Hearing Date: December 7, 2012
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ITEM 3

TEST CLAIM
FINAL STAFF ANALYSIS

AND

PROPOSED STATEMENT OF DECISION

Education Code Sections 11500, 11501, 11502, 11503, 11504, 11506, 49091.10, 49091.14, 51101, 51101.1

Statutes 1990, Chapter 1400; Statutes 1998, Chapter 864; Statutes 1998, Chapter 1031; Statutes 2001, Chapter 749; and Statutes 2002, Chapter 1037

Parental Involvement Programs

03-TC-16

San Jose Unified School District, Claimant

Table of Contents

SixTen and Associates
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September 25, 2003

Certified Mail : 7001 0360 0000 5999 8942

Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: TEST CLAIM OF San Jose Unified School District
Statutes of 2002/Chapter 1037
Parental Involvement Programs

Dear Ms. Higashi:

Enclosed are the original and seven copies of the San Jose Unified School District test claim for the above referenced mandate.

I have been appointed by the District as its representative for the test claim. The District requests that all correspondence originating from your office and documents subject to service by other parties be directed to me, with copies to:

Patrick Day,
Director of Special Projects
San Jose Unified School District
855 Lenzen Street, Suite 1060
San Jose, California 95814

The Commission regulations provide for an informal conference of the interested parties

within thirty days. If this meeting is deemed necessary, I request that it be conducted in conjunction with a regularly scheduled Commission hearing.

Sincerely,

For Keith B. Petersen

C: Patrick Day, Director of Special Projects
San Jose Unified School District

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 2 (1/91)

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TEST CLAIM FORM

Claim No. 03-TC-16

Local Agency or School District Submitting Claim

SAN JOSE UNIFIED SCHOOL DISTRICT

Contact Person	Telephone Number
Keith B. Petersen, President SixTen and Associates	Voice: 858-514-8605 Fax: 858-514-8645

Claimant Address

San Jose Unified School District
855 Lenzen Avenue Lenzen Avenue
San Jose, California 95126-2736

Representative Organization to be Notified

Dr. Carol Berg, Consultant, Education Mandated Cost Network c/o School Services of California 1121 L Street, Suite 1060 Sacramento, CA 95814	Voice: 916-446-7517 Fax: 916-446-2011

This claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIII B of the California Constitution. This test claim is filed pursuant to section 17551 (a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code citation(s) within the chaptered bill, if applicable.

	Parental Involvement Programs	
Chapter 1037, Statutes of 2002	Education Code Section 11500	Education Code Section 11506
Chapter 749, Statutes of 2001	Education Code Section 11501	Education Code Section 49091.10
Chapter 1031, Statutes of 1998	Education Code Section 11502	Education Code Section 40091.14
Chapter 864, Statutes of 1998	Education Code Section 11503	Education Code Section 51101
Chapter 1400, Statutes of 1990	Education Code Section 11504	Education Code Section 51101.1

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

Name and Title of Authorized Representative	Telephone No.
Patrick Day, Director of Special Projects San Jose Unified School District	Voice: (408) 535-6142 Fax: (408) 535-2317

Signature of Authorized Representative	Date
X	September 24, 2003

Claim Prepared By:
Keith B. Petersen
SixTen and Associates
5252 Balboa Avenue, Suite 807
San Diego, CA 92117
Voice: (858) 514-8605

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

Test Claim of:	
	No. CSM _____
San Jose Unified School District,	
	Chapter 1037, Statutes of 2002
	Chapter 749, Statutes of 2001
	Chapter 1031, Statutes of 1998
	Chapter 864, Statutes of 1998
	Chapter 1400, Statutes of 1990
Test Claimant.	
	Education Code Section 11500, 11501, 11502, 11503, 11504, 11506, 49091.10, 49091.14, 51101 and 51101.1
	Parental Involvement Programs
	TEST CLAIM FILING

PART 1. AUTHORITY FOR THE CLAIM

The Commission on State Mandates has the authority pursuant to Government Code section 17551(a) to "...hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution." San Jose Unified School District is a "school district" as defined in

Government Code section 17519.[1]

PART II. LEGISLATIVE HISTORY OF THE CLAIM

This test claim alleges mandated costs reimbursable by the state for school districts and county offices of education to adopt and implement policies and procedures to encourage the involvement of parents and guardians in the education of their children.

SECTION 1. LEGISLATIVE HISTORY PRIOR TO JANUARY 1, 1975

Prior to January 1, 1975, there were no statutes, codes, or regulations which required school districts to adopt or implement policies and procedures concerning parental involvement as set forth in this test claim.

