ITEM 5

TEST CLAIM
FINAL STAFF ANALYSIS

Penal Code Sections 273a, 11164, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, 11165.6, 11165.7, 11165.9, 11165.14, 11166, 11166.5, 11168, and 11174.3,
Including Former Penal Code Sections 11161.5, 11161.6, 11161.7

Statutes 1975, Chapter 226
Statutes 1976, Chapters 242 and 1139
Statutes 1977, Chapter 958
Statutes 1978, Chapter 136
Statutes 1979, Chapter 373
Statutes 1980, Chapters 855, 1071 and 1117
Statutes 1981, Chapters 29 and 435
Statutes 1982, Chapter 905
Statutes 1984, Chapters 1170, 1391, 1423, 1613, and 1718
Statutes 1985, Chapters 189, 464, 1068, 1420, 1528, 1572 and 1598
Statutes 1986, Chapters 248 and 1289
Statutes 1987, Chapters 640, 1020, 1418, 1444 and 1459
Statutes 1988, Chapters 39, 269 and 1580
Statutes 1990, Chapters 931 and 1603
Statutes 1991, Chapters 132 and 1102
Statutes 1992, Chapter 459
Statutes 1993, Chapters 346, 510 and 1253
Statutes 1994, Chapter 1263
Statutes 1996, Chapters 1080, 1081 and 1090
Statutes 1997, Chapters 83 and 134
Statutes 1998, Chapter 311
Statutes 2000, Chapters 287 and 916
Statutes 2001, Chapters 133 and 754

Child Abuse and Neglect Reporting
(01-TC-21)

San Bernardino Community College District, Claimant

EXECUTIVE SUMMARY

Background

San Bernardino Community College District filed a test claim on June 28, 2002, alleging that amendments to child abuse reporting statutes since January 1, 1975, have resulted in reimbursable increased costs mandated by the state. A declaration of costs incurred was also submitted by the San Jose Unified School District. A number of changes to the law have occurred, particularly with a reenactment in 1980, and substantive amendments in 1997 and 2000. Claimant alleges that all of these changes have imposed a reimbursable state-mandated program on school districts.

The Department of Finance and the Department of Social Services (DSS) both oppose the test claim, largely on procedural grounds. DSS also challenges the claim on several substantive points, particularly arguing that many of the provisions claimed do not in fact mandate that new duties be performed by school districts.

Staff finds that while many of the test claim statutes do not impose mandatory new duties on school districts, there are some new activities alleged that are not required by prior law, thus mandating a new program or higher level of service, as described below.

Conclusion

Staff concludes that Penal Code sections 11165.7 and 11174.3, as added or amended by Statutes 1987, chapters 640 and 1459, Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 1998, chapter 311, Statutes 2000, chapter 916, and Statutes 2001, chapters 133 and 754; mandate new programs or higher levels of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities for K-12 school districts:

- Reporting to the State Department of Education the reasons why training is not provided, whenever school districts do not train their employees specified in Penal Code section 11165.7, subdivision (a), in the duties of mandated reporters under the child abuse reporting laws. (Pen. Code, § 11165.7, subd. (d).)
- Informing a selected member of the staff of the following requirements prior to the interview whenever a suspected victim of child abuse or neglect is to be interviewed during school hours, on school premises, and has requested that a staff member of the school be present at the interview:

  > The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Penal Code section 11167.5. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. (Pen. Code, § 11174.3, subd. (a).)

Staff concludes that any test claim statutes, executive orders and allegations not specifically approved above, do not mandate a new program or higher level of service, or impose costs mandated by the state under article XIII B, section 6.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis to partially approve this test claim.

STAFF ANALYSIS

Claimant

San Bernardino Community College District

Chronology

06/28/02	Claimant files the test claim with the Commission on State Mandates (Commission)
07/08/02	Commission staff issues the completeness review letter and requests comments from state agencies
08/02/02	Department of Finance (DOF) requests an extension of time for filing comments for 120 days, to consult with the Office of the Attorney General
08/05/02	Commission staff grants a 90-day extension to November 5, 2002
08/08/02	Department of Social Services (DSS) requests an extension of time to November 26, 2002
08/12/02	Commission staff grants the extension of time as requested
10/21/02	DOF files letter confirming that they also have an extension of time to file comments until November 26, 2002
11/25/02	DSS files comments on the test claim
11/26/02	DOF files comments on the test claim
12/26/02	Claimant files rebuttal to comments by DOF
12/31/02	Commission staff issues a request to the claimant for a response to the state agency comments
01/17/03	Claimant submits response to the Commission's request, responding to the DSS comments and referring to earlier response to DOF's comments
09/12/07	Commission staff requests comments from the California Community Colleges
10/17/07	Commission staff issues the draft staff analysis on the test claim
11/08/07	Claimant files comments on the draft staff analysis

Background

This test claim alleges that amendments to California's mandatory child abuse reporting laws impose a reimbursable state-mandated program on schools districts. A separate test claim, *Interagency Child Abuse and Neglect Investigation Reports* (*ICAN*, 00-TC-22), was filed by the County of Los Angeles on many of the same statutes, regarding the activities alleged to be required of law enforcement, county welfare, and related departments. San Bernardino Community College District filed interested party comments on the draft staff analysis for the *ICAN* test claim, 00-TC-22, on September 7, 2007, requesting that the findings for that test claim apply to "all police departments and law enforcement agencies," including school district and community college district police departments. The two test claims present a number of separate issues of law and fact and were not consolidated.

A child abuse reporting law was first added to the Penal Code in 1963, and initially required medical professionals to report suspected child abuse to local law enforcement or child welfare authorities. The law was regularly expanded to include more professions required to report suspected child abuse (now termed "mandated reporters"), and in 1980, California reenacted and substantively amended the law, entitling it the "Child Abuse and Neglect Reporting Act," or "CANRA."

The Court in *Stecks v. Young* (1995) 38 Cal.App.4th 365, 370-371, provides an overview of the Child Abuse and Neglect Reporting Act, following the 1980 reenactment at Penal Code section 11164 et seq.:

> For more than 30 years, California has used mandatory reporting obligations as a way to identify and protect child abuse victims. In 1963, the Legislature passed former section 11161.5, its first attempt at imposing upon physicians and surgeons the obligation to report suspected child abuse. Although this initial version and later ones carried the risk of criminal sanctions for noncompliance, the state Department of Justice estimated in November 1978 that only about 10 percent of all cases of child abuse were being reported. (*Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1216-1217 [242 Cal.Rptr. 312].)
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> Faced with this reality and a growing population of abused children, in 1980 the Legislature enacted the Child Abuse Reporting Law (§ 11165 et seq.), a comprehensive scheme of reporting requirements "aimed at increasing the likelihood that child abuse victims are identified." (*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 254 [21 Cal.Rptr.2d 169], citing *Ferraro v. Chadwick* (1990) 221 Cal.App.3d 86, 90 [270 Cal.Rptr. 379].) The Legislature subsequently renamed the law the Child Abuse and Neglect Reporting Act (Act) (§ 11164). (Stats. 1987, ch. 1444, § 1.5, p. 5369.)
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> These statutes, all of which reflect the state's compelling interest in preventing child abuse, are premised on the belief that reporting suspected abuse is fundamental to protecting children. The objective has been to identify victims, bring them to the attention of the authorities, and, where warranted, permit intervention. (*James W. v. Superior Court*, *supra*, 17 Cal.App.4th at pp. 253-254.)

Claimant's Position

San Bernardino Community College District's June 28, 2002[1] test claim filing alleges that amendments to child abuse reporting statutes since January 1, 1975, have resulted in reimbursable increased costs mandated by the state. The test claim narrative and declarations allege new activities for school districts, county offices of education, and community college districts, as follows:[2]

- Mandated reporting of known or suspected child abuse to a police or sheriff's department, or to the county welfare department, as soon as practicable by telephone, and

[1] The potential reimbursement period begins no earlier than July 1, 2000, based upon the filing date for this test claim. (Gov. Code, § 17557.)

