to an appellant who is less than 18 years of age. (§ 48919, 5th par.)

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[19] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 867. [Emphasis in original.]

[20] Possession of a firearm (on or after Oct. 11, 1993) (Stats. 1993, ch. 1256); possession of a knife of no reasonable use to the pupil, or an explosive at school (on or after Oct. 11, 1993 until Dec. 31, 1993) (Stats. 1993, ch. 1255).

- Participating in the county board of education's initial hearing on the appeal of an expulsion when the appeal results in a hearing de novo. (§ 48919, 1st & 2d pars.)
- Sending notice, conducting a supplemental hearing, and rendering a modified decision of an expulsion pursuant to a county board of education's remand of an expulsion appeal. (§ 48923, subd. (a)(1).)
- Expunging the pupil's and district's records of an expulsion if so ordered by the county board of education. (§ 48923, subd. (b).)

Claimant Position

Claimant alleges that the test claim statutes impose a reimbursable mandate under article XIII B section 6 of the California Constitution. In the test claims submitted in December 1996, claimant alleges costs "for school districts to suspend and expel pupils, suspend expulsion orders and readmit expelled pupils, for specified reasons according to specified procedures."[21] Claimant pled many activities and closely followed the statutory language in its pleadings.

Claimant acknowledges the original *Pupil Expulsions* and *Pupil Suspensions* test claims (CSM 4455 & 4456) alleged reimbursable activities enacted between January 1, 1975 and December 31, 1993, but incorporates by reference the allegations of reimbursable mandates in the original test claim and the request to amend it. In August 1997, Commission staff was notified that claimant is not alleging reimbursable activities for special education pupils.[22]

Claimant filed comments on the draft staff analysis in May 2008, disagreeing that expulsion for possession of an explosive and some reporting activities are federal mandates under No Child Left Behind or (for explosive possession only) the Gun-Free Schools Act of 1994. Claimant argues that staff has misapplied the *City of Sacramento*[23] and *Hayes*[24] cases in concluding that the state statute imposes a federal mandate. Claimant also argues that the school official's extension of a suspension during the expulsion process (§ 48911, subd. (g)) should be reimbursable because it is part of the requirement to provide safe schools. Claimant also asserts that a school district issuing a subpoena in an expulsion hearing is a necessary part of the section 48918 due process hearing as a means of forcing witnesses to attend, and is an alternative method of performing the mandate. Claimant states: "the fact that the local education agencies have a choice of methods does not mean they have the choice not to implement the mandate." And according to claimant, section 48919.5 should be reimbursable when a county office of education uses an administrative hearing panel to conduct expulsion appeal hearings because it is an alternative method of performing the mandate to have a hearing. These comments are addressed in the analysis below.

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[21] *Pupil Expulsions II* test claim, filed December 23, 1996, page 2.

[22] Letter from Diana Halpenny, San Juan Unified School District, August 5, 1997.

[23] *City of Sacramento v. State of California* (*City of Sacramento*) (1990) 50 Cal.3d 51.

[24] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564.

Interested Party Position

San Diego Unified School District (SDUSD) filed comments in May 2008 on the draft staff analysis, arguing that the conclusion that No Child Left Behind is a federal mandate on school districts to expel for possession of an explosive conflicts with the Supreme Court's *San Diego Unified School District* decision. SDUSD also asserts that issuing a subpoena in an expulsion hearing is a cost designated to satisfy the minimum requirements of federal due process and should be reimbursable. These comments are addressed in the analysis below.

Department of Finance Position

The Department of Finance submitted comments on both the *Pupil Expulsions II* and *Pupil Suspensions II* test claims in November 1997, April 1998 (on the first amendment), and October 1999 (on the third amendment). The comments generally focus on keeping decisions consistent with the original *Pupil Suspensions* and *Pupil Expulsions* test claim decisions, and on differentiating between discretionary (non reimbursable) and mandatory (reimbursable) duties, and those required by federal due process. Finance's position was briefed and considered by the California Supreme Court in the *San Diego Unified School District* case.

In its July 2008 comments on the draft staff analysis, Finance comments that two activities would result in one-time, negligible costs: (1) clarifying notice for pupil representation in section 48918, subdivision (b)(5), and (2) a county office of education's plan for educational services to expelled pupils in section 48926.

And as discussed further below, Finance disagrees that section 48923, subdivision (b), is a reimbursable mandate for the school district to adopt findings for an expulsion on remand from the county office of education when it determines that the school district's decision is not supported by the findings, but evidence supporting the required findings exists in the record of the proceedings. Finance argues that it is the school district's decision to not include the evidence that support the expulsion in the findings, so it should not be reimbursable on remand from the county office of education.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[25] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[26] "Its

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

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

purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[27] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[28]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[29]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[30] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[31] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[32]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[33]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[34] In making its

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

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

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

[29] *San Diego Unified School Dist. v. Commission on State Mandates,, supra,* 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

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

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

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

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

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

decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[35]

Issue 1: Over which Test Claim Statutes does the Commission have jurisdiction?

The first issue is which statutes the Commission has jurisdiction over, since many of the statutes the claimant pled and the Commission already determined in the prior test claims were re-alleged in the current consolidated claim.

An administrative agency does not have jurisdiction to rehear a decision that has become final.[36] Since *Pupil Expulsions* (CSM 4455) was decided in November 1997, and became effective May 4, 1998, it became final upon mailing to the parties.[37] Likewise, *Pupil Suspensions* (CSM 4456) was decided in December 1996, the same month it became final. And the *Pupil Expulsion Appeals* (CSM 4463) decision became final after its March 27, 1997 adoption. Since two of the statutes in the *Pupil Expulsions* decision (§§ 48915 & 48918) were litigated and decided by the California Supreme Court on August 2, 2004,[38] that decision was final 30 days after the court's decision was filed.[39]

Given these prior final decisions, the test claim statutes for each initial claim are reviewed to determine whether they have already been adjudicated by the Commission as discussed below.

The Commission has jurisdiction over all versions of code sections that were amended after the Commission's original Statements of Decision if the claimant pled the amendment in question. Claimant did not plead 2002 and later amendments to the test claim statutes. The following chart summarizes the statutes over which the Commission has jurisdiction:

Prior Commission Statement of Decision	**Ed. Code §§ Pled in Claim**	**NO JURISDICTION** Version previously adjudicated	**JURISDICTION**
(or pleading, see Note) *Pupil Expulsions* CSM 4455	48900	Stats. 1977, ch. 965 Stats. 1978, ch. 668 Stats. 1982, ch. 318 Stats. 1983, ch. 498 Stats. 1984, chs. 23, 536	Stats. 1995, ch. 972 Stats. 1996, ch. 915 Stats. 1997, ch. 637 Stats. 2001, ch. 484 (2002 & 2003 amendments not

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

[36] *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407. *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143.

[37] California Code of Regulations, title 2, section 1188.2. The only exception would be for a reconsideration within 30 days of the decision (see Gov. Code, § 17559 & Cal. Code Regs., tit. 2, § 1188.4), but no reconsideration request was filed.

[38] *San Diego Unified School Dist., supra,* 33 Cal.4th 859. The statutes the court decided were sections 48915 and 48918.

[39] California Rules of Court, rule 8.532 (b).

Prior Commission Statement of Decision	Ed. Code §§ Pled in Claim	NO JURISDICTION Version previously adjudicated	JURISDICTION
Pupil Expulsions CSM 4455 (con'd)		Stats. 1985, ch. 318 Stats. 1986, ch. 1136[40] Stats. 1987, ch. 383 Stats. 1989, ch. 1306 Stats. 1992, ch. 909 Stats. 1994, ch. 1198	pled)
	48900.2	Stats. 1992, ch. 909	None
	48900.3[41]	Stats. 1994, ch. 1198	Stats. 1999, ch. 646 (technical)
	48900.4	Stats. 1994, ch. 1017	None (2002 amendment not pled)
	48900.7	N/A (no prior determination)	Stats. 1997, ch. 405
	48900.8	N/A (no prior determination)	Stats.1997, ch.637 (2005 amendment not pled)
	48915	Stats. 1983, ch. 498 Stats. 1984, ch. 23 Stats. 1992, ch. 909 Stats. 1993, chs. 1255 & 1256 Stats. 1994, ch. 1198[42]	Stats. 1995, ch. 972 Stats. 1996, chs. 915 & 1052 Stats. 2001, ch. 116
	48915.1	Stats. 1987, ch. 942 Stats. 1990, ch. 1231 Stats. 1993, ch. 1257	Stats.1996, ch. 937
	48915.2	Stats. 1993, ch. 1257	Stats. 1995, chs. 972 & 974
	48915.7	Stats. 1993, ch. 1256 (withdrawn)	None.
	48916	Stats. 1983, ch. 498	Stats.1992, ch. 152 Stats.1995, chs. 972 & 974 (2003 amendment not pled)
	48916.1	N/A (no prior determination)	Stats. 1995, ch.974 Stats. 1996, ch.937

[40] Although decided by the Commission, Stats. 86, ch. 1136, was mistyped as Stats. 85, ch. 1136 in the Statement of Decision for *Pupil Expulsions* CSM 4455.

[41] Statutes 1994, chapter 1198 added section 48900.3 regarding hate violence (defined in Ed. Code, § 233, subd. (e)). The *Pupil Expulsions* CSM 4455 and *Pupil Suspensions* CSM 4456 Statements of Decision determined that section 48915 (Stats. 1993, ch. 1255 & 1256) does not constitute a reimbursable mandate, but did not discuss the amendment to section 48915 by Statutes 1994, chapter 1198 that added a reference to section 48900.3. However, the *San Diego Unified School Dist.* decision indicated that the Statutes 1994, chapter 1198 amendment to section 48915 was a discretionary expulsion that is not a new program or higher level of service (*San Diego Unified School Dist., supra,* 33 Cal.4th 859, 871, 884-885). Thus, the Commission does not have jurisdiction over section 48900.3 (Stats. 1994, ch. 1198) but does have jurisdiction over section 48900.3 as amended by Statutes 1999, chapter 646.

[42] The court took jurisdiction over this statute in *San Diego Unified School Dist., supra,* 33 Cal.4th 859,871, fn. 9, although the statute made only nonsubstantive amendments.

Prior Commission Statement of Decision	Ed. Code §§ Pled in Claim	NO JURISDICTION Version previously adjudicated	JURISDICTION
			Stats. 1999, ch.646 (2005 amendment not pled)
	48916.2	Stats. 1996, ch. 15 (withdrawn)	None.
	48917 (& former § 48907.5)	N/A (no prior determination) (Stats. 1990, ch.1234 withdrawn)	Stats.1979, ch.1014 (§ 48907.5) Stats. 1983, ch. 498 Stats.1995, ch. 95
	48918	Stats. 1975, ch. 1253 Stats. 1976, ch. 1010 Stats. 1977, ch. 965 Stats. 1978, ch. 668 Stats. 1982, ch. 318 Stats. 1983, ch. 498 Stats. 1984, ch. 622 Stats. 1990, ch. 1231 Stats. 1994, ch.146[43]	Stats.1995, chs. 937, 972 & 974 Stats.1996, ch. 915 Stats.1998, ch. 489 Stats. 1999, ch. 332 (2003 amendment not pled)
	48918.5	N/A (no prior determination)	Stats. 1996, ch.915
Pupil Suspensions from School CSM 4456 §§ 148900, 48900.2, 48900.3, 48900.4, 48900.7 & 48900.8 are listed above.	48900.5	N/A (no prior determination) (Stats. 1985, ch. 907 withdrawn)	Stats. 1983, chs.498 & 1302
	48911, Subds. (f) & (g)[44]	Stats. 1977, ch.965 Stats. 1978, ch.668 Stats. 1980, ch.73 Stats. 1983, ch. 498 Stats. 1985, ch. 856 Stats. 1987, ch.134 (Stats. 1990, ch.1234 withdrawn) (Stats. 1992, ch.1360 withdrawn)[45]	Stats. 1983, ch.1302 Stats. 1994, ch.146 (only subds. (f) & (g) after Stats. 1976, ch. 1010) (2002 amendment not pled)
Pupil Expulsion Appeals CSM 4463	48919	Stats. 1983, ch. 498	Stats. 1997, ch. 417 Stats. 2000, ch. 147
	48919.5	N/A (no prior determination)	Stats. 1997, ch. 417
	48923	Stats. 1983, ch. 498	Stats. 2000, ch. 147

[43] The court took jurisdiction over this statute in *San Diego Unified School Dist., supra,* 33 Cal.4th 859,871, fn. 9, although the statute made only nonsubstantive amendments.

[44] The Commission's *Pupil Suspensions* (CSM 4456) decision expressly made no findings on subdivisions (f), (g), and (h), of section 48911. The current claim includes section 48911, subdivisions (f) and (g), so the Commission has jurisdiction over these subdivisions as they existed after Statutes 1976, chapter 1010 was enacted (but not the amendment of Stats. 2002, ch. 492, which claimant did not plead).

[45] In original test claim, claimant mistyped this as Stats. 1993, ch. 1360.

Prior Commission Statement of Decision	Ed. Code §§ Pled in Claim	NO JURISDICTION Version previously adjudicated	JURISDICTION
No Prior Decision for *Educational Services Plan for Expelled Pupils* (97-TC-09)	48926	N/A (no prior determination)	Stats. 1995, ch. 974
	§§48915, 48916 & 48916.1 are listed above.		

Filing a test claim establishes reimbursement eligibility starting in the fiscal year before the fiscal year in which the test claim is filed.[46] Thus, claimant's *Pupil Expulsions II and Pupil Suspensions II* test claims, filed on December 23, 1996, establish reimbursement eligibility beginning July 1, 1995, unless the alleged statute has a later effective date.

Similarly, the *Educational Services Plan for Expelled Pupils* (97-TC-09) test claim was filed in December 1997, thereby establishing reimbursement eligibility beginning July 1, 1996 (but only for § 48926, as the other statutes pled in 97-TC-09 have an earlier reimbursement eligibility date because they were pled in the earlier test claims).

Issue 2: Do the Test Claim Statutes Constitute a Program within the Meaning of Article XIII B, Section 6 of the California Constitution?

In order for the test claim statutes to be subject to article XIII B, section 6 of the California Constitution, the statutes must constitute a "program," defined as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[47] Only one of these findings is necessary to trigger article XIII B, section 6.[48]

Staff finds that the test claim statutes constitute a program. The California Supreme Court, in the *San Diego Unified School Dist.* case, held that the suspension and expulsion statutes constitute a program because they provide an enhanced service to the public in the form of safer schools for the vast majority of students. What the court stated regarding section 48915 could apply to all the test claim statutes:

> Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public. Moreover, here … the law implementing this state policy applies uniquely to local public schools.[49]

The test claim statutes generally concern pupil safety and the rights of suspended and expelled pupils, and the statutes apply uniquely to public schools, school districts, or county offices of education, and not generally to all residents and entities in the state. Thus, staff finds that the test claim statutes constitute a program within the meaning of article XIII B, section 6.

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[46] Government Code section 17557, subdivision (e).

[47] *County of Los Angeles, supra*, 43 Cal.3d 46, 56.

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

[49] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878-879.

Issue 3: Do the Test Claim Statutes Impose a State-Mandated New Program or Higher Level of Service?

Each activity in the test claim statutes is analyzed to determine whether it: (1) is state mandated, and (2) is a new program or higher level of service. For those that do, Issue 4 will address whether they impose "costs mandated by the state" within the meaning of Government Code sections 17514 and 17556.

Section 48915 classifies pupil expulsions into three categories of greater to lesser offenses. The first category is the most serious offenses listed in subdivision (c), for which pupils are immediately suspended, recommended for expulsion, and expelled pursuant to subdivision (d).

A. Suspension and Expulsion for Most Serious Offenses (§ 48915 subds. (c) & (d))

Section 48915, subdivisions (c) and (d) (as amended by Stats. 1995, ch. 972, Stats. 1996, chs. 915 & 1052, and Stats. 2001, ch. 116) provide:

> (c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds:
> (1) Possessing, selling, or otherwise furnishing a firearm. … [without prior written permission]
> (2) Brandishing a knife at another person.
> (3) Unlawfully selling a controlled substance [as defined].
> (4) Committing or attempting to commit a sexual assault as defined … or committing a sexual battery as defined in subdivision (n) of Section 48900.
> (5) Possession of an explosive.
> (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c) … .

Read together, subdivisions (c) and (d) indicate that for each subdivision (c) offense, there is a three-step process involving: (1) the principal or superintendent immediately suspending the pupil pursuant to Section 48911, (2) the principal's or superintendent's recommendation to expel the pupil, and (3) the governing board's expulsion order. These, in turn, trigger the suspension procedures in section 48911, and the expulsion hearing procedures in section 48918.

The test claim statutes add the following offenses to Education Code section 48915, subdivision (c): (1) Brandishing a knife at another person (Stats. 1995, ch. 972); (2) Unlawfully selling a controlled substance (Stats. 1995, ch. 972); (3) Committing or attempting to commit a sexual assault as defined or committing a sexual battery as defined (Stats. 1996, chs. 1052, sec. 2); (4) Possession of an explosive (Stats. 2001, ch. 116).

As to the requirement to "immediately suspend, pursuant to section 48911" in section 48915, subdivision (c), this expressly incorporates all the required suspension procedures in section 48911 as follows:

- Precede the suspension with an informal conference conducted by the principal or the principal's designee or the superintendent of schools between the pupil[50] and, whenever practicable, the teacher, supervisor, or school employee who referred the pupil to the principal, the principal's designee, or the superintendent of schools. Inform the pupil of the reason for the disciplinary action and the evidence against him or her and give the pupil the opportunity to present his or her version and evidence in his or her defense. (§ 48911, subd. (b).)
- At the time of the suspension, a school employee shall make a reasonable effort to contact the pupil's parent or guardian in person or by telephone. Whenever the pupil is suspended from school, the parent or guardian shall be notified in writing of the suspension. (§ 48911, subd. (d).)
- A school employee shall report the suspension of the pupil including the cause therefore, to the governing board of the school district or to the school district superintendent in accordance with the regulations of the governing board. (§ 48911, subd. (e).)[51]

The first issue is whether the activities in subdivisions (c) and (d) of section 48915 (to immediately suspend, recommend for expulsion, and expel) are reimbursable for each of the offenses added to subdivision (c) by the test claim statutes.

In the *San Diego Unified School Dist.* case, the California Supreme Court interpreted section 48915. The court recognized that "a compulsory suspension and a mandatory recommendation of expulsion under Education Code section 48915, in turn trigger a mandatory expulsion hearing."[52] The court also observed that, in the absence of the operation of Education Code section 48915's mandatory provision, a school district would not automatically incur the due process hearing costs mandated by federal law for expulsion under the subdivision (c) offenses.[53]

> Instead, a district would incur such hearing costs only if a school principal first were to exercise discretion to recommend expulsion. Accordingly, *in its mandatory aspect, Education Code section 48915 appears to constitute a state mandate,* in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.[54] [Emphasis added.]

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[50] Pupil is defined to include "a pupil's parent or guardian or legal counsel." (§ 48925, subd. (e).)

[51] The Commission's *Pupil Suspensions* decision CSM-4456 found that the following activities are reimbursable: "1. The attendance of the referring school employee in the pre-suspension conference between the principal (or designee or superintendent) and the pupil, whenever practicable. 2. A report of the cause of each school suspension to the district office."

[52] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 879. The court was referring to the mandatory expulsion provision of section 48915, subdivision (c) (former subd. (b)).

[53] *Id.* at page 880.

[54] *Ibid.*

Suspension, expulsion recommendation and expulsion order for brandishing a knife or unlawfully selling a controlled substance: Statutes 1995, chapter 972, added to section 48915, subdivision (c), (former subd. (b)) the following offenses to "possession of a firearm" for which a pupil must be immediately suspended and recommended for expulsion: (1) brandishing a knife[55] at another person, and; (2) unlawfully selling a controlled substance.[56] Chapter 972 also amended subdivision (d) to add: "The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c) …."

Staff finds that the principal or superintendent immediately suspending and recommending expulsion, and the governing board ordering a pupil expelled for brandishing a knife at another person, or for unlawfully selling a controlled substance, is a state mandate. As the Supreme Court stated regarding section 48915, former subdivision (b) (now subd. (c)):

> This provision … *did* require immediate suspension followed by a mandatory expulsion recommendation (and it provided that a student found by the governing board to have possessed a firearm would be removed from the school site by limiting disposition to ether expulsion or "referral" to an alternative school). Moreover … whenever expulsion is recommended a student has a right to an expulsion hearing. Accordingly, it is appropriate to characterize the former provision [now § 48915 subd. (c)] as *mandating* immediate suspension, a recommendation of expulsion, *and hence, an expulsion hearing*.[57]

Additionally, the plain language of subdivision (c) of section 48915 states: "The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at a school or at a school activity off school grounds." Similarly, subdivision (d) states that "the governing board shall order a pupil expelled upon finding that the pupil committed" the act listed in subdivision (c). The word 'shall' in these provisions indicates that the suspension, expulsion recommendation, and expulsion order are mandatory.[58] Therefore, staff finds that it is a state mandate, upon determining that a pupil brandished a knife at another person or unlawfully sold a controlled substance, for the principal or superintendent to immediately suspend and recommend expulsion, and for the governing board to order the pupil expelled.

The next issue is whether immediate suspension, recommended expulsion, and the governing board expulsion order for brandishing a knife or unlawfully selling a controlled substance

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[55] Subdivision (g) of section 48915 defines 'knife' as, "any dirk, dagger, or other weapon with a fixed, sharpened blade fitted primarily for stabbing, a weapon with a blade fitted primarily for stabbing, a weapon with a blade longer than 3 ½ inches, a folding knife with a blade that locks into place, or a razor with an unguarded blade."

[56] Prior law required a principal or superintendent to recommend a pupil's expulsion for this offense, unless the principal or superintendent finds, and so reports in writing to the governing board, that expulsion is inappropriate, due to the particular circumstances, which shall be set out in the report of the incident (former § 48915, subd. (a), Stats. 1994, ch. 1198).

[57] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 870. Emphasis in original.

[58] Education Code section 75, "'Shall' is mandatory and 'may' is permissive."

constitute a new program or higher level of service. Under prior law (§ 48915, subd. (b), Stats. 1994, ch. 1198) the principal or superintendent's immediate suspension and expulsion recommendation, and the governing board's expulsion order was only required for possession of a firearm.

As to brandishing a knife, preexisting law authorizes suspending or expelling a pupil for threatening physical injury to another person, (§ 48900, subd. (a) & former 48915, subd. (b)), and was required for a pupil possessing a knife unless the principal finds that expulsion is inappropriate due to the particular circumstance (§ 48915, subd. (a)(2)).

Preexisting law did not, however, specify "brandishing" a knife as grounds for pupil suspension or expulsion. Therefore, staff finds that effective January 1, 1996, section 48915, subdivision (c), constitutes a new program or higher level of service for the principal or superintendent to immediately suspend pursuant to section 48911 and recommend expulsion, and for the governing board to order expulsion, for a pupil who brandishes a knife at another person (§ 48915, subd. (c)(2), Stats. 1995 ch. 972).

As to unlawfully selling controlled substances, under the prior version of section 48915 (Stats. 1994, ch. 1198) a pupil must be recommended for expulsion as follows:

> (a) The principal or the superintendent of schools shall recommend a pupil's expulsion for any of the following acts, unless the principal or superintendent finds, and so reports in writing to the governing board, that expulsion is inappropriate, due to the particular circumstance, which shall be set out in the report of the incident: [¶]…[¶] (3) Unlawful sale of any controlled substance listed in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code, except for the first offense for the sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis.

Thus, recommending expulsion was required under prior law, but not immediate suspension or issuing the expulsion order. The Statement of Decision for *Pupil Expulsions* (CSM 4455) found a reimbursable activity for recommending a pupil for expulsion for unlawful sale of a controlled substance, except the first offense for the sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis.[59]

Because the test claim statute adds the requirement for the pupil to be immediately suspended pursuant to section 48911, and in subdivision (d) of section 48915, the requirement to expel the pupil, staff finds that immediate suspension, pursuant to section 48911, and issuing an expulsion order for selling a controlled substance is a state-mandated new program or higher level of service, effective January 1, 1996.

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[59] The amended and consolidated parameters and guidelines for the *Pupil Suspensions, Expulsions and Expulsion Appeals* test claims currently reimburse recommending expulsion and an expulsion hearing for unlawfully selling a controlled substance, except for the first offense for the sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis. See Commission on State Mandates, "Amended and Consolidated Parameters and Guidelines: *Pupil Suspensions, Expulsions, and Expulsion Appeals.*" amended July 28, 2006, pp. 6-7.

The test claim statute removes the phrase "unless the principal or superintendent finds, and so reports in writing to the governing board, that expulsion is inappropriate, due to the particular circumstance." Although the test claim statute removes the principal's or superintendent's requirement to report to the governing board when expulsion is not recommended, and removes the discretion *not* to recommend the pupil's expulsion, staff finds that these changes are not a new program or higher level of service because they do not require a new activity of the school district or increase the level or quality of service provided.

Moreover, the test claim statute removes the exception for the principal or superintendent to recommend expulsion for the "first offense for the sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis." By removing the exception, staff finds that a new program or higher level of service is created for the principal or superintendent to immediately suspend, pursuant to section 48911, and recommend the pupil's expulsion, and for the governing board to order the pupil's expulsion for the first offense of a sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis, effective January 1, 1996 (§ 48915, subd. (c)(3), Stats. 1995 ch. 972).

Expulsion recommendation and expulsion order for possessing an explosive: Statutes 2001, chapter 116 amended subdivision (c) of section 48915 as follows (underline text added):

> (c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶]…[¶] (5) Possession of an explosive.
>
> (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c)… [¶]…[¶].
>
> (h) As used in this section, the term "explosive" means "destructive device" as described in Section 921 of Title 18 of the United States Code.

Former section 48915, subdivision (a)(2), from 1983 (Stats. 1983, ch. 498) until 2001 (Stats. 2001, ch. 116) required the principal or superintendent to recommend expulsion of a pupil for possession of "any firearm, knife, explosive, or other dangerous object" "unless the principal or the superintendent finds … that expulsion is inappropriate, due to the particular circumstances." The 2001 amendment placed explosive possession into the list of mandatory expellable offenses in section 48915, subdivision (c), thereby removing the principal's or superintendent's discretion to not recommend expulsion for explosive possession. The state statute was enacted, according to the legislative findings, because the state was notified in August 2000 that it was out of compliance with the federal Gun-Free Schools Act of 1994.[60]

The issue is whether the principal or superintendent recommending an expulsion (suspension is discussed separately below) and the governing board ordering an expulsion of a pupil for possessing an explosive constitutes a federal mandate, which would mean that there is no reimbursable state mandate.[61] Staff finds that Statutes 2001, chapter 116's amendment to section

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[60] Statutes 2001, chapter 116, section 1, subdivision (c).

[61] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 879-880. "[A]rticle XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state-*

48915 that adds explosive possession is a federal mandate on the state to require school districts "to expel from school for a period of not less than one year a student who is determined to have brought a firearm to a school."[62] Firearm is defined to include an explosive.

The federal statutes at issue, the Gun-Free Schools Act of 1994, and its successor, the No Child Left Behind Act of 2001 (NCLB), require states that receive federal funds to have a state law requiring expulsion of a pupil who possesses a firearm. The federal definition of "firearm" includes an explosive. The applicable provision from the Gun-Free Schools Act of 1994 (or the gun-free provision) is as follows with nonsubstantive amendments made by NCLB as indicated:

> ~~Except as provided in paragraph (3),~~ [63]~~each~~ Each State receiving Federal funds under ~~this Act~~ any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a ~~weapon~~ firearm to a school [or to have possessed a firearm at a school] under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of such local educational agency to modify such expulsion requirement for a student on a case-by-case basis ~~if such modification is in writing~~.[64] [¶]…[¶]
>
> (3) DEFINITION.--For the purpose of this section, the term ~~'weapon' means a firearm as such term is defined in section 921 of title 18, United States Code.~~ 'firearm' has the same meaning given such term in section 921(a) of title 18.[65]

The 1994 version of 18 USCA section 921 (a)(3) and (a)(4) contains the following definitions:

> (3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
>
> (4) The term "destructive device" means-- (A) any explosive, incendiary, or poison gas-- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more

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mandated costs, not *federally* mandated costs." See also California Constitution, article XIII B, section 9, subdivision (b).