SECTION 2. LEGISLATIVE HISTORY AFTER DECEMBER 31, 1974

Chapter 1400, Statutes of 1990, Section 1, added Chapter 16, "Programs to Encourage Parental Involvement", to Part 7, Division 1 of Part 1 of the Education Code, Sections 11500 through 11506.

Education Code Section 11500[2] states the findings and declarations of the

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[1] Government Code Section 17519, as added by Chapter 1459/84:

"School District" means any school district, community college district, or county superintendent of schools."

[2] Education Code Section 11500, added by Chapter 1400, Statutes of 1990, Section 1:

"The Legislature hereby finds and declares all of the following:
(a) Despite a substantial increase in school funding over the last five years, a significant percentage of the school-aged population, particularly in large urban areas, is

Legislature. Subdivision (a) provides that despite a substantial increase in school funding over the last five years, a significant percentage of the school-aged population, particularly in large urban areas, is learning well below the statewide average and is making only marginal progress at best. Subdivision (b) provides that parental involvement and support in the education of children is an integral part of improving academic achievement. Educational research has established that properly constructed parent involvement programs can play an important and effective role in the participation of parents in their children's schools and in raising pupil achievement levels. Subdivision (c) provides that the federal government has recognized the critical role of parents in the educational process and now mandates parental involvement programs as a condition of eligibility for funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297).

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learning well below the statewide average and is making only marginal progress at best.

(b) Parental involvement and support in the education of children is an integral part of improving academic achievement. Educational research has established that properly constructed parent involvement programs can play an important and effective role in the participation of parents in their children's schools and in raising pupil achievement levels.

(c) The federal government has recognized the critical role of parents in the educational process and now mandates parental involvement programs as a condition of eligibility for funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297).

(d) The State Board of Education has also adopted a policy urging the creation of parent involvement programs in all schools.

(e) California's School Improvement Program has historically maintained parent involvement as one of its component parts.

(f) Research and experience have demonstrated that these programs succeed only when certain components are made part of the program."

Subdivision (d) provides that the State Board of Education has also adopted a policy urging the creation of parent involvement programs in all schools. Subdivision (e) provides that California's School Improvement Program has historically maintained parent involvement as one of its component parts and subdivision (f) provides that research and experience have demonstrated that these programs succeed only when certain components are made part of the program.

Section 11501[3] states the intent of the Legislature in enacting the chapter to ensure that parent involvement programs are properly designed and implemented and to provide a focus and structure for these programs based on prior experience and research while maintaining sufficient local flexibility to design a program that best meets the needs of the local community.

Section 11502[4] states the following purposes and goals for school districts for

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[3] Education Code Section 11501, added by Chapter 1400, Statutes of 1990, Section 1:

"It is the intent of the Legislature in enacting this chapter to ensure that parent involvement programs are properly designed and implemented and to provide a focus and structure for these programs based on prior experience and research while maintaining sufficient local flexibility to design a program that best meets the needs of the local community."

[4] Education Code Section 11502, added by Chapter 1400, Statutes of 1990, Section 1:

"It is the purpose and goal of this chapter to do all of the following:
(a) To engage parents positively in their children's education by helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.
(b) To inform parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to

parental involvement:

(a) Helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.

(b) Informing parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.

(c) Building consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

(d) Training teachers and administrators to communicate effectively with parents.

(e) Integrating parent involvement programs, including compliance with this chapter, into the school's master plan for academic accountability.

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improve their children's academic success and to assist their children in learning at home.

(c) To build consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

(d) To train teachers and administrators to communicate effectively with parents.

(e) To integrate parent involvement programs, including compliance with this chapter, into the school's master plan for academic accountability."

Section 11503[5] requires the governing board of each school district to establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-290). That program shall contain at least the following elements:

(a) Procedures to ensure that parents are consulted and participate in the

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[5] Education Code Section 11503, added by Chapter 1400, Statutes of 1990, Section 1:

"The governing board of each school district shall establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-290). That program shall contain at least the following elements:

(a) Procedures to ensure that parents are consulted and participate in the planning, design, implementation, and evaluation of the program.

(b) Regular and periodic programs throughout the school year that provide for training, instruction, and information on all of the following:

(1) Parental ability to directly affect the success of their children's learning through the support they give their children at home and at school.

(2) Home activities, strategies, and materials that can be used to assist and enhance the learning of children both at home and at school.

(3) Parenting skills that assist parents in understanding the development needs of their children and in understanding how to provide positive discipline for, and build healthy relationships with, their children.