[2] Test Claim Filing, pages 122-124.

in writing within 36 hours. (Pen. Code, §§ 11165.9 and 11166, subd. (a).) "All mandated reporters are further compelled to report incidents of child abuse or neglect by the fact that failure to do so is a misdemeanor, pursuant to Penal Code Section 11166, Subdivision (b)."

- Mandated reports "are required to be made on forms adopted by the Department of Justice" (Pen. Code, § 11168.)
- "To assist and cooperate with law enforcement agencies investigating alleged complaints of child abuse or neglect committed at a school site." (Pen. Code, § 11165.14.)
- "To notify the staff member selected, and for that selected staff member to be present at an interview of a suspected victim when the child so requests." (Pen. Code, § 11174.3.)
- "To either train its mandated reporters in child abuse or neglect detection and their reporting requirements; or, to file a report with the State Board of Education stating the reasons why this training is not provided." (Pen. Code, § 11165.7, subd. (d).)
- "When training their mandated reporters in child abuse or neglect reporting, to supply those trainees with a written copy of their reporting requirements and a written disclosure of their confidentiality rights." (Pen. Code, § 11165.7, subd. (c).)
- "To obtain signed statements from its mandated reporters, on district forms, prior to commencing employment with the district, and as a prerequisite to that employment, to the effect that he or she has knowledge of his or her child abuse and neglect reporting requirements and their agreement to perform those duties." (Pen. Code, § 11166.5.)

The filing includes a declaration from the San Bernardino Community College District Chair of Child Development and Family and Consumer Science, and a declaration from the San Jose Unified School District, Director of Student Services, stating that each of the districts have incurred unreimbursed costs for the above activities.

The claimant rebutted the state agency comments on the test claim filing in separate letters dated December 19, 2002 (responding to DOF), and January 17, 2003 (responding to DSS). The claimant filed comments on the draft staff analysis dated November 7, 2007. The claimant's substantive arguments will be addressed in the analysis below.[3]

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[3] In the December 19, 2002 rebuttal, the claimant argues that the state DOF comments are "incompetent" and should be stricken from the record since they do not comply with the Commission's regulations (Cal. Code Regs, tit. 2, § 1183.02, subd. (d).) That regulation requires written responses to be signed at the end of the document, under penalty of perjury by an authorized representative of the state agency, with the declaration that it is true and complete to the best of the representative's personal knowledge, information, or belief. The claimant contends that "DOF's comments do not comply with this essential requirement."

Determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109). Thus, factual allegations raised by a party regarding how a program is implemented are not relied upon by staff at the test

Department of Finance Position

In comments filed November 26, 2002, DOF alleges the test claim does not meet basic test claim filing standards, and "requests that the Commission reject the claim for failure to comply with the specificity requirement in 2 CCR section 1183(e)." Further, DOF argues that the claim should be denied, because:

> [T]he District fails to point to any provision of law or regulation that defines a community college district as a mandated reporter within the meaning of Penal Code section 11165.7. While several versions of this section mention teachers and various school district employees, none of the enactments of this section include employees of community college districts in the definition of mandated reporter. While community colleges are part of the public school system, community college districts are legal entities separate and distinct from school districts. (Education Code §§ 66700, 68012.) …
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> As a final matter, the Department moves to strike the declaration of … Director of Student Services at the San Jose Unified School District [because the statements] do not authenticate the factual assertions made by the claimant, as required by 2 CCR section 1183(e)(4). The declaration is therefore irrelevant to the mandate claim submitted by the San Bernardino Community College District.

No comments were received on the draft staff analysis.

Department of Social Services Position

DSS's comments on the test claim filing, submitted November 25, 2002, also argue that the test claim as submitted fails "to set forth clearly and precisely which specific statutory provisions, enacted on or after 1975, imposed new mandates on local government, as required by Title 2, California Code of Regulations (CCR), section 1183(e)."

DSS also challenges the claim on several substantive points including: arguing that Penal Code section 11165.14 does not impose a duty on its face to cooperate and assist law enforcement agencies, as pled; and the duty of a staff member to be present at the interview of a suspected victim, upon request, pursuant to Penal Code section 11174.3, is voluntary which "negates the mandate claim." In addition, DSS asserts that the training of mandated reporters "is optional, and can be avoided if it reports to the State Department of Education why such training was not provided [and] the report can be transmitted orally or electronically, at no or de minimis cost to Claimant."

No comments were received on the draft staff analysis.

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claim phase when recommending whether an entity is entitled to reimbursement under article XIII B, section 6. The state agency responses contain comments on whether the Commission should approve this test claim and are, therefore, not stricken from the administrative record.

Discussion

The courts have found that article XIII B, section 6, of the California Constitution[4] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[5] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[6] 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.[7] 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.[8]

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.[9] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[10] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[11]

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

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

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

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

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

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

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

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

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[12]

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.[13] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[14]

Issue 1: What is the scope of the Commission's jurisdiction on this test claim and is a community college district an eligible test claimant under the test claim statutes?

(A) What is the scope of the Commission's jurisdiction on this test claim?

As a preliminary matter, DSS and DOF challenged the sufficiency of the test claim pleadings in comments filed November 25 and 26, 2002, respectively.

Government Code section 17551 requires the Commission to hear and decide upon a claim by a local agency or school district that the claimant is entitled to reimbursement pursuant to article XIII B, section 6 of the California Constitution. Government Code section 17521 defines the test claim as the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Thus, the Government Code gives the Commission jurisdiction only over those statutes or executive orders pled by the claimant in the test claim. At the time of the test claim filing on June 28, 2002, section 1183, subdivision (e), of the Commission regulations required the following content for an acceptable filing:[15]

> All test claims, or amendments thereto, shall be filed on a form provided by the commission [and] shall contain at least the following elements and documents:
>
> (1) A copy of the statute or executive order alleged to contain or impact the mandate. The specific sections of chaptered bill or executive order alleged must be identified.

The regulation also required copies of all "relevant portions of" law and "[t]he specific chapters, articles, sections, or page numbers must be identified," as well as a detailed narrative describing the prior law and the new program or higher level of service alleged. Staff finds that the Commission has jurisdiction over the statutes and code sections listed on the test claim title page and described in the narrative, and each will be analyzed below for the imposition of a reimbursable state mandated program.

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[12] *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.

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

[14] *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.

[15] The required contents of a test claim are now codified at Government Code section 17553.

(B) Is a community college district an eligible test claimant under the test claim statutes?

DOF also raised the issue that the claimant, as a community college district, is not a proper party to the claim because "[w]hile several versions of this section mention teachers and various school district employees, none of the enactments of this section include employees of community college districts in the definition of mandated reporter. While community colleges are part of the public school system, community college districts are legal entities separate and distinct from school districts. (Education Code §§ 66700, 68012.)"