[62] Former 20 USCA section 8921 (b)(1). Current 20 USCA section 7151 (b). Firearm is defined in subdivision (b)(3) as "the same meaning given such term in section 921 (a) of Title 18."

[63] Former 20 USCA section 8921 (b)(3) stated: "(A) Any State that has a law in effect prior to the date of enactment of the Improving America's Schools Act of 1994 which is in conflict with the not less than one year expulsion requirement described in paragraph (1) shall have the period of time described in subparagraph (B) to comply with such requirement."

[64] Former 20 USCA section 8921 (b)(1). Current 20 USCA section 7151 (b). Firearm is defined in subdivision (b)(3) as "the same meaning given such term in section 921 (a) of Title 18."

[65] Former 20 USCA section 8921 (b)(1).

than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

Enacted effective January 1, 2002, the test claim statute (Stats. 2001, ch. 116, eff. Jan. 2002) expressly states its purpose is to implement the federal Gun-Free Schools Act, as stated in the Legislative findings and declarations in section 1:

(a) The Gun-Free Schools Act of 1994, contained in Part F (commencing with Section 8921) of Subchapter XIV of Chapter 70 of Title 20 of the United States Code, requires each state receiving Elementary Secondary Education Act (ESEA) funds to have in effect a state law requiring expulsion from school, for not less than one year, a student who is determined to have brought a weapon to school.[66]

(b) The term weapon is defined in the Gun-Free Schools Act of 1994 to include explosives (20 U.S.C. Sec. 8921 (b)(4)); 18 U.S.C. Sec. 921(a)(3)).

(c) In August of 2000, the State Department of Education was notified that state law does not currently require mandatory expulsion of a pupil who brings an explosive to school and therefore may be in violation of the Gun-Free Schools Act of 1994.

(d) Failure to comply with the Gun-Free Schools Act of 1994 has the potential to jeopardize over 1 billion dollars in federal funds.

Although the federal gun-free provision, effective July 1, 1995, was considered by the Supreme Court in *San Diego Unified School District* case, it made no decision on the Act. The court addressed only the statutes on which the Commission had issued a decision, which was section 48915 as amended through 1994. The court stated that its conclusion does "not foreclose the possibility that … [the federal statute] may lead to a different conclusion when applied to versions of Education Code section 48915 effective in years 1995 and thereafter."[67]

The California Supreme Court discussed the issue of what constitutes a federal mandate under article XIII B in *City of Sacramento v. State of California*.[68] The issue in that case was whether the state statute extending mandatory coverage under the state's unemployment insurance law to

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[66] The current federal statute uses the term "firearm" instead of "weapon." See 20 U.S.C.A. 7151 (b). Subdivision (b)(3) states "For purposes of this section, the term "firearm" has the same meaning given such term in section 921(a) of Title 18."

[67] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 883-884.

[68] *City of Sacramento, supra*, 50 Cal.3d 51.

include state and local governments and nonprofit corporations constituted a state mandate. The court noted that states that failed to alter their unemployment compensation laws to include employees of public agencies faced loss of the federal tax credit and administrative subsidy.[69] The court held that the federal unemployment insurance law implemented by the test claim statute was not a state mandate because it was not unique to local government.

The court went on, however, to discuss whether the test claim statute constituted a federal mandate. The city and county argued that the treatment of federal mandates in article XIII B, section 9, required clear legal compulsion in the federal statute. The state, on the other hand, argued that, "the consequences of California's failure to comply with the federal 'carrot and stick' scheme were so substantial that the state had no realistic 'discretion' to refuse."[70] The court agreed with the state's argument, noting:

> [T]he vast bulk of cost-producing federal influence on government at the state and local levels was by inducement or incentive rather than direct compulsion. That remains so to this day. Thus, if article XIII B's reference to 'federal mandates' were limited to strict legal compulsion by the federal government, it would have been largely superfluous. … As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense.[71]

The court then listed the following five factors as to whether a test claim statute qualifies as a federal mandate on the states:

> [W]e here attempt no final test for "mandatory" versus "optional" compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and the Commission must respect the governing principle of article XIII B, section 9(b): neither state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.[72]

The court recognized that these factors are consistent with the statutory scheme, including Government Code section 17513's definition of "costs mandated by the federal government."[73]

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[69] *Id.* at page 58.

[70] *Id.* at page 71.

[71] *Id.* at pages 73-74.

[72] *Id.* at page 76.

[73] *Id.* at pages 75-76. The *City of Sacramento* court cited former Revenue and Taxation Code section 2206, which is nearly identical to current Government Code section 17513, defining "costs mandated by the Federal Government" as: "[A]ny increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a

The court also stressed the penalties for not implementing the test claim statute by finding: (1) California businesses would face full, double unemployment taxation by the state and federal governments; (2) an intolerable expense against the state's economy on its face; and (3) placing California employers at a serious competitive disadvantage against those in other states.[74] The court held that these penalties were "certain and severe"[75] so the state statute was adopted "under federal coercion tantamount to compulsion."[76] Thus, as a federal mandate, the state statute was excluded from the spending limits in article XIII B.

In the Gun-Free Schools Act of 1994, and NCLB[77] the "federal influence on government at the state and local levels [is] by inducement or incentive [e.g., federal funding] rather than direct compulsion."[78] In the absence of direct legal compulsion, the factors from the *City of Sacramento* case are applied to determine whether the federal statutes constitute a federal mandate on the state.

As to the first factor, the nature and purpose of the Gun-Free Schools Act, it was enacted to prevent school-related violence.[79] The express purpose of the test claim statute (Stats. 2001, ch. 116) regarding expulsion for possession of an explosive, is to comply with the Gun-Free Schools Act of 1994, of which the gun-free provision was reenacted by NCLB in January 2002.

The second factor is whether the design of the federal program suggests an intent to coerce. As amended by NCLB in January 2002, failure to comply with the federal gun-free provision would jeopardize "Federal funds under any subchapter of this chapter …"[80] which is "Chapter 70 -

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federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements imposed upon the state would result in substantial monetary penalties or loss of funds to public or private persons in the state whether the federal law was enacted before or after the state law, regulation, or executive order. "Costs mandated by the federal government" does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[74] *Id.* at page 74.

[75] *Ibid*.

[76] *Id.* at page 57.

[77] Former 20 U.S.C. section 8921 (a), currently at 20 U.S.C. section 7151.

[78] *City of Sacramento, supra*, 50 Cal.3d 51, 73.

[79] *Colvin ex rel. Colvin v. Lowndes County, Mississippi School Dist.* (1999) 114 F. Supp. 2d 504 N. Dist. Miss., 506, fn 1.

[80] 20 USCA 7151 (b): "Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school … a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school …"

Strengthening and Improvement of Elementary and Secondary Schools." The state statute (Stats. 2001, ch. 116) was also effective in January 2002.

A large portion of Title I funding is aimed at schools serving students living in poverty.[81] The Elementary and Secondary Education Act (ESEA) was enacted in 1965, so states have received Title I funds for over 40 years.[82] NCLB reauthorized ESEA effective in January 2002. Participation in NCLB is tied to continued receipt of Title I funds.[83]

When Utah considered opting out of NCLB, the U.S. Department of Education opined that forfeiting Federal Title I funding would also jeopardize other funding under the Elementary and Secondary Education Act.[84] The U.S. Department of Education's interpretation, as an agency charged with enforcement of NCLB, is entitled to deference.[85]

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[81] This is according to EdSource, an independent, nonpartisan, not-for-profit organization whose mission is to clarify complex education issues and to promote thoughtful policy decisions about public school improvement. See <http://www.californiaschoolfinance.org/ FinanceSystem/DollarstoDistricts /NoChildLeftBehindNCLB/tabid/96/Default.aspx> as of September 14, 2007, on page 1444 of the record.

[82] Elementary and Secondary Education Act of 1965, Public Law 89-10. See *Alexander v. Califano* (1977) 432 Fed. Supp. 1182, 1190, fn. 9: "[Former] Cal.Ed.Code Sec. 551 states that "The people of the State of California accept the provisions of, and each of the funds provided by, the act of Congress entitled . . . " Elementary and Secondary Education Act of 1965. See also, [former] Cal.Ed.Code Sec. 6456."

[83] 20 USCA 6303(g) (4) and *passim*: "Each state educational agency that desires to receive funds under this subsection shall…" This phrase prefaces the NCLB provisions that require a local activity. See also the website of the National Conference on State Legislatures: <http://www.ncsl.org/statefed/nclblegal.htm> as of April 4, 2008, on page 1452 of the record.

[84] Letter from Eugene Hickok, Acting Deputy Secretary, U.S. Department of Education to Dr. Steven O. Laing, Utah Superintendent of Public Instruction, February 6, 2004. See: <http://www.ccsso.org/content/pdfs/USDEdLettertoUtah.pdf> as of April 4, 2008. The letter states in part:

> Utah may choose not to participate in one or more titles of the ESEA. Utah's nonparticipation under Title I, Part A, [Improving Basic Programs Operated by Local Educational Agencies] however, would have serious consequences for funding under other ESEA programs. For example, a number of the formulas for allocating federal funds are linked to the State's funding under the Title I, Part A program. As a result, if Utah chooses not to participate under Title I, Part A, Utah's formula funds under the following programs would be negatively affected:
>
> - Even Start (Title I, Part B, Subpart 3)
> - Comprehensive School Reform (Title I, Part F)
> - State and Local Technology Grants (Title II, Part D, Subpart 1)
> - Safe and Drug Free Schools and Communities (Title IV, Part A)
> - 21st Century Community Learning Centers (Title IV, Part B)

In fiscal year 2006-07, California budgeted $1.76 billion in federal Title I funds.[86] Losing Title I funding could affect California educational programs such as the Reading First[87] ($143.8 million in California's 2006-07 Budget Act[88]), Even Start ($27.7 million in the 2005-06 Budget Act),[89] and Comprehensive School Reform[90] ($27.7 million in the 2005-06 Budget Act).[91] All of these programs are within Chapter 70 - Strengthening and Improvement of Elementary and Secondary Schools, of the Federal Education Code.

The third factor is when state and/or local participation began. In the *City of Sacramento* case, the court said that the state had afforded unemployment insurance protection to its private sector workers for over 40 years before the test claim statute was adopted.[92] The federal Gun-Free Schools Act was enacted effective July 1, 1995,[93] and had thus been in place almost six years before the 2001 test claim statute was enacted. And although both the state statute and NCLB were effective in January 2002, the state could jeopardize federal Title I funds it has received since 1965 for noncompliance with the federal gun-free provision of NCLB.

- Education for Homeless Children and Youth (Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act)

Of course, if Utah does not receive funds under these programs, its local educational agencies [school districts] would also not be able to participate.

[85] *Contract Management v. Rumsfeld* (2006) 434 F.3d 1145, 1147. "If … the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [Citation omitted.] If so, we defer to the agency's interpretation."

[86] Statutes 2006, chapter 47 and 48, Item 6110-136-0890, Schedule 1.

[87] Reading First is a federally funded program that provides districts with a minimum of $6,500 per K-3 teacher for reading professional development. Reading First was authorized by Title I, Part B, Subpart I of the Elementary and Secondary Education Act, as amended by NCLB.

[88] Statutes 2006, chapter 47 and 48, Item 6110-126-0890.

[89] Even Start funds local educational agencies (LEAs) and community-based organizations to plan and coordinate services to help parents gain the skills needed to become full partners in the education of their young children. Even Start integrates (1) early childhood education, (2) adult literacy or adult basic education, (3) parenting education and (4) parent-child interactive literacy activities into a unified, four-component family literacy program.

[90] Comprehensive School Reform is a federal program that gives schools and their districts the opportunity to implement schoolwide, research-based reform strategies designed to increase student learning and academic achievement.

[91] See <http://www.lao.ca.gov/analysis_2006/education/ed_14_anl06.html> as of September 14, 2007.

[92] *City of Sacramento, supra,* 50 Cal.3d 51, 74.

[93] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 883.

Claimant, in May 2008 comments on the draft staff analysis, disagrees that the test claim statute is a federal mandate on the state and argues that the analysis provides no factual basis for this conclusion. Claimant first notes that the *City of Sacramento* case concluded that where economic penalties were certain and severe, the federal coercion was tantamount to compulsion. Claimant asserts that the loss of Title I funds is neither certain, nor are the consequences severe, arguing that if the Title I programs go away, so do the costs, so there is no fiscal penalty to the state.

Staff disagrees. The loss of the Title I educational programs themselves (not merely the loss of funds for them) would be a certain and severe penalty on California. The legislative findings and declarations cited above (especially the finding that over $1 billion in federal funds would be jeopardized), indicates the Legislature's opinion that the consequences of not enacting Statutes, 2001, chapter 116 would be certain and severe. And the legislative history of chapter 116 states:

> The Office of Inspector General, U.S. Department of Education, issued a Final Audit Report, February 2001, notifying the California Department of Education that California state law may not be in compliance with the Gun-Free Schools Act of 1994. Failure to comply with the Gun-Free Schools Act puts students' safety at risk and may jeopardize over $1 billion California receives in federal education funding.
>
> Federal law requires states receiving funds under the Elementary and Secondary Education Act to require local educational agencies to expel students who bring explosives to school for at least one year. Under existing California law, students who bring explosives on campus may be expelled, but it is not required, and there is no mandatory length of expulsion. State officials have known about the state's non-compliance since August 2000.
>
> Senate Bill 166 will amend existing law to make sure California is in full compliance with the Gun-Free Schools Act of 1994, which requires a zero-tolerance policy for explosives on campus. Senate Bill 166 will put California in full compliance with the Gun-Free Schools Act of 1994 by requiring local educational agencies to expel students who bring explosives on campus for at least one year. [94]

Claimant also states that the February 6, 2004 letter from the U.S. Department of Education to the Utah Superintendent of Public Schools, cited above, postdates Statutes 2001, chapter 116, so it cannot have influenced the California legislation. Staff agrees that the letter to Utah did not influence the test claim statute. Rather, the letter shows U.S. Department of Education's interpretation of the law, which is entitled to deference. It also shows federal coercion and "serious consequences" for failure to comply with the Gun-Free Schools Act (later NCLB). Based on this interpretation of the law by the U.S. Department of Education, staff finds that the penalty for noncompliance is certain and severe.

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[94] Assembly Committee on Education, Analysis of Senate Bill No. 166 (2001-2002 Reg. Sess.) as amended May 15, 2001, pages 2-3.

SDUSD, in May 2008 comments on the draft staff analysis, also argues that chapter 116 is not a federal mandate, asserting that such a conclusion conflicts with the case *San Diego Unified School District v. Commission on State Mandates*[95] based on the Supreme Court's rejection of the argument that the statute requiring expulsion for firearm possession (§ 48915) was a federal mandate. Staff disagrees. Although the court did reject this argument, it did so based on the fact that the 1994 test claim statute predated the federal statute.[96] That is not the case here where the federal statute (the Gun Free Schools Act of 1994) predated the 2001 test claim statute by several years, and the test claim statute was enacted in response to the federal statute. SDUSD's comments fail to mention the following in the *San Diego Unified School District* decision: "[W]e do not foreclose the possibility that 20 United States Code section 7151 or its predecessor, 20 United States Code section 8921, may lead to a different conclusion when applied to versions of Education Code section 48915 effective in years 1995 and thereafter."[97]

In sum, because the test claim statute (Stats. 2001, ch. 116) recognized that the amount (in excess of $1 billion) of federal funds in jeopardy for failure to comply with the federal statute, and because federal Title I funding has been relied on by states for over 40 years, staff finds that the 2001 amendment to section 48915 is a federal mandate on the state.

In *Hayes v. Commission on State Mandates,* the court cited the *City of Sacramento* analysis for determining whether there is a federal mandate on the state, but said further analysis is required to determine whether there is a state mandate on the local entities.[98] Thus, the next issue is whether California's enactment of Statutes 2001, chapter 116 -- the principal or superintendent to recommend a pupil be expelled, and the governing board to order a pupil expelled, for possession of an explosive -- constitutes a mandate on school districts.

The *Hayes* court[99] held that the federal Education of the Handicapped Act (now Individuals with Disabilities Education Act) was a federal mandate on the state. The court then laid out the following test for determining whether the state imposes a mandate on local entities:

> *If the state freely chose to impose the costs upon the local agency as a means of implementing a federal program* then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.[100] [Emphasis added.]

In this case, the federal statute's plain language requires that "Each State receiving Federal funds under this Act shall have in effect a State law requiring local educational agencies to expel from

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

[96] *Id.* at pages 882-884.

[97] *Id.* at page 884.

[98] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593. We assume, for purposes of this analysis, that the reference to local agencies includes school districts, which are treated the same under the statutory scheme (Gov. Code, § 17500 et seq.).

[99] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564.

[100] *Id.* at pages 1593-1594.

school for a period of not less than one year a student who is determined to have brought a firearm to a school." [101] Based on the plain language of this federal statute, the amount of funding the state could lose for noncompliance, and that Title I funding under ESEA has been distributed for over 40 years, the state did not freely choose to implement the Gun-Free Schools Act and NCLB by requiring school districts to expel pupils for possessing an explosive.

Claimant, in May 2008 comments on the draft staff analysis, asserts that "the federal statute does not require the state to require the local agency to bear the cost of the expulsions. The State has chosen to pass these costs along to the local education agencies by failing to fund this alleged federal mandate." Claimant argues that there is a state-mandated program under the *Hayes* test. Staff disagrees. According to the *Hayes* court, "the Commission must focus upon the costs incurred by local school districts and whether those costs were imposed on local districts by federal mandate or by the state's *voluntary choice in its implementation* of the federal program."[102] The plain language of the federal statute gives the state no choice in implementation. Rather, it requires "a State law *requiring local educational agencies* to expel from school for a period of not less than one year a student who is determined to have brought a firearm [including an explosive] to a school." [103] Thus, the state has not freely chosen to impose the costs of these expulsions on the local educational agencies, in that the federal statute mandates how the state statute is implemented – by the local educational agency (school district).

Therefore, staff finds that the 2001 amendment to section 48915, subdivision (c) (Stats. 2001, ch. 116) is a federal mandate on school districts under the 20 USCA section 7151 (b), the federal gun-free provision. Consequently, a principal or superintendent recommending a pupil for expulsion, and the governing board ordering a pupil expelled for possession of explosives is not a state mandate that is subject to reimbursement under article XIII B, section 6.

Suspension for possessing an explosive: Although expulsion for possession of an explosive is a federal mandate as discussed above, the federal statute[104] does not require a pupil *suspension* for possession of an explosive (although "immediate" suspension is required under state law, in § 48915, subd. (c), Stats. 2001, ch. 116). Thus, the issue is whether the principal or superintendent's suspension of a pupil for possession of an explosive is a federal mandate or a state mandate. Staff finds that the suspension activity is a state mandate, not a federal one.

Here, the federal law does not require the pupil's suspension, only the pupil's expulsion.[105] It is the state law that triggers the suspension and exceeds federal law.[106] Therefore, staff finds that

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[101] Former 20 USCA section 8921 (b)(1). Current 20 USCA section 7151 (b). Firearm is defined in (b)(3) as "the same meaning given such term in section 921 (a) of Title 18."

[102] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1595. [Emphasis added.]

[103] Emphasis added. Former 20 USCA section 8921 (b)(1). Current 20 USCA section 7151 (b). [Emphasis added.] Firearm is defined in (b)(3) as "the same meaning given such term in section 921 (a) of Title 18."

[104] Former 20 USCA section 8921 (b)(1). Current 20 USCA section 7151 (b).

[105] 20 U.S.C.A. section 7151 (b).

suspending a pupil for possession of an explosive is not a federal mandate. Based on the plain language of subdivision (c) of section 48915 that the principal or superintendent shall "immediately suspend" the pupil, staff finds that this provision is a state mandate.[107]

Preexisting law authorizes but does not require a principal or superintendent to immediately suspend a pupil for possessing an explosive. Enacted in 1983, section 48900, subdivision (b) states, "A pupil may not be suspended from school or recommended for expulsion, unless the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has … possessed … any … explosive." At least one court has interpreted section 48900 to authorize pupil suspension and expulsion.[108] Therefore, because suspension for possession of an explosive was not previously required, staff finds that effective January 1, 2002, it is a state-mandated new program or higher level of service for a principal or superintendent to immediately suspend, pursuant to section 48911, a pupil who possess an explosive at school or at a school activity off school grounds (§ 48915, subd. (c), Stats. 2001, ch. 116).

Suspension, expulsion recommendation, and expulsion order for selling or furnishing a firearm: In 1995 section 48915, subdivision (c) (Stats. 1995, ch. 972) was amended as follows:

> (c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶]…[¶]
> (5) … selling or otherwise furnishing a firearm. …[Except for cases of prior written permission, as specified.]
> (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c) … .

As a threshold matter, staff finds that immediately suspending a pupil and recommending a pupil for expulsion for selling or furnishing a firearm is a state mandate because the plain language of subdivision (c) of section 48915 uses the mandatory "shall"[109] in requiring the principal or superintendent to "recommend expulsion of a pupil" for committing those offenses.

Staff also finds that this 1995 amendment (Stats. 1995, ch. 972) to section 48915, subdivision (c) (former subd. (b)) is not a federal mandate. As in *San Diego Unified School Dist.* case, [110] it is the state law and not the federal law that requires a pupil expulsion or suspension for selling or furnishing a firearm. The federal statute applies to "a student who is determined to have brought

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[106] See *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 881; and Government Code section 17513.

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

[108] See *T.H. v. San Diego Unified School Dist.* (2004) 122 Cal. App.4th 1267, 1276. Cf. *Fremont Union High School Dist. v. Santa Clara County Board of Education* (1991) 235 Cal.App.3d 1182, 1185-1188.

[109] Education Code section 75.

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

a firearm to a school or to have possessed a firearm at school" [111] but not to *selling* or *otherwise furnishing* a firearm. Since the federal law does not require pupil discipline for selling or furnishing a firearm, it is the state law that triggers the pupil suspension and expulsion. Therefore, staff finds that immediately suspending and recommending a pupil for expulsion, as well as the governing board expelling a pupil for selling or otherwise furnishing a firearm, are state-mandated activities.

As to whether these activities are a new program or higher level of service, the prior version of section 48915 (Stats. 1994, ch. 1198) required immediate suspension, an expulsion recommendation, and expulsion for firearm possession (former § 48915, subd. (b)). Selling or otherwise furnishing a firearm was an offense for which suspension, recommending expulsion, and expelling the pupil were authorized but not required (§ 48900, subd. (b)).

Therefore, staff finds that it is a state-mandated new program or higher level of service, effective January 1, 1996, for a principal or superintendent to immediately suspend a pupil pursuant to section 48911, and to recommend the pupil's expulsion, and for the governing board to order a pupil's expulsion for selling or furnishing a firearm unless the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal (§ 48915, subds. (c)(1) & (d), Stats. 1995, ch. 972).

Suspension, expulsion recommendation, and expulsion order for sexual assault or sexual battery: Section 48915, subdivision (c), was amended by Statutes 1996, chapters 915 and 1052, to add to the immediate suspension and mandatory expulsion recommendation provision, the following in subdivision (c)(4):

> (c) The principal or superintendent of schools shall immediately suspend, pursuant to Section 48911, and shall recommend expulsion of a pupil that he or she determines has committed any of the following acts at school or at a school activity off school grounds: [¶]…[¶]
> (4) Committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900 or committing a sexual battery as defined in subdivision (n) of Section 48900. [112] [¶]…[¶]
> (d) The governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c) … .

Staff finds that it is a state mandate to immediately suspend and recommend expulsion for a pupil for committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined. The use of "shall"[113] in section 48915, subdivisions (c)(4) and (d), requires the principal or superintendent to immediately suspend and recommend expulsion, as

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[111] 20 USCA section 7151 (b).

[112] Chapter 915 also amended section 48900 to add in subdivision (n) the following new offense for which a pupil may be suspended and recommended for expulsion: "Committed or attempted to commit a sexual assault as defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code or committed a sexual battery as defined in Section 243.4 of the Penal Code."

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

well as the governing board to order expulsion, for a pupil who commits or attempts to commit a sexual assault, as defined, or sexual battery, as defined.

Because it was not required under prior law, staff finds that the principal or superintendent suspending, pursuant to section 48911, and recommending expulsion, and the governing board ordering expulsion, for pupils who commit or attempt to commit a sexual assault, or commits a sexual battery, as defined, [114] is a new program or a higher level of service, effective January 1, 1997 (§ 48915, subds. (c)(4) & (d), Stats. 1996, chs. 915 & 1052). Staff finds that the section 48911 suspension procedures listed above are also part of this activity.

B. Immediate Suspensions for the Most Serious Offenses (§§ 48915 (c) & 48911)

Most of the suspension procedures in section 48911 were addressed in the *Pupil Suspensions* test claim (CSM-4456) and were denied reimbursement because the Commission determined that the test claim statutes were enacted to extend to public school pupils who face suspension the federal procedural due process requirements the U.S. Supreme Court specified in *Goss v. Lopez*.[115] In the *Pupil Suspensions* test claim (CSM-4456) the claimant did not plead, and the Commission did not make findings on, the activities in subdivisions (f), (g) and (h) of section 48911, which are addressed in this analysis.

The Commission also has jurisdiction over the amendment to section 48911 by Statutes 1983, chapter 1302, which substituted "Section 48914"[116] for "Section 48904"[117] at the end of former subdivision (d)(3) in section 48911 relating to a notice of a statement of a parent's or pupil's right to request a meeting with the superintendent. Because this amendment is technical and imposes no activities on school districts, staff finds it is not a state mandate within the meaning of article XIII B, section 6.

Additionally, the Commission has jurisdiction over the amendment by Statutes 1994, chapter 146 (a code maintenance bill) but also finds that this only technically amended section 48911 and therefore does not constitute a state mandate within the meaning of article XIII B, section 6.

Extend suspension & parent meeting (§ 48911, subd. (g)): Section 48911, subdivisions (g), contains a procedure for extending suspensions as follows:

> (g) In a case where expulsion from any school or suspension for the balance of the semester from continuation school is being processed by the governing board, the school district superintendent …[or designee] may extend the suspension until the governing board has rendered a decision in the action. However, an extension

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[114] A sexual assault is defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code and a sexual battery as defined in Section 243.4 of the Penal Code (§ 48900, subd. (n)).

[115] *Goss v. Lopez* (1975) 419 U.S. 565, 581-582.

[116] This section authorizes the school district to establish a policy that permits school officials to conduct a meeting with the parent or guardian of a suspended pupil.

[117] This section, added by Statutes 1977, chapter 965, relating to parental meetings with superintendent on suspensions, was repealed by Statutes 1983, chapter 498. The reference to 48914 was removed, and subdivision (d) was rewritten, by Statutes 1987, chapter 134.

> may be granted only if the school district superintendent … [or designee] has determined, following a meeting in which the pupil and the pupil's parent or guardian are invited to participate, that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process. If the pupil or the pupil's parent or guardian has requested a meeting to challenge the original suspension pursuant to Section 48914, the purpose of the meeting shall be to decide upon the extension of the suspension order under this section and may be held in conjunction with the initial meeting on the merits of the suspension.

Staff finds that extending the suspension is not a state mandate. The provision is permissive in that it states that the superintendent "may" extend the suspension, and there is nothing in the statute or the record to indicate that extension is practically compelled by the state.