(4) Parental ability to develop consistent and effective communications between the school and the parents concerning the progress of the children in school and concerning school programs.

(c) An annual statement identifying specific objectives of the program.

(d) An annual review and assessment of the program's progress in meeting those objectives. Parents shall be made aware of the existence of this review and assessment through regular school communications mechanisms and shall be given a copy upon the parent's request."

planning, design, implementation, and evaluation of the program.

(b) Regular and periodic programs throughout the school year that provide for training, instruction, and information on all of the following:

(1) Parental ability to directly affect the success of their children's learning through the support they give their children at home and at school.

(2) Home activities, strategies, and materials that can be used to assist and enhance the learning of children both at home and at school.

(3) Parenting skills that assist parents in understanding the development needs of their children and in understanding how to provide positive discipline for, and build healthy relationships with, their children.

(4) Parental ability to develop consistent and effective communications between the school and the parents concerning the progress of the children in school and concerning school programs.

(c) An annual statement identifying specific objectives of the program.

(d) An annual review and assessment of the program's progress in meeting those objectives. Parents shall be made aware of the existence of this review and assessment through regular school communications mechanisms and shall be given a copy upon the parent's request.

Section 11504[6] requires the governing board of each school district to adopt a policy on parent involvement, consistent with the goals set forth in Section 11502, for those schools not receiving funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988.

Section 11506[7] provides that schools which receive federal funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P. L. 100-297), and receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29, may receive funds for school improvement plans pursuant to

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[6] Education Code Section 11504, added by Chapter 1400, Statutes of 1990, Section 1:

"The governing board of each school district shall adopt a policy on parent involvement, consistent with the purposes and goals set forth in Section 11502, for each school not governed by Section 11503."

[7] Education Code Section 11506, added by Chapter 1400, Statutes of 1990, Section 1:

"Schools that receive federal funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P. L. 100-297), and receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29, may receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29 only if they comply with this chapter."

Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29 only if they comply with this chapter.

Chapter 864, Statutes of 1998, Section 2, added Education Code Section 51101[8].

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[8] Education Code Section 51101, added by Chapter 864, Statutes of 1998, Section 2:

"(a) Except as provided in subdivision (c), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. Although volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate

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school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a bi-annual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

Subdivision (a) provides that, except as provided in subdivision (c), the parents and guardians of pupils enrolled in public schools have the right, and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. Although

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(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

(c) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction."

volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a bi-annual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

Subdivision (b) requires each school in the district to work together with parents and guardians in a mutually supportive and respectful partnership to help their children succeed in school. Subdivision (b) also requires each governing board of a school district to develop jointly with parents and guardians, and adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may

help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

Chapter 1031, Statutes of 1998, Section 2, added Education Code Section

49091.10[9]. Subdivision (a) requires each classroom instructor to compile and store all primary supplemental instructional materials, including textbooks, teacher's manuals, films, tapes, and software and to make these materials available for inspection by a parent or guardian. The governing board is required to develop and adopt procedures regarding timely inspections, receiving inspection requests, scheduling inspections and supervision during the inspection of these materials. Subdivision (b) requires school districts to arrange for observation of classes and activities upon request by a parent or guardian. The governing board is also required to adopt procedures regarding parent and guardian observations, reviewing requests from parents or guardians to observe classes and/or activities, scheduling observations with the parent or guardian and the classroom instructor or activity director and admission of the parent or guardian to the school site.

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[9] Education Code Section 49091.10, added by Chapter 1031, Statutes of 1998, Section 2:

"(a) All primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, tapes, and software shall be compiled and stored by the classroom instructor and made available promptly for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

(b) A parent or guardian has the right to observe instruction and other school activities that involve his or her child in accordance with procedures determined by the governing board of the school district to ensure the safety of pupils and school personnel and to prevent undue interference with instruction or harassment of school personnel. Reasonable accommodation of parents and guardians shall be considered by the governing board of the school district. Upon written request by the parent or guardian, school officials shall arrange for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe and in accordance with procedures determined by the governing board of the school district."

Chapter 1031, Statutes of 1998, Section 2, added Education Code Section 49091.14[10] which requires school districts to compile the curriculum, including titles, descriptions, and instructional aims, for every course offered by the school district in a prospectus at least once each year and to make the prospectus available for review at each school site. School districts are required to reproduce the prospectus and make it available upon request and may charge the requestor an amount not to exceed the cost of duplication.