Staff finds that the term "teachers," as used in the Child Abuse and Neglect Reporting Act, is inclusive of community college district teachers. The term is deliberately broad as it is used in the statutory list of mandatory child abuse reporters. That list is currently found at Penal Code section 11165.7, and begins:

> (a) As used in this article, "mandated reporter" is defined as any of the following:
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> (1) A teacher.
> (2) An instructional aide.
> (3) A teacher's aide or teacher's assistant employed by any public or private school.
> (4) A classified employee of any public school.
> (5) An administrative officer or supervisor of child welfare and attendance, or a certificated pupil personnel employee of any public or private school. …

An Attorney General Opinion (72 Ops.Cal.Atty.Gen. 216 (1989)) analyzed the wording of earlier versions of the statutory scheme to find that a ballet teacher at a post-secondary private school in San Francisco was included in the meaning of the word "teacher," as used in CANRA, when the school admitted students as young as eight years old.[16] The opinion goes into great detail using statutory construction to deduce the legislative meaning of the word "teacher" in this context. Finding that the word "teacher" is now singled out in the statute without any qualification, the opinion reaches the following conclusion:

> Without intending to suggest that the meaning of the word "teacher" as found in the Act is without bounds and mandates a reporting duty on any person who happens to impart some knowledge or skill to a child, we do not accept the proffered limitation that it applies only to teachers in K-12 schools. We find nothing in the statutory language of the Child Abuse and Neglect Reporting Act to support such a limitation on the plain meaning of the word "teacher".
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> ¶ … ¶
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> The Child Abuse and Neglect Reporting Act imposes a duty on "teachers" to report instances of child abuse that they come to know about or suspect in the course of their professional contact in order that child protective agencies might take appropriate action to protect the children. We are constrained to interpret the

[16] "An opinion of the Attorney General "is not a mere 'advisory' opinion, but a statement which, although not binding on the judiciary, must be 'regarded as having a quasi judicial character and [is] entitled to great respect,' and given great weight by the courts." (*Community Redevelopment Agency of City of Los Angeles v. County of Los Angeles* (2001) 89 Cal.App.4th 719, 727.)

> language of the Act according to the ordinary meaning of its terms to effect that purpose. Doing so, we conclude that a person who teaches ballet at a private ballet school is a "teacher" and thus a "child care custodian" as defined by the Act, and therefore has a mandatory duty to report instances of child abuse under it.

The term "teacher" is applied to community college instructors elsewhere in the Penal Code, and in case law.[17] CANRA is aimed at the protection of individuals under the age of 18 from child abuse and neglect;[18] therefore it is significant that community colleges are required to serve some students under 18 years old. Education Code section 76000 provides that "a community college district shall admit to the community college any California resident … possessing a high school diploma or the equivalent thereof." Education Code section 48412 requires that the proficiency exams be offered to any students "16 years of age or older," who has or will have completed 10th grade, and "shall award a "certificate of proficiency" to persons who demonstrate that proficiency. The certificate shall be equivalent to a high school diploma." Thus 16 and 17 year olds can be regular students at community colleges.

Therefore, staff finds that a community college district is an eligible test claimant under the test claim statutes, as some of the claimed activities apply to employers of mandated reporters, including teachers. However, the issue of community college districts being "school districts" within the meaning of CANRA is more complex, and will be analyzed as the term appears in the test claim statutes below.

Issue 2: Do the test claim statutes mandate a new program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute or executive order mandates a new program or higher level of service within an existing program when it compels a local agency or school district to perform activities not previously required, or when legislation requires that costs previously borne by the state are now to be paid by school districts.[19] Thus, in order for a test claim statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must order or command that school districts perform an activity or task.

The test claim allegations will be analyzed by areas of activities, as follows: (a) mandated reporting of child abuse and neglect; (b) training mandated reporters; (c) investigation of suspected child abuse involving a school site or a school employee; (d) employee records. The prior law in each area will be identified.

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[17] For examples, see Penal Code section 291.5 and *Compton Community College etc. Teachers v. Compton Community College Dist.* (1985) 165 Cal.App.3d 82.

[18] Penal Code sections 11164 and 11165.

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

(A) Mandated Reporting of Child Abuse and Neglect

Penal Code Section 11164:

The test claim pleadings include Penal Code section 11164.[20] Subdivision (a) states that the title of the article is the "Child Abuse and Neglect Reporting Act," and subdivision (b) provides that "[t]he intent and purpose of this article is to protect children from abuse and neglect. In any investigation of suspected child abuse or neglect, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim."

In *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 470, the court examined Penal Code section 11164 and found "the statute imposed no mandatory duty on County or Employees. Rather, the statute merely stated the Legislature's "intent and purpose" in enacting CANRA, an article composed of over 30 separate statutes." In reaching this conclusion, the court relied on reasoning from *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 639 [*Terrell R.*]:

> An enactment creates a mandatory duty if it requires a public agency to take a particular action. (*Wilson v. County of San Diego, supra*, 91 Cal.App.4th at p. 980.) An enactment does not create a mandatory duty if it merely recites legislative goals and policies that must be implemented through a public agency's exercise of discretion. (*Ibid.*) The use of the word "shall" in an enactment does not necessarily create a mandatory duty. (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 910-911, fn. 6 [136 Cal.Rptr. 251, 559 P.2d 606]; *Wilson v. County of San Diego, supra,* 91 Cal.App.4th at p. 980.)

Staff also finds this statement of law persuasive, and the *Jacqueline T.* court's legal finding on the nature of section 11164 as merely an expression of legislative intent is directly on point with the case at hand. Therefore, staff finds that Penal Code section 11164 does not mandate a new program or higher level of service on school districts.

Penal Code Sections 11165.9, 11166, and 11168, Including Former Penal Code Section 11161.7:

Penal Code section 11166,[21] subdivision (a), as pled, provides that "a mandated reporter shall make a report to an agency specified in Section 11165.9 whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. The mandated reporter shall make a report to the agency immediately or as soon as is practicably possible by telephone and the mandated reporter shall prepare and send a written report thereof within 36 hours of receiving the information concerning the

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[20] Added by Statutes 1987, chapter 1459; amended by Statutes 2000, chapter 916.

[21] As added by Statutes 1980, chapter 1071; amended by Statutes 1981, chapter 435, Statutes 1982, chapter 905, Statutes 1984, chapter 1423, Statutes 1986, chapter 1289, Statutes 1987, chapter 1459, Statutes 1988, chapters 269 and 1580, Statutes 1990, chapter 1603, Statutes 1992, chapter 459, Statutes 1993, chapter 510, Statutes 1996, chapters 1080 and 1081, and Statutes 2000, chapter 916.

incident." Penal Code section 11165.9 requires reports be made "to any police department, sheriff's department, county probation department if designated by the county to receive mandated reports, or the county welfare department. It does not include a school district police or security department." Penal Code section 11168[22] (derived from former Pen. Code, § 11161.7)[23] requires the written reports to be made on forms "adopted by the Department of Justice."

Mandated child abuse reporting has been part of California law since 1963, when Penal Code section 11161.5 was first added. Former Penal Code section 11161.5, as amended by Statutes 1974, chapter 348, required specified medical professionals, public and private school officials and teachers, daycare workers, summer camp administrators, and social workers to report on observed non-accidental injuries or apparent sexual molest, by making a report by telephone and in writing to local law enforcement and juvenile probation departments, or county welfare or health departments. The code section began:

> (a) In any case in which a minor is brought to a physician and surgeon, dentist, resident, intern, podiatrist, chiropractor, or religious practitioner for diagnosis, examination or treatment, or is under his charge or care, or in any case in which a minor is observed by any registered nurse when in the employ of a public health agency, school, or school district and when no physician and surgeon, resident, or intern is present, by any superintendent, any supervisor of child welfare and attendance, or any certificated pupil personnel employee of any public or private school system or any principal of any public or private school, by any teacher of any public or private school, by any licensed day care worker, by an administrator of a public or private summer day camp or child care center, or by any social worker, and it appears to the [reporting party] from observation of the minor that the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, or that any injury prohibited by the terms of Section 273a has been inflicted upon the minor, he shall report such fact by telephone and in writing, within 36 hours, to both the local police authority having jurisdiction and to the juvenile probation department;[24] or in the alternative, either to the county welfare department, or to the county health department. The report shall state, if known, the name of the minor, his whereabouts and the character and extent of the injuries or molestation.

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[22] As added by Statutes 1980, chapter 1071 and amended by Statutes 2000, chapter 916. Derived from former Penal Code section 11161.7, added by Statutes 1974, chapter 836, and amended by Statutes 1977, chapter 958.