Claimant, in May 2008 comments on the draft staff analysis, argues as follows:

> The purpose of these extensions is to remove the student from the campus pending the decision on the expulsion to prevent repeated dangerous or unsafe behaviors. The Commission has determined that school districts are required by law to provide a safe school environment [citations omitted] and this is a method of meeting that requirement.

Claimant's argument regarding a safe school environment applies to nearly all the activities in the test claim. The goal of safe schools, however, may also be accomplished by making an expulsion decision within the suspension period, thereby avoiding the need to extend the suspension. It is local officials, rather than the state, that make the decision requiring a school district to incur the costs.[118] Therefore, staff finds that extending the suspension, as provided by subdivision (g) of section 48911, is not a state mandate within the meaning of article XIII B, section 6.

Moreover, staff finds that extending the suspension is not a new program or higher level of service. Prior law also authorized extending the suspension:

> In a case where an action is pending in juvenile court in regard to a student, or where expulsion is being processed by the governing board, a superintendent or other person designated by him in writing, may extend the suspension until such time as the juvenile court or other governing board has rendered a decision in the action.[119]

Claimant's May 2008 comments assert that this statute does not apply because it was enacted after 1975, the measurement date provided by Government Code section 17514. In determining whether there is a new program or higher level of service, however, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim

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

[119] Former section 48911 (Stats. 1976, ch. 1010). Former section 48903, subdivision (h) (Stats. 1977, ch. 965).

statute.[120] Claimant pled section 48911 as far back as Statues 1977, chapter 965. The legal requirements for suspensions in effect immediately before this statute was Statutes 1976, chapter 1010, and section 48903 of Statutes 1977, chapter 965. Since those statutes also authorized extending a suspension, staff finds that doing so is not a new program or higher level of service.

The last sentence of subdivision (g) calls for a parent meeting as follows:

> If the pupil or the pupil's parent or guardian has requested a meeting to challenge the original suspension pursuant to Section 48914, the purpose of the meeting shall be to decide upon the extension of the suspension order under this section and may be held in conjunction with the initial meeting on the merits of the suspension.

Section 48914 authorizes but does not require school districts to have a policy regarding meeting with parents of suspended pupils.[121] If the section 48914 suspension policy is not required, then the parent meeting is also not required, since school officials are not required to respond to the parent's request for a second meeting. Moreover, section 48911, subdivision (b), calls for an informal conference on the merits of the suspension with the pupil, the principal or principal's designee or superintendent, and the teacher or school employee who referred the pupil for suspension. Because section 48925, subdivision (e), defines "pupil" to include the parent or guardian or legal counsel, this initial suspension meeting is to include the parent or guardian. Thus, if the meeting with the parent in subdivision (g) is "to challenge the original suspension" then it is already provided for in subdivision (b) of section 48911 and is not a state-mandated new program or higher level of service.[122]

On the other hand, if the parent meeting in subdivision (g) is to extend the suspension, it is a downstream activity resulting from the discretionary decision to extend the suspension. As such, the following rule stated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[123]

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

[121] Section 48914 states "Each school district is authorized to establish a policy that permits school officials to conduct a meeting with the parent or guardian of a suspended pupil to discuss the causes, the duration, the school policy involved, and other matters pertinent to the suspension." Section 48914 is not part of this test claim, and staff makes no finding on it.

[122] In the *Pupil Suspensions from School* (CSM 4456) Statement of Decision, one of the reimbursable activities is: "The attendance of the referring school employee in the pre-suspension conference between the principal (or designee, or superintendent) and the pupil, whenever practicable (§ 48911, subd. (b)).

[123] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

Thus, staff finds that the parent meeting in subdivision (g) of section 48911 is not a state mandate within the meaning of article XIII B, section 6.

The *Pupil Suspension from School* Statement of Decision (CSM 4456) only provides reimbursement for the referring school employee's attendance at the parent meeting. The principal's or superintendent's attendance, however, was required under prior law. Claimant pled section 48911 back to Statues 1977, chapter 965. Prior law (former § 48910, Stats. 1976, ch. 1010) stated in part:

> On or before the third consecutive schoolday of any given period of suspension, the parent or guardian of the pupil involved shall be asked to attend a meeting with school officials, at which time the causes, the duration, the school policy involved, and other matters pertinent to the suspension shall be discussed.

Therefore, staff finds that the principal's or superintendent's attendance at the parent meeting is not a new program or higher level of service (§ 48911, subd. (g)).

Penalizing pupils and appointing a designee (§ 48911 (f) & (h)): Subdivision (f) of section 48911 requires a pupil's parent or guardian to respond "without delay" to any request from school officials to attend a conference regarding the pupil's behavior. It also prohibits penalizing the pupil for the failure of, or making a suspended pupil's reinstatement contingent on, the pupil's parent or guardian attending a conference with school officials. Claimant pled the activity of not imposing a penalty for failure of pupil's parent or guardian to attend the conference.

This subdivision merely prohibits penalizing the pupil for the inaction of the parent or guardian, but does not mandate an activity. Thus, staff finds that section 48911, subdivision (f), is not a state mandate within the meaning of article XIII B, section 6.

Subdivision (h) of section 48911 defines a "principal's designee" and authorizes the designee's selection as follows:

> For the purposes of this section, a "principal's designee" is any one or more administrators at the schoolsite specifically designated by the principal, in writing, to assist with disciplinary procedures.
>
> In the event that there is not an administrator in addition to the principal at the schoolsite, a certificated person at the schoolsite may be specifically designated by the principal, in writing, as a "principal's designee," to assist with disciplinary procedures. The principal may designate only one person at a time as the principal's primary designee for the school year.
>
> An additional person meeting the requirements of this subdivision may be designated by the principal, in writing, to act for the purposes of this article when both the principal and the principal's primary designee are absent from the schoolsite. The name of the person, and the names of any person or persons designated as "principal's designee," shall be on file in the principal's office.

This section is not an exception to, nor does it place any limitation on, Section 48903.[124]

Staff finds that subdivision (h) of section 48911 does not mandate an activity of a school district. It defines 'principal's designee' and authorizes but does not require school principals to select designees for purposes of school discipline. Therefore staff finds that selecting a "principal's designee" in section 48911, subdivision (h), is not a state mandate within the meaning of article XIII B, section 6.

C. Expulsion Recommendation and Order for Serious Offenses (§ 48915 subds. (a) & (b))

Second in the hierarchy of pupil expulsion offenses after those in section 48915, subdivision (c), are the serious offenses in section 48915, subdivision (a), which states (test claim statute amendments are marked):

> (a) Except as provided in subdivisions (c) and (e), the principal or the superintendent of schools shall recommend the expulsion of a pupil for any of the following acts committed at school or at a school activity off school grounds, unless the principal or superintendent finds that expulsion is inappropriate, due to the particular circumstance:
> (1) Causing serious physical injury to another person, except in self defense.
> (2) Possession of any knife or other dangerous object of no reasonable use to the pupil.
> (3) Unlawful possession of any controlled substance … except for the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis.
> (4) Robbery or extortion.
> (5) Assault or battery, as defined … upon any school employee.
>
> (b) Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board may order a pupil expelled upon finding that the pupil committed an act listed in subdivision (a) … A decision to expel shall be based on a finding of one or both of the following:
> (1) Other means of correction are not feasible or have repeatedly failed to bring about proper conduct.
> (2) Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others. [Emphasis added.]

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[124] Section 48903 states: (a) Except as provided in subdivision (g) of Section 48911 and in Section 48912, the total number of days for which a pupil may be suspended from school shall not exceed 20 schooldays in any school year, unless for purposes of adjustment, a pupil enrolls in or is transferred to another regular school, an opportunity school or class, or a continuation education school or class, in which case the total number of schooldays for which the pupil may be suspended shall not exceed 30 days in any school year.
(b) For the purposes of this section, a school district may count suspensions that occur while a pupil is enrolled in another school district toward the maximum number of days for which a pupil may be suspended in any school year.

The activities at issue are first, the principal's or superintendent's recommendation to expel, and second, the governing board issuing an expulsion order, each of which is discussed below. The only offenses at issue here are those added to subdivision (a) by the test claim statutes: possession of a controlled substance (Stats. 1995, ch. 972), and assault or battery on a school employee (Stats. 1996, chs. 915 & 1052).

Expulsion recommendation for possession of a controlled substance and assault or battery on a school employee: Statutes 1995, chapter 972 amended section 48915, subdivision (a)(3), by adding "unlawful possession of any controlled substance" as specified, to the list of offenses for which a principal or superintendent shall recommend a pupil's expulsion unless a finding is made that expulsion is inappropriate under the circumstances. Subdivision (a)(3) excepts from the requirement to recommend expulsion "the first offense of possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis."

The 1996 amendments (Stats. 1996, chs. 915 & 1052, § 2) add to section 48915, subdivision (a), assault or battery, as defined,[125] on any school employee to the list of offenses for which a principal or superintendent shall recommend a pupil's expulsion unless a finding is made that expulsion is inappropriate under the circumstances.

Staff finds that adding 'unlawful possession of any controlled substance' as specified, to the offenses for which a principal or superintendent recommends the pupil for expulsion is a state mandate. The plain language of subdivision (a) of section 48915 is mandatory: "the principal or the superintendent of schools shall[126] recommend the expulsion of a pupil for any of the following acts…" Although the recommendation is not made if expulsion is found inappropriate due to the circumstances, the principal or superintendent has no control over the existence of "inappropriate circumstances." If the facts or circumstances call for an expulsion, the principal or superintendent must recommend one. Therefore, staff finds that, effective January 1, 1996, it is a state mandate for the principal or superintendent to recommend expulsion for a pupil who possesses a controlled substance, as defined, (except for the first offense of possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis).

Similarly, staff finds that adding 'assault or battery on any school employee' to the offenses for which a principal or superintendent recommends a pupil for expulsion is a state mandate. The plain language of subdivision (a) of section 48915 is mandatory: "[T]he principal or the superintendent of schools shall recommend the expulsion of a pupil for any of the following acts…"[127] Therefore, staff finds it is a state mandate on the principal or superintendent to recommend the expulsion of a pupil who commits an assault or battery on a school employee, effective January 1, 1997.

Preexisting law authorizes the principal to suspend or expel a pupil for possession of a controlled substance (former § 48915, subd. (c) & § 48900, subd. (c)). Section 48900 actually prohibits suspension or expulsion *unless* the principal or superintendent of the school determines that the

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[125] As defined in sections 240 and 242 of the Penal Code.

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

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

pupil possesses a controlled substance (§ 48900, subd. (c)). One court has interpreted this section as giving discretion to suspend or expel a pupil.[128] Prior law did not, however, require the principal or superintendent to recommend expulsion for possession of a controlled substance. Therefore, staff finds, effective January 1, 1996, that it is a new program or higher level of service for the principal or superintendent of schools to recommend expelling a pupil for possession of a controlled substance, as defined (except for the first offense of possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis) (§ 48915, subd. (a)(3), Stats. 1995, ch. 972).

As to whether recommending expulsion for assault or battery on a school employee is a new program or higher level of service, preexisting law required the principal or superintendent to recommend expulsion for causing serious physical injury to another person (§ 48915, subd. (a)(1)). But according to the following rules of statutory construction, 'causing serious physical injury to another' is not the same as 'assault or battery on a school employee.'

> Every word and phrase employed is presumed to be intended to have meaning and perform a useful function … [and] a construction rendering some words in the statute useless or redundant is to be avoided.[129]
>
> Where the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored.[130]

Given these rules, staff finds effective January 1, 1997, it is a state-mandated new program or higher level of service for the principal or superintendent of schools to recommend the expulsion of a pupil who commits assault or battery on any school employee (§48915, subd. (a)(5), Stats. 1996, chs. 915 & 1052).

Expulsion order for possession of a controlled substance or assault/battery on a school employee: As discussed above, Statutes 1995, chapter 972 and Statutes 1996, chapters 915 and 1052, added two offenses to subdivision (a) of section 48915 for which a principal or superintendent must recommend a pupil's expulsion unless doing so is inappropriate under the circumstances. The two offenses are assault or battery, as defined, on any school employee, and possession of a controlled substance, as defined.

Unlike the principal's requirement to recommend expulsion discussed above, subdivision (b) of section 48915 states that "the governing board *may* order a pupil expelled upon finding that the pupil committed an act listed in subdivision (a)." [Emphasis added.] Thus, the question is whether the district governing board is mandated by the state to issue an expulsion order for assault or battery, as defined, on any school employee, or possession of a controlled substance, as defined. Staff finds that it is not state-mandated because the governing board is not legally

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[128] *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1276.

[129] *People v. Contreras* (1997) 55 Cal.App.4th 760, 764.

[130] *Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1593.

compelled by the state to expel pupils for these offenses, nor is there evidence in the record the board is practically compelled by the state to expel a pupil for these offenses.

As to legal compulsion, the case *T.H. v. San Diego Unified School Dist.*,[131] provides some guidance. In it, the court upheld a facial constitutional challenge to a school district's "zero tolerance" regulations that required a referral to the governing board for an expulsion hearing. The *T.H.* court analyzed the statutory scheme, including section 48915, comparing the more serious expulsion offenses in subdivisions (c) and (a) to the lesser expulsion offenses in subdivisions (b) and (e). In doing so, the *T.H.* court used the following rules:

> [W]e independently determine the meaning of the relevant statutes and ascertain the Legislature's intent. In so doing, we 'consider first the words of the statute because they are generally the most reliable indicator of legislative intent.' [Citation omitted.] We must construe the language 'in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.' [Citation omitted.] Statutory construction rules 'are not to be rigidly applied in isolation … the correct construction of a statute is not divorced from its context. [Citations omitted.][132]

Applying these rules to the test-claim statute amendments to subdivision (a) of section 48915, the words state: "Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel …, the governing board *may* order a pupil expelled … [Emphasis added.]." The use of the word "may" in the statute means that the governing board has discretion as to whether or not to expel the pupil. "'Shall' is mandatory and 'may' is permissive."[133] So the plain language of the statute does not require an expulsion order.

The Commission, like a court, also abides by the following rules of statutory construction: "Where the same word or phrase might have been used in the same connection in different portions of a statute but a different word or phrase having different meaning is used instead, the construction employing that different meaning is to be favored."[134] And a "construction should not be given to a statute, if it can be avoided, which will lead to absurd results or to a conclusion plainly not contemplated by the legislature."[135]

Applying these rules, the use of "may" in subdivision (b) instead of "shall" demonstrates that the Legislature intended different meaning, and potentially a different outcome, for pupils who commit subdivision (a) offenses, as opposed to the more serious offenses in subdivision (c).[136]

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[131] *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1278.

[132] *Id.* at page 1280.

[133] Education Code section 75.

[134] *Kray Cabling Co. v. County of Contra Costa, supra*, 39 Cal.App.4th 1588, 1593.

[135] *Reuter v. Board of Sup'rs of San Mateo County* (1934) 220 Cal. 314, 321.

[136] Also see *Forster v. Superior Court* (1992) 11 Cal.App.4th 782, 791: "Since the Legislature used the words both "shall" and "may" in the different subdivisions of [Code Civ. Proc.] section 396, it presumably did so to distinguish between mandatory and directory provisions."

Construing the "may" in subdivision (b) the same as the "shall" in subdivision (c) would lead to a result that was not contemplated by the Legislature, which is deemed aware of the preexisting definition in Education Code 75: "'[s]hall' is mandatory and 'may' is permissive."

The *T.H.* court interpreted section 48915 as the Legislature making specific "the circumstances for triggering an expulsion hearing and the findings that must be made at these hearings. These circumstances [are] grouped in three primary categories."[137] The *T.H.* court labeled the offenses in subdivision (c), discussed above, as the "Most Serious Offenses," and proceeded to discuss the others as the "non-Most Serious Offenses."[138] Of these most serious offenses in subdivision (c), the Supreme Court, in the *San Diego Unified School Dist.* case, said the following:

> Accordingly, *in its mandatory aspect, Education Code section 48915 appears to constitute a state mandate,* in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.[139]

By contrast, of the lesser offenses in subdivision (e) (discussed below), the *T.H.* court characterized the principal or superintendent's role by stating, "the Legislature *did not provide a mandatory or presumptive referral requirement,* and instead stated: 'Upon recommendation by the principal, superintendent of schools, …, the governing board may order a pupil expelled upon finding [the identified statutory expulsion ground.]'" [140] Interpreting these lesser pupil expulsion offenses as having the same mandatory effect as those offenses in subdivision (c) would "lead to absurd results or to a conclusion plainly not contemplated by the legislature."[141]

In creating the three-part hierarchy of expulsion offenses, the Legislature clearly intended to give flexibility and increasing levels of discretion to school principals, superintendents and district governing boards in dealing with pupil expulsions. As the *T.H.* court recognized, school districts have "broad authority to carry on activities and programs [that] are necessary or desirable in meeting their needs."[142] School districts also have "diverse needs unique to their individual communities and programs," and "should have the flexibility to create their own unique solutions."[143] As the Attorney General of California stated in a decision that a school may not adopt a "zero tolerance" policy to expel pupils for drug possession: "Other than with respect to

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[137] *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1277.

[138] *Id*. at page 1278 and *passim.*

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

[140] *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1278. Emphasis added.

[141] *Reuter v. Board of Sup'rs of San Mateo County* (1934) 220 Cal. 314, 321.

[142] Education Code section 35160; *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1281.

[143] Education Code section 35160.1, subdivision (a); *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1281.

the four extremely serious offenses listed in section 48915, subdivision (c)(3), a district may not refuse to exercise the discretionary authority granted to it under the statutory scheme."[144]

Moreover, because the school district governing board (rather than the state) makes the decision requiring a school district to incur the costs of the expulsion order, as well as associated downstream activities, the activity is not legally compelled.[145]

Legal compulsion aside, in the *Kern High School Dist.* case, the California Supreme Court found that state mandates could be found in cases of practical compulsion on the local entity when a statute imposes "certain and severe penalties such as double taxation or other draconian consequences"[146] for not participating in the programs. The court also described practical compulsion as "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[147]

Here, nothing on the face of the statute imposes "certain and severe penalties such as double taxation or other draconian consequences"[148] for not expelling a pupil who possessed a controlled substance or committed an assault or battery on a school employee.

In the *San Diego Unified School Dist.* case,[149] the Supreme Court discussed section 48918's requirement for a due process hearing prior to a discretionary expulsion. The court cited the school district's and amici curiae briefs in the opinion's footnote 22, noting their argument of an obligation to suspend and expel pupils based on the safe school's provision of the state constitution (Cal. Const. art. I, § 28, subd. (c)), as well as a right to an education (Ed. Code, § 48200 et seq. & Cal. Const. art. IX, § 5).[150] The court recognized the possibility of practical compulsion to expel pupils when it stated: "The District and amici curiae note that although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any school program."[151] Deciding the issue on alternative grounds, the Supreme Court expressly did not extend the holding of the *City of Merced* case to pupil expulsions.[152]

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[144] 80 Opinions of the Attorney General 348, 353 (1997). Since the opinion, possession of an explosive was added to the four offenses in subdivision (c) of section 48915.

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

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

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

[148] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

[149] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887-888.

[150] *Id.* at page 887.

[151] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887, fn. 22.

[152] *Id.* at page 887-888, citing *City of Merced v. State of California* (1984) 153 Cal.App.3d 777. The *San Diego Unified School Dist.* court agreed with the Commission's decision that found that

The record for these test claims, however, contains no evidence or legal argument that school districts are practically compelled by the state to expel pupils for possession of controlled substances, or assault or battery on school district employees.

Since the expulsion order is a discretionary act by the school district governing board, the following rule articulated by the Supreme Court in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[153]

Therefore, staff finds section 48915, subdivisions (a)(3),[154] (a)(5),[155] and (b), that authorizes a governing board to issue an expulsion order for a pupil who either possesses a controlled substance, as defined, or commits an assault or battery, as defined, on any school employee, is not a state mandate within the meaning of article XIII B, section 6, and consequently is not reimbursable (§ 48915, subd. (a)(3), (a)(5) & (b), Stats. 1995, ch. 972, & Stats. 1996, chs. 915 & 1052).

D. Expulsion Order and Findings for Lesser Offenses (§ 48915 subds. (b) & (e))

Lowest in the three-part hierarchy of pupil expulsion offenses are those referenced in section 48915, subdivisions (b)[156] and (e),[157] which states (with test-claim statute amendments marked):

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the provision is not a new program or higher level of service based on the prior law's definition of 'good cause'.

[153] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[154] As amended by Statutes 1995, chapter 972.

[155] As amended by Statutes 1996, chapters 915 & 1052.

[156] Subdivision (b) cites the offenses in section 48900, (a) through (e), which are: (a) attempting to cause, or threatening to cause physical injury to another person, or willfully using force or violence on another, except in self defense; (b) possessing, selling or otherwise furnishing any firearm, knife, explosive, or other dangerous object unless the pupil has permission, as specified; (c) unlawfully possessing, using, selling, or otherwise furnishing, or being under the influence of, any controlled substance; (d) unlawfully offering, arranging, or negotiating to sell any controlled substance (as specified) an alcoholic beverage, or an intoxicant of any kind; and (e) committing or attempting to commit a robbery or extortion.

[157] Subdivision (e) cites the offenses in section 48900, subdivisions (f) through (m), and sections 48900.2 (sexual harassment), 48900.3 (hate violence) and 48900.4 (harassment, threats, or intimidation). The section 48900, subdivisions (f) – (m) offenses are: (f) cause or attempt to cause damage to school or private property; (g) steal or attempt to steal school or private property; (h) possess or use tobacco products, except prescription products; (i) commit an obscene act or engage in habitual profanity or vulgarity; (j) unlawful possession or unlawful offering, arranging or negotiating to sell drug paraphernalia; (k) disrupt school activities or otherwise willfully defy the valid authority of supervisors, teachers, administrators, school

(b) Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board may order a pupil expelled upon finding that the pupil committed an act listed in subdivision (a) or in subdivision (a), (b), (c), (d), or (e) of Section 48900. A decision to expel shall be based on a finding of one or both of the following:
(1) Other means of correction are not feasible or have repeatedly failed to bring about proper conduct.
(2) Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others. [¶]…[¶]
(e) Upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel appointed pursuant to subdivision (d) of Section 48918, the governing board may order a pupil expelled upon finding that the pupil, at school or at a school activity off of school grounds violated subdivision (f), (g), (h), (i), (j), (k), (l), or (m) of Section 48900, or Section 48900.2, 48900.3, or 48900.4, and either of the following:
(1) That other means of correction are not feasible or have repeatedly failed to bring about proper conduct.
(2) That due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others. [Emphasis added.]

The issue is whether the principal or superintendent's expulsion recommendation and the governing board's expulsion order for any of the following offenses added by the test claim statutes (to § 48915, subds. (b) & (e)) impose a state mandate:

- Possess an imitation firearm (§ 48900, subd. (m)): Statutes 1995, chapter 972 added "possession of an imitation firearm," as defined, to those in subdivision (e) of section 48915 for which a pupil may be expelled.

  Chapter 972 also amended subdivision (b) of section 48915,[158] by requiring the governing board to find one or both of the following: "(1) Other means of correction are not feasible or have repeatedly failed to bring about the proper conduct. (2) due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others."

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personnel engaged in the performance of their duties; (l) knowingly receiving stolen school or private property; (m) possess an imitation firearm, as defined.

[158] The subdivision (b) offenses referenced those in section 48900, subdivisions (a) through (e), which at the time chapter 972 was enacted, were: (a) caused, attempted to cause, or threatened to cause physical injury to another person; (b)possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object without permission; (c) unlawfully offered, arranged, or negotiated to sell any controlled substance or alcoholic beverage or an intoxicant of any kind; (e) committed or attempted to commit robbery or extortion.

- Harass, threaten or intimidate school personnel or pupils (§ 48900.4): Statutes 1996, chapters 915 and 1052 amended the expulsion provision of subdivision (e) of section 48915 by adding the offense in section 48900.4, which is a pupil in grades 4 through 12 who intentionally engages in:

  [H]arassment, threats, or intimidation, directed against school district personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment.

- Willful use of force on another (§ 48900, subd. (a)(2)): Statutes 1997, chapter 637 amended section 48900 by adding, in subdivision (a)(2): "Willfully use force or violence upon the person of another, except in self-defense" as an offense for which a pupil may be suspended or expelled. Section 48915, subdivision (b), incorporates section 48900, subdivision (a), by reference. It authorizes expulsion for this offense based on finding one or both of the following: other means of correction are not feasible or have repeatedly failed to bring about proper conduct or, due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.

- Aid or abet physical injury of another person (§ 48900, subds. (s) & (a)): Statutes 2001, chapter 484 added the following to subdivision (q) (now in subd. (s)) of section 48900:

  A pupil who aids or abets, as defined in Section 31 of the Penal Code, the infliction or attempted infliction of physical injury to another person may suffer suspension, but not expulsion, pursuant to the provisions of this section.[159] Except that a pupil who has been adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury *shall be subject to discipline pursuant to subdivision (a)*. [Emphasis added.]

  As an expulsion provision, the last sentence above indicates that a pupil adjudged by a juvenile court to have aided or abetted a crime of physical violence, as specified, is "subject to discipline pursuant to subdivision (a)."[160] This puts the offense in the same category as those in section 48915, subdivision (b) (which incorporates the offenses in § 48900, subd. (a)) for which a pupil may be expelled.

Subdivisions (b) and (e) of section 48915 are the operative provisions containing the authority to suspend or expel. The statutory provisions incorporated into these subdivisions, cited above, describe the expulsion offenses. According to the plain language of both subdivisions (b) and (e)

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[159] Statutes 2003, chapter 21 removed the phrase "the provisions of" in this sentence. Staff makes no finding on this amendment.

[160] Subdivision (a) of section 48900 authorizes expulsion or suspension for a pupil who: "(a)(1) Caused, attempted to cause, or threatened to cause physical injury to another person. (2) Willfully used force or violence upon the person of another, except in self-defense."

("the governing board may order a pupil expelled") the decision of the governing board in ordering an expulsion is discretionary - there is no legal compulsion to expel the pupil.[161]

As to the principal or superintendent's role in recommending expulsion for subdivision (e) offenses, the court in *T.H. v. San Diego Unified School Dist.* stated, "the Legislature did not provide a mandatory or presumptive referral requirement, and instead stated: 'Upon recommendation by the principal, superintendent of schools, …, the governing board may order a pupil expelled upon finding [the identified statutory expulsion ground.]'" [162] Moreover, the Supreme Court in *San Diego Unified School Dist.,* characterized subdivision (e) (and by extension, subd. (b), which is nearly identical) as giving the principal discretion to recommend a pupil's expulsion.[163] In short, there is no legal compulsion to recommend expulsion or issue an expulsion order for these offenses.

Nor is there any evidence or legal argument in the record regarding practical compulsion to expel for these offenses. Therefore, staff finds that it is not a state mandate for a principal or superintendent or hearing officer or administrative panel to recommend, or for a governing board to order, expulsion for a pupil who is determined to have done any of the following: possessed an imitation firearm (§ 48900, subd. (m), Stats. 1995, ch. 972), harassed, threatened, or intimidated school personnel or pupils (§ 48900.4, Stats. 1996, chs. 915 & 1052), willfully used force or violence upon the person of another (§ 48900, subd. (a)(2), Stats. 1997, ch. 637), has been adjudged by a juvenile court to have aided or abetted a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury (§ 48900, subds. (s) & (a), Stats. 2001, ch. 484).

As to the governing board's findings when issuing the expulsion order, before Statutes 1995, chapter 972, there was no requirement in subdivision (b) of section 48915 for the governing board (regarding the offenses in § 48915, subd. (b)) to find one or both of the following: "(1) Other means of correction are not feasible or have repeatedly failed to bring about the proper conduct. (2) Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others."[164] As discussed above, the decision to recommend the expulsion is discretionary. The consideration of these two factors is a downstream activity that occurs only after the discretionary expulsion recommendation, and would not occur without the principal's or superintendent's recommendation to expel the pupil. As the Supreme Court stated regarding downstream requirements that are triggered by a discretionary activity:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—

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

[162] *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1278. Emphasis added.