Chapter 749, Statutes of 2001, Section 1, amended Education Code Section 51101[11] to add a new subdivision (c) which provides that all schools who participate in

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[10] Education Code Section 49091.14, added by Chapter 1031, Statutes of 1998, Section 2:

"The curriculum, including titles, descriptions, and instructional aims of every course offered by a public school, shall be compiled at least once annually in a prospectus. Each schoolsite shall make its prospectus available for review upon request. When requested, the prospectus shall be reproduced and made available. School officials may charge for the prospectus an amount not to exceed the cost of duplication."

[11] Education Code Section 51101, added by Chapter 864, Statutes of 1998, Section 1, as amended by Chapter 749, Statutes of 2001, Section 1:

"(c) All schools that participate in the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 and that maintain kindergarten or any of grades 1 to 5, inclusive, shall jointly develop with parents or guardians for all children enrolled at that schoolsite, a school-parent compact pursuant to Section 6319 of Title 20 of the United States Code.

(ed) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction."

the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 and that maintain kindergarten or any of grades 1 to 5, inclusive, shall jointly develop with parents or guardians for all children enrolled at that schoolsite, a school-parent compact pursuant to Section 6319 of Title 20 of the United States Code. Former subdivision (c) was relettered as subdivision (d).

Chapter 1037, Statutes of 2002, Section 2, amended Education Code Section 51101[12], subdivision (a)(12) to include disciplinary rules and procedures and promotion

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[12] Education Code Section 51101, added by Chapter 864, Statutes of 1998, Section 2, as amended by Chapter 1037, Statutes of 2002, Section 2:

"(a) Except as provided in subdivision (d), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

...

(12) To be informed in advance about school rules, including disciplinary rules and procedures pursuant to Section 35291, attendance, and promotion policies pursuant to Section 48070.5, dress codes, and procedures for visiting the school.

...

(16) To be notified, as early in the school year as practicable pursuant to Section 48070.5, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils, including those parents and guardians whose primary language is not English, shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and

policies to these items requiring notice in advance; to add a new subdivision (a)(16) which requires school districts to notify parents or guardians, as early in the school year as practicable if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child; and subdivision (b) was amended to specifically include parents whose primary language is not English.

Chapter 1037, Statutes of 2002, Section 3, added Education Code Section 51101.1[13]. Subdivision (a) requires school districts to take all reasonable steps to

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social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:...."

[13] Education Code Section 51101.1, as added by Chapter 1037, Statutes of 2002, Section 3:

"(a) A parent or guardian's lack of English fluency does not preclude a parent or guardian from exercising the rights guaranteed under this chapter. A school district shall take all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to Section 48985, of the rights and opportunities available to them pursuant to this section.

(b) Parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and as follows:

(1) To receive, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the English language development test.

(2) To be given any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) To participate in school and district advisory bodies in accordance with federal and state laws and regulations.

(4) To support their children's advancement toward literacy. School personnel shall encourage parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language. School districts are encouraged to make available, to the extent possible, surplus or undistributed instructional materials to parents and

ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to section 48985[14], of the rights and opportunities available to them pursuant to this section. Subdivision (b) provides that parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and, in addition, requires school districts to do the following:

(1) To inform parents and guardians of the results of their child's performance on standardized tests, including the English language development test.

(2) To provide any written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) To encourage parents and guardians to participate in school and district

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guardians, pursuant to subdivision (d) of Section 60510, in order to facilitate parental involvement in their children's education.

(5) To be informed, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

(c) A school with a substantial number of English learners is encouraged to establish parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled."

[14] Education Code Section 48985, added by Chapter 36, Statutes of 1977, Section 476, as amended by Chapter 219, Statutes of 1981, Section 2:

"When 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 through 12 speak a single primary language other than English, as determined from the census data submitted to the Department of Education pursuant to Section 52164 in the preceding year, all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being in English, be written in such primary language, and may be responded to either in English or the primary language."

advisory bodies.

(4) To encourage parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language.

(5) To inform parents and guardians about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

Subdivision (c) requires schools with a substantial number of English learners to establish parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of, and participation in, the educational programs in which their children are enrolled.

PART III. STATEMENT OF THE CLAIM

SECTION 1. COSTS MANDATED BY THE STATE

The Statutes and Education Code Sections referenced in this test claim result in school districts incurring costs mandated by the state, as defined in Government Code section 17514[15], by creating new state-mandated duties related to the uniquely

[15] Government Code section 17514, as added by Chapter 1459/84:

"Costs mandated by the state" means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution.

governmental function of providing services to the public and these statutes apply to school districts and do not apply generally to all residents and entities in the state.[16]

The new duties mandated by the state upon school districts and county offices of education require state reimbursement of the direct and indirect costs of labor, materials and supplies, data processing services and software, contracted services and consultants, equipment and capital assets, staff and student training and travel to implement the following activities:

A) Pursuant to Chapter 16 ("Programs to Encourage Parental Involvement"), commencing with Education Code Section 11500, Chapter 6.6 ("The Education Empowerment Act of 1998"), commencing with Education Code Section 49091.10, and Chapter 1.5 ("Parental Involvement"), commencing with Education Code Section 51100, developing, adopting and implementing policies and procedures, and periodically updating those policies and procedures, to encourage the involvement of parents and guardians in the education of their children.