[23] Penal Code section 11161.7 was added by Statutes 1974, chapter 836, and required DOJ to issue an optional form, for use by medical professionals to report suspected child abuse. Then, Statutes 1977, chapter 958, one of the test claim statutes, amended section 11161.7 and for the first time required a mandatory reporting form to be adopted by DOJ, to be distributed by county welfare departments.

[24] Subdivision (b) provided that reports that would otherwise be made to a county probation department are instead made to the county welfare department under specific circumstances.

The list of "mandated reporters," as they are now called, has grown since 1975. The detailed list, now found at Penal Code section 11165.7,[25] includes all of the original reporters and now also includes teacher's aides, other classified school employees, as well as numerous other public and private employees and professionals.

Staff finds that the duties alleged are not required of school districts, but of mandated reporters as individual citizens. The statutory scheme requires duties of individuals, identified by either their profession or their employer, but the duties are not being performed on behalf of the employer or for the benefit of the employer, nor are they required by law to be performed using the employer's resources. Penal Code section 11166 also includes the following provision, criminalizing the failure of mandated reporters to report child abuse or neglect:[26]

> Any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of one thousand dollars ($1,000) or by both that fine and punishment.

Failure to make an initial telephone report, followed by preparation and submission of a written report within 36 hours, on a form designated by the Department of Justice, subjects the mandated reporter to criminal liability. This criminal penalty applies to mandated reporters as individuals and does not extend to their employers. In addition, under Penal Code section 11172, mandated reporters are granted immunity as individuals for any reports they make: "No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article, and *this immunity shall apply even if* the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect *outside of his or her professional capacity or outside the scope of his or her employment*." [Emphasis added.] Therefore, staff finds that the duties are required of mandated reporters as individuals, and there is no new program or higher level of service imposed on school districts for the activities required of mandated reporters.

The draft staff analysis discussed the fact that article XIII B, section 6 does not require reimbursement for "[l]egislation defining a new crime or changing an existing definition of a crime."[27] In comments dated November 7, 2007, the claimant states that the analysis:

> has misconstrued the constitutional exception and has also ignored Government Code Section 17556, subdivision (g), which excludes reimbursement "only for that portion of the statute relating directly to the enforcement of the crime or infraction." The test claim alleges reimbursable activities for the mandated reporters to report observed child abuse and neglect. The reporting is compelled both by affirmative law (Section 11165.1) and by penal coercion (Section 11166). The test claim does not allege mandated costs to enforce the crime of failure to report which would be excluded by subdivision (g).

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[25] Added by Statutes 2000, chapter 916.

[26] This provision was moved to Penal Code section 11166 by Statutes 2000, chapter 916. Prior to that, the misdemeanor provision was found at section 11172, as added by Statutes 1980, chapter 1071.

[27] California Constitution, article XIII B, section 6, subdivision (a)(2).

The pertinent portion of Government Code section 17556 follows:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following: ¶...¶
>
> (g) The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

The Government Code section 17556, subdivision (g) "crimes exception" to finding costs mandated by the state only applies after finding that a new program or higher level of service has been imposed. Here, staff finds that the duties alleged are required of mandated reporters as individual citizens, and no new program or higher level of service has been imposed directly on school districts. Therefore, staff finds that Penal Code sections 11165.9, 11166, and 11168, (including former Penal Code section 11161.7), do not mandate a new program or higher level of service on school districts for activities required of mandated reporters.

Definitions: Penal Code Sections 273a, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, and 11165.6:

The test claim alleges that all of the statutory definitions of abuse and neglect in the Child Abuse and Neglect Reporting Act result in a reimbursable state-mandated program.

Penal Code section 11165.6, [28] as pled, defines child abuse as "a physical injury that is inflicted by other than accidental means on a child by another person." The code section also defines the term "child abuse or neglect" as including the statutory definitions of sexual abuse (§ 11165.1[29]), neglect (§ 11165.2[30]), willful cruelty or unjustifiable punishment (§ 11165.3[31]), unlawful corporal punishment or injury (§ 11165.4[32]), and abuse or neglect in out-of-home care (§ 11165.5[33]). The test claim also alleges the statute defining the term child (§ 11165[34]).

While the definitional code sections alone do not require any activities, they do require analysis to determine if, in conjunction with any of the other test claim statutes, they mandate a new program or higher level of service by increasing the scope of required activities within the child abuse and neglect reporting program.

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[28] As repealed and reenacted by Statutes 2000, chapter 916.

[29] Added by Statutes 1987, chapter 1459; amended by Statutes 1997, chapter 83 and Statutes 2000, chapter 287; derived from former Penal Code section 11165 and 11165.3.

[30] Added by Statutes 1987, chapter 1459; derived from former Penal Code section 11165.

[31] Added by Statutes 1987, chapter 1459.

[32] Added by Statutes 1987, chapter 1459; amended by Statutes 1988, chapter 39, and Statutes 1993, chapter 346.

[33] Added by Statutes 1987, chapter 1459; amended by Statutes 1988, chapter 39, Statutes 1993, chapter 346, and Statutes 2000, chapter 916. The cross-reference to section 11165.5 was removed from section 11165.6 by Statutes 2001, chapter 133.

[34] Added by Statutes 1987, chapter 1459; derived from former Penal Code section 11165.

Penal Code section 11165 defines the word child as "a person under the age of 18 years." This is consistent with prior law, which has defined child as "a person under the age of 18 years" since the child abuse reporting law was reenacted by Statutes 1980, chapter 1071. Prior to that time, mandated reporting laws used the term minor rather than child. Minor was not defined in the Penal Code, but rather during the applicable time the definition was found in the Civil Code, as "an individual who is under 18 years of age."[35] Thus no substantive changes have occurred whenever the word child has been substituted for the word minor.

Former Penal Code section 11161.5 mandated child abuse reporting when "the minor has physical injury or injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, or that any injury prohibited by the terms of Section 273a has been inflicted upon the minor." The prior law of Penal Code section 273a[36] follows:

> (1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding 1 year, or in the state prison for not less than 1 year nor more than 10 years.
>
> (2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

Staff finds that the definition of child abuse and neglect found in prior law was very broad, and required mandated child abuse reporting of physical and sexual abuse, as well as non-accidental acts by any person which could cause mental suffering or physical injury. Prior law also required mandated reporting of situations that injured the health or may endanger the health of the child, caused or permitted by any person.

Staff finds these sweeping descriptions of reportable child abuse and neglect under prior law encompass every part of the statutory definitions of child abuse and neglect, as pled. Claimant's

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[35] Former Civil Code section 25; reenacted as Family Code section 6500 (Stats. 199, ch. 162, operative Jan. 1, 1994.)

[36] Added by Statutes 1905, chapter 568; amended by Statutes 1963, chapter 783, and Statutes 1965, chapter 697. The section has since had the criminal penalties amended by Statutes 1976, chapter 1139, Statutes 1980, chapter 1117, Statutes 1984, chapter 1423, Statutes 1993, chapter 1253, Statutes 1994, chapter 1263, Statutes 1996, chapter 1090, and Statutes 1997, chapter 134, as pled, but the description of the basic crime of child abuse and neglect remains good law.

November 7, 2007 comments dispute this and state: "To the contrary, the new CANRA definitions are each precise, specifically enumerated, and evolved over time by numerous amendments to the code." Staff agrees, but this does not mean that the amended definitions have created a higher level of service over the previous definitions of reportable child abuse and neglect. In *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568, the Court stated a fundamental rule of statutory construction: "'Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose ....' " [Citation omitted.] That purpose is not necessarily to change the law. 'While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute.'" Staff finds that the same acts of abuse or neglect that are reportable under the test claim statutes were reportable offenses under pre-1975 law.