[163] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 870.

[164] Before being rewritten by Statutes 1995, chapter 972, this governing board finding was only made for the offenses listed in section 48900, subdivisions (f) through (l) (former § 48915, subd. (d)). The findings were not required for expulsions for offenses listed section 48900, subdivisions (a) through (e) (former § 48915, subd. (c), Stats. 1994, ch. 1198).

> even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[165]

Therefore, staff finds that it is not a state mandate within the meaning of article XIII B, section 6, upon recommendation by the principal, superintendent of schools, or by a hearing officer or administrative panel, for a district governing board, when ordering a pupil expelled under subdivision (b) of section 48915, to find one or both of the following: "(1) Other means of correction are not feasible or have repeatedly failed to bring about the proper conduct. (2) due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others."

E. Suspension or Expulsion for Other Offenses (§§ 48900.3, 48900 (o) & 48900.7)

The following offenses in the test claim statutes (§§ 48900.3, 48900.7 and 48900, subd. (o)) may also subject a pupil to an expulsion.

Expel or suspend for hate violence (§ 48900.3): Also incorporated into section 48915, subdivision (e) is section 48900.3, which authorizes suspension or expulsion for hate violence, as defined,[166] if other means of correction are not feasible or have repeatedly failed to bring about the proper conduct, or due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others (§ 48915, subd. (e)). Section 48900.3 was technically amended by Statutes 1999, chapter 646 as follows:

> In addition to the reasons ~~specified~~ *set forth* in Sections 48900 and 48900.2, a pupil in any of grades 4 to 12, inclusive, may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of hate violence, as defined in subdivision (e) of Section ~~33032.5~~ *233*.

Given that the 1999 changes are nonsubstantive, staff finds that section 48900.3, as amended by Statutes 1999, chapter 646, is not a state mandate because the amendment imposes no activities on school districts.

Two additional offenses in the test claim statutes are not among the expulsion offenses listed in section 48915: "harass, threaten or intimidate a pupil witness" and "terroristic threats."

Expel or suspend for harassing, threatening, or intimidating a pupil witness (§ 48900, subd. (o)) or for terroristic threats (§ 48900.7): Statutes 1996, chapter 915 added to section 48900 a new subdivision (o) regarding harassing, threatening, or intimidating a pupil witness. It states:

> A pupil may not be suspended from school or recommended for expulsion, unless the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed an act as defined pursuant to any of subdivisions (a) through (q), inclusive. [¶]…[¶] (o) Harassed, threatened, or

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[165] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[166] Hate violence is defined in Education Code section 233, subdivision (e), as "any act punishable under Section 422.6, 422.7, or 422.75 of the Penal Code."

> intimidated a pupil who is a complaining witness or witness in a school disciplinary proceeding for the purpose of either preventing that pupil from being a witness or retaliating against that pupil for being a witness, or both.[167]

Statutes 1997, chapter 405 added section 48900.7 to the Education Code, which states:

> In addition to the reasons specified in Sections 48900, 48900.2, 48900.3, and 48900.4, a pupil *may be* suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has made terroristic threats [168] against school officials or school property, or both. [Emphasis added.]

The plain meaning of section 48900 prohibits a suspension or an expulsion recommendation "unless" the principal or superintendent makes a determination regarding the pupil's offense. Sections 48900 and 48900.7 require no suspension or expulsion recommendation. Rather, the statute's use of 'may not' (in 48900) indicates that suspension or expulsion is prohibited unless the principal or superintendent makes the requisite determinations. Similarly, the use of 'may' in section 48900.7 indicates that suspension or an expulsion recommendation is discretionary.[169]

In *T.H. v. San Diego Unified School Dist.*, the court interpreted section 48900 as discretionary, stating: "Education Code section 48900 states a student may be 'suspended from school or recommended for expulsion' for committing one of 18 identified offenses."[170] Thus, there is no legal compulsion to suspend or expel a pupil for harassing, threatening or intimidating a pupil who is a complaining witness or witness in a school disciplinary proceeding. And based on the permissive language of section 48900.7, there is no legal compulsion to suspend or recommend the expulsion of a pupil for making terroristic threats.

Nor is there evidence or argument in the record regarding practical compulsion, as the statute contains no "certain and severe penalties such as double taxation or other draconian

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[167] Statutes 1996, chapter 915 amended section 48915 to add this offense to the discretionary expulsion provisions in subdivision (e), but this amendment did not become effective because Statutes 1996, chapter 1052, section 2, which did not refer to subdivision (o) of section 48900, was enacted and took precedence.

[168] Terroristic threat, as defined in subdivision (b) of section 48900.7, "shall include any statement, whether written or oral, by a person who willfully threatens to commit a crime which will result in death, great bodily injury to another person, or property damage in excess of one thousand dollars ($1,000), with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, or for the protection of school district property, or the personal property of the person threatened or his or her immediate family."

[169] Education Code section 75: "'Shall' is mandatory and 'may' is discretionary."

[170] *T.H. v. San Diego Unified School Dist., supra,* 122 Cal.App.4th 1267, 1276.

consequences"[171] for not suspending or recommending expulsion of a pupil who harasses, threatens, or intimidates a pupil witness, or for not suspending or expelling a pupil who makes terroristic threats.

Therefore, staff finds that it is not a state mandate for a principal or superintendent to suspend or recommend expulsion of a pupil who harassed, threatened or intimidated a pupil who is a complaining witness or witness in a school disciplinary proceeding, (§ 48900, subd. (o), added by Stats. 1996, ch. 915) or who made terroristic threats, as defined (§48900.7, added by Stats. 1997, ch. 405).

F. Procedures in Expulsion Hearings (§ 48918)

As the Supreme Court observed in the *San Diego Unified School Dist.* case, "whenever expulsion is recommended a student has a right to an expulsion hearing."[172]

Section 48918 requires school districts to establish rules and regulations governing expulsion procedures. The rules and regulations must include the following: an expulsion hearing within 30 days of the alleged offense, with exceptions; an expulsion decision within 10 days after the hearing, with exceptions; notice of the hearing, as specified, including notice that the pupil may be represented by legal counsel or a nonattorney adviser. For allegations of sexual assault or attempted sexual assault, or sexual battery, there are additional expulsion procedures (in §§ 48918 & 48918.5) that are discussed separately below.

Since the Commission's original *Pupil Expulsions* decision only made findings on section 48918 as last amended by Statutes 1990, chapter 1231,[173] the issue is whether the subsequent amendments pled (Stats. 1995, chs. 937, 972 & 974, Stats. 1996, ch. 915, Stats. 1998, ch. 489, Stats. 1999, ch. 332) impose a state-mandated, new program or higher level of service. The activities that were amended into the test claim statutes are issuing a subpoena in the expulsion hearing process, postponing the expulsion hearing, and clarifying the pupil notice provision.

Issue subpoena and postpone hearing: Section 48918 states: "The governing board of each school district shall establish rules and regulations governing procedures for the expulsion of pupils. These procedures shall include, but are not necessarily limited to, all of the following: …"

Statutes 1995, chapters 937 and 974 inserted a new subdivision (i) into section 48918 authorizing the district governing board to issue subpoenas for the personal appearances of witnesses at the expulsion hearing.

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[171] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

[172] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 870.

[173] Although the Supreme Court took jurisdiction over the amendment to section 48918 made by Statutes 1994, chapter 146, (*San Diego Unified School Dist., supra,* 33 Cal.4th 859,871, fn. 9) this 1994 amendment was merely a code maintenance bill that made no substantive changes.

Statutes 1998, chapter 489 amended subdivision (a) of section 48918 by adding that if compliance with the time requirements for conducting an expulsion hearing is impractical due to a summer recess for more than two weeks, the days during the recess are not counted as schooldays in meeting the time requirements, not to exceed 20 schooldays. Unless the pupil requests postponement, the hearing shall not be held later than 20 days before the first day of school.

Because section 48918 states that each "school district shall establish rules and regulations"[174] staff finds that the one-time activity of amending the school district's expulsion rules and regulations to incorporate the subpoena authority and hearing postponement, as described above, are mandated by the state. Staff also finds that, since it was not previously required, adding these procedures to the rules and regulations is a new program or higher level of service.

Therefore, staff finds that, effective January 1, 1996,[175] section 48918, subdivision (i) (Stats. 1995, ch. 974, § 7.5), is a state-mandated new program or higher level of service for the one-time activity of school districts amending their expulsion rules and regulations to provide for the issuing of subpoenas, as follows:

> (i) (1) Before the hearing has commenced, the governing board may issue subpoenas at the request of either the superintendent of schools or the superintendent's designee or the pupil, for the personal appearance of percipient witnesses at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or the superintendent's designee or the pupil, issue subpoenas. All subpoenas shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. Enforcement of subpoenas shall be done in accordance with Section 11525 of the Government Code.[176]
>
> (2) Any objection raised by the superintendent of schools or the superintendent's designee or the pupil to the issuance of subpoenas may be considered by the governing board in closed session, or in open session, if so requested by the pupil before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas shall be final and binding.
>
> (3) If the governing board, hearing officer, or administrative panel determines, in accordance with subdivision (f), that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing, a subpoena shall not be issued to compel the personal attendance of that witness at the hearing. However, that witness may be compelled to testify by means of a sworn declaration as provided for in subdivision (f).

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

[175] See Statutes 1995, chapter 974, sections 7.5 and 10.

[176] This was amended to section 11455.20 of the Government Code by Statutes 2003, chapter 552. Staff makes no finding on this 2003 amendment.

> (4) Service of process shall be extended to all parts of the state and shall be served in accordance with Section 1987 of the Code of Civil Procedure. All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties, shall receive mileage in the same amount and under the same circumstances as prescribed for witnesses in civil actions in a superior court. Fees and mileage shall be paid by the party at whose request the witness is subpoenaed.

Staff also finds that exercising this subpoena power is not a state mandate because doing so is a discretionary act of the governing board. Section 48918, subdivision (i)'s plain language provides school districts with discretion: "the governing board *may* issue subpoenas."[177] [Emphasis added.]

Claimant, in comments on the draft staff analysis submitted May 2008, argues as follows:

> The hearing is a necessary part of the expulsion due process. The school district is required to adopt all of the due process rules specified in Section 48918 and each of these methods becomes a tool for implementing the state mandated due process for expulsions. Witnesses are integral to satisfy the "minimum requirements of federal due process" contemplated by the *San Diego* decision. If the witnesses do not attend voluntarily, the school district needs to utilize the subpoena power.

Similarly, the SDUSD, in May 2008 comments on the draft staff analysis, asserts that issuing a subpoena is a hearing cost designed to satisfy the minimum requirements of federal due process.

Both claimant and SDUSD ignore the Fourth District Court of Appeal decision that found the subpoena power in section 48918 is discretionary. In the 2003 case *Woodbury v. Brown-Dempsey*,[178] the court examined the subpoena power in section 48918, first concluding that "Based solely on the language of the statute, we would conclude that Education Code section 48918, subdivision (i)(1) prescribes a permissive, rather than a mandatory, act."[179] The court then analyzed the legislative history of subdivision (i) of section 48918, noting that the bill had originally required a school board to issue subpoenas, but was amended to make subpoenas discretionary. The court concluded that this amendment demonstrated legislative intent that the statute not be mandatory.[180] According to the court, requiring mandatory issuance of subpoenas on request "would foreseeably embroil school boards in protracted prehearing proceedings solely concerning contested rulings on the issuance of subpoenas" and would "do little to enhance

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

[178] *Woodbury v. Brown-Dempsey* (2003) 108 Cal.App4th 421, 433-437.

[179] *Id.* at page 433.

[180] *Id.* at pages 434-436

effectiveness of expulsion hearings."[181] The court also rejected the notion that a mandatory subpoena power is necessary to satisfy due process requirements.[182]

Therefore, staff finds that issuing subpoenas for expulsion hearings (§ 48918, subd. (i), Stats. 1995, chs. 937 & 974) is not a mandate on school districts within the meaning of article XIII B, section 6, and consequently, is not reimbursable.

For the same reasons discussed above, staff also finds that the one-time activity of amending the school district's expulsion rules and regulations to incorporate the hearing postponement changes of Statutes 1998, chapter 489, is a state mandate, effective January 1, 1999. Additionally, staff finds that, since it was not previously required, adding these procedures to the rules and regulations is a new program or higher level of service. Therefore, staff finds that, effective January 1, 1999, section 48918, subdivision (a) (Stats. 1998, ch. 489), is a state-mandated new program or higher level of service for the school district to amend its expulsion rules and regulations to include the following:

> If compliance by the governing board with the time requirements for the conducting of an expulsion hearing under this subdivision is impracticable due to a summer recess of governing board meetings of more than two weeks, the days during the recess period shall not be counted as schooldays in meeting the time requirements. The days not counted as schooldays in meeting the time requirements for an expulsion hearing because of a summer recess of governing board meetings shall not exceed 20 schooldays, as defined in subdivision (c) of Section 48915, and unless the pupil requests in writing that the expulsion hearing be postponed, the hearing shall be held no later than 20 calendar days prior to the first day of school for the school year.

Staff also finds that exercising this authority to postpone the hearing is not a state mandate. This 1998 amendment to subdivision (a) of section 48918 merely provides flexibility in meeting statutory deadlines and does not otherwise require a school district activity. Therefore, staff finds that it does not impose a state mandate on school districts and is not reimbursable.

Clarify notice for pupil representation: Statutes 1999, chapter 332 amended subdivision (b)(5) of section 48918 as follows [amendments in strikeout or underline]:

> The governing board of each school district shall establish rules and regulations governing procedures for the expulsion of pupils. These procedures shall include, but are not necessarily limited to, all of the following: [¶]…[¶]
>
> (b) Written notice of the hearing shall be forwarded to the pupil at least 10 calendar days prior to the date of the hearing. The notice shall include all of the following: [¶]…[¶]

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[181] *Id.* at page 437.

[182] *Ibid.*

> (5) Notice of the opportunity for the pupil or the pupil's parent or guardian to appear in person or ~~employ or~~ *to* be represented by legal counsel or by a nonattorney adviser, to inspect and obtain copies of all documents…"

Chapter 332 also added definitions of "legal counsel" and "nonattorney advisor" and stated: "Nothing in this section is intended to require a pupil or the pupil's parent or guardian to be represented by legal counsel or by a nonattorney adviser at the hearing."

Claimant pled the activity, as of January 1, 2000, of notifying and advising pupils of their opportunity to appear and be represented by counsel.

Staff finds that amending the district's rules and regulations to provide for this notice, as well as amending the notice to the pupil of his or her right to be represented by legal counsel or a nonattorney adviser, are state mandates, effective January 1, 2000.

In the *San Diego Unified* case, the California Supreme Court discussed procedural costs for mandatory expulsions as follows:

> Because it is state law (Education Code section 48915's mandatory expulsion provision) and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows … that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case (state legislation in effect through mid-1994), *all* such hearing costs—those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements—are, with respect to the mandatory expulsion provision of section 48915, state mandated costs, fully reimbursable by the state.[183]

As discussed above, pupil expulsions for the mandatory offenses in section 48915, subdivision (c) are state-mandated. Applying the holding from the *San Diego Unified* case quoted above, because these expulsions are based on state and not federal law, the hearing and notice costs are state mandated and not federally mandated.

Also, the amended notice provision is a new program or higher level of service. Prior law only required notice of the opportunity to be represented by "counsel." This was amended by the test claim statute to "legal counsel or by a nonattorney adviser." The amended notice, therefore, is a new program or higher level of service in that it was not required before the test claim statute.

Therefore, staff finds effective January 1, 2000, that the amendment to subdivision (b)(5) of section 48918 by Statutes 1999, chapter 332, is a state-mandated new program or higher level of service for the one-time activities of (1) updating the school district rules and regulations regarding notification to the pupil regarding the opportunity to be represented by legal counsel or a nonattorney adviser, and (2) revising the pupil notification to include the right to be represented by legal counsel or a nonattorney advisor when the governing board orders the pupil expelled for certain offenses specified below.

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[183] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 881-882.

The next issue is to which expulsion offenses this notice revision applies. It is a state mandate for the principal or superintendent to recommend an expulsion for a pupil who committed an offense in subdivision (c) of section 48915, as discussed above, and this recommendation entitles the pupil to a hearing,[184] Therefore, staff finds, effective January 1, 2000 (except for one later-enacted offense effective in 2002), that the amended notice in (b)(5) of section 48918 (Stats. 1999, ch. 332) is a state-mandated new program or higher level of service when the principal or superintendent recommends the pupil for expulsion for any of the following offenses:

- Brandishing a knife at another person (§ 48915, subds. (c)(2) & (d), Stats. 1995, ch. 972).
- Unlawfully sells a controlled substance. (§ 48915, subd. (c)(3) & (d)).
- Possessing, selling or furnishing a firearm without permission (§ 48915, subds. (c)(1) & (d)).
- Committed or attempted to commit a sexual assault, as defined, or committed a sexual battery, as defined (§§ 48900, subd. (n) & 48915, subds. (c)(4) & (d)).
- Effective January 1, 2002, possessing an explosive (§ 48915, subds. (c)(5) & (d)).

Even though expulsion for possession of an explosive is a federal mandate, as discussed above, staff finds that it is reimbursable to notify the pupil of his or her right to a nonattorney advisor when a pupil is expelled for this offense. In *Long Beach Unified School Dist. v. State of California*,[185] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[186] The reasoning of *Long Beach Unified School Dist.* is instructive in this case. Although expelling a pupil for possession of an explosive is a federal mandate, the notice of legal counsel or a nonattorney advisor is an activity, like in *Long Beach Unified School Dist.,* that goes beyond the federal requirement to expel the pupil.[187] Moreover, the state freely chose to impose this notice activity on school district governing boards that expel pupils for possession of an explosive, making the activity a state and not a federal mandate.[188]

Staff also finds that because it is mandatory for a principal or superintendent to recommend expulsion when a pupil commits an offense listed in subdivision (a) of section 48915, and that recommendation triggers the right to an expulsion hearing,[189] effective January 1, 2000, that the amended notice in (b)(5) of section 48918 (Stats. 1999, ch. 332) is a state-mandated new

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[184] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 870.

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

[186] *Id.* at page 173.

[187] *Ibid*.

[188] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[189] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 870.

program or higher level of service when the principal or superintendent recommends the pupil for expulsion for any of the following offenses:

- Unlawfully possesses a controlled substance, as defined, (except for the first offense of possession of not more than one anvoirdupois ounce of marijuana, other than concentrated cannabis) (§ 48915, subd. (a)(3), Stats. 1995, ch. 972).
- Commits assault or battery, as defined, on a school employee (§ 48915, subd. (a)(5), Stats. 1996, chs. 915 & 1052).
- Causes serious physical injury to another person, except in self defense. (§ 48915, subd. (a)(1)).
- Possession of any knife or other dangerous object of no reasonable use to the pupil (§ 48915, subd. (a)(2)).
- Robbery or extortion (§ 48915, subd. (a)(4)).

G. Expulsion Procedures for Alleged Sexual Assault or Sexual Battery (§§ 48918 (b)(c) & (h), & 48918.5)

Statutes 1996, chapter 915 added expulsion procedures (in §§ 48918 & 48918.5) that apply exclusively when the governing board conducts an expulsion hearing for a pupil who allegedly commits or attempts to commit a sexual assault, or commits a sexual battery. Section 48918 requires the school district to establish rules and regulations governing procedures for expelling pupils. Section 48918 was amended to add to the rules and regulations the following that apply only in cases were sexual assault or attempted sexual assault, or sexual battery, are alleged:

> [A] complaining witness shall be given five days' notice prior to being called to testify, and shall be entitled to have up to two adult support persons, including but not limited to, a parent, guardian, or legal counsel, present during their testimony. Prior to a complaining witness testifying, support persons shall be admonished that the hearing is confidential. Nothing in this subdivision shall preclude the person presiding over an expulsion hearing from removing a support person whom the presiding person finds is disrupting the hearing. If one or both of the support persons is also a witness, the provisions of Section 868.5 of the Penal Code[190] shall be followed for the hearing. (§ 48918, subd. (b), Stats. 1996, ch. 915.)

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[190] This Penal Code provision authorizes up to two support person for prosecuting witnesses for certain crimes. Subdivision (b) and (c) of Penal Code section 868.5 provide:

> (b) If the person or persons so chosen [as support persons] are also prosecuting witnesses, the prosecution shall present evidence that the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person' s attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. In the case of a juvenile court

> If the hearing is to be conducted at a public meeting, … a complaining witness shall have the right to have his or her testimony heard in a session closed to the public when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. (§ 48918, subd. (c), Stats. 1996, ch. 915.)
>
> [E]vidence of specific instances of a complaining witness' prior sexual conduct is presumed inadmissible and shall not be heard absent a determination by the person conducting the hearing that extraordinary circumstances exist requiring the evidence to be heard. Before the person conducting the hearing makes the determination on whether extraordinary circumstances exist requiring that specific instances of a complaining witness' prior sexual conduct be heard, the complaining witness shall be provided notice and an opportunity to present opposition to the introduction of the evidence. In the hearing on the admissibility of the evidence, the complaining witness shall be entitled to be represented by a parent, guardian, legal counsel, or other support person. Reputation or opinion evidence regarding the sexual behavior of the complaining witness is not admissible for any purpose. (§ 48918, subd. (h), Stats. 1996, ch. 915.)

Statutes 1996, chapter 915 also added section 48918.5 to the Education Code, discussed below, which details further procedures when the expulsion hearing is based on allegations of sexual assault or attempted sexual assault or sexual battery, such as:

(1) Providing the complaining witness with a copy of the applicable disciplinary rules.
(2) Advising him or her of the right to receive five days' notice of scheduled testimony.
(3) Having up to two adult support persons at the time the complaining witness testifies, and
(4) Having the hearing closed when the complaining witnesses' testimony is presented.

> proceeding, the judge shall inform the support person or persons that juvenile court proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. In all cases, the judge shall admonish the support person or persons to not prompt, sway, or influence the witness in any way. Nothing in this section shall preclude a court from exercising its discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the witness.
>
> (c) The testimony of the person or persons so chosen who are also prosecuting witnesses shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during that testimony. Whenever the evidence given by that person or those persons would be subject to exclusion because it has been given before the corpus delicti has been established, the evidence shall be admitted subject to the court's or the defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

Other provisions include postponement of the hearing and conduct at the hearing, and requiring the complaining witness and accused pupil to refrain from contacting each other.

Witness & hearing procedures for sexual assault or battery in § 48918: Staff finds amending the school district's expulsion rules and regulations is a state mandate for all of the amendments in section 48918 made by Statutes 1996, chapter 915, based on the language in section 48918 that states that the, "school district shall establish rules and regulations."[191] Specifically, staff finds that section 48918 (Stats. 1996, ch. 915) imposes a state mandate on school districts for the one-time activity of including in their expulsion rules and regulations all of the following when the pupil is alleged to have committed or attempted to commit a sexual assault, or committed a sexual battery:

- A complaining witness shall be given five days' notice prior to being called to testify (§ 48918, subd. (b), Stats. 1996, ch. 916).
- A complaining witness shall be entitled to have up to two adult support persons, including but not limited to, a parent, guardian, or legal counsel, present during his or her testimony (*Ibid.*).
- Prior to a complaining witness testifying, support persons shall be admonished that the hearing is confidential (*Ibid.*).
- Nothing shall preclude the person presiding over an expulsion hearing from removing a support person whom the presiding person finds is disrupting the hearing. If one or both of the support persons is also a witness, the provisions of Section 868.5 of the Penal Code[192] shall be followed for the hearing (*Ibid.*).

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

[192] Penal Code section 868.5 entitles a prosecuting witness in certain crimes to have up to two support persons during the witness' testimony, one of which may accompany the witness to the stand. Section 868.5 also states:

> (b) If the person or persons so chosen are also prosecuting witnesses, the prosecution shall present evidence that the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. In the case of a juvenile court proceeding, the judge shall inform the support person or persons that juvenile court proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. In all cases, the judge shall admonish the support person or persons to not prompt, sway, or influence the witness in any way. Nothing in this section shall preclude a court from exercising its discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the witness.

- If the hearing is to be conducted at a public meeting, … a complaining witness shall have the right to have his or her testimony heard in a session closed to the public when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. (§ 48918, subd. (c), Stats. 1996, ch. 915.)
- Evidence of specific instances of a complaining witness' prior sexual conduct is presumed inadmissible and shall not be heard absent a determination by the person conducting the hearing that extraordinary circumstances exist requiring the evidence to be heard. Before the person conducting the hearing makes the determination on whether extraordinary circumstances exist requiring that specific instances of a complaining witness' prior sexual conduct be heard, the complaining witness shall be provided notice and an opportunity to present opposition to the introduction of the evidence (§ 48918, subd. (h), Stats. 1996, ch. 915.)
- In the hearing on the admissibility of the evidence, the complaining witness shall be entitled to be represented by a parent, guardian, legal counsel, or other support person. Reputation or opinion evidence regarding the sexual behavior of the complaining witness is not admissible for any purpose. (§ 48918, subd. (h), Stats. 1996, ch. 915.)

Staff also finds that including these in the school district's expulsion rules and regulations is a new program or higher level of service effective January 1, 1997, since they were not required to be in the policies and procedures under prior law.

The next issue is which of these activities are a state-mandated new program or higher level of service to implement.

Implementation of at least some of these witness procedures is a state-mandated new program or higher level of service for the following reasons. First, the legislative history of the test claim statute indicates that the intent of the witness procedures was to "provide protections for a complaining witness."[193] Second, it is a mandate to immediately suspend and expel a pupil for

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(c) The testimony of the person or persons so chosen who are also prosecuting witnesses shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during that testimony. Whenever the evidence given by that person or those persons would be subject to exclusion because it has been given before the corpus delicti has been established, the evidence shall be admitted subject to the court's or the defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

[193] "The sections of the bill providing protections for a complaining witness are modeled after Penal and California Evidence Code sections relating to the treatment of witnesses and evidence

sexual assault or attempted sexual assault, or sexual battery, which automatically triggers the hearing procedures in section 48918 that apply to expulsions for those offenses. Regarding similar statutes that trigger section 48918 expulsion procedures, the Supreme Court stated, "it is appropriate to characterize the … provision as *mandating* an immediate suspension, a recommendation of expulsion *and hence, an expulsion hearing.*"[194] Therefore, not only is putting these procedures in the school district's expulsion rules and regulations a state-mandated new program or higher level of service, but implementing at least some of them is also.

Staff finds that giving the complaining witness five days notice to testify, as well as admonishing the support persons that the hearing is confidential, are state mandates. Subdivision (b) of section 48918[195] (Stats. 1996, ch. 915) uses "shall"[196] to require both activities, as follows:

> In a hearing in which a pupil is alleged to have committed or attempted to commit a sexual assault as specified in subdivision (n) of Section 48900 or committing a sexual battery as defined … a complaining witness shall be given five days' notice prior to being called to testify, and shall be entitled to have up to two adult support persons, … Prior to a complaining witness testifying, support persons shall be admonished that the hearing is confidential.

Preexisting law did not require notice for complaining witnesses; only for the accused pupil 10 calendar days before the expulsion hearing (§ 48918, subd. (b)). Preexisting law also did not require a witness' support person(s) receiving admonishment regarding confidentiality. Therefore, staff finds that giving the complaining witness five days' notice before testifying, and admonishing the witness' support person(s) that the hearing is confidential, is a new program or higher level of service when a pupil is recommended for an expulsion involving allegations of committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined, effective January 1, 1997 (§ 48918, subd. (b), Stats. 1996, ch. 915).