B) Pursuant to Education Code Section 11502, subdivision (a), engaging parents

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[16] Public schools are a Article XIII B, Section 6 "program," pursuant to Long Beach Unified School District v. State of California, (1990) 225 Cal.App.3d 155, 172; 275 Cal.Rptr. 449:

"In the instant case, although numerous private schools exist, education in our society is considered to be a peculiarly government function. (Cf. Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal.App.3d at p.537) Further, public education is administered by local agencies to provide service to the public. Thus public education constitutes a 'program' within the meaning of Section 6."

positively in their children's education by helping parents develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.

C) Pursuant to Education Code Section 11502, subdivision (b), informing parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.

D) Pursuant to Education Code Section 11502, subdivision (c), building consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

E) Pursuant to Education Code Section 11502, subdivision (d), training teachers and administrators to communicate effectively with parents.

F) Pursuant to Education Code Section 11502, subdivision (e), integrating parent involvement programs into the school's master plan for academic accountability.

G) Pursuant to Education Code Section 11504, adopting a policy on parent involvement, consistent with the purposes and goals set forth in Section 11502, for each school not governed by Section 11503.

H) Pursuant to Education Code Section 49091.10, subdivision (a), making all primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, tapes, and software available for inspection by a parent or guardian in a reasonable timeframe or in accordance with

procedures determined by the governing board of the school district.

I) Pursuant to Education Code Section 49091.10, subdivision (b), upon written request by a parent or guardian, arranging for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe and in accordance with procedures determined by the governing board of the school district.

J) Pursuant to Education Code Section 49091.14, compiling in a prospectus, at least once annually, the curriculum, including titles, descriptions, and instructional aims, of every course offered by each school in the district; making that prospectus available for review upon request; and reproducing and making copies available

K) Pursuant to Education Code Section 51101, subdivision (a), informing parents and guardians of enrolled pupils and, where appropriate, to allow participation by parents and guardians, as follows:

(1) Allowing observation of the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) For the teacher and the principal to meet with the parent or guardian within a reasonable time after a request for such a meeting.

(3) Supervising parents and guardians who volunteer their time and resources for the improvement of school facilities and school programs, including, but

not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher.

(4) Notifying parents and guardians on a timely basis if their child is absent from school without permission.

(5) Providing to parents and guardians the results of their child's performance on standardized tests and statewide tests and providing information on the performance of the school that their child attends on standardized statewide tests.

(6) Responding to requests of parents and guardians that their child be enrolled in a particular school.

(7) To provide a school environment that is safe and supportive of learning.

(8) Allowing parents and guardians to examine the curriculum materials of the class or classes in which their child is enrolled.

(9) Informing parents and guardians of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) Providing parents and guardians with access to the school records of their child.

(11) Providing parents and guardians with information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) Informing parents and guardians, in advance, about school rules, including

disciplinary rules and procedures pursuant to Section 35291, attendance, retention, and promotion policies pursuant to Section 48070.5, dress codes, and procedures for visiting the school.

(13) Providing parents and guardians with information about any psychological testing the school does involving their child and to cease such testing when they deny permission to give the test.

(14) Scheduling and implementing a biannual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions.

(15) Responding to parent's and guardian's questions about anything in their child's record that they may feel is inaccurate or misleading or is an invasion of privacy

(16) Notifying parents and guardians as early in the school year as practicable pursuant to Section 48070.5, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.

L) Pursuant to Education Code Section 51101, subdivision (b), working together with parents and guardians in a mutually supportive and respectful partnership to help their children succeed in school

M) Pursuant to Education Code Section 51101, subdivision (b), developing, jointly with parents and guardians, and adopting a policy that outlines how parents or

guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(a) Monitoring attendance of their children.

(b) Ensuring that homework is completed and turned in on a timely basis.

(c) Participation of the children in extracurricular activities.

(d) Monitoring and regulating the television viewed by their children.

(e) Working with their children at home in learning activities that extend learning in the classroom.