Penal Code section 11165.1 provides that sexual abuse, for purposes of child abuse reporting, includes sexual assault or sexual exploitation, which are further defined. Sexual assault includes all criminal acts of sexual contact involving a minor, and sexual exploitation refers to matters depicting, or acts involving, a minor and "obscene sexual conduct." Prior law required reporting of sexual molestation, as well as "unjustifiable physical pain or mental suffering."

Sexual molestation is not a defined term in the Penal Code. However, former Penal Code section 647a, now section 647.6, criminalizes actions of anyone "who annoys or *molests* any child under the age of 18." In a case regularly cited to define "annoy or molest," *People v. Carskaddon* (1957) 49 Cal.2d 423, 425-426, the California Supreme Court found that:

> The primary purpose of the above statute is the 'protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.' (*People v. Moore*, *supra*, 137 Cal.App.2d 197, 199; *People v. Pallares*, 112 Cal.App.2d Supp. 895, 900 [246 P.2d 173].) The words 'annoy' and 'molest' are synonymously used (Words and Phrases, perm. ed., vol. 27, 'molest'); they generally refer to conduct designed 'to disturb or irritate, esp. by continued or repeated acts' or 'to offend' (Webster's New Inter. Dict., 2d ed.); and as used in this statute, they ordinarily relate to 'offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender.' (*People v. Pallares*, *supra*, p. 901.) Ordinarily, the annoyance or molestation which is forbidden is 'not concerned with the state of mind of the child' but it is 'the objectionable acts of defendant which constitute the offense,' and if his conduct is 'so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would 'annoy or molest' within the purview of' the statute. (*People v. McNair*, 130 Cal.App.2d 696, 697-698 [279 P.2d 800].)

By use of the general term sexual molestation in prior law, rather than specifying sexual assault, incest, prostitution, or any of the numerous Penal Code provisions involving sexual crimes, the statute required mandated child abuse reporting whenever there was evidence of "offenses against children, [with] a connotation of abnormal sexual motivation." Thus, sexual abuse was a reportable offense under prior law, as under the definition at Penal Code section 11165.1.

Penal Code section 11165.2 specifies that neglect, as used in the Child Abuse and Neglect Reporting Act, includes situations "where any person having care or custody of a child willfully

causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered," "*including* the intentional failure of the person having care or custody of a child to provide adequate food, clothing, shelter, or medical care." Not providing adequate food, clothing, shelter, or medical care is tantamount to placing a child "in such situation that its person or health may be endangered," as described in prior law, above. Thus the same circumstances of neglect were reportable under prior law, as under the definition pled.

The prior definition of child abuse included situations where "[a]ny person … willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering." The current definition of willful cruelty or unjustifiable punishment of a child, found at Penal Code section 11165.3 carries over the language of Penal Code section 273a, without distinguishing between the misdemeanor and felony standards.[37]

The definition of unlawful corporal punishment or injury, found at Penal Code section 11165.4, as pled, prohibits "any cruel or inhuman corporal punishment or injury resulting in a traumatic condition." Again, prior law required reporting of any non-accidental injuries, willful cruelty, and "unjustifiable physical pain or mental suffering," which encompasses all of the factors described in the definition for reportable unlawful corporal punishment or injury. The current law also excludes reporting of self-defense and reasonable force when used by a peace officer or school official against a child, within the scope of employment. This exception actually narrows the scope of child abuse reporting when compared to prior law.

Penal Code section 11165.5 defines abuse or neglect in out-of-home care as all of the previously described definitions of abuse and neglect, "where the person responsible for the child's welfare is a licensee, administrator, or employee of any facility licensed to care for children, or an administrator or employee of a public or private school or other institution or agency." Prior law required reporting of abuse by "any person," and neglect by anyone who had a role in the care of the child.[38] Thus any abuse reportable under section 11165.5 would have been reportable under prior law, as detailed above. As further evidence of this redundancy, Statutes 2001, chapter 133, effective July 31, 2001, removed the reference to abuse or neglect in out-of-home care from the general definition of child abuse and neglect at Penal Code section 11165.6. Therefore, staff finds that Penal Code sections 273a, 11165, 11165.1, 11165.2, 11165.3, 11165.4, 11165.5, and 11165.6, do not mandate a new program or higher level of service on school districts by increasing the scope of child abuse and neglect reporting.

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[37] Penal Code section 273a distinguishes between those "circumstances or conditions likely to produce great bodily harm or death" (felony), and those that are not (misdemeanor).

[38] *People v. Toney* (1999) 76 Cal.App.4th 618, 621-622: "No special meaning attaches to this language [care or custody] "beyond the plain meaning of the terms themselves. The terms 'care or custody' do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver." (*People v. Cochran* (1998) 62 Cal.App.4th 826, 832, 73 Cal.Rptr.2d 257.)"

(B) Training Mandated Reporters:

Penal Code Section 11165.7:

The claimant is also requesting reimbursement for training mandated reporters based on Penal Code section 11165.7.[39] Penal Code section 11165.7, subdivision (a), now includes the complete list of professions that are considered mandated reporters of child abuse and neglect; subdivision (b), as pled, provides that volunteers who work with children "are encouraged to obtain training in the identification and reporting of child abuse." The code section continues, as amended by Statutes 2001, chapter 754:

> (c) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees' confidentiality rights.
>
> (d) School districts that do not train their employees specified in subdivision (a) in the duties of mandated reporters under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.
>
> (e) The absence of training shall not excuse a mandated reporter from the duties imposed by this article.

Specifically, claimant alleges a reimbursable state mandate for school districts: "To either train its mandated reporters in child abuse or neglect detection and their reporting requirements; or, to file a report with the State Board of Education stating the reasons why this training is not provided."[40] In comments on the draft staff analysis, dated November 7, 2007, the claimant states: "The requirement to train staff derives from the same form of legislative imperative ("shall") as subdivision (c), which states that "districts which do not train the employees … shall report … the reasons training is not provided." … Both training and reporting are required as mutually exclusive parts of Section 11165.7."

DSS argues there is no express duty in the test claim statute for school districts, as employers or otherwise, to provide training to mandated reporters. On page 3 of the November 25, 2002 comments, DSS states:

> Claimant also asserts that Penal Code Section 11165.7 imposes mandated reporter training. (See Test Claim, page 123 lines 16-23) However, Claimant conceded that the training is optional, and can be avoided if it reports to the State Department of Education why such training was not provided. The form of the report is not specified in law. Therefore, the report can be transmitted orally or electronically, at no or de minimis cost to Claimant. Moreover, Claimant has not

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[39] Added by Statutes 1987, chapter 1459; amended by Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 2000, chapter 916, Statutes 2001, chapter 133 (urgency), and Statutes 2001, chapter 754.

[40] Test Claim Filing, page 123.

> provided any facts to support its view that activities associated with such a report are in excess of that which was required under law in 1975.

Some history of Penal Code section 11165.7 is helpful to put the training language into legislative context. This section was substantively amended by Statutes 2000, chapter 916; prior to that amendment, subdivision (a) did not provide the complete list of mandated reporters, but instead defined the term "child care custodian" for the purposes of the Child Abuse and Neglect Reporting Act. The definition provided that a "child care custodian" included "an instructional aide, a teacher's aide, or a teacher's assistant employed by any public or private school, who has been trained in the duties imposed by this article, if the school district has so warranted to the State Department of Education; [and] a classified employee of any public school who has been trained in the duties imposed by this article, if the school has so warranted to the State Department of Education." All other categories of "child care custodian" defined in former Penal Code section 11165.7, including teachers, child care providers, social workers, and many others, were not dependent on whether the individual had received training on being a mandated reporter. Following the definition of "child care custodian," the prior law of section 11165.7 continued:

> (b) Training in the duties imposed by this article shall include training in child abuse identification and training in child abuse reporting. As part of that training, school districts shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees' confidentiality rights.
>
> (c) School districts which do not train the employees specified in subdivision (a) in the duties of child care custodians under the child abuse reporting laws shall report to the State Department of Education the reasons why this training is not provided.
>
> (d) Volunteers of public or private organizations whose duties require direct contact and supervision of children are encouraged to obtain training in the identification and reporting of child abuse.