As to the complaining witness' right to have two adult support persons in section 48918, subdivision (b) (now subd. (b)(5)) staff finds that having these support persons is not a state mandate because it does not require a school district activity. There is an exception, however, if one or both of the support persons is also a witness, in which case the provisions of Section 868.5 of the Penal Code are required to be followed at the hearing. This section 868.5 procedure includes: (1) Only one support person may accompany the witness to the witness stand, although the other may remain in the room during the witness' testimony. (2) For the prosecution to present evidence that the support person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness; (3) For the governing board, on the prosecution's showing in (2), to grant the request for the support person unless information presented by the defendant or noticed by the district establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of

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in judicial proceedings relating to sexual misconduct." Senate Committee on Education, Analysis of Assembly Bill No. 692 (1995-1996 Reg. Sess.) amended May 1, 1996, page 6.

[194] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 870. Emphasis in original.

[195] This provision is currently in subdivision (b)(5) of section 48918.

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

influencing or affecting the content of that testimony. (4) The governing board shall inform the support person or persons that the proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. (5) For the governing board to admonish the support person or persons to not prompt, sway, or influence the witness in any way. (6) For the testimony of their support person or persons who are also prosecuting witnesses to be presented before the testimony of the prosecuting witnesses. (7) For the prosecuting witnesses to be excluded from the courtroom during that testimony. (8) When the evidence given by the support person would be subject to exclusion because it has been given before the corpus delicti[197] has been established, for the evidence to be admitted subject to the governing board or defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

As to the right to closed session testimony for a witness complaining of sexual assault or alleged sexual assault, or sexual battery (§ 48918, subd. (c)) staff finds that this is a state mandate to have the testimony in closed session "when testifying at a public meeting would threaten serious psychological harm to the complaining witness, and there are no alternative procedures to avoid the threatened harm,"[198] as described. Subdivision (c) states the alternative procedures as follows:

> If the hearing is to be conducted at a public meeting, and there is a charge of committing or attempting to commit a sexual assault as defined in subdivision (n) of Section 48900, a complaining witness *shall have the right* to have his or her testimony heard in a session closed to the public when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. [Emphasis added.]

Preexisting law, in the first paragraph of paragraph (c), states that the hearing is closed to the public unless the pupil being expelled requests in writing that it be conducted at a public meeting at least five days before the hearing date, but contained no mention of the complaining witness' rights. Because this was not required under prior law, staff finds that it is a new program or higher level of service for the school district to allow the complaining witness to have closed session testimony if the specified conditions (threaten serious psychological harm and no alternative procedures to avoid it) are met.

Staff also finds that the prohibition in subdivision (h) of section 48918 (Stats. 1996, ch. 915) of introducing a complaining witness' prior sexual conduct does not mandate an activity on school districts. If the person conducting the hearing makes a determination that extraordinary circumstances exist requiring the evidence of specific instances of the witness' prior sexual conduct to be heard, the person does so at his or her own discretion, so any resulting notice and opportunity for opposition is not mandated by the state. As to the witness' right to representation

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[197] The corpus delicti is the basic element or fact of a crime.

[198] Section 48918, subdivision (c), as amended by Statutes 1996, chapter 915.

in subdivision (h), there is no indication that this requires a school district activity. Therefore, staff finds that witness representation is not a state mandate (§ 48918, subd. (b), Stats. 1996, ch. 915).

In sum, staff finds that effective January 1, 1997, the amendments of Statutes 1996, chapter 915 to section 48918 impose a state-mandated new program or higher level of service on school districts to do the following in expulsion hearings when a pupil is recommended for expulsion for committing or attempting a sexual assault, as defined, or committing a sexual battery, as defined:

- Give the complaining witness five days' notice prior to being called to testify (§ 48918, subd. (b), Stats. 1996, ch. 915).
- Before the complaining witness' testimony, admonish the witness' support person(s) that the hearing is confidential (§ 48918, subd. (b), Stats. 1996, ch. 915).
- If the complaining witness has one or more support persons, and one or more of the support persons is also a witness, the provisions of Section 868.5 of the Penal Code shall be followed at the hearing (§ 48918, subd. (b), Stats. 1996, ch. 915). The section 868.5 procedures include: (1) Only one support person may accompany the witness to the witness stand, although the other may remain in the room during the witness' testimony. (2) For the prosecution to present evidence that the support person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness; (3) For the governing board, on the prosecution's showing in (2), to grant the request for the support person unless information presented by the defendant or noticed by the district establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. (4) The governing board shall inform the support person or persons that the proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. (5) For the governing board to admonish the support person or persons to not prompt, sway, or influence the witness in any way. (6) For the testimony of their support person or persons who are also prosecuting witnesses to be presented before the testimony of the prosecuting witnesses. (7) For the prosecuting witnesses to be excluded from the courtroom during that testimony. (8) When the evidence given by the support person would be subject to exclusion because it has been given before the corpus delicti[199] has been established, for the evidence to be admitted subject to the governing board or defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.
- If the hearing is conducted at a public meeting, hear the witness' testimony in a session closed to the public if testifying would threaten serious psychological harm and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another

[199] The corpus delicti is the basic element or fact of a crime.

place communicated to the hearing room by means of closed-circuit television (§§ 48918, subd. (c), Stats. 1996, ch. 915).

Witness & hearing procedures for sexual assault or battery (§ 48918.5): Statutes 1996, chapter 915 added section 48918.5, which requires, for expulsions based on allegations of sexual assault or attempted sexual assault, or sexual battery, as defined, the school district to establish rules and regulations governing procedures, to include, but not be limited to, the following:

> At the time that the expulsion hearing is recommended, the complaining witness shall be provided with a copy of the applicable disciplinary rules and advised of his or her right to: (1) receive five days' notice of the complaining witness's scheduled testimony at the hearing, (2) have up to two adult support persons of his or her choosing, present in the hearing at the time he or she testifies; (3) to have the hearing closed during the time they testify pursuant to subdivision (c) of section 48918. (§ 48918.5, subd. (a).)
>
> The expulsion hearing may be postponed for one schoolday in order to accommodate the special physical, mental, or emotional needs of a pupil who is the complaining witness where the allegations arise under subdivision (n) of section 48900. (§ 48918.5, subd. (b).)
>
> The district shall provide a nonthreatening environment for a complaining witness in order to better enable them to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each school district shall provide a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony. In the discretion of the person conducting the hearing, the complaining witness shall be allowed reasonable periods of relief from examination and cross-examination during which he or she may leave the hearing room. The person conducting the hearing may arrange the seating within the hearing room of those present in order to facilitate a less intimidating environment for the complaining witness. The person conducting the hearing may limit the time for taking the testimony of a complaining witness to the hours he or she is normally in school, if there is no good cause to take the testimony during other hours. The person conducting the hearing may permit one of the complaining witness's support persons to accompany him or her to the witness stand. (§ 48918.5, subd. (c).)
>
> [C]omplaining witnesses and accused pupils are to be advised immediately to refrain from personal or telephonic contact with each other during the pendency of any expulsion process. (§ 48918.5, subd. (d).)

Staff finds that all of the provisions above are mandated to be in the district's rules and regulations governing expulsion procedures, according to the plain language of section 48918.5:

> In expulsion hearings involving allegations brought pursuant to subdivision (n) of Section 48900, the governing board of each school district shall establish rules

and regulations governing procedures. The procedures shall include, but are not limited to, all of the following:[200]

Staff also finds that putting these procedures in the district's rules and regulations is a new program or higher level of service, since the district was not required to have them under prior law. Therefore, staff finds that, effective January 1, 1997, it is a state-mandated new program or higher level of service for the school district to insert all of the above into its expulsions rules and regulations (§ 48918.5, Stats. 1996, ch. 915).

Thus, staff finds that section 48918.5 is a state mandate to amend the school district's rules and regulations to include the language above regarding complaining witnesses and hearing postponement (in subds. (a),(b), (c) & (d) of § 48918.5).

The use of "may" in section 48918.5 indicates which procedures are discretionary and not mandated by the state.[201] For example, the authorization to postpone the hearing is discretionary because subdivision (b) states that the hearing "may" be postponed for one schoolday to accommodate the pupil's needs. Part of subdivision (c) is also discretionary because it lists activities based on "the discretion of the person conducting the hearing," such as: allowing the complaining witness reasonable periods of relief from examination and cross-examination to leave the hearing room, arranging the seating in the hearing room to facilitate a less intimidating environment for the complaining witness, limiting the time for taking the testimony of a complaining witness to the hours he or she is normally in school if there is no good cause to take testimony during other hours, and permitting the complaining witness to have one support person accompany him or her to the witness stand. Staff finds that implementing these discretionary activities in subdivisions (b) and part of (c) are not mandated by the state.

Even though the Supreme Court, in *San Diego Unified School Dist.,* held that all hearing procedures that flow from mandatory expulsions are reimbursable, the court's reasoning does not apply to these discretionary, non-federal procedures. First, the discussion of the procedures in *San Diego Unified School Dist.* focused on *federal* due process law, which is not implicated in the discretionary provisions of subdivisions (b) and (c). Second, the court's conclusion was based on "the statutes existing at the time of the test claim in this case (state legislation in effect through mid-1994)."[202] There were no discretionary hearing procedures at issue in *San Diego Unified School Dist.* except the decision to expel (which the court considered). Therefore, because discretionary non-federal procedures were added by section 48918.5 (Stats. 1996, ch. 915) the reasoning of *San Diego Unified School Dist.* regarding reimbursable procedures for hearing costs does not apply.

For the same reasons discussed above for the 48918 procedures, staff also finds that implementation of some of these procedures in subdivisions (a), (c) and (d) of section 48918.5, is mandated by the state based on the legislative history of the test claim statute[203] as well as the

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

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

[202] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 881-882.

[203] "The sections of the bill providing protections for a complaining witness are modeled after Penal and California Evidence Code sections relating to the treatment of witnesses and evidence

requirement to expel for these offenses,[204] which automatically triggers the hearing procedures[205] in section 48918.5 that apply to expulsions for those offenses. Thus, staff finds that based on the plain language in section 48918.5, implementing the following is state-mandated in hearings involving allegations brought pursuant to subdivision (n) of section 48900 (sexual assault or attempted sexual assault, or sexual battery):

- At the time the expulsion hearing is recommended, to provide the complaining witness with a copy of the applicable disciplinary rules and advise him or her of various rights regarding the hearing. (§ 48918.5, subd. (a).)
- For the district to provide a nonthreatening environment for a complaining witness, as specified. (§ 48918.5, subd. (c).)
- To advise the complaining witness and accused pupil(s) to immediately refrain from personal or telephonic contact with each other during the pendency of the expulsion process. (§ 48918.5, subd. (d).)

Staff also finds that these mandatory activities above in section 48918.5 are a new program or higher level of service, in that school districts were not required to implement them before Statutes 1996, statutes 915. Therefore, staff finds, effective January 1, 1997, that it is a state-mandated new program or higher level of service for school districts to implement the following when a pupil is recommended for expulsion involving allegations of sexual assault or attempted sexual assault, as defined, or sexual battery, as defined:

- At the time the expulsion hearing is recommended, provide the complaining witness with a copy of the applicable disciplinary rules and to advise the witness of his or her right to: (1) receive five days' notice of the complaining witness's scheduled testimony at the hearing, (2) have up to two adult support persons of his or her choosing present in the hearing at the time he or she testifies; and (3) "have the hearing closed during the time they [sic] testify pursuant to subdivision (c) of section 48918" (§ 48918.5, subd. (a), Stats. 1996, ch. 915).
- Provide a nonthreatening environment for a complaining witness in order to better enable them [sic] to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each school district shall provide a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony. (§ 48918.5, subd. (c), Stats. 1996, ch. 915.)

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in judicial proceedings relating to sexual misconduct." Senate Committee on Education, Analysis of Assem. Bill No. 692 (1995-1996 Reg. Sess.) amended May 1, 1996, page 6.

[204] Education Code Section 48915, subdivision (c)(4) requires expulsion for sexual assault or sexual battery.

[205] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 870.

- Immediately advise the complaining witnesses and accused pupils to refrain from personal or telephonic contact with each other during the pendency of any expulsion process. (§ 48918.5, subd. (d), Stats. 1996, ch. 915).

H. Suspend Enforcement of Expulsion Order & Reinstate Pupil (§ 48917, former § 48907)

At the time it issues an expulsion order, the school district governing board does several things. It can suspend enforcement of the expulsion order. It recommends a plan of rehabilitation to the pupil[206] and refers the pupil to a program of study that meets specified conditions.[207] It also sets a date upon which the pupil will be reviewed for readmission (except for pupils who commit offenses listed in § 48915, subd. (c), for which the date for readmission is set one year from the expulsion).[208] The governing board also ensures an education program is provided to the expelled pupil,[209] notifies the pupil's parent or guardian of this placement,[210] as well as the right to appeal the expulsion,[211] and maintain records of expulsions.[212] The parent or guardian is required, upon enrolling the pupil in a new school district, to notify the new district of the expulsion.[213]

Section 48917 governs suspending enforcement of the expulsion order. It was enacted as section 48907.5 in 1976 (Stats. 1976, ch. 1010)[214] and amended in 1979 (Stats. 1979, ch. 1014). It was renumbered section 48917 in 1983 (Stats. 1983, ch. 498) and amended in 1990 and 1995 (Stats. 1990, ch. 1234, Stats.1995, ch. 95). No determination was made on sections 48917 or 48907.5 in the original *Pupil Expulsions* (CSM 4455) or *Pupil Suspensions* (CSM 4456) decisions.

Section 48917, subdivision (a), states in part:

> The governing board, upon voting to expel a pupil, may suspend the enforcement of the expulsion order for a period of not more than one calendar year and … as a

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[206] Education Code section 48916, subdivision (b).

[207] Education Code section 48915, subdivision (d).

[208] Education Code section 48916, subdivision (a).

[209] Education Code section 48916.1, subdivision (a), which states: "Except for pupils expelled pursuant to subdivision (d) of Section 48915, the governing board of a school district is required to implement the provisions of this section only to the extent funds are appropriated for this purpose in the annual Budget Act or other legislation, or both."

[210] Education Code section 48918, subdivision (j)(2).

[211] Education Code section 48918, subdivision (j)(1).

[212] Education Code sections 48918, subdivision (k) & 48916.1, subdivision (e).

[213] Education Code section 48918, subdivision (j)(3).

[214] It was originally enacted as section 10605.1 in the 1959 Education Code by Statutes 1975, chapter 1253, effective January 1, 1976. Article XIII B, section 6 is not a bar to reimbursement, which provides that the Legislature need not provide a subvention of funds for statutes enacted before January 1, 1975.

condition of the suspension of enforcement, assign the pupil to a school, class, or program that is deemed appropriate for the rehabilitation of the pupil.

Because the plain language of subdivision (a) is permissive,[215] staff finds that it is not a mandate to suspend enforcement of an expulsion order or, as a condition of suspending enforcement, to assign the pupil to a school, class, or program deemed appropriate for rehabilitation of the pupil.

Subdivision (b) of section 48917 (as of Stats. 1990, ch. 1234) states: "the governing board shall apply the criteria for suspending the enforcement of the expulsion order equally to all pupils." But since suspending the expulsion order itself is discretionary, requiring it to be applied equally is conditional on (and downstream to) the discretionary act of suspending enforcement. Therefore, staff finds that equally applying the criteria for suspending enforcement of the expulsion order is also not a state-mandated activity.

During the period of suspension of the expulsion order, the pupil is deemed to be on probationary status (§ 48917, subd. (c)).

The governing board may also revoke the suspension of an expulsion order "if the pupil commits any of the acts enumerated in Section 48900 or violates any of the district's rules and regulations governing pupil conduct." (§ 48917, subd. (d).) If the pupil does so, he or she may be expelled under the original expulsion order. Expunging the records of the expulsion proceeding is also authorized. Staff finds that these activities in subdivision (d) are not state-mandated, both as discretionary activities themselves, and as downstream activities from a discretionary activity.

Subdivision (e) of section 48917 states: "Upon satisfactory completion of the rehabilitation assignment of a pupil, the governing board shall reinstate the pupil in a school of the district and may also order the expungement of any or all records of the expulsion proceedings." Although subdivision (e) appears to require readmission, it is a downstream activity resulting from the discretionary decisions to both suspend the enforcement of the expulsion order and assign the pupil to rehabilitation. And the language of subdivision (e) indicates that expunging the pupil's expulsion record is not required. Therefore, staff finds that subdivision (e) of section 48917 (Stats. 1983, ch. 498 & Stats. 1995, ch. 95) is not a state mandate.

In sum, every version of section 48917 and former section 48907.5[216] is permissive and discretionary, and therefore, not mandated by the state. These statutes establish conditions under which local school officials, rather than the state, decide to suspend enforcement of the expulsion order.[217] Nor does the statute on its face impose "certain and severe penalties such as double taxation or other draconian consequences"[218] for not suspending the expulsion order, and the

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

[216] Section 48907.5 (Stats. 1976, ch. 1010), amended by Statutes 1979, chapter 1014, renumbered section 48917 by Statutes 1983, chapter 498, and amended in 1990 and 1995 (Stats. 1990, ch. 1234, Stats.1995, ch. 95).

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

[218] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

record is silent on evidence or legal argument regarding practical compulsion. In the *Kern High School Dist.* case, the California Supreme Court stated:

> [A]ctivities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice.[219]

Therefore, staff finds that section 48917 and former section 48907.5 (Stats. 1976, ch. 1010, Stats. 1979, ch. 1014, Stats. 1983, ch. 498, Stats. 1990, ch. 1234, & Stats.1995, ch. 95) do not impose a state mandate on schools or school districts within the meaning of article XIII B, section 6 of the California Constitution.

I. Recommend a Rehabilitation Plan to Expelled Pupil (§ 48916 (b))

Subdivision (b) of section 48916 specifies a rehabilitation plan for the expelled pupil as follows:

> The governing board shall recommend a plan of rehabilitation for the pupil at the time of the expulsion order, which may include, but not be limited to, periodic review as well as assessment at the time of review for readmission. The plan may also include recommendations for improved academic performance, tutoring, special education assessments, job training, counseling, employment, community service, or other rehabilitative programs.

The issue is whether the post-1983 amendments to subdivision (b) of section 48916 (Stats. 1992, ch. 152, Stats. 1995, chs. 972 & 974, since the *Pupil Expulsions* CSM 4455 decision)[220] impose a state mandate to recommend a plan of rehabilitation to the expelled pupil.

As amended by Statutes 1992, chapter 152, section 48916 stated, "The governing board may recommend a plan of rehabilitation for the pupil …." In other words, it authorized but did not require the school district to recommend a rehabilitation plan to the pupil. Therefore, since recommending the plan was discretionary, staff finds that section 48916 (as amended by Stats. 1992, ch. 152) is not a state mandate within the meaning of article XIII B, section 6.

As amended by Statutes 1995, chapter 974, however, section 48916 reads "the governing board *shall* recommend a plan of rehabilitation for the pupil." [Emphasis added.] Use of the word 'shall' makes a provision mandatory.[221]

Therefore, staff finds that section 48916, subdivision (b) (as amended by Stats. 1995, ch. 974, eff. July 1, 1996) is a state mandate to recommend a plan of rehabilitation for the pupil at the time of the expulsion order.[222]

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[219] *Kern High School Dist., supra,* 30 Cal.4th at page 742.

[220] Statutes 2003 chapter 552 is an amendment that clarifies when the pupil would be reviewed for readmission if the expulsion is ordered during the summer session. Since claimant did not plead chapter 552, staff makes no finding on it.

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

As to whether recommending a plan of rehabilitation for a pupil is a new program or higher level of service, the prior version of section 48916 (Stats. 1992, ch. 152) stated:

> The governing board may recommend a plan of rehabilitation for the pupil, which may include, but not be limited to, periodic review as well as assessment at the time of application for readmission. The plan may also include recommendations for counseling, employment, community service, or other rehabilitative programs.

Thus, staff finds that, effective July 1, 1996 (or later, depending on the offense), it is state-mandated new program or higher level of service for a school district to recommend a rehabilitation plan to a pupil at the time of the expulsion order (§ 48916, subd. (b), Stats. 1995, ch. 974) when the pupil commits an act in section 48915, subdivision (c), as discussed below.

Staff finds that recommending a rehabilitation plan to the pupil at the time of the expulsion order is a state-mandated new program or higher level of service only when the governing board orders the pupil expelled under subdivision (d) of section 48915 for any of the most serious 'mandatory' expulsion offenses in subdivision (c) of section 48915, that the pupil commits at school or at a school activity off school grounds.[223] These offenses apply to recommending a rehabilitation plan because the school district is legally compelled to expel a pupil for any of these offenses, i.e., the governing board has no discretion but to expel the pupil who commits one of them.

Although expulsion for possession of an explosive is a federal mandate, as discussed above, staff finds that recommending a rehabilitation plan is state-mandated new program or higher level of service when a pupil is expelled for possessing an explosive. In *Long Beach Unified School Dist. v. State of California*,[224] the court considered whether a state executive order involving school desegregation constituted a state mandate. The court held that the executive order required school districts to provide a higher level of service than required by federal constitutional or case law because the state requirements went beyond federal requirements.[225] The reasoning of *Long Beach Unified School Dist.* is instructive in this case. Although expelling a pupil for possession of an explosive is a federal mandate, recommending a rehabilitation plan is an activity, like in *Long Beach Unified School Dist.*, that goes beyond the federal requirement to

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[222] Statutes 1995, chapter 974, section 9, subdivision (b) states: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act [including § 48916] shall become operative only to the extent funds are appropriated for its purpose in the annual Budget Act, or other legislation, or both." This provision was deleted, however, effective September 26, 1996, by Statutes 1996, chapter 937, section 6 (but as explained below, the rehabilitation plan is only required for pupils expelled pursuant to § 48915, subd. (d), so this provision has no effect).

[223] These offenses are: (1) brandishing a knife at another person; (2) Possessing, selling or furnishing a firearm without permission; (3) Committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined; (4) Possessing an explosive and, (5) Unlawfully possessing a controlled substance, as defined.

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

[225] *Id.* at page 173.

expel the pupil.[226] Moreover, the state freely chose to impose recommending a rehabilitation plan on governing boards that expel pupils for possession of an explosive, making the activity a state and not a federal mandate.[227] Therefore, staff finds that when the pupil is expelled for possessing an explosive, it is a state-mandated new program or higher level of service to recommend a plan of rehabilitation of the pupil (§ 48915, subds. (c)(1) & (c)(5)).

Next to consider are the offenses in subdivision (a) of section 48915, for which the "governing board may order a pupil expelled … ." (§ 48915, subd. (b)). As discussed above, these offenses are possession of a controlled substance, as defined, and committing an assault or battery, as defined, on a school district employee.[228] Because it is not mandatory for the governing board to expel for these offenses, they are discretionary for purposes of this analysis. Therefore, recommending a rehabilitation plan is not a state mandate when a pupil is expelled for an offense listed in subdivision (a) of section 48915.

For the same reason, staff finds that recommending a rehabilitation plan is not a state mandate when a pupil is expelled for the other offenses under the discretionary expulsion provision, as discussed above (offenses in § 48915, subds. (b) & (e): possessing an imitation firearm; assault or battery, as defined, on a school district employee; unlawfully possessing any controlled substance, as defined; harassing, threatening, or intimidating school district personnel or pupils, as defined; and aiding or abetting the infliction or attempted infliction of physical injury to another person, as specified).

This finding is consistent with an earlier Supreme Court case, *Kern High School Dist.*, in which the court rejected the argument that the downstream activities (notice and agenda costs) were legally compelled "without regard to whether a claimant's participation in the underlying program is voluntary or compelled."[229] Here, the underlying program is the governing board's discretionary order to expel the pupil.

Therefore, staff finds that when the governing board recommends a plan of rehabilitation to a pupil, it is *not* a state-mandated new program or higher level of service, when the pupil is expelled for any of the following offenses:

- Possess an imitation firearm, as defined (§ 48900, subd. (m) & 48915, subd. (e)).
- Commits an assault or battery, as defined, on a school district employee (§ 48915, subd. (a)(5)).
- Unlawfully possess any controlled substance, as defined, except for the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannibis (§ 48915, subd. (a)(3)).

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[226] *Ibid.*

[227] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1593-1594.

[228] Although these are not the only offenses in subdivision (a), they are the ones over which the Commission has jurisdiction to make expulsion findings, as discussed above.

[229] *Kern School Dist., supra,* 30 Cal.4th 727, 731.

- Willfully uses force or violence upon the person of another, except in self-defense (§ 48900, subd. (a)(2) & 48915 subd. (b)).
- Harrassment, threats or intimidation directed against school district personnel or pupils, as defined, for pupils in grades 4-12 inclusive (§ 48900.4 & 48915 subd. (b)).
- Aids or abets, as defined in Section 31 of the Penal Code, the infliction or attempted infliction of physical injury to another person, who has been adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury (§ 48900, subd. (s)).

Staff also finds that the governing board recommending a plan of rehabilitation to a pupil (which may include, but not be limited to, periodic review as well as assessment at the time of review for readmission, recommendations for improved academic performance, tutoring, special education assessments, job training, counseling, employment, community service, or other rehabilitative programs) is a state-mandated new program or higher level of service when the pupil is expelled for any of the following offenses (§ 48916, subd. (b), as amended by Stats. 1995, ch. 974, eff. July 1, 1996):

- Brandishing a knife at another person (§ 48915, subds. (c)(2), (c)(3) & (d)).
- Possessing, selling or furnishing a firearm without permission (§§ 48900, subd. (b) & 48915, subds. (c)(1), (c)(5) & (d)).
- Unlawfully selling a controlled substance, as defined (§ 48915, subd. (c)(3) & (d), Stats. 1995, ch. 972).
- Committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined (eff. Jan. 1, 1997; §§ 48900, subd. (n) & 48915, subds. (c)(4) & (d)).
- Possessing an explosive (eff. Jan. 1, 2002; § 48915, subds. (c)(5) & (d)).

For the remainder of this analysis, except as otherwise noted, the activities discussed apply only to these most serious mandatory expulsion offenses (in § 48915, subd. (c)), because they are downstream to the mandatory expulsion order.

J. Program of Study for Expelled Pupil (§§ 48915 (d), 48916.1, & 48918 (j))

Since 1993, pupils expelled for the most serious offenses in subdivisions (a) or (c) of section 48915 are prohibited from enrolling in school during the expulsion "unless it is a county community school … or a juvenile court school … or [added by Stats. 1995, chs. 972 & 974] a community day school …."[230]

Effective January 1, 1996, the governing board is required to refer pupils expelled for the most serious offenses listed in section 48915, subdivision (c), to a program of study that: "(1) Is appropriately prepared to accommodate pupils who exhibit discipline problems. (2) Is not

[230] Section 48915.2, subdivision (a).

provided at a comprehensive middle, junior, or senior high school, or at any elementary school. (3) Is not housed at the schoolsite attended by the pupil at the time of suspension."[231]

Section 48916.1 provides, "at the time an expulsion of a pupil is ordered, the governing board of the school district shall ensure that an educational program is provided to the pupil who is subject to the expulsion order for the period of the expulsion." It further states:

> Except for pupils expelled pursuant to subdivision (d) of Section 48915, the governing board of a school district is required to implement the provisions of this section only to the extent funds are appropriated for this purpose in the annual Budget Act or other legislation, or both. (§ 48916, subd. (a).)[232]

The expelled pupil's educational program "may be operated by the school district, the county superintendent of schools, or a consortium of districts or in joint agreement with the county superintendent of schools." (§ 48916.1, subd. (b)). The program "may not be situated within or on the grounds of the school from which the pupil was expelled" and expelled pupils in kindergarten or grades 1 to 6 inclusive may not be combined or merged with pupils in grades 7 to 12 (§ 48916.1, subds. (b) & (c)). A county superintendent of schools may enter into an agreement with another county if it cannot serve the expelled pupils of a school district within its county (§ 48916.1, subd. (f)).