(f) Volunteering in their children's classrooms, or for other activities at the school.

(g) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

N) Pursuant to Education Code Section 51101.1, subdivision (a), taking all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to Section 48985, of the rights and opportunities available to them pursuant to the section.

O) Pursuant to Education Code Section 51101.1, subdivision (b), ensuring the participation of parents and guardians of English learners pursuant to Section 51101 as follows:

(1) Providing, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the English language development test.

(2) Giving any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) Allowing participation in school and district advisory bodies in accordance with federal and state laws and regulations.

(4) Encouraging parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language.

(5) Informing those parents and guardians, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs,

accountability measures, and school improvement efforts.

P) Pursuant to Education Code Section 51101.1, subdivision (c), establishing parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled when a school has a substantial number of English learners.

SECTION 2. EXCEPTIONS TO MANDATE REIMBURSEMENT

None of the Government Code Section 17556[17] statutory exceptions to a finding

[17] Government Code section 17556, as last amended by Chapter 589, Statutes of 1989:

"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 that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

(b) The statute or executive order affirmed for the state that which had been declared existing law or regulation by action of the courts.

(c) The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

(d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

(e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

(f) The statute or executive order imposed duties which were expressly included

of costs mandated by the state apply to this test claim. Note, that to the extent school districts may have previously performed functions similar to those mandated by the referenced code sections, such efforts did not establish a preexisting duty that would relieve the state of its constitutional requirement to later reimburse school districts when these activities became mandated.[18]

SECTION 3. FUNDING PROVIDED FOR THE MANDATED PROGRAM

Schools may receive federal funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P. L. 100-297), and may receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29, and may receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29 if they comply with the requirements of Chapter 16.

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in a ballot measure approved by the voters in a statewide election.

(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."

[18] Government Code section 17565, added by Chapter 879, Statutes of 1986:

"If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

The No Child Left Behind Act of 2001, Public Law 107-110 (January 8, 2002), section 1118, is a possible source of funding for a portion of the activities required herein. Education Code Section 49091.14 allows district to charge an amount not to exceed the costs of duplication of prospectus.

To the extent any funds are actually appropriated and received, they would reduce the costs claimed herein.

PART IV. ADDITIONAL CLAIM REQUIREMENTS

The following elements of this claim are provided pursuant to Section 1183, Title 2, California Code of Regulations:

Exhibit 1: Declaration of Don Iglesias
Deputy Superintendent of Instruction
San Jose Unified School District

Exhibit 2: Copies of Statutes Cited

Chapter 1037, Statutes of 2002

Chapter 749, Statutes of 2001

Chapter 1031, Statutes of 1998

Chapter 864, Statutes of 1998

Chapter 1400, Statutes of 1990

Exhibit 3: Copies of Code Sections Cited

Education Code Section 11500

Education Code Section 11501

Education Code Section 11502

Education Code Section 11503

Education Code Section 11504

Education Code Section 11506

Education Code Section 49091.10

Education Code Section 49091.14

Education Code Section 51101

Education Code Section 51101.1

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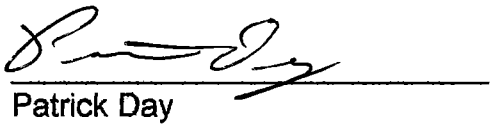
PART V. CERTIFICATION

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 22, 2003, at San Jose, California by:

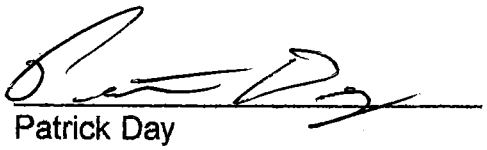


Patrick Day
Director of Special Projects
San Jose Unified School District

Voice: (408) 535-6142
Fax: (408) 535-2317

PART VI. APPOINTMENT OF REPRESENTATIVE

San Jose School District appoints Keith B. Petersen, SixTen and Associates, as its representative for this test claim.



Patrick Day
Director of Special Projects
San Jose Unified School District

Sept. 22, 2003
Date

EXHIBIT 1
DECLARATION OF DON IGLESIAS

DECLARATION OF DON IGLESIAS

San Jose Unified School District

Test Claim of San Jose Unified School District

COSM_____

Chapter 1037, Statutes of 2002
Chapter 749, Statutes of 2001
Chapter 1031, Statutes of 1998
Chapter 864, Statutes of 1998
Chapter 1400, Statutes of 1990

Education Code Section 11500	Education Code Section 11506
Education Code Section 11501	Education Code Section 49091.10
Education Code Section 11502	Education Code Section 49091.14
Education Code Section 11503	Education Code Section 51101
Education Code Section 11504	Education Code Section 51101.1

Parental Involvement Programs

I, Don Iglesias, Deputy Superintendent of Instruction, San Jose Unified School District, make the following declaration and statement.