Thus, public and private school teacher's aides, and classified employees of public schools, were only "child care custodians," and by extension, mandated reporters, *if* they received training in child abuse identification and reporting. However, even under prior law, employers were not legally required to provide such training.

In *City of San Jose v. State of California*, the court clearly found that "[w]e cannot, however, read a mandate into language which is plainly discretionary."[41] The court concluded "there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[42] No mandatory language is used to require employers to provide mandated reporter training. Therefore, based on the plain language of the

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[41] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

[42] *Id*. at page 1817.

statute,[43] staff finds that Penal Code section 11165.7, as pled,[44] does not mandate a new program or higher level of service upon school districts for providing training to mandated reporter employees.

However, if mandated reporter training is not provided, the code section requires that school districts "shall report to the State Department of Education the reasons why." DSS argues that the reporting should be de minimis, and therefore not reimbursable. Staff finds that mandates law does not support this conclusion. The concept of a de minimis activity does appear in mandates case law – most recently in the California Supreme Court opinion on *San Diego Unified School Dist.*, which described a de minimis standard as it applied in a situation where there was an existing federal law program on due process procedures, but the state then added more, by "articulat[ing] specific procedures, not expressly set forth in federal law."[45] The Court found that "challenged state rules or procedures that are intended to implement an applicable federal law—and whose costs are, in context, de minimis—should be treated as part and parcel of the federal mandate." The Court recognized that it was unrealistic to expect the Commission to determine which statutory procedures were required for minimum federal standards of due process, versus any "excess" due-process standards only required by the state.

The Court did not come up with a dollar amount as a threshold for determining de minimis additions to an existing non-reimbursable program, nor any other clear standard; simply finding that the costs and activities must be de minimis, "in context." The context described by the Court in *San Diego* does not have a parallel here. The activity of reporting to the State Department of Education on the lack of training is a new activity, severable and distinct from any other part of the Child Abuse and Neglect Reporting Act, and is not implementing a larger, non-reimbursable program.

In addition, Government Code section 17564 provides the minimum amount that must be claimed in either a test claim or claim for reimbursement. The claimant alleges costs in excess of $200, the minimum standard at the time of filing the test claim. A declaration of costs incurred

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[43] "'[W]hen interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning.'" [Citation omitted.] *Bonnell v. Medical Bd. of California* (2003) 31 Cal.4th 1255, 1261.

[44] Statutes 2004, chapter 842 amended subdivision (c), regarding training for mandated reporters. Current law now provides "(c) Employers are strongly encouraged to provide their employees who are mandated reporters with training in the duties imposed by this article. This training shall include training in child abuse and neglect identification and training in child abuse and neglect reporting. Whether or not employers provide their employees with training in child abuse and neglect identification and reporting, the employers shall provide their employees who are mandated reporters with the statement required pursuant to subdivision (a) of Section 11166.5."

Staff notes that "strongly encouraged" is not mandatory language, but an expression of legislative intent (see *Terrell R., supra,* 102 Cal.App.4th 627, 639.) Also, an amendment may be "'the result of a legislative attempt to clarify the true meaning of the statute.'" *Williams v. Garcetti, supra,* 5 Cal.4th 561, 568.

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

was also submitted by the San Jose Unified School District.[46] Therefore, the test claim satisfies the initial burden of demonstrating that school districts have incurred the minimum increased costs for the test claim statute. Staff notes that Government Code section 17564 now requires that any reimbursement claims submitted must exceed $1000, and this will apply for any future reimbursement claims filed pursuant to this test claim.

Finally, there must be a determination of what is meant by "school districts" in the context of Penal Code section 11165.7 – did the Legislature intend that community college districts be included in this requirement? "School district" is not defined in this code section or elsewhere in CANRA, nor is there a general definition to be used in the Penal Code as a whole. Rules of statutory construction demand that we first look to the words in context to determine the meaning.[47]

The report is required to be made to the State Department of Education, which generally controls elementary and secondary education. The State Department of Education is governed by the Board of Education. Education Code section 33031 provides: "The board shall adopt rules and regulations not inconsistent with the laws of this state (a) for its own government, (b) for the government of its appointees and employees, (c) for the government of the day and evening elementary schools, the day and evening secondary schools, and the technical and vocational schools of the state, and (d) for the government of other schools, *excepting* the University of California, the California State University, and *the California Community Colleges*, as may receive in whole or in part financial support from the state."

A community college district generally provides post-secondary education, and the controlling state organization is the California Community Colleges Board of Governors.[48] Particularly since the reorganization of the Education Code by Statutes 1976, chapter 1010, there are growing statutory distinctions between K-12 "school districts" and "community college districts" throughout the code, including the Penal Code.[49] While these factors alone are not controlling, the fact that the training reporting requirement is limited to "school districts" and not all public and private schools, or even all employers of mandated reporters, is indication that the legislative intent was limited, and that school districts should be interpreted narrowly. Therefore, staff finds that the term "school districts" refers to K-12 school districts and is exclusive of community college districts in this case.

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[46] Test Claim Filing, exhibit 1.

[47] "Statutory language is not considered in isolation. Rather, we 'instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.'" *Bonnell v. Medical Bd. of California, supra,* 31 Cal.4th 1255, 1261.

[48] Education Code section 70900 et seq.

[49] Penal Code section 291, 291.1 and 291.5 set up separate statutes for law enforcement informing public schools, private schools, and community college districts, respectively when a teacher, instructor or other employees are arrested for sex offenses.

Thus, staff finds that Penal Code section 11165.7, subdivision (d), mandates a new program or higher level of service on K-12 school districts, as follows:

- Report to the State Department of Education the reasons why training is not provided, whenever school districts do not train their employees specified in Penal Code section 11165.7, subdivision (a), in the duties of mandated reporters under the child abuse reporting laws.

(C) Investigation of Suspected Child Abuse Involving a School Site or a School Employee

Penal Code Sections 11165.14 and 11174.3:

Penal Code section 11165.14,[50] addresses the duty of law enforcement to "investigate a child abuse complaint filed by a parent or guardian of a pupil with a school or an agency specified in Section 11165.9 against a school employee or other person that commits an act of child abuse, as defined in this article, against a pupil at a schoolsite."

The test claim alleges that Penal Code section 11165.14 mandates school districts "[t]o assist and cooperate with law enforcement agencies investigating alleged complaints of child abuse or neglect committed at a school site."[51]

DSS argues Penal Code section 11165.14 does not impose a duty on its face for school districts to cooperate with and assist law enforcement agencies.

In comments dated November 7, 2007, the claimant further argues: "Nearly every school district employee is a mandated reporter of child abuse and subject to criminal punishment for failure to comply in this duty. Therefore, the district and its employees are practically compelled to participate in the investigation."

Staff finds that the plain language of Penal Code section 11165.14 does not require school district personnel to engage in the activities of assisting and cooperating with investigation of complaints as alleged by the claimant. Further, there is no evidence in the record that section 11165.14 "practically compels" the participation of a school district or its employees in a child abuse investigation, in a manner that results in a reimbursable state mandated program. The imposition of a reimbursable state mandate through "practical compulsion" is not described in the California Constitution or in statute. The California Supreme Court discussed the issue most recently in *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731, stating:

> Although we do not foreclose the possibility that a reimbursable state mandate might be found in circumstances short of legal compulsion-for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program-claimants here faced no such practical compulsion. Instead, although claimants argue that they have had "no true option or choice" other than to participate in the underlying funded educational programs, the asserted compulsion in this case stems only from the circumstance that claimants have found the benefits of

[50] Added by Statutes 1991, chapter 1102, and amended by Statutes 2000, chapter 916.