After the expulsion hearing, the pupil must receive "a notice of the education alternative placement to be provided to the pupil during the time of expulsion." (§ 48918, subd. (j)).

Refer pupil to program of study: Subdivision (d) of section 48915, as amended by Statutes 1995, chapter 972, states that the "governing board shall order a pupil expelled upon finding that the pupil committed an act listed in subdivision (c) *and shall refer that pupil to a program of study* that meets all of the following conditions… ." [Emphasis added.]

Because the plain language of this subdivision uses the mandatory word 'shall,' it requires referring the pupil to the program of study for all the offenses listed in subdivision (c).[233]

Therefore, staff finds that, effective January 1, 1996, referring an expelled pupil to a program of study, as specified, is a state mandate for pupils expelled for the most serious mandatory expulsion offenses (listed in § 48915, subd. (c)).[234]

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[231] Section 48915, subdivision (d).

[232] Although this provision was codified effective September 26, 1996 by Statutes 1996, chapter 937, section 48916 was amended in the same way by Statutes 1995, chapter 974. Section 9, subdivision (b) of Statutes 1995, chapter 974 (eff. July 1, 1996) states: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act shall become operative only to the extent funds are appropriated for its purpose in the annual Budget Act, or other legislation, or both."

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

[234] Providing instruction to expelled pupils, however, is not required by section 48915. As stated in the legislative history of Statutes 1995, chapter 972 (S.B. 966) this bill "does not require that

Preexisting law (§ 48915.2, subd. (a), added by Stats. 1993, ch. 1257, amended by Stats. 1995, chs. 972 & 974) provides that, during the period of expulsion a pupil who is expelled for any of the most serious offenses in section 48915, subdivision (c), may be permitted to enroll only in a county community school or a juvenile court school. Preexisting law did not require the expelled pupil be referred to a program of study, so staff finds that doing so is a new program or higher level of service.

Thus, staff finds, effective January 1, 1996, that subdivision (d) of section 48915 is a state-mandated new program or higher level of service to refer the expelled pupil to a program of study that meets the following criteria: (1) is appropriately prepared to accommodate pupils who exhibit discipline problems; (2) is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school; and (3) is not housed at the schoolsite attended by the pupil at the time of suspension (§ 48915, subd. (d), Stats. 1995, ch. 972). Referring the expelled pupil to this program of study is only a state-mandated new program or higher level of service when the governing board orders a pupil expelled for any of the most serious mandatory expulsion offenses (listed in § 48915, subd. (c)).

Ensure an educational program is provided: Section 48916.1 was added by Statutes 1995, chapter 974 (eff. July 1, 1996) and amended by Statutes 1996, chapter 937, (eff. Sept. 26, 1996). Subdivision (a) states, with the 1996 amendments marked, as follows:

> At the time an expulsion of a pupil is ordered, the governing board of the school district shall ensure that an educational program is provided to the pupil who is subject to the expulsion order for the period of the expulsion~~, but~~. *Except for pupils expelled pursuant to subdivision (d) of Section 48915, the governing board of a school district is required to implement the provisions of this section* only to the extent funds are appropriated for this purpose in the annual Budget Act or other legislation, or both.[235]

The legislative history indicates that the purpose of the bill (Stats. 1995, ch. 974, A.B. 922) according to the author, was "to require districts to take responsibility for the placement of all expelled students."[236]

The mandatory language in subdivision (a) states that the school district "shall ensure that an educational program is provided to the pupil … for the period of expulsion."[237] Therefore, staff

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pupils be served in an alternative program." Senate Rules Committee, Senate Floor Analysis of Senate Bill No. 966 (1995-1996 Reg. Sess.) as amended Sept. 11, 1995, page 4.

[235] Statutes 1995, chapter 974, section 9, subdivision (b) stated: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act shall become operative only to the extent funds are appropriated for its purpose on the annual Budget Act, or other legislation, or both." Because this analysis only applies to pupils expelled pursuant to subdivision (d) of section 48915, neither this provision, nor the amendment to subdivision (a) of section 48916.1 by Statutes 1996, chapter 937, affects this analysis.

[236] Assembly Committee on Education, Analysis of Assembly Bill No. 922 (1995-1996 Reg. Sess.) as amended March 27, 1995, page 2.

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

finds that ensuring that an educational program is provided to a pupil expelled pursuant to subdivision (d) of section 48915 is a state mandate, effective July 1, 1996.[238]

The educational program may be provided through the school district, the county superintendent of schools, or a consortium of districts or in joint agreement with the county superintendent of schools (§ 48916.1, subd. (b), added by Statutes 1995, chapter 974).

The educational program may not be situated within or on the grounds of the school from which the pupil was expelled, and grades kindergarten through 6 may not be combined with grades 7 to 12 in the educational program, except for community day schools offering instruction in any of grades kindergarten through 8th (§ 48916.1, subds. (c) & (d)).[239]

For pupils in grades 7 through 12, the district was originally allowed to offer independent study to implement the educational program (§ 48916.1, subd. (e), Stats. 1995, ch. 974) but this was removed in 1996 (Stats. 1996, ch. 937). The school district is authorized to enter into an agreement with a county superintendent of schools in another county if the school district's county superintendent cannot serve the county's expelled pupils (§ 48916.1, subd. (f)).

These provisions in section 48916.1 define the scope of the requirement to ensure the educational program is provided to the expelled pupil pursuant to subdivision (a) of section 48916.1, but do not impose additional state-mandated activities.

Because it was not required by prior law, staff finds that ensuring that this educational program is provided to the expelled pupil pursuant to section 48916.1, subdivision (a), as added by Statutes 1995, chapter 974, is a new program or higher level of service as of July 1, 1996.

Therefore, staff finds that effective July 1, 1996, section 48916.1 (Stats. 1995, ch. 974) is a state-mandate new program or higher level of service for ensuring that an educational program is provided to a pupil expelled for any of the most serious mandatory expulsion offenses (listed in § 48915, subd. (c)). The program must conform to the specifications in section 48916.1.

Notice of education alternative placement: Section 48918, subdivision (j), as amended by Statutes 1995, chapter 974, requires sending the expelled pupil's parent or guardian (in addition to other notices) "a notice of the education alternative placement to be provided to the pupil during the time of the expulsion."[240]

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[238] Statutes 1995, chapter 974, section 9, subdivision (b) stated: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act shall become operative only to the extent funds are appropriated for its purpose on the annual Budget Act, or other legislation, or both." Because this analysis only applies to pupils expelled pursuant to subdivision (d) of section 48915, neither this provision, nor the amendment to subdivision (a) of section 48916.1 by Statutes 1996, chapter 937, affects this analysis.

[239] Statutes 1996, chapter 937 (eff. September 26, 1996) added the following to subdivision (d): "This subdivision, as it relates to the separation of pupils by grade levels, does not apply to community day schools offering instruction in any of kindergarten and grades 1 to 8, inclusive, and established in accordance with Section 48660."

[240] Statutes 1995, chapter 974, section 9, subdivision (b) states: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act [including

Because the plain language of subdivision (j) uses the mandatory "shall"[241] staff finds that providing a notice of an alternative placement to the expelled pupil is a state mandate.

Prior law did not require this notice of the alternative placement, so staff also finds that providing it is a new program or higher level of service.

Therefore, staff finds that effective January 1, 1996,[242] that section 48918, subdivision (j), is a state-mandated new program or higher level of service to provide a notice of the education alternative placement to the pupil's parent or guardian at the time of expulsion for a pupil expelled for any of the most serious mandatory expulsion offenses listed in section 48915, subdivision (c) (§ 48918, subd. (j), Stats. 1995, ch. 974).

K. Set Readmission Review Date and Procedures (§ 48916 (a) & (c))

An expulsion order "shall remain in effect until the governing board, in the manner prescribed in this article, orders the readmission of a pupil." (§ 48916, subd. (a).)

For the mandatory expulsion offenses in section 48915, subdivision (c), the readmission review date is one year from the date the expulsion occurred, "except the governing board may set an earlier date for the readmission on a case-by-case basis." (§ 48916, subd. (a).) A description of the readmission procedure must be made available to the pupil and his or her parent or guardian at the time the expulsion order is entered. (§ 48916, subd. (c).)

If the expulsion is ordered during the summer session or the intersession period of a year-round program, the readmission review date must be not later than the last day of the semester following the summer session or intersession period in which the expulsion occurred.

The governing board "shall adopt rules and regulations establishing a procedure for the filing and processing of requests for readmission and the process for the required review of all expelled pupils for readmission" (hereafter called the readmission process). (§ 48916, subd. (c).)

The 1995 amendment added the following to subdivision (a) of section 48916:

> At the time an expulsion of a pupil is ordered, the governing board shall set a date, not later than the last day of the semester following the semester in which the expulsion occurred, when the pupil ~~may apply~~ shall be reviewed for readmission to a school maintained by the district, or to the school the pupil last attended. For a pupil who has been expelled pursuant to subdivision (c) of section 48915, the governing board shall set a date of one year from the date the expulsion occurred, when the pupil shall be reviewed for readmission to a school

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§ 48918, subd. (j)] shall become operative only to the extent funds are appropriated for its purpose in the annual Budget Act, or other legislation, or both." This provision was deleted effective September 26, 1996, by Statutes 1996, chapter 937, section 6, but it has no effect on this analysis because the only state-mandated activity involves pupils expelled pursuant to subdivision (d) of Section 48915.

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

[242] See Statutes 1995, chapter 974, sections 7.5 and 10.

> maintained by the district, except that the governing board may set an earlier date for readmission on a case-by-case basis.

Also, subdivision (c) of section 48916 was amended in part (by Stats. 1995, ch. 974) as follows:

> The governing board of each school district shall adopt rules and regulations establishing a procedure for the filing and processing of requests for readmission and the process for the required review of all expelled pupils for readmission.

These amendments added activities required of a school district. Thus, staff finds the following in section 48916 (amended by Stats. 1995, chs. 972 & 974) are state mandates within the meaning of article XIII B, section 6 for pupils expelled pursuant to section 48915, subdivision (c), at the time the expulsion is ordered:

- Set a date when the pupil will be reviewed for readmission by the governing board (§ 48916, subd. (a)).
- The one-time activity of adopting rules and regulations for the process for the review of expelled pupils for readmission. (§ 48916, subd. (c).)

To subdivision (a) was added: "the governing board may set an earlier date for readmission on a case-by-case basis." The plain language of this provision indicates that setting an earlier readmission date on a case-by-case basis is a discretionary activity and not required.[243] Thus, staff finds that setting an earlier readmission date is not a state mandate within the meaning of article XIII B, section 6.

As to whether setting a readmission date is a new program or higher level of service, the prior version of section 48916 stated, "At the time an expulsion of a pupil is ordered, the governing board shall set a date, not later than the last day of the semester following the semester in which the expulsion occurred, when the pupil may apply for readmission to a school maintained by the district." (Former § 48916, 1st par., Stats. 1983, ch. 498). This activity was found reimbursable in the *Pupil Expulsions* (CSM 4455) decision.[244]

Since setting a date for readmission was required under prior law, staff finds that this is not a new program or higher level of service in this test claim, even though as amended, the date calculation differs for pupils expelled for the most serious offenses listed in section 48915, subdivision (c). Setting a readmission date is not a new activity.

As to whether adopting rules and regulations for readmission is a new program or higher level of service, there was no prior requirement, in section 48916, or elsewhere to adopt rules and regulations establishing "the process for the required review of all expelled pupils for readmission." (§ 48916, subd. (c), Stats. 1995, chs. 972 & 974.) Thus, staff finds that adopting these rules and regulations is a new program or higher level of service.

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

[244] The amended consolidated parameters and guidelines list one reimbursable activity as: "If the governing board expelled a pupil for possession of a firearm, then the following activities are reimbursable: 1. setting a date when the pupil may apply for readmission to a district school."

In sum, staff finds that section 48916, subdivision (c), (Stats 1995, chs. 972 & 974) is a state-mandated new program or higher level of service for school districts to adopt rules and regulations establishing the process for the required review of all expelled pupils for readmission, effective July 1, 1996.[245]

L. Appeal Expulsion Order to County Board of Education (§§ 48919, 48919.5 & 48923)

Section 48919 authorizes an expelled pupil or the pupil's parent or guardian to file an appeal of the expulsion decision to a county board of education within 30 days following the decision of the governing board. It requires the county board of education (or hearing officer or administrative panel in class 1 or class 2 counties)[246] to hold a hearing within 30 schooldays following the filing of a formal request.

Section 48919 further requires the appealing pupil to submit a written request to the school district for the transcript "simultaneously with the filing of the notice of appeal with the county board of education." The district is required to provide the pupil with transcripts, supporting documents, and records within 10 schooldays following the pupil's written request. On receipt of the records, the pupil is to file suitable copies of them with the county board of education.

Section 48919.5 (Stats. 1997, ch. 417) authorizes a class 1 or class 2 county board of education to use a hearing officer or an impartial administrative panel of three or more certificated persons appointed by the county board of education to hear expulsion appeals, as specified.

Section 48923 governs the introduction of relevant and material evidence at the expulsion hearing that could not have been produced without reasonable diligence or was improperly excluded by the school district. It authorizes the county board to either remand the matter to the governing board for consideration of the evidence, or grant a hearing upon reasonable notice to the pupil and the governing board.

Since the *Pupil Expulsion Appeals* (CSM 4463) Statement of Decision, section 48919 has been amended by Statutes 1997, chapter 417, and Statutes 2000, chapter 147. Section 48919.5 was added by Statutes 1997, chapter 417 and has not been amended. There is no Commission finding on section 48919.5. Section 48923 was amended by Statutes 2000, chapter 147. Since all of these amendments were pled by the claimant, the issue is whether they impose state-mandated new program or higher level of service within the meaning of article XIII B, section 6.

Hearing officer or administrative panel expulsion appeal procedure: Section 48919.5, as added by Statutes 1997, chapter 417, authorizes county offices of education with 180,000 or more average daily attendance (a class 1 or class 2 county) to use a hearing officer or impartial administrative panel, as specified, to hear expulsion appeals. The hearing officer or panel applies the procedures in sections 48919, 48920, 48922, 48923, and 48925. (Ed. Code, § 48919.5, subd. (c).) The members of the impartial panel are prohibited from being members of

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[245] Statutes 1995, chapter 974, section 9 (eff. July 1, 1996). This provision was amended by, by Statutes 1996, chapter 937, section 6.

[246] A class 1 county is a county with 1994-95 average daily attendance of more than 500,000. (Ed. Code, § 48915.5, subd. (e)(2).) A class 2 county is a county with 1994-95 average daily attendance of at least 180,000 but less than 500,000. (Ed. Code, § 48915.5, subd. (e)(3).)

the school district governing board or employees of the school district from which the pupil filing the appeal was expelled, and prohibits the hearing officer or members of the administrative panel from having been involved in the pupil's expulsion. The hearing officer or panel does not issue a final order, but prepares a recommended decision for the county board of education (Ed. Code, § 48919.5, subd. (b)). The county office of education then reviews the recommended decision and record, and within 10 schooldays of receiving the recommended decision issues a final order (Ed. Code, § 48919.5, subd. (d)).

The plain language of section 48919.5 states that the county offices of education "may" use the hearing officer or an impartial administrative panel to hear expulsion appeals.[247]

Claimant, in May 2008 comments on the draft staff analysis, argues that:

> Alternative methods of performing a mandate do not make performing the mandate discretionary. The Legislature has declared the available methods to implement their intent, and the fact that the local education agencies have a choice of methods does not mean they have the choice not to implement the mandate.

Staff agrees that the mandate to hear expulsion appeals is not discretionary, and is reimbursable based on the Commission's *Pupil Expulsion Appeals* decision (CSM 4463).[248] The alternative procedure to accomplish the hearing via an administrative panel or hearing officer, however, is discretionary and not mandated. As section 48919 states regarding adopting rules for the hearing officer procedure: "If the county board of education in a class 1 or class 2 county *elects to use the procedures in Section 48919.5,* then the board shall adopt rules and regulations establishing procedures for expulsion appeals under Section 48919.5." [Emphasis added.] This language makes clear that the hearing officer procedure is discretionary. Moreover, it is the local school officials, rather than the state, that make the decision requiring the county office of education to incur the cost of a hearing officer procedure.[249]

Therefore, staff finds that section 48919.5 (added by Stats. 1997, ch. 417) does not mandate a new activity to use a hearing officer or administrative panel to hear expulsion appeals.

Adopt rules for alternative expulsion appeal procedure: Section 48919 (amended by Stats. 1997, ch. 417 & Stats. 2000, ch. 147) authorizes county offices of education with 180,000 or more average daily attendance to use the alternative procedure in section 48919.5, which calls for using a hearing officer or administrative panel hearing for expulsions appeals. The second paragraph of section 48919 was amended by Statutes 1997, chapter 417 to add underlined text as follows:

> The county board of education shall adopt rules and regulations establishing procedures for expulsion appeals conducted under this section. If the county

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

[248] The Statement of Decision found, in addition to other hearing-related activities, that the following is reimbursable: "conducting an initial hearing on an appeal and rendering a decision, limited to appeals which result in a hearing de novo." (§§ 48919, 2d par. & 48923.)

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

> board of education in a class 1 or class 2 county elects to use the procedures in Section 48919.5, then the board shall adopt rules and regulations establishing procedures for expulsion appeals under Section 48919.5. The adopted rules and regulations shall include, but need not be limited to, the requirements for filing a notice of appeal, the setting of a hearing date, the furnishing of notice to the pupil and the governing board regarding the appeal, the furnishing of a copy of the expulsion hearing record to the county board of education, procedures for the conduct of the hearing, and the preservation of the record of the appeal.

The Statement of Decision for *Pupil Expulsion Appeals* (CSM 4463) determined that "[a]dopting rules and regulations establishing procedures for expulsion appeals" is reimbursable. (§ 48919, 4th par.)

The rules and regulations added by the test claim statute (for the "appeals under Section 48919.5") are a downstream activity based on the discretionary decision to use the section 48919.5 alternative procedure. As a required activity resulting from a discretionary one, the following rule in the *Kern High School Dist.* case applies:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[250]

In sum, staff finds that section 48919 does not impose a state-mandated new program or higher level of service to adopt rules and regulations for an alternative hearing procedure (§ 48919, Stats. 1997, ch. 417 & Stats. 2000, ch. 147).

Transcript requests: The amendments to section 48919 made by Statutes 2000, chapter 147, in addition to nonsubstantive changes, require school districts to give the expulsion transcript records to the pupil within 10 days of the pupil's request, and clarify that the pupil's request must be written. Prior law gave the school district only five days to comply with the pupil's request. Because this provision gives the school district more time to comply with a pupil's request, staff finds that section 48919, as amended by Statutes 2000, chapter 147, does not impose a new program or higher level of service on school districts, so there is no reimbursable mandate within the meaning of article XIII B, section 6.

Remand to school district: Section 48923 (Stats. 1983, ch. 498) was decided by the Commission in the *Pupil Expulsion Appeals* (CSM 4463) decision. Claimant pled Statutes 2000, chapter 147, which added a new subdivision (b) to section 48923, as follows:

> (b) If the county board determines that the decision of the governing board is not supported by the findings required to be made by Section 48915, but evidence supporting the required findings exists in the record of the proceedings, the county board shall remand the matter to the governing board for adoption of the required findings. This remand for the adoption and inclusion of the required findings shall not result in an additional hearing pursuant to Section 48918, except

[250] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

> that final action to expel the pupil based on the revised findings of fact shall meet all requirements of subdivisions (j) and (k) of Section 48918.

Thus, the issue is whether subdivision (b) of section 48923, as added by Statutes 2000, chapter 147, imposes a mandate on county boards of education or school district governing boards. Staff finds that it does.

Staff finds that subdivision (b) of section 48923 is a state mandate on the county board of education because the language indicates that the board "shall remand the matter to the governing board for adoption of the required findings" when the county board determines that the governing board decision is not supported by the findings that are supported by evidence in the record.

Staff also finds that subdivision (b) constitutes a state mandate on the school district governing board, upon remand by the county board, to adopt the required findings and to comply with subdivisions (j) and (k) of section 48918. Section 48918, subdivision (j), requires giving notice of the following: the expulsion decision, the right to appeal to the county board, the education alternative placement to be provided during the expulsion, and the obligation of the parent or guardian to inform a new school district in which the pupil may enroll of the pupil's expulsion. Subdivision (k) of section 48918 requires maintaining a record of each expulsion and its cause.

Adopting the requisite findings is not discretionary for the county board or the school district. Not doing so could expose the county board or school district to a suit under Code of Civil Procedure 1094.5, subdivision (b), for abuse of discretion, which is established "if the respondent has not proceeded in a manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Education Code section 48922, subdivision (c), states that an abuse of discretion is established if "school officials have not met the procedural requirements of this article."[251]

Finance, in its July 11, 2008 comments on the draft staff analysis, disagrees that this activity is a mandate. According to Finance: "A district's *choice* does not constitute a state-imposed mandate or a state-imposed consequence that would compel the district to action. It would not be prudent for a district not to include the evidence in the finding, but it is a risk and choice borne by the district and the district alone." [Emphasis in original.]

Staff disagrees with Finance. The county board's remand is like an appeal in which the school district (like a trial court) must adopt the county board's findings because it came to a different legal conclusion. The district has no discretion. It is legally required to adopt the requisite findings upon remand by the county board. The event that triggers the district's adoption of findings is the county board of education's decision to remand, a decision over which the district has no control. Therefore, staff finds that section 48923, subdivision (b) is a state mandate on the school district to adopt the expulsion finding(s) upon remand by the county board.

Staff also finds that section 48923, subdivision (b), is a new program or higher level of service. Prior law did not require the county board to remand a matter under the specified circumstances, nor did it require the school district to adopt the remanded findings. The legislative history of Statutes 2000, chapter 147, discussed the state of the law before enacting subdivision (b):

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[251] See also 80 Opinions of the Attorney General 91 (1997).

> County boards are not authorized to "retry" an expulsion case, but are to ensure that proper procedures were following [sic] during school district expulsion hearings. It is not uncommon for county boards to find that the school district has not properly prepared the findings of fact required for the expulsion, even though the necessary information is clearly a part of the record, which is available to the county board. Under current law, the only option usually available to the county board in this instance is to overturn the expulsion, and allow the student to return to school. Although there are differences of opinion amongst legal authorities as to this requirement, this bill would make clear that the county board could simply remand the case back to the school district, rather than overturning the expulsion.[252]

The Statement of Decision for *Pupil Expulsion Appeals* (CSM 4463) determined a school district is eligible for reimbursement when the pupil appeals an expulsion for possession of a firearm, knife or explosive, for "participating in the county board of education's initial hearing on the appeal of an expulsion when the appeal results in a hearing de novo."[253] (§ 48919, 1st & 2d pars.) The school district requirement to adopt findings on remand in the test claim statute, however, is different than participation in the "initial" county board of education hearing.

Therefore, staff finds that, effective January 1, 2001, section 48923, subdivision (b), (added by Stats. 2000, ch. 147) imposes a state-mandated new program or higher level of service on a county board of education to remand an expulsion matter to a school district for adoption of the required findings if the school district's decision is not supported by the findings required by section 48915[254] but evidence supporting the required findings exists in the record of the proceedings. Staff also finds that this county board activity applies to any expulsion, and is not limited to those for offenses in section 48915, subdivision (c), because the county board of education must remand the matter regardless of what the expulsion was for, and has no discretion not to act.

Staff also finds that section 48923, subdivision (b) (added by Stats. 2000, ch. 147) imposes a state mandate on a school district governing board, upon remand by the county board, to adopt the required findings and to expel the pupil, and that the remand "shall not result in an additional hearing pursuant to Section 48918, except that final action to expel the pupil based on the revised findings of fact shall meet all requirements of subdivisions (j) and (k) of Section 48918." This

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[252] Assembly analysis of Assembly Bill No. 1721 (1999-2000 Reg. Sess.) as amended June 7, 2000, page 3.

[253] Possession of a firearm (on or after Oct. 11, 1993) (Stats. 1993, ch. 1256); possession of a knife of no reasonable use to the pupil, or an explosive at school (on or after Oct. 11, 1993 until Dec. 31, 1993) (Stats. 1993, ch. 1255).

[254] A decision to expel is based on a finding that either: "(1) Other means of correction are not feasible or have repeatedly failed to bring about proper conduct. (2) Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others." (Ed. Code, § 48915, subds. (b) & (e).)

adoption of the required findings is also a new program or higher level of service, since it was not required under prior law.

This means that, effective January 1, 2001, it is a state-mandated new program or higher level of service for a school district, when adopting the required findings on remand from the county board of education, to: (1) take final action on the expulsion in a public session (not hold another hearing) and; (2) provide notice to the pupil or the pupil's parent or guardian of the following: the expulsion decision, the right to appeal to the county board, the education alternative placement to be provided during the expulsion, and the obligation of the parent or guardian to inform a new school district in which the pupil may enroll of the pupil's expulsion (§ 48918, subd. (j)); and (3) maintain a record of each expulsion and the cause therefor (§ 48918, subd. (k)). Staff finds that these activities are only a state-mandated new program or higher level of service when the district governing board orders the pupil expelled for any of the most serious mandatory expulsion offenses (listed in § 48915, subd. (c)).

M. Expelling District's Readmission Review (§§ 48917 (e), & 48916 (a), (c) - (e))

Section 48916 governs how a pupil is readmitted to the expelling school district. Upon completion of the readmission review process, the governing board is required to readmit the pupil unless it finds that "the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." (§ 48916, subd. (c), Stats. 1995, ch. 974.)

Since the *Pupil Expulsions* (CSM 4455) decision, section 48916 has been amended by Statutes 1992, chapter 152, Statutes 1995, chapter 972, Statutes 1995, chapter 973, Statutes 1995, chapter 974, and Statutes 2003, chapter 552. Claimant pled all these amendments except for Statutes 1995, chapter 973 and Statutes 2003, chapter 552,[255] upon which staff makes no findings.

The 1992 amendment to section 48916 (Stats. 1992, ch. 152), inserted the provision that the governing board is not required to readmit a pupil on completion of the readmission review process. Because this provision does not require a school district activity, staff finds that it does not impose a state mandate.

The 1995 amendments (chs. 972 & 974) rewrote section 48916,[256] adding the following to subdivision (a):

> At the time an expulsion of a pupil is ordered, the governing board shall set a date, not later than the last day of the semester following the semester in which

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[255] The 2003 amendment merely clarified when the pupil would be reviewed for readmission if the expulsion is ordered during the summer session.

[256] Statutes 1995, chapter 974, section 9, subdivision (b) states: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act [including the § 48916 amendments] shall become operative only to the extent funds are appropriated for its purpose in the annual Budget Act, or other legislation, or both." This provision was deleted effective September 26, 1996, by Statutes 1996, chapter 937, section 6, but it has no effect on this analysis because the only state-mandated activities involve only pupils expelled pursuant to subdivision (d) of Section 48915.

> the expulsion occurred, when the pupil ~~may apply~~ shall be reviewed for readmission to a school maintained by the district, or to the school the pupil last attended.

The 1995 amendment to subdivision (c) requires readmission of the pupil "unless the governing board makes a finding that the pupil has not met the condition of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district."

If the governing board denies readmission to an expelled pupil:

> [T]he governing board shall make a determination either to continue the placement of the pupil in the alternative education program initially selected for the pupil during the period of the expulsion order or to place the pupil in another program that may include, but need not be limited to, serving expelled pupils, including placement in a county community school. (§ 48916, subd. (d), Stats. 1995, ch. 974, eff. July 1, 1996.)

Although subdivision (d) of section 48916 states that the board conditionally makes this determination (if readmission is denied pursuant to subdivision (c), i.e., if the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district) the board is required to make a determination if the facts support it. According to the plain language of subdivision (c), unless the governing board can make either of these findings, it is required to readmit the pupil.