In my capacity as Deputy Superintendent of Instruction, I am responsible for implementing programs intended to promote parental involvement in the district. I am familiar with the requirements of the Education Code Sections above. These Education Code Sections require the San Jose Unified School District to implement the following activities:

A) Pursuant to Chapter 16 ("Programs to Encourage Parental Involvement"), commencing with Education Code Section 11500, Chapter 6.6 ("The Education Empowerment Act of 1998"), commencing with Education Code Section 49091.10, and Chapter 1.5 ("Parental Involvement"), commencing with Education Code Section 51100, developing, adopting and implementing policies and

procedures, and periodically updating those policies and procedures, to encourage the involvement of parents and guardians in the education of their children.

B) Pursuant to Education Code Section 11502, subdivision (a), engaging parents positively in their children's education by helping parents develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.

C) Pursuant to Education Code Section 11502, subdivision (b), informing parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.

D) Pursuant to Education Code Section 11502, subdivision (c), building consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

E) Pursuant to Education Code Section 11502, subdivision (d), training teachers and administrators to communicate effectively with parents.

F) Pursuant to Education Code Section 11502, subdivision (e), integrating parent involvement programs into the school's master plan for academic accountability.

G) Pursuant to Education Code Section 11504, adopting a policy on parent involvement, consistent with the purposes and goals set forth in Section 11502,

for each school not governed by Section 11503.

H) Pursuant to Education Code Section 49091.10, subdivision (a), making all primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, tapes, and software available for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

I) Pursuant to Education Code Section 49091.10, subdivision (b), upon written request by a parent or guardian, arranging for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe and in accordance with procedures determined by the governing board of the school district.

J) Pursuant to Education Code Section 49091.14, compiling in a prospectus, at least once annually, the curriculum, including titles, descriptions, and instructional aims, of every course offered by each school in the district; making that prospectus available for review upon request; and reproducing and making copies available

K) Pursuant to Education Code Section 51101, subdivision (a), informing parents and guardians of enrolled pupils and, where appropriate, to allow participation by parents and guardians, as follows:

(1) Allowing observation of the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will

be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) For the teacher and the principal to meet with the parent or guardian within a reasonable time after a request for such a meeting.

(3) Supervising parents and guardians who volunteer their time and resources for the improvement of school facilities and school programs, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher.

(4) Notifying parents and guardians on a timely basis if their child is absent from school without permission.

(5) Providing to parents and guardians the results of their child's performance on standardized tests and statewide tests and providing information on the performance of the school that their child attends on standardized statewide tests.

(6) Responding to requests of parents and guardians that their child be enrolled in a particular school.

(7) To provide a school environment that is safe and supportive of learning.

(8) Allowing parents and guardians to examine the curriculum materials of the class or classes in which their child is enrolled.

(9) Informing parents and guardians of their child's progress in school and of the appropriate school personnel whom they should contact if problems

arise with their child.

(10) Providing parents and guardians with access to the school records of their child.

(11) Providing parents and guardians with information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) Informing parents and guardians, in advance, about school rules, including disciplinary rules and procedures pursuant to Section 35291, attendance, retention, and promotion policies pursuant to Section 48070.5, dress codes, and procedures for visiting the school.

(13) Providing parents and guardians with information about any psychological testing the school does involving their child and to cease such testing when they deny permission to give the test.

(14) Scheduling and implementing a biannual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions.

(15) Responding to parent's and guardian's questions about anything in their child's record that they may feel is inaccurate or misleading or is an invasion of privacy

(16) Notifying parents and guardians as early in the school year as practicable pursuant to Section 48070.5, if their child is identified as being at risk of

retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.

L) Pursuant to Education Code Section 51101, subdivision (b), working together with parents and guardians in a mutually supportive and respectful partnership to help their children succeed in school

M) Pursuant to Education Code Section 51101, subdivision (b), developing, jointly with parents and guardians, and adopting a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(a) Monitoring attendance of their children.

(b) Ensuring that homework is completed and turned in on a timely basis.

(c) Participation of the children in extracurricular activities.

(d) Monitoring and regulating the television viewed by their children.

(e) Working with their children at home in learning activities that extend learning in the classroom.

(f) Volunteering in their children's classrooms, or for other activities at the school.