[51] Test Claim Filing, page 123.

> various funded programs "too good to refuse"-even though, as a condition of program participation, they have been forced to incur some costs.

Here, there is no substantial penalty or loss of funding at issue, and no alternative legal rationale is apparent to explain why there is "practical compulsion" to engage in the test claim activities alleged to be required by section 11165.14. The duties of individual mandated reporters are described in section 11166, not section 11165.14, and while this may be augmented by an underlying civic duty to cooperate with a law enforcement investigation,[52] there is no investigatory duty imposed by statute on the mandated reporter. The Crime and Violence Prevention Center of the California Attorney General's Office issues a publication called "Child Abuse: Educator's Responsibilities," which is designed to "assist educators in determining their reporting responsibilities."[53] In the 6th edition, revised January 2007, at page 13, the document states:

> [S]chool personnel who are mandated to report known or reasonably suspected instances of child abuse play a critical role in the early detection of child abuse. Symptoms or signs of abuse are often first seen by school personnel. Because immediate investigation by a law enforcement agency, or welfare department may save a child from repeated abuse, school personnel should not hesitate to report suspicious injuries or behavior. **Your duty is to report, not investigate.** [Emphasis in original.]

Based upon all of the above, staff finds neither legal nor practical compulsion has been imposed by Penal Code section 11165.14 for school districts "[t]o assist and cooperate with law enforcement agencies investigating alleged complaints of child abuse or neglect committed at a school site." Therefore, staff finds that Penal Code section 11165.14 does not impose a new program or higher level of service on school districts.

Claimant further alleges a reimbursable state mandate is imposed by Penal Code section 11174.3;[54] the code section, as pled, follows:

> (a) Whenever a representative of a government agency investigating suspected child abuse or neglect or the State Department of Social Services deems it necessary, a suspected victim of child abuse or neglect may be interviewed during

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[52] *People v. McKinnon* (1972) 7 Cal.3d 899, 915, at footnote 6, the Court noted: "As concluded by the President's Commission on Law Enforcement and Administration of Justice: "That every American should cooperate fully with officers of justice is obvious ... [T]he complexity and anonymity of modern urban life, the existence of professional police forces and other institutions whose official duty it is to deal with crime, must not disguise the need - far greater today than in the village societies of the past - for citizens to report all crimes or suspicious incidents immediately; to cooperate with police investigations of crime; in short, to 'get involved.'" (The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice (1967) p. 288.)"

[53] <http://safestate.org/documents/CA_Child_Abuse_Ed_Respon_2007_ADA.pdf> as of November 15, 2007.

[54] Added by Statutes 1987, chapter 640, and amended by Statutes 1998, chapter 311, Statutes 2000, chapter 916.

school hours, on school premises, concerning a report of suspected child abuse or neglect that occurred within the child's home or out-of-home care facility. The child shall be afforded the option of being interviewed in private or selecting any adult who is a member of the staff of the school, including any certificated or classified employee or volunteer aide, to be present at the interview. A representative of the agency investigating suspected child abuse or neglect or the State Department of Social Services shall inform the child of that right prior to the interview.

The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Section 11167.5. A representative of the school shall inform a member of the staff so selected by a child of the requirements of this section prior to the interview. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. Failure to comply with the requirements of this section does not affect the admissibility of evidence in a criminal or civil proceeding.

(b) The Superintendent of Public Instruction shall notify each school district and each agency specified in Section 11165.9 to receive mandated reports, and the State Department of Social Services shall notify each of its employees who participate in the investigation of reports of child abuse or neglect, of the requirements of this section.

Claimant alleges that the mandated activities include notifying "the staff member selected, and for that selected staff member to be present at an interview of a suspected victim when the child so requests." DSS argues that the duty of a staff member to be present at the interview of a suspected victim, upon request, pursuant to Penal Code section 11174.3, is voluntary which "negates the mandate claim."

As discussed above, the court in *City of San Jose, supra*, found that "[w]e cannot, however, read a mandate into language which is plainly discretionary."[55] Penal Code section 11174.3 states: "A staff member selected by a child may decline the request to be present at the interview." Thus, staff finds that the optional nature of a school staff member's attendance at the investigative interview does not impose a reimbursable state-mandated program on school districts. The claimant's November 7, 2007 comments argue:

> The DSA ignores that the district incurs costs for this new activity as a result of two independent choices which are not controlled by the school employer, but by the persons making the choice. Thus, if a student requests (first independent

[55] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816.

choice) a district employee to participate and the district employee consents (second independent choice), costs are incurred by the district (and not the persons who made the choices).

Accepting this as true, there is still no evidence of either a higher level of service or actual increased costs mandated by the state in order for a school staff member to attend the child abuse investigation interview. Penal Code section 11174.3 states if the district employee opts "to be present at the interview," the interview "*shall be held at a time during school hours when it does not involve an expense to the school.*" Thus, the interview is required to be held during a time, such as the staff member's break or lunch period, where substitute personnel are not required. In *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1285, the court found: "The presence of these references to reimbursement for lost revenue in article XIII supports a conclusion that by using the word "cost" in section 6 the voters meant the common meaning of cost as *an expenditure or expense actually incurred.*"

However, staff does identify that there is a new activity plainly required by the test claim statute for a school representative to inform the selected member of the staff of the requirements of Penal Code section 11174.3 prior to the interview. In order to identify the eligible claimants for this activity, there must be a determination of whether there was legislative intent that the terms "school" or "school districts," as used in this code section includes community colleges. In *Delaney v. Baker* (1999) 20 Cal.4th 23, 41-42, the Court found:

> It is, of course, "generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute." (*People v. Dillon* (1983) 34 Cal.3d 441, 468 [194 Cal.Rptr. 390, 668 P.2d 697].) But that presumption is rebuttable if there are contrary indications of legislative intent.

Staff is unable to find any indications of legislative intent to indicate that community college districts were intended to be included in the use of the terms "school" or "school district" within Penal Code section 11174.3; therefore the terms are given the same meaning as determined for Penal Code section 11165.7, above, as excluding community college districts.

Therefore, based on the plain language of the statute, staff finds that Penal Code section 11174.3 mandates a new program or higher level of service on K-12 school districts for the following activity:

- Informing a selected member of the staff of the following requirements prior to the interview whenever a suspected victim of child abuse or neglect is to be interviewed during school hours, on school premises, and has requested that a staff member of the school be present at the interview:

  > The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Penal Code section 11167.5. A staff member

selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school.

(D) Employee Records

Penal Code Section 11166.5:

Penal Code section 11166.5, [56] subdivision (a), as pled, follows, in pertinent part:

> (a) On and after January 1, 1985, any mandated reporter as specified in Section 11165.7, with the exception of child visitation monitors, prior to commencing his or her employment, and as a prerequisite to that employment, shall sign a statement on a form provided to him or her by his or her employer to the effect that he or she has knowledge of the provisions of Section 11166 and will comply with those provisions. The statement shall inform the employee that he or she is a mandated reporter and inform the employee of his or her reporting obligations under Section 11166. The employer shall provide a copy of Sections 11165.7 and 11166 to the employee.[57]
>
> ¶…¶
>
> The signed statements shall be retained by the employer or the court [regarding child visitation monitors], as the case may be. The cost of printing, distribution, and filing of these statements shall be borne by the employer or the court.
>
> This subdivision is not applicable to persons employed by public or private youth centers, youth recreation programs, and youth organizations as members of the support staff or maintenance staff and who do not work with, observe, or have knowledge of children as part of their official duties.