Subdivision (e) of section 48916, (added by Stats. 1995, ch. 974) requires the governing board to provide written notice to the expelled pupil and his or her parent or guardian describing the reasons for denying readmission into the regular school district program, and specifies that the notice must include the determination of the educational program for the expelled pupil. The pupil is required to enroll in that educational program unless the parent or guardian elects to enroll the pupil in another school district.

The 1995 amendments added activities required of a school district.[257] Thus, staff finds the following in section 48916 (Stats. 1995, chs. 972 & 974) are state mandates within the meaning of article XIII B, section 6, for pupils expelled pursuant to section 48915, subdivision (d):

- Review the pupil for readmission (§ 48916, subd. (a)).
- Readmit the pupil or find that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district. (§ 48916, subd. (c)).
- If readmission is denied, the governing board shall make the determination to either continue the placement of the expelled pupil in the alternative education program, or to place the pupil in another program that may include, but need not be limited to, serving expelled pupils, including placement in a county community school (§ 48916, subd. (d)).
- If readmission is denied, the governing board shall provide written notice to the expelled pupil and the pupil's parent or guardian describing the reasons for denying readmission to

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

> the regular school program. The written notice shall include the determination of the education program for the expelled pupil. (§ 48916, subd. (e)).

The next issue is whether these activities are a new program or higher level of service. As quoted above, the 1995 amendment to subdivision (a) replaced "may apply for readmission" with "shall be reviewed for readmission." Under prior law, section 48916 did not require the school district to review the expelled pupil for readmission. As of the 1995 amendment, the pupil's readmission review is a mandatory duty of the governing board.[258] Therefore, staff finds that this amendment to section 48916, subdivision (a), requiring readmission review, is a new program or higher level of service.

The 1995 amendment to subdivision (c) of section 48916 requires pupil readmission: "unless the governing board makes a finding that the pupil has not met the condition of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." Therefore, staff finds that readmitting the pupil or finding that the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district is a new program or higher level of service.

As to whether readmission or making findings to deny readmission is a new program or higher level of service, the prior version of section 48916 (Stats. 1983, ch. 498) stated:

> An expulsion order shall remain in effect until the governing board may, in the manner prescribed in this article, order the readmission of a pupil. At the time an expulsion of a pupil is ordered, the governing board shall set a date .. when the pupil may apply for readmission to a school maintained by the district. [¶]…[¶] Upon completion of the readmission process, the governing board shall not be required to readmit the pupil. (former § 48916, 1st & 3d par., the last sentence was added by Stats. 1992, ch. 152).

Since prior law authorized but did not require readmission of a pupil, staff finds that effective July 1, 1996, subdivision (d) of section 48916 (Stats. 1995, ch. 974) is a new program or higher level of service for the governing board to readmit the pupil or make the requisite findings to deny readmission, as specified.

Staff also finds that providing written notice to the expelled pupil and the pupil's parent or guardian describing the reasons for denying readmission to the regular school program, to include the determination of the education program for the expelled pupil (§ 48916, subd. (e)) is a new program or higher level of service, since it was not required under prior law.

In sum, staff finds that section 48916 (Stats. 1995, chs. 972 & 974) is a state-mandated new program or higher level of service, effective July 1, 1996, for school districts to do the following when the governing board orders the pupil expelled pursuant to subdivision (d) of section 48915 for any of the most serious mandatory expulsion offenses (in § 48915, subd. (c)):

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[258] Education Code section 75, "'Shall' is mandatory and 'may' is permissive."

- Review the pupil for readmission (§ 48916, subd. (a)).
- Order the expelled pupil's readmission or make a finding to deny readmission if "the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." (§ 48916, subd. (c).)
- If readmission is denied, the governing board shall make the determination to either continue the placement of the expelled pupil in the alternative education program, or to place the pupil in another program that may include, but need not be limited to, serving expelled pupils, including placement in a county community school (§ 48916, subd. (d)).
- If readmission is denied, the governing board shall provide written notice to the expelled pupil and the pupil's parent or guardian describing the reasons for denying readmission to the regular school program. The written notice shall include the determination of the education program for the expelled pupil. (§ 48916, subd. (e)).

N. New School District's Readmission Review (§§ 48915.1 & 48915.2)

A pupil's claim of entitlement for admission to a California school district is based in part on age and residency or a voluntary interdistrict transfer agreement.[259]

Section 48915.1 describes the following procedure for pupils expelled from a school district for lesser offenses (not in subdivisions (a) or (c) of section 48915) to gain admission to a school in a different district from which the pupil was expelled:

> [T]he board shall hold a hearing to determine whether that individual poses a continuing danger either to the pupils or employees of the school district. The hearing and notice shall be conducted in accordance with the rules and regulations governing procedures for the expulsions of pupils as described in Section 48918. (§ 48915.1, subd. (a).)

A school district considering a pupil admission may request information from another school district, as specified, to which the expelling district is required to respond "with all deliberate speed but shall respond no later than five working days from the date of the receipt of the request." (§ 48915.1, subd. (a).) The parent, guardian, or emancipated pupil who was expelled (except those expelled pursuant to subds. (a) or (c) of § 48915) is required to inform the receiving school district of his or her status with the previous school district upon enrollment (§ 48915.1, subd. (b).). "If this information is not provided to the school district and [it] later determines the pupil was expelled from the previous school district, the lack of compliance shall be recorded and discussed in the hearing required pursuant to subdivision (a)." (*Ibid.*)

The governing board may deny enrollment to the pupil for the remainder of the expulsion period "after a determination has been made, pursuant to a hearing, that the individual poses a potential danger to either the pupils or employees of the school district." (§ 48915.1, subd. (c).) The governing board may either deny enrollment, permit enrollment, or permit conditional enrollment in a regular school program or another educational program (§ 48915.1, subd. (d)).

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[259] Education Code sections 48915.1, subdivision (e) and section 48915.2, subdivision (b). Legal residency in the school district is treated in section 48200 and interdistrict transfer agreements are treated in section 46600 et seq..

A pupil expelled from another district for lesser offenses (not in subds. (a) or (c) of § 48915) may enroll in the school district during the term of the expulsion after a determination has been made, pursuant to a hearing, that the pupil does not pose a danger to either the pupils or employees of the school district (§ 48915.1, subd. (e)). Permission to enroll depends on whether the pupil has established legal residence in the school district after the expulsion, or has enrolled pursuant to an interdistrict agreement.[260]

As to pupils expelled for the more serious offenses, a pupil expelled for any of the offenses listed in subdivisions (a) or (c) of section 48915 "shall not be permitted to enroll in any other school or school district during the period of expulsion unless it is a county community school pursuant to subdivision (c) of Section 1981, or a juvenile court school, as described in Section 48645.1, or a community day school … ." (§ 48915.2, subd. (a).)

> After a determination has been made, pursuant to a hearing under Section 48918, that an individual expelled from another school district for any act described in subdivision (a) or (c) of Section 48915 does not pose a danger to either the pupils or employees of the school district, the governing board of a school district may permit the individual to enroll in the school district after the term of expulsion, subject to one of the following conditions: (1) He or she has established legal residence in the school district … (2) He or she is enrolled in the school pursuant to an interdistrict agreement executed between the affected school district …." (§ 48915.2, subd. (b))

In the *Pupil Expulsions* (CSM 4455) decision, the Commission found that sections 48915.1, as amended by Statutes 1993, chapter 1257, and 48915.2, as added by the same 1993 statute, constitute reimbursable state mandates. Section 48915.1 was amended again by Statutes 1996, chapter 937, to add more offenses for which a pupil would not be allowed to gain admittance (those in § 48915, subd. (c)). Section 48915.2 has also been amended (by Stats. 1995, chs. 972 & 974) since the *Pupil Expulsions* (CSM 4455) decision.

Given these amendments to sections 48915.1 and 48915.2, the issue is whether the amendments impose any state- mandated new programs or higher levels of service. For section 48915.1, only the amendment made by Statutes 1996, chapter 937 is at issue. The amendments of Statutes 1995, chapters 972 and 974 to section 48915.2 are also discussed.

Readmission to different district (more serious offenses in subds. (c) and (a) of § 48915): Since the *Pupil Expulsions* (CSM 4455) decision, section 48915.2 has been amended by Statutes 1995, chapters 972 and 974. These amendments add a reference to pupils expelled under section 48915, subdivision (c) (to those expelled under § 48915, subd. (a)) who are not permitted to enroll in another school during the expulsion period, except a county community school or a juvenile court school (§ 48915.2, subd. (a)). The amendment also adds a community day school to those in which an expelled pupil would be allowed to enroll during the expulsion period.

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[260] Interdistrict agreements are authorized by Education Code section 46600, subdivision (b), which states: "In addition to the requirements of subdivision (e) of Section 48915.1, and regardless of whether an agreement exists or a permit is issued pursuant to this section, any district may admit a pupil expelled from another district in which the pupil continues to reside."

Staff finds that the 1995 amendment to subdivision (a) does not impose a state mandate because it does not require an activity of a school district. It merely adds offenses that would prohibit a pupil, if expelled for those offenses, from enrolling in another school during the expulsion term, and adds another type of school (community day school) in which the pupil may enroll.

Subdivision (b) of section 48915.2 was amended by Statutes 1995, chapter 974 (eff. July 1, 1996) as underlined:

> After a determination has been made, pursuant to a hearing under Section 48918, that an individual expelled from another school district for any act described in subdivision (a) or (c) of section 48915 does not pose a danger to either the pupils or employees of the school district, the governing board of a school district may permit the individual to enroll in the school district after the term of expulsion, subject to [the pupil establishing legal residence in the district, or enrollment based on an interdistrict agreement, as specified].

Staff finds that this amendment to subdivision (b) of section 48915.2 imposes a state mandate to determine, via a section 48918 hearing, whether the pupil expelled for an offense in subdivision (c) of section 48915 poses a danger to either the pupils or employees of the district.

This determination is limited to applicants who have been expelled by a district that has not entered into a voluntary interdistrict transfer agreement with the receiving district. The Supreme Court, in the *Kern High School Dist.* case, gave the following rule:

> [A]ctivities undertaken at the option or discretion of a local government entity … do not trigger a state mandate and hence do not require reimbursement of funds—even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice.[261]

Since a school district that has an interdistrict transfer agreement has voluntarily undertaken to admit pupils from another district, the district has made the "discretionary decision to participate in a particular program or practice." Therefore, staff finds that if the expelling and receiving districts have an interdistrict transfer agreement, the readmission determination is not a state mandate.

Although subdivision (b) of section 48915.2 does not expressly require the school district to make a determination regarding the pupil's enrollment (it applies "after a determination"), the district cannot turn the pupil away without a hearing because pupils have a right to a public education.[262] Thus, if the expelling and receiving districts do not have an interdistrict transfer agreement, staff finds that it is a state mandate to determine, pursuant to a hearing under section 48918, whether an individual expelled from another school district for any act described in subdivision (c) of section 48915 poses a danger to either the pupils or employees of the school district.

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[261] *Kern High School Dist., supra,* 30 Cal.4th 727, 742.

[262] Education Code section § 48200 et seq. and California Constitution, article IX, section 5. See also *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 887, fn. 22.

Prior to the 1995 amendment, the determination to admit the pupil was required for pupils expelled from another school district for any act described in subdivision (a) of section 48915. As amended by Statutes 1994, chapter 1198, the offenses listed in former subdivision (a) of section 48915 were:

> (1) Causing serious physical injury to another person, except in self-defense.
> (2) Possession of any knife, explosive, or other dangerous object of no reasonable use to the pupil at school or at a school activity off school grounds.
> (3) Unlawful sale of any controlled substance …[as specified] except for the first offense for the sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis.
> (4) Robbery or extortion.

Since preexisting law required the determination, pursuant to a hearing under section 48918, that an individual expelled from another school district for any of the acts listed above does not pose a danger to either the pupils or employees of the school district, staff finds that making this determination at a readmission hearing is not a new program or higher level of service for a pupil who committed any of those subdivision (a) offenses.

Section 48915, subdivisions (a) and (c), was amended by Statutes 1995, chapter 972, to add the following three offenses to those listed above.

- Unlawful possession of any controlled substance [as specified] … except for the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis. (§ 48915, subd. (a)(3).)
- Possessing, selling, or otherwise furnishing a firearm … [without permission as specified]. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. (§ 48915, subd. (c)(1).)
- Brandishing a knife at another person. (§ 48915, subd. (c)(2).)

And the following offenses were added later:

- Committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined. (§§ 48900, subd. (n) & 48915, subds. (c)(4) & (d), Stats. 1996, chs. 915 & 1052.)
- Possession of an explosive. (§ 48915, subd. (c)(5), Stats. 2001, ch. 116.)

Therefore, effective July 1, 1996, staff finds that section 48915.2 (Stats. 1995, ch. 974)[263] is a state-mandated new program or higher level of service for the school district to determine, pursuant to the hearing procedures under section 48918, that an individual expelled from another

[263] "[A] school district may permit the individual to enroll in the school district after the term of expulsion, subject to one of the following conditions: (1) He or she has established legal residence in the school district, pursuant to Section 48200. (2) He or she is enrolled in the school pursuant to an interdistrict agreement executed between the effected school districts pursuant to Chapter 5 (commencing with Section 46600) of Part 26." (§ 48915.2, subds. (b)(1) & (b)(2).)

school district does not pose a danger to either the pupils or employees of the school district if the pupil has committed any of the following offenses:

- Unlawful possession of any controlled substance [as specified] … except for the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis. (§ 48915, subd. (a)(3).)
- Possessing, selling, or otherwise furnishing a firearm … [without permission as specified]. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. (§ 48915, subd. (c)(1).)
- Brandishing a knife at another person. (§ 48915, subd. (c)(2).)
- Effective January 1, 1997, committing or attempting to commit a sexual assault, as defined, or commits a sexual battery, as defined. (§§ 48900, subd. (n) & 48915, subds. (c)(4) & (d).)
- Effective January 1, 2002, possessing an explosive. (§ 48915, subd. (c)(5).)

This activity only applies to determinations of applicants who have been expelled by a district that has not entered into a voluntary interdistrict transfer agreement with the receiving district.

Readmission to a different district (lesser offenses not in subds. (a) or (c) of § 48915): Section 48915.1, subdivision (a) was amended in 1996 (Stats. 1996, ch. 937) as underlined:

> If the governing board of a school district receives a request from an individual who has been expelled from another school district for an act other than those described in subdivision (a) or (c) of Section 48915, for enrollment in a school maintained by the school district, the board shall hold a hearing to determine whether that individual poses a continuing danger either to the pupils or employees of the school district. The hearing and notice shall be conducted in accordance with the rules and regulations governing procedures for the expulsions of pupils as described in Section 48918.

Since this 1996 amendment to subdivision (a) of section 48915.1 excludes pupils expelled for a new group of offenses[264] from requesting enrollment in another school district, it does not mandate a school district activity. Thus, staff finds that it does not constitute a state mandate within the meaning of article XIII B, section 6.

Similarly, subdivision (c) of section 48915.1 (also amended by Stats. 1996, ch. 937) adds expulsion offenses (in subd. (c) of § 48915) for which the district need not determine, after a hearing, to deny enrollment for the remainder of the expulsion period (again, expanding the exception from those expelled under § 48915, subd. (a) to add those expelled under subd. (c) of

[264] Subdivision (c) of section 48915 is the immediate suspension and mandatory recommended expulsions provision for the five offenses discussed above: possessing , selling, or otherwise furnishing a firearm (with specified exceptions), brandishing a knife at another person, unlawfully selling a controlled substance, committing or attempting to commit a sexual assault and (as added by Stats. 2001, ch. 116) possessing an explosive.

§ 48915). Since this amendment also does not require an activity of a school district, staff finds that it is not a state mandate within the meaning of article XIII B, section 6.

Subdivision (b) of section 48915.1 requires the parent or guardian or emancipated pupil who has been expelled for an act other than the more serious offenses listed in subdivision (a) and (as amended by Stats. 1996, ch. 937) subdivision (c) of section 48915, to inform the receiving district of his or her status with the previous school district. Staff finds that this amendment (Stats. 1996, ch. 937) to section 48915.1, subdivision (b), does not impose a state-mandated activity on a school district.

O. Educational Services Plan and Pupil Data (§§ 48926, 48900.8 & 48916.1)

County office of education plan for educational services to expelled pupils: Section 48926, added by Statutes 1995, chapter 974, requires county superintendents of schools to develop a plan for providing education services to all pupils expelled within the county. The application is limited, however, to "counties that operate community schools pursuant to Section 1980." The plan is required to "be adopted by the governing board of each school district within the county and by the county board of education." The section also specifies what the plan must contain, requires it to be submitted to the Superintendent of Public Instruction by June 30, 1997, and requires a triennial update on June 30 thereafter.

Section 48926 applies to county offices of education only in counties that operate community schools "pursuant to Section 1980." Section 1980 authorizes but does not require a county board of education to establish and maintain one or more community schools. Among those authorized to enroll in these schools are pupils expelled for reasons specified in section 48915.[265]

School districts and county offices of education have alternatives to those community schools, as discussed above. These include community day schools (§ 48660 et seq.), juvenile court schools (§ 48645.1 et seq.), or for some pupils, independent study (§ 51747, subd. (c)(7)). The alternative programs may be operated by a consortium of districts or in joint agreement with the county superintendent of schools (§ 48916.1, subd. (b)) or via agreement with the county superintendent of another county (§ 48916.1, subd. (f)).

Section 48926 applies to a "county superintendent of schools in counties that operate community schools pursuant to Section 1980," and section 1980 is permissive as to the operation of the community schools. This means that developing the section 48926 plan is a discretionary activity and is not legally compelled. Nor does the statute on its face impose "certain and severe penalties such as double taxation or other draconian consequences"[266] for not developing a plan for providing education services to all pupils expelled within the county, or not operating a community school pursuant to section 1980. This is especially true given the alternatives to community schools, as listed above. In short, neither the statute nor the record contains evidence

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[265] Education Code section 1981, subdivisions (a) and (c)(3).

[266] *Kern High School Dist., supra,* 30 Cal.4th 727, 751. In another part of the opinion, the court stated an example of practical compulsion as a substantial penalty (independent of the program funds at issue) for not complying with the statute. (*Id.* at p. 731).

of practical compulsion to operate a community school or develop a plan for providing education services to all pupils expelled within a county.

Therefore, staff finds that section 48926, as added by Statutes 1995, chapter 974, does not impose a state mandate on county offices of education within the meaning of article XIII B, section 6.

Section 48926 also states: "The plan shall be adopted by the governing board of each school district within the county and by the county board of education." Therefore, staff finds that it is a state mandate for the school district governing board to adopt the plan, should the county superintendent of schools develop one. Staff also finds that this is a new program or higher level of service, since prior to Statutes 1995, chapter 974, district governing boards were not required to adopt a county plan for providing education services to all expelled pupils in the county.

Thus, staff finds that it is a state-mandated new program or higher level of service, if the county superintendent of schools develops a plan for providing education services to all expelled pupils in the county, for school district governing boards to adopt the plan, effective July 1, 1996 (Stats. 1995, ch. 974).[267]

Identify offense(s) in pupil's record: Section 48900.8 (as added by Stats. 1997, ch. 637) states that "each school district shall specifically identify, by offense committed, in all appropriate official records of a pupil each suspension or expulsion of that pupil for the commission of any of the offenses set forth in Section 48900, … 48900.2, … 48900.3 … 48900.4, or …48915."[268] This identification is required, "For purposes of notification to parents, and for the reporting of expulsion or suspension offenses to the [California] department [of Education.]" Based on the mandatory language, staff finds that section 48900.8 is a state mandate for those most serious mandatory suspension and expulsion offenses listed in section 48915, subdivision (c).

Preexisting law requires school districts to maintain records of all expulsions, including the cause, and requires them to be recorded in the pupil's mandatory interim record (former § 48918, subd. (j), current subd. (k)). As to suspensions, preexisting law requires that they be reported to the school district governing board (§ 48911, subd. (e)), and "routine discipline data" and "disciplinary notices" are included in the school district's permitted records (Cal.Code Regs., tit. 5, § 432, subd. (b)(3)((C) & (E)). However, preexisting law did not require suspensions to be recorded in the official records of each pupil. Therefore, staff finds that identifying by offense,

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[267] Statutes 1995, chapter 974, section 9, subdivision (b), (eff. July 1, 1996) states: "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act [including § 48926] shall become operative only to the extent funds are appropriated for its purpose in the annual Budget Act, or other legislation, or both." This provision was deleted, however, effective September 26, 1996, by Statutes 1996, chapter 937, section 6, and there is no evidence that funds were appropriated for this act between July 1, 1996 and September 26, 1996 – the effective date and repeal date of the provision in section 9 (Stats. 1995, ch. 974).

[268] The amendment of Statutes 2005, chapter 677 to section 48900.8 (upon which staff makes no findings because it was not pled) added the offense in section 48900.7 (terroristic threats against school officials for school property, or both) and removed the citations to subdivisions within sections 48900 and 48915.

in all appropriate official records of a pupil, each suspension of that pupil is a state-mandated new program or higher level of service for pupils suspended under section 48915, subdivision (c), effective January 1, 1998 (§ 48900.8, Stats. 1997, ch. 637).

Expulsion data maintenance and reporting (July 1 – September 25, 1996): Section 48916.1 was enacted by Statutes 1995, chapter 974, and was effective on July 1, 1996.[269]

Before Statutes 1996, chapter 937, (eff. Sept. 26, 1996) substantially amended it, subdivision (f) of section 48916.1 stated:

> (1) (A) The governing board of the school district shall maintain outcome data and report them upon request from the State Department of Education on those pupils who are expelled for any reason and who are enrolled in education programs operated by the school district, the county superintendent of schools, or as otherwise authorized pursuant to this section. Outcome data shall include, but not be limited to, attendance, graduation and dropout rates of expelled pupils enrolled in alternative placement programs. Outcome data shall also include attendance, graduation and dropout rates, and comparable levels of academic progress, of pupils participating in independent study offered by the school district.
>
> (B) Districts shall also maintain data as further specified by the Superintendent of Public Instruction, on the number of pupils placed in community day school or participating in independent study whose immediate preceding placement was county community school, continuation school, or comprehensive school, or who was not enrolled in any school.
>
> (C) Districts shall also maintain data on the number of pupils placed in community day school whose subsequent placement is county community school, continuation school, or comprehensive school, or who are not enrolled in any school.
>
> (2) If the county superintendent of schools operates an educational program pursuant to this section, the county superintendent of schools shall provide to the governing board of the school district outcome data as specified in subparagraph (A) of paragraph (1) and outcome data on pupils participating in independent study programs offered by the county office of education.

Because this provision uses the mandatory "shall"[270] staff finds that it is a state mandate for school districts to do the following from July 1, 1996 (the effective date of Stats. 1995, ch. 974) until September 25, 1996 (when this provision was amended by Stats. 1996, ch. 937):

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[269] Statutes 1995, chapter 974 included the following in section 9, subdivision (b): "With the exception of pupils expelled pursuant to subdivision (d) of Section 48915, the provisions of this act shall become operative only to the extent funds are appropriated for its purpose in the annual Budget Act, or other legislation, or both." Because the following analysis only applies to expulsions pursuant to subdivision (d) of section 48915 (for the most serious offenses in § 48915, subd. (c)), the provision in section 9, subdivision (b) has no effect on this analysis.

1. Maintain outcome data on those pupils who are expelled and who are enrolled in education programs operated by the school district, the county superintendent of schools, or as otherwise authorized pursuant to section 48916.1 (Stats. 1995, ch. 974). Outcome data shall include, but not be limited to, attendance, graduation and dropout rates of expelled pupils enrolled in alternative placement programs. Outcome data shall also include attendance, graduation and dropout rates, and comparable levels of academic progress, of pupils participating in independent study offered by the school district.

2. Maintain data as further specified by the Superintendent of Public Instruction, on the number of pupils placed in community day school or participating in independent study whose immediate preceding placement was county community school, continuation school, or comprehensive school, or who was not enrolled in any school.

3. Maintain data on the number of pupils placed in community day school whose subsequent placement is county community school, continuation school, or comprehensive school, or who are not enrolled in any school.

Staff finds that subdivision (f)(2) is not a state mandate on a county superintendent because it only applies to a "county superintendent of schools who operates an educational program pursuant to this section [48916.1, Stats. 1995, ch. 974]. The county superintendent of schools is not required to operate an education program for expelled pupils, however, as stated in subdivision (b) that the education program "may" be provided by a county superintendent of schools.

Staff also finds that reporting the data to the California Department of Education (CDE), as stated in subdivision (f)(1)(A) is not a state mandate between July 1, 1996 and September 25, 1996, because the data is reported only "upon request" and there is no evidence in the record that CDE requested this information to be reported.

Preexisting law requires school districts to maintain records of all expulsions, including the cause, and requires them to be recorded in the pupil's mandatory interim record (former § 48918, subd. (j), current subd. (k)). Preexisting law did not require maintaining outcome data, so staff finds that maintaining this outcome data on pupils, as specified, is a new program or higher level of service.

Therefore, staff finds that, from July 1, 1996 until September 25, 1996, section 48916.1 (Stats. 1995, ch. 974) is a state-mandated new program or higher level of service for school districts to maintain outcome data on pupils expelled for the most serious offenses in subdivision (c) of section 48915, as follows:

1. Maintain outcome data on those pupils who are expelled and who are enrolled in education programs operated by the school district, the county superintendent of schools, or as otherwise authorized pursuant to section 48916.1 (Stats. 1995, ch. 974). Outcome data shall include, but not be limited to, attendance, graduation and dropout rates of expelled pupils enrolled in alternative placement

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

programs. Outcome data shall also include attendance, graduation and dropout rates, and comparable levels of academic progress, of pupils participating in independent study offered by the school district.

2. Maintain data as further specified by the Superintendent of Public Instruction, on the number of pupils placed in community day school or participating in independent study whose immediate preceding placement was county community school, continuation school, or comprehensive school, or who was not enrolled in any school.

3. Maintain data on the number of pupils placed in community day school whose subsequent placement is county community school, continuation school, or comprehensive school, or who are not enrolled in any school.

Expulsion data maintenance and reporting (September 26, 1996 – January 7, 2002): Statutes 1996, chapter 937 (eff. Sept. 26, 1996) moved the outcome data provision in section 48916.1 to subdivision (e)(1) and amended it as follows:

> Each school district shall maintain the following data: (A) The number of pupils recommended for expulsion. (B) The grounds for each recommended expulsion. (C) Whether the pupil was subsequently expelled. (D) Whether the expulsion order was suspended. (E) The type of referral made after the expulsion. (F) The disposition of the pupil after the end of the period of expulsion.

Subdivision (e)(2) of section 48916.1, as amended by Statutes 1996, chapter 937, states in part:

> If a school district does not report outcome data as required by this subdivision, the Superintendent may not apportion any further money to the school district pursuant to Section 48664 until the school district is in compliance with this subdivision.

Subdivision (e)(2) also requires the Superintendent of Public Instruction to notify the school district if it has failed to report the data, and gives the district 30 days to comply.

Because subdivision (e)(1) of section 48916.1 uses the mandatory "shall" staff finds that maintaining the expulsion data, as specified, is a state mandate.[271] And because subdivision (e)(2) prohibits the Superintendent of Public Instruction from apportioning funds to a school district that does not report the expulsion data in subdivision (e)(1), staff finds that this subdivision also imposes a state mandate on school districts to report the data to CDE, as not reporting it would be a "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[272]

The next issue is whether maintaining and reporting the expulsion data is a new program or higher level of service.

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

[272] *Kern High School Dist., supra,* 30 Cal.4th 727, 731.

Prior law (§ 48916.1, Stats. 1995, ch. 974, discussed above) required school districts to maintain outcome data, such as attendance, graduation and dropout rates of expelled pupils enrolled in alternative placement programs and independent study.