Subdivisions (b) through (d) are specific to the state, or concern court-appointed child visitation monitors, and are not applicable to the test claim allegations.

The claimant alleges that the code section requires school districts "[t]o obtain signed statements from its mandated reporters, on district forms, prior to commencing employment with the district, and as a prerequisite to that employment, to the effect that he or she has knowledge of

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[56] Added by Statutes 1984, chapter 1718, and amended by Statutes 1985, chapters 464 and 1598, Statutes 1986, chapter 248, Statutes 1987, chapter 1459, Statutes 1990, chapter 931, Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 1993, chapter 510, Statutes 1996, chapter 1081, Statutes 2000, chapter 916, and Statutes 2001, chapter 133 (oper. Jul. 31, 2001.)

[57] The amendment by Statutes 2000, chapter 916 removed a detailed statement of the content Penal Code section 11166 that was to be included in the form provided by the employer – and instead provides more generically that "The statement shall inform the employee that he or she is a mandated reporter and inform the employee of his or her reporting obligations under Section 11166." Staff finds that the essential content requirements for the form remain the same.

In addition, Statutes 2000, chapter 916 first added the requirement that "The employer shall provide a copy of Sections 11165.7 and 11166 to the employee."

his or her child abuse and neglect reporting requirements and their agreement to perform those duties."

DSS argues that the claimant has not offered "any evidence that it was necessary to modify employment forms or that employment forms were so modified." Staff notes that determining whether a statute or executive order constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution is a pure question of law.[58] A properly filed test claim alleging a new program or higher level of service was mandated by statute(s) or executive order(s), including declarations that the threshold level of costs mandated by the state were imposed pursuant to Government Code sections 17514 and 17564, is generally sufficient for the Commission to reach a legal conclusion on the merits.

Staff finds that the basic requirements of section 11166.5, subdivision (a) were first added to law by Statutes 1984, chapter 1718. The law affects all employers—both public and private—of what are now termed "mandated reporters." Currently, the list of mandated reporters includes a wide variety of professions, designed to encompass nearly anyone who may come into contact with children, or otherwise may have knowledge of suspected child abuse and neglect, through the course of their work. Just a few examples from this list: essentially all medical and counseling professionals, including interns; all clergy and those that keep their records; any licensee, administrator, or employee of a licensed community care or child day care facility; and commercial film and photographic print processors and their employees. Such individuals may be employed by diverse private non-profit or for-profit employers including medical groups, hospitals, churches, synagogues and other places of worship, small in-home daycares as well as large childcare centers, and any retail store with a photo lab.

The California Supreme Court in *County of Los Angeles v. State of California, supra,* found that "new program or higher level of service" addressed "programs that carry out the governmental function of providing services 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."[59] In *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545-1546, the court applied the reasoning to a claim for mandate reimbursement for elevator safety regulations that applied to all public and private entities.

> County acknowledges the elevator safety regulations apply to all elevators, not just those which are publicly owned. FN4 As these regulations do not impose a "unique requirement" on local governments, they do not meet the second definition of "program" established by *Los Angeles.*
>
> FN4. An affidavit submitted by State in support of its motion for summary judgment established that 92.1 percent of the elevators subject to these regulations are privately owned, while only 7.9 percent are publicly owned or operated.
>
> Nor is the first definition of "program" met. ¶ …¶ In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not

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[58] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[59] *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56.

> whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." FN5
>
> FN5. This case is therefore unlike *Lucia Mar, supra,* in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835, 244 Cal.Rptr. 677, 750 P.2d 318) and *Carmel Valley, supra,* where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537, 234 Cal.Rptr. 795.)

In this case, the statutory requirements apply equally to public and private employers of any individuals described as mandated reporters within CANRA. The alternative prong of demonstrating that the law carries out the governmental function of providing a service to the public is also not met. In this case, staff finds that informing newly-employed mandated reporters of their legal obligations to report suspected child abuse or neglect is not inherently a *governmental function* of providing service to the public, any more than providing safe elevators.

The claimant, in comments filed November 7, 2007, argues that this is not a law of general application, and "[t]he mandated reporting system is the basis of a distinctly governmental and penal system of investigation of child abuse, which is not within the purview of private persons or entities." While the investigation and prosecution of alleged child abuse and neglect is certainly the role of governmental entities, defined mandated reporters have not been confined to the realm of government. Rather the role has been extended to a vast and diverse group of individuals who, through their work, may encounter suspected child abuse and neglect. Claimant offers no factual evidence to support the proposition that "the absolute number of persons who are mandated reporters would probably be government employees as the super majority."[60] Penal Code section 11166.5 places a duty on all employers of mandated reporters listed in section 11165.7—this duty applies whether the employer is private or public. Therefore, staff finds that Penal Code section 11166.5 does not mandate a new program or higher level of service on school districts.

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

Reimbursement under article XIII B, section 6 is required only if any new program or higher level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute or executive order that mandates a new program or higher level of service. The claimant alleges costs in excess of $200, the minimum standard at the time of filing the test claim, pursuant to Government Code section 17564. A declaration of costs incurred was also submitted by the San Jose Unified School District.[61] Government Code section 17556 provides exceptions to finding costs mandated by the state. Staff finds that none have applicability to deny this test claim. Thus, for the activities listed in the conclusion below, staff finds accordingly that the new program or higher level of service also imposes costs mandated

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[60] Claimant Comments, November 7, 2007, page 3.

[61] Test Claim Filing, exhibit 1.

by the state within the meaning of Government Code section 17514, and none of the exceptions of Government Code section 17556 apply.

CONCLUSION

Staff concludes that Penal Code sections 11165.7 and 11174.3, as added or amended by Statutes 1987, chapters 640 and 1459, Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 1998, chapter 311, Statutes 2000, chapter 916, and Statutes 2001, chapters 133 and 754; mandate new programs or higher levels of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities for K-12 school districts:

- Reporting to the State Department of Education the reasons why training is not provided, whenever school districts do not train their employees specified in Penal Code section 11165.7, subdivision (a), in the duties of mandated reporters under the child abuse reporting laws. (Pen. Code, § 11165.7, subd. (d).)[62]
- Informing a selected member of the staff of the following requirements prior to the interview whenever a suspected victim of child abuse or neglect is to be interviewed during school hours, on school premises, and has requested that a staff member of the school be present at the interview:

  > The purpose of the staff person's presence at the interview is to lend support to the child and enable him or her to be as comfortable as possible. However, the member of the staff so elected shall not participate in the interview. The member of the staff so present shall not discuss the facts or circumstances of the case with the child. The member of the staff so present, including, but not limited to, a volunteer aide, is subject to the confidentiality requirements of this article, a violation of which is punishable as specified in Penal Code section 11167.5. A staff member selected by a child may decline the request to be present at the interview. If the staff person selected agrees to be present, the interview shall be held at a time during school hours when it does not involve an expense to the school. (Pen. Code, § 11174.3, subd. (a).)[63]

Staff concludes that any test claim statutes, executive orders and allegations not specifically approved above, do not mandate a new program or higher level of service, or impose costs mandated by the state under article XIII B, section 6.

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[62] Added by Statutes 1987, chapter 1459; amended by Statutes 1991, chapter 132, Statutes 1992, chapter 459, Statutes 2000, chapter 916, Statutes 2001, chapter 133 (urgency), and Statutes 2001, chapter 754. Reimbursement for this activity begins July 1, 2000, based on the test claim filing date; the reimbursable activity was not substantively altered by later operative amendments.

[63] Added by Statutes 1987, chapter 640, and amended by Statutes 1998, chapter 311, Statutes 2000, chapter 916. Reimbursement for this activity begins July 1, 2000, based on the test claim filing date; the reimbursable activity was not substantively altered by later operative amendments.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis to partially approve this test claim.