Prior law did not require school districts to maintain aggregate data, however, as required by section 48916, subdivision (e)(1), including information on the number of pupils recommended for expulsion and whether they were subsequently expelled, as specified. Nor did prior law require reporting the specified data to CDE, as required by subdivision (e)(2) of section 48916. Consequently, staff finds that maintaining and reporting the data called for in subdivision (e) of section 48916 is a new program or higher level of service, effective September 26, 1996.

Therefore, effective September 26, 1996 until January 7, 2002 (when federal NCLB was enacted) staff finds that section 48916.1 (Stats. 1996, ch. 937) is a state-mandated new program or higher level of service for school districts to maintain data on the following and report it to CDE:

> (A) The number of pupils recommended for expulsion. (B) The grounds for each recommended expulsion. (C) Whether the pupil was subsequently expelled. (D) Whether the expulsion order was suspended. (E) The type of referral made after the expulsion. (F) The disposition of the pupil after the end of the period of expulsion. (§ 48916, subd. (e), Stats. 1996, ch. 937).

This activity is reimbursable for pupils expelled for the most serious expulsion offenses (listed in § 48915, subd. (c)).

Expulsion data maintenance and reporting (January 8, 2002 - present): The No Child Left Behind Act of 2001 (NCLB), effective January 8, 2002, states the following:

> (c)(3) Uniform management information and reporting system
> (A) Information and statistics
> A state shall establish a uniform management information and reporting system.
> (B) Uses of funds
> A State may use funds described in subparagraphs (A) and (b) of subsection (b)(2) of this section, either directly or through grants and contracts, to implement the uniform management information and reporting system described in subparagraph (a), for the collection of information on --
> (i) truancy rates; and
> (ii) the frequency, seriousness, and incidence of violence and drug-related offenses resulting in suspensions and expulsions in elementary schools and secondary schools in the State**.** [¶]…[¶]
> (C) COMPILATION OF STATISTICS
> In compiling the statistics required for the uniform management information and reporting system, the offenses described in subparagraph (B)(ii) shall be defined pursuant to the State's criminal code, but shall not identify victims of crimes or persons accused of crimes. The collected data shall include incident reports by school officials, anonymous student surveys, and anonymous teacher surveys.
> (D) REPORTING

> The information described under subparagraph (B) shall be reported to the public and the data referenced in clauses (i) and (ii) shall be reported to the State on a school-by-school basis.[273]

The issue is whether maintaining and reporting the data is a federal mandate as a result of this NCLB provision. "[A]rticle XIII B, section 6, and the implementing statutes … by their terms, provide for reimbursement only of *state*- mandated costs, not *federally* mandated costs."[274]

For the same reasons explained on pages 32-41 above (explosive possession under NCLB), staff finds it is a federal mandate on the state to maintain and report to CDE the following data, effective January 8, 2002: (A) The number of pupils recommended for expulsion; (B) The grounds for each recommended expulsion; and (C) Whether the pupil was subsequently expelled.

Staff also finds that this portion of NCLB is a federal mandate on the school district. As stated by the *Hayes* court, "the Commission must focus upon the costs incurred by local school districts and whether those costs were imposed on local districts by federal mandate or by the state's *voluntary choice in its implementation* of the federal program."[275] The plain language of the federal statute gives the state no choice in implementation because it states that the "data … shall be reported to the State on a school-by-school basis." Thus, the state has not freely chosen to impose the costs of these expulsions on the local educational agencies, in that the federal statute mandates how the state statute is implemented – by the school or school district.

The federal requirement to report "violence and drug related offenses" includes all those offenses in subdivision (c) of section 48915 for which issuing an expulsion order is required. Therefore, staff finds that reporting this data is not mandated by the state within the meaning of article XIII B, section 6, effective January 8, 2002, because it is a federal mandate as of that date, for school districts to maintain data on the following and report it to CDE: (A) The number of pupils recommended for expulsion; (B) The grounds for each recommended expulsion; and (C) Whether the pupil was subsequently expelled.

However, the next issue is whether reporting the following data (also listed in § 48916.1, subd. (e)(1)) to CDE is a federal mandate:

> (D) Whether the expulsion order was suspended. (E) The type of referral made after the expulsion. (F) The disposition of the pupil after the end of the period of expulsion. (§ 48916, subd. (e), Stats. 1996, ch. 937).

Staff finds that it is not. Federal law only requires reporting "the frequency, seriousness, and incidence of violence and drug related offenses resulting in suspensions and expulsion." Although this encompasses paragraphs (A) through (C) of section 48916.1, subdivision (e)(1), it does not encompass paragraphs (D) through (F).

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[273] 20 U.S.C. section 7112 (c)(3). [Emphasis added.]

[274] *San Diego Unified School Dist, supra,* 33 Cal.4th 859, 879-880. See also California Constitution, article XIII B, section 9, subdivision (b).

[275] *Hayes v. Commission on State Mandates, supra,* 11 Cal. App. 4th 1564, 1595. [Emphasis added.]

In the *San Diego Unified School Dist.*[276] case, the court considered whether the mandatory expulsion provision of Education Code section 48915, subdivision (c) for possession of a firearm constitutes a nonreimbursable federal mandate. In finding that there was no federal requirement for a pupil expulsion during the time period in question, the court stated:

> Because it is state law … and not federal due process law, that requires the District to take steps that in turn require it to incur hearing costs, it follows … that we cannot characterize *any* of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). [277]

Here, as in *San Diego Unified School Dist.*, the federal law does not require reporting whether the expulsion order was suspended, or the type of referral made after the expulsion, or the disposition of the pupil after the end of the period of expulsion. Federal law only requires reporting the "frequency, seriousness, and incidence of violence and drug related offenses resulting in suspensions and expulsion in elementary and secondary schools."[278] Thus, it is the state law that triggers the suspension -- without discretion on the part of the principal or school district to do otherwise.

It is also a new program or higher level of service to maintain this information for the same reasons as discussed above.

Therefore, staff finds that it is a state-mandated new program or higher level of service, effective September 26, 1996, for the school district to maintain data on the following and report it to CDE for pupils expelled for the most serious offenses in section 48915, subdivision (c): "(D) Whether the expulsion order was suspended. (E) The type of referral made after the expulsion. (F) The disposition of the pupil after the end of the period of expulsion." (§ 48916.1, subd. (e), Stats. 1996, ch. 937).

Issue 4: Do the Test Claim Statutes Impose Costs Mandated by the State within the Meaning of Government Code Sections 17514 and 17556?

The claimant, in a declaration submitted with the test claim, estimated that it incurred approximately $320,000 in staffing and other costs to process 208 recommended expulsions during July 1, 1995 to June 30, 1996. Although the reimbursement period for these activities starts in January 1, 1996 and later because of the effective dates of the test-claim legislation, staff finds that there is sufficient time-period overlap to find costs mandated by the state as defined by Government Code section 17514. Staff also finds that none of the exceptions to reimbursement in Government Code section 17556 apply to the activities found above to be state-mandated new programs or higher levels of service.

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

[277] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 881. See also *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 173.

[278] 20 USCA section 7112 (c)(3).

CONCLUSION

For the reasons discussed above, staff finds that the test claim statutes impose a reimbursable state-mandated program within the meaning of article XIII B, section 6, of the California Constitution and Government Code section 17514, for all of the following activities:

- Effective January 1, 1996 (the § 48911 suspension procedures[279] are part of these activities, as well as the § 48918 expulsion hearing procedures):
    - For the principal or superintendent to immediately suspend, pursuant to section 48911, and recommend expulsion, and for the governing board to order expulsion for a pupil who brandishes a knife at another person (§ 48915, subd. (c)(2), Stats. 1995 ch. 972).
    - For the principal or superintendent to immediately suspend, pursuant to section 48911, and the governing board to issue an expulsion order for a pupil who sells a controlled substance, as defined (§ 48915, subd. (c)(3), Stats. 1995 ch. 972).
    - For a principal or superintendent to immediately suspend a pupil pursuant to section 48911, and to recommend the pupil's expulsion, and for the governing board to order a pupil's expulsion for selling or furnishing a firearm unless the pupil had obtained prior written permission to possess the firearm from a certificated school employee, which is concurred in by the principal or the designee of the principal (§ 48915, subds. (c)(1) & (d), Stats. 1995, ch. 972).
    - For the principal or superintendent to immediately suspend, pursuant to section 48911, and recommend the pupil's expulsion, and for the governing board to order the pupil's expulsion for the first offense of a sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis (§ 48915, subd. (c)(3), Stats. 1995 ch. 972).

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[279] As discussed on pages 28-29, the suspension procedures are: Precede the suspension with an informal conference conducted by the principal or the principal's designee or the superintendent of schools between the pupil (defined to include "a pupil's parent or guardian or legal counsel" § 48925, subd. (e)) and, whenever practicable, the teacher, supervisor, or school employee who referred the pupil to the principal, the principal's designee, or the superintendent of schools. Inform the pupil of the reason for the disciplinary action and the evidence against him or her and give the pupil the opportunity to present his or her version and evidence in his or her defense. (§ 48911, subd. (b).)

At the time of the suspension, a school employee shall make a reasonable effort to contact the pupil's parent or guardian in person or by telephone. Whenever the pupil is suspended from school, the parent or guardian shall be notified in writing of the suspension. (§ 48911, subd. (d).)

A school employee shall report the suspension of the pupil including the cause therefore, to the governing board of the school district or to the school district superintendent in accordance with the regulations of the governing board. (§ 48911, subd. (e).)

- Also effective January 1, 1996:
    - For the principal or superintendent of schools to recommend expelling a pupil for possession of a controlled substance, as defined (except for the first offense of possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis) (§ 48915, subd. (a)(3), Stats. 1995, ch. 972). The section 48918 expulsion hearing procedures are part of this activity.
    - For a pupil expelled for any of the most serious offenses (in § 48915, subd. (c)), to refer the pupil to a program of study that meets the following criteria: (1) is appropriately prepared to accommodate pupils who exhibit discipline problems; (2) is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school; (3) is not housed at the schoolsite attended by the pupil at the time of suspension (§ 48915, subd. (d), Stats. 1995, ch. 972).
    - For a pupil expelled for any of the most serious offenses (in § 48915, subd. (c)), to provide a notice of the education alternative placement to the pupil's parent or guardian at the time of expulsion order. (§ 48918, subd. (j), Stats. 1995, ch. 974).
    - For the school district to amend its expulsion rules and regulations to provide for issuing subpoenas, as specified in subdivision (i) of section 48918.[280] This is a one-time activity (§ 48918, subd. (i), Stats. 1995, ch. 974, §§ 7.5 & 10).

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[280] Section 48918, subdivision (i), states: (1) Before the hearing has commenced, the governing board may issue subpoenas at the request of either the superintendent of schools or the superintendent's designee or the pupil, for the personal appearance of percipient witnesses at the hearing. After the hearing has commenced, the governing board or the hearing officer or administrative panel may, upon request of either the county superintendent of schools or the superintendent's designee or the pupil, issue subpoenas. All subpoenas shall be issued in accordance with Sections 1985, 1985.1, and 1985.2 of the Code of Civil Procedure. Enforcement of subpoenas shall be done in accordance with 11455.20 (originally § 11525) of the Government Code.

(2) Any objection raised by the superintendent of schools or the superintendent's designee or the pupil to the issuance of subpoenas may be considered by the governing board in closed session, or in open session, if so requested by the pupil before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas shall be final and binding.

(3) If the governing board, hearing officer, or administrative panel determines, in accordance with subdivision (f), that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing, a subpoena shall not be issued to compel the personal attendance of that witness at the hearing. However, that witness may be compelled to testify by means of a sworn declaration as provided for in subdivision (f).

(4) Service of process shall be extended to all parts of the state and shall be served in accordance with Section 1987 of the Code of Civil Procedure. All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or any political subdivision thereof, shall receive fees, and all witnesses appearing pursuant to subpoena, except the parties,

- Effective July 1, 1996:
    - To ensure that an educational program is provided to the pupil expelled for any of the most serious offenses in subdivision (c) of section 48915. The program must conform to the specifications in section 48916.1. (§ 48916.1, Stats. 1995, ch. 974.)
    - To recommend a rehabilitation plan to a pupil at the time of the expulsion order (§ 48916, subd. (b), Stats. 1995, ch. 974) when a pupil is expelled for any of the most offenses listed in subdivision (c) of section 48915.
    - For the one-time activity of adopting rules and regulations to establish the process for the required review of all expelled pupils for readmission. (§ 48916, subd. (c), Stats. 1995, chs. 972 & 974.)
    - To do the following when the governing board orders the pupil expelled for any of the most serious mandatory expulsion offenses (in § 48915, subd. (c)) (§ 48916, Stats. 1995, chs. 972 & 974):
        - Review the pupil for readmission (§ 48916, subd. (a)).
        - Order the expelled pupil's readmission or make a finding to deny readmission if "the pupil has not met the conditions of the rehabilitation plan or continues to pose a danger to campus safety or to other pupils or employees of the school district." (§ 48916, subd. (c).)
        - If readmission is denied, the governing board to make the determination to either continue the placement of the expelled pupil in the alternative education program, or to place the pupil in another program that may include, but need not be limited to, serving expelled pupils, including placement in a county community school (§ 48916, subd. (d)).
        - If readmission is denied, the governing board shall provide written notice to the expelled pupil and the pupil's parent or guardian describing the reasons for denying readmission to the regular school program. The written notice shall include the determination of the education program for the expelled pupil. (§ 48916, subd. (e)).
    - If the county superintendent of schools develops a plan for providing education services to all expelled pupils in the county, for school district governing boards to adopt the plan, effective July 1, 1996 (Stats. 1995, ch. 974).
    - Before allowing the expelled pupil to enroll in a school district that did not expel the pupil, for the receiving district's governing board to determine, pursuant to a hearing under Section 48918, whether an individual expelled from another school district for the offenses listed below poses a danger to either the pupils or employees of the school district (§ 48915.2, subd. (b), Stats. 1995, ch. 974). This activity only is only

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shall receive mileage in the same amount and under the same circumstances as prescribed for witnesses in civil actions in a superior court. Fees and mileage shall be paid by the party at whose request the witness is subpoenaed.

reimbursable for determinations of applicants who have been expelled by a district that has not entered into a voluntary interdistrict transfer agreement with the receiving district.

- Unlawful possession of any controlled substance [as specified] … including the first offense for the possession of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis. (§ 48915, subd. (a)(3).)
- Possessing, selling, or otherwise furnishing a firearm … [without permission as specified]. This subdivision applies to an act of possessing a firearm only if the possession is verified by an employee of a school district. (§ 48915, subd. (c)(1).)
- Brandishing a knife at another person. (§ 48915, subd. (c)(2).)
- Committing or attempting to commit a sexual assault, as defined, or committing a sexual battery, as defined. (§ 48900, subd. (n) & 48915, subds. (c)(4) & (d), Stats. 1996, chs. 915 and 1052.)
- Possession of an explosive. (§ 48915, subd. (c)(5), Stats. 2001, ch. 116.)

- From July 1, 1996 until September 25, 1996, for school districts to maintain outcome data for pupils expelled for the most serious offenses in subdivision (c) of section 48915, as follows (§ 48916.1, Stats. 1995, ch. 974):
  - Maintain outcome data on those pupils who are expelled and who are enrolled in education programs operated by the school district, the county superintendent of schools, or as otherwise authorized pursuant to section 48916.1 (Stats. 1995, ch. 974). Outcome data shall include, but not be limited to, attendance, graduation and dropout rates of expelled pupils enrolled in alternative placement programs. Outcome data shall also include attendance, graduation and dropout rates, and comparable levels of academic progress, of pupils participating in independent study offered by the school district.
  - Maintain data as further specified by the Superintendent of Public Instruction, on the number of pupils placed in community day school or participating in independent study whose immediate preceding placement was county community school, continuation school, or comprehensive school, or who was not enrolled in any school.
  - Maintain data on the number of pupils placed in community day school whose subsequent placement is county community school, continuation school, or comprehensive school, or who are not enrolled in any school.
- Effective September 26, 1996, for the school district to maintain data on the following and report it to CDE for pupils expelled for the most serious offenses in section 48915, subdivision (c): (1) Whether the expulsion order was suspended. (2) The type of referral made after the expulsion. (3) The disposition of the pupil after the end of the period of expulsion. (§ 48916.1, subd. (e), Stats. 1996, ch. 937.)

- Effective September 26, 1996 until January 7, 2002, for school districts to maintain data on the following and report it to CDE for pupils expelled for the most serious offenses in section 48915, subdivision (c):
    - (A) The number of pupils recommended for expulsion. (B) The grounds for each recommended expulsion. (C) Whether the pupil was subsequently expelled. (D) Whether the expulsion order was suspended. (E) The type of referral made after the expulsion. (F) The disposition of the pupil after the end of the period of expulsion. (§ 48916.1, subd. (e), Stats. 1996, ch. 937.)
- Effective January 1, 1997:
    - For the principal or superintendent to suspend, pursuant to section 48911, and recommend expulsion, and for the governing board to order expulsion, for pupils who commit or attempt to commit a sexual assault or sexual battery, as defined[281] (§ 48915, subds. (c)(4) & (d), Stats. 1996, chs. 915 & 1052). The section 48911 suspension procedures listed on pages 28-29 are part of this activity, as well as the expulsion hearing procedures in section 48918.
    - For the principal or superintendent of schools to recommend expelling a pupil for assault or battery on any school employee. (§48915, subd. (a)(5), Stats. 1996, chs. 915 & 1052.) The expulsion hearing procedures in section 48918 are part of this activity.
    - For the one-time activity of amending the school district's rules and regulations to include the following procedures that apply when there is a recommendation to expel a pupil based on an allegation of sexual assault or attempted sexual assault, or sexual battery, as defined in subdivision (n) of section 48900:
        - A complaining witness shall be given five days' notice prior to being called to testify. (§ 48918, subd. (b), Stats. 1996, ch. 916.)
        - A complaining witness shall be entitled to have up to two adult support persons, including but not limited to, a parent, guardian, or legal counsel, present during his or her testimony (*Ibid.*).
        - If the complaining witness has one or more support persons, and one or more of the support persons is also a witness, to follow the provisions of Section 868.5 of the Penal Code[282] at the hearing (§ 48918, subd. (b), Stats. 1996, ch. 915).

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[281] A sexual assault is defined in Section 261, 266c, 286, 288, 288a, or 289 of the Penal Code and a sexual battery as defined in Section 243.4 of the Penal Code (§ 48900, subd. (n)).

[282] Penal Code section 868.5 entitles a prosecuting witness in certain crimes to have up to two support persons during the witness' testimony, one of which may accompany the witness to the stand. Section 868.5 also states:

> (b) If the person or persons so chosen are also prosecuting witnesses, the prosecution shall present evidence that the person's attendance is both desired by

- Prior to a complaining witness testifying, support persons shall be admonished that the hearing is confidential (*Ibid.*).
- Nothing shall preclude the person presiding over an expulsion hearing from removing a support person whom the presiding person finds is disrupting the hearing. If one or both of the support persons is also a witness, the provisions of Section 868.5 of the Penal Code shall be followed for the hearing (*Ibid.*).
- If the hearing is to be conducted at a public meeting, … a complaining witness shall have the right to have his or her testimony heard in a session closed to the public when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. (§ 48918, subd. (c), Stats. 1996, ch. 915.)
- Evidence of specific instances of a complaining witness' prior sexual conduct is presumed inadmissible and shall not be heard absent a determination by the person conducting the hearing that extraordinary circumstances exist requiring the evidence to be heard. Before the person conducting the hearing makes the determination on whether extraordinary circumstances exist requiring that specific instances of a complaining witness' prior sexual conduct be heard, the complaining

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the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. In the case of a juvenile court proceeding, the judge shall inform the support person or persons that juvenile court proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. In all cases, the judge shall admonish the support person or persons to not prompt, sway, or influence the witness in any way. Nothing in this section shall preclude a court from exercising its discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the witness.

(c) The testimony of the person or persons so chosen who are also prosecuting witnesses shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during that testimony. Whenever the evidence given by that person or those persons would be subject to exclusion because it has been given before the corpus delicti has been established, the evidence shall be admitted subject to the court's or the defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

witness shall be provided notice and an opportunity to present opposition to the introduction of the evidence. (§ 48918, subd. (h), Stats. 1996, ch. 915.)

- In the hearing on the admissibility of the evidence, the complaining witness shall be entitled to be represented by a parent, guardian, legal counsel, or other support person. Reputation or opinion evidence regarding the sexual behavior of the complaining witness is not admissible for any purpose. (§ 48918, subd. (h), Stats. 1996, ch. 915.)
- For the governing board to give the complaining witness five days notice before testifying, and admonishing the witness' support person(s) that the hearing is confidential. (§ 48918, subd. (b), Stats. 1996, ch. 915).
- For the governing board to allow the complaining witness to have closed session testimony when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television. (§ 48918, subd. (c), Stats. 1996, ch. 915.)
- At the time that the expulsion hearing is recommended, the complaining witness is provided with a copy of the applicable disciplinary rules and advised of his or her right to: (1) receive five days' notice of the complaining witness's scheduled testimony at the hearing, (2) have up to two adult support persons of his or her choosing, present in the hearing at the time he or she testifies; (3) to have the hearing closed during the time they testify pursuant to subdivision (c) of section 48918. (§ 48918.5, subd. (a).)
- The expulsion hearing may be postponed for one schoolday in order to accommodate the special physical, mental, or emotional needs of a pupil who is the complaining witness. (§ 48918.5, subd. (b).)
- For the district to provide a nonthreatening environment for a complaining witness in order to better enable them to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each school district provides a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony. In the discretion of the person conducting the hearing, the complaining witness is allowed reasonable periods of relief from examination and cross-examination during which he or she may leave the hearing room. The person conducting the hearing may arrange the seating within the hearing room of those present in order to facilitate a less intimidating environment for the complaining witness. The person conducting the hearing may limit the time for taking the testimony of a complaining witness to the hours he or she is normally in school, if there is no good

cause to take the testimony during other hours. The person conducting the hearing may permit one of the complaining witness's support persons to accompany him or her to the witness stand. (§ 48918.5, subd. (c).)

- For the person conducting the expulsion hearing to immediately advise the complaining witnesses and accused pupils to refrain from personal or telephonic contact with each other during the pendency of any expulsion process. (§ 48918.5, subd. (d), Stats. 1996, ch. 915.)

- For school districts to do the following when a pupil is recommended for an expulsion involving allegations of sexual assault or attempted sexual assault, as defined, or sexual battery, as defined in section 48900, subdivision (n):
  - At the time the expulsion hearing is recommended, provide the complaining witness with a copy of the applicable disciplinary rules and to advise the witness of his or her right to: (1) receive five days' notice of the complaining witness's scheduled testimony at the hearing, (2) have up to two adult support persons of his or her choosing present in the hearing at the time he or she testifies; and (3) "have the hearing closed during the time they [sic] testify pursuant to subdivision (c) of section 48918." (§ 48918.5, subd. (a), Stats. 1996, ch. 915.)
  - If the complaining witness has one or more support persons, and one or more of the support persons is also a witness, to follow the provisions of Section 868.5 of the Penal Code at the hearing. (§ 48918, subd. (b), Stats. 1996, ch. 915.) The section 868.5 procedures include: (1) Only one support person may accompany the witness to the witness stand, although the other may remain in the room during the witness' testimony. (2) For the prosecution to present evidence that the support person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness; (3) For the governing board, on the prosecution's showing in (2), to grant the request for the support person unless information presented by the defendant or noticed by the district establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. (4) The governing board shall inform the support person or persons that the proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. (5) For the governing board to admonish the support person or persons to not prompt, sway, or influence the witness in any way. (6) For the testimony of their support person or persons who are also prosecuting witnesses to be presented before the testimony of the prosecuting witnesses. (7) For the prosecuting witnesses to be excluded from the courtroom during that testimony. (8) When the evidence given by the support person would be subject to exclusion because it has been given before the corpus delicti[283] has

[283] The corpus delicti is the basic element or fact of a crime.

been established, for the evidence to be admitted subject to the governing board or defendant's motion to strike that evidence from the record if the corpus delicti is not later established by the testimony of the prosecuting witness.

- Provide a nonthreatening environment for a complaining witness in order to better enable him or her to speak freely and accurately of the experiences that are the subject of the expulsion hearing, and to prevent discouragement of complaints. Each school district shall provide a room separate from the hearing room for the use of the complaining witness prior to and during breaks in testimony." (§ 48918.5, subd. (c), Stats. 1996, ch. 915.)
- Immediately advise the complaining witnesses and accused pupils to refrain from personal or telephonic contact with each other during the pendency of any expulsion process. (§ 48918.5, subd. (d), Stats. 1996, ch. 915.)

- Effective January 1, 1998, for school districts to identify by offense, in all appropriate official records of a pupil, each suspension (but not expulsion) of that pupil for any of the most serious mandatory offenses (in § 48915, subd. (c)) (§ 48900.8, Stats. 1997, ch. 637).
- Effective January 1, 1999, for the school district to amend its expulsion rules and regulations as follows (§ 48918, subd. (a), Stats. 1998, ch. 498). This is a one-time activity.
  - If compliance by the governing board with the time requirements for the conducting of an expulsion hearing under subdivision (a) of section 48918 is impracticable due to a summer recess of governing board meetings of more than two weeks, the days during the recess period shall not be counted as schooldays in meeting the time requirements. The days not counted as schooldays in meeting the time requirements for an expulsion hearing because of a summer recess of governing board meetings shall not exceed 20 schooldays, as defined in subdivision (c) of Section 48915, and unless the pupil requests in writing that the expulsion hearing be postponed, the hearing shall be held no later than 20 calendar days prior to the first day of school for the school year.
- Effective January 1, 2000:
  - For a school district to perform the following one-time activities: (1) updating the school district rules and regulations regarding notification to the pupil regarding the opportunity to be represented by legal counsel or a nonattorney adviser, and (2) revising the pupil notification to include the right to be represented by legal counsel or a nonattorney advisor (§ 48918, subd. (b)(5), Stats. 1999, ch. 332). These activitie are reimbursable when the pupil commits any of the offenses specified in subdivision (c) or subdivision (a) of section 48915.
  - For a county board of education to remand an expulsion matter to a school district for adoption of the required findings if the school district's decision is not supported by the findings required by section 48915, but evidence supporting the required findings exists in the record of the proceedings (§ 48923, subdivision (b), Stats. 2000, ch. 147). This activity is reimbursable for any expulsion.

- For a school district, when adopting the required findings on remand from the county board of education, to: (1) take final action on the expulsion in a public session (not hold another hearing) and; (2) provide notice to the pupil or the pupil's parent or guardian of the following: the expulsion decision, the right to appeal to the county board, the education alternative placement to be provided during the expulsion, and the obligation of the parent or guardian to inform a new school district in which the pupil may enroll of the pupil's expulsion (§ 48918, subd. (j)); and (3) maintain a record of each expulsion and the cause therefor (§ 48918, subd. (k)). (§ 48923, subdivision (b), Stats. 2000, ch. 147.) This activity is only reimbursable when the district governing board orders the pupil expelled for any of the most serious mandatory expulsion offenses (listed in § 48915, subd. (c)).

- Effective January 1, 2002, for a principal or superintendent to immediately suspend, pursuant to section 48911, a pupil who possess an explosive at school or at a school activity off school grounds (§ 48915, subds. (c) & (d), Stats. 2001, ch. 116). The section 48911 suspension procedures listed on pages 28-29, as well as the section 48918 expulsion hearing procedures, are part of this activity.

Staff also finds that the remaining test claim statutes over which the Commission has jurisdiction do not constitute reimbursable state-mandates within the meaning of article XIII B, section 6.

Recommendation

Therefore, staff recommends that the Commission adopt this analysis and partially approve the test claim for the activities specified above.