(g) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

N) Pursuant to Education Code Section 51101.1, subdivision (a), taking all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to Section 48985, of the rights and opportunities available to them pursuant to the section.

O) Pursuant to Education Code Section 51101.1, subdivision (b), ensuring the participation of parents and guardians of English learners pursuant to Section 51101 as follows:

(1) Providing, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the

English language development test.

(2) Giving any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) Allowing participation in school and district advisory bodies in accordance with federal and state laws and regulations.

(4) Encouraging parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language.

(5) Informing those parents and guardians, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

P) Pursuant to Education Code Section 51101.1, subdivision (c), establishing parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled when a school has a substantial number of English learners.

It is estimated that the District incurred more than $1,000 for the fiscal year of July 1, 2002 through June 30, 2003 to implement these new duties mandated by the state and for which it cannot otherwise obtain reimbursement.

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

of the State of California that the foregoing is true and correct, except where stated upon information and belief and where so stated I declare that I believe them to be true.

EXECUTED this 22 day of September, 2003 in the City of San Jose, California.

Don Iglesias
Deputy Superintendent of Instruction
San Jose Unified School District

EXHIBIT 2
COPIES OF STATUTES CITED

CHAPTER 1400

An act to add Chapter 16 (commencing with Section 11500) to Part 7 of the Education Code, relating to education.

[Approved by Governor September 27, 1990. Filed with Secretary of State September 28, 1990.]

The people of the State of California do enact as follows:

SECTION 1. Chapter 16 (commencing with Section 11500) is added to Part 7 of the Education Code, to read:

CHAPTER 16. PROGRAMS TO ENCOURAGE PARENTAL INVOLVEMENT

11500. The Legislature hereby finds and declares all of the following:

(a) Despite a substantial increase in school funding over the last five years, a significant percentage of the school-aged population, particularly in large urban areas, is learning well below the statewide average and is making only marginal progress at best.

(b) Parental involvement and support in the education of children is an integral part of improving academic achievement. Educational research has established that properly constructed parent involvement programs can play an important and effective role in the participation of parents in their children's schools and in

raising pupil achievement levels.

(c) The federal government has recognized the critical role of parents in the educational process and now mandates parental involvement programs as a condition of eligibility for funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-297).

(d) The State Board of Education has also adopted a policy urging the creation of parent involvement programs in all schools.

(e) California's School Improvement Program has historically maintained parent involvement as one of its component parts.

(f) Research and experience have demonstrated that these programs succeed only when certain components are made part of the program.

11501. It is the intent of the Legislature in enacting this chapter to ensure that parent involvement programs are properly designed and implemented and to provide a focus and structure for these programs based on prior experience and research while maintaining sufficient local flexibility to design a program that best meets the needs of the local community.

11502. It is the purpose and goal of this chapter to do all of the following:

(a) To engage parents positively in their children's education by helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.

(b) To inform parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.

(c) To build consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

(d) To train teachers and administrators to communicate effectively with parents.

(e) To integrate parent involvement programs, including compliance with this chapter, into the school's master plan for academic accountability.

11503. The governing board of each school district shall establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100-290). That program shall contain at least the following elements:

(a) Procedures to ensure that parents are consulted and participate in the planning, design, implementation, and evaluation of the program.

(b) Regular and periodic programs throughout the school year that provide for training, instruction, and information on all of the

following:

(1) Parental ability to directly affect the success of their children's learning through the support they give their children at home and at school.

(2) Home activities, strategies, and materials that can be used to assist and enhance the learning of children both at home and at school.

(3) Parenting skills that assist parents in understanding the development needs of their children and in understanding how to provide positive discipline for, and build healthy relationships with, their children.

(4) Parental ability to develop consistent and effective communications between the school and the parents concerning the progress of the children in school and concerning school programs.

(c) An annual statement identifying specific objectives of the program.

(d) An annual review and assessment of the program's progress in meeting those objectives. Parents shall be made aware of the existence of this review and assessment through regular school communications mechanisms and shall be given a copy upon the parent's request.

11504. The governing board of each school district shall adopt a policy on parent involvement, consistent with the purposes and goals set forth in Section 11502, for each school not governed by Section 11503.

11505. To the extent permitted by federal law, a school district may contract with nonprofit organizations and agencies experienced in administering parent involvement programs to design or implement, or design and implement, a school's parent involvement program.

11506. Schools that receive federal funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P. L. 100-297), and receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29, may receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29 only if they comply with this chapter.

SEC. 2. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000),

reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SCHOOLS AND SCHOOL DISTRICTS—PROFESSIONAL DEVELOPMENT PROGRAMS—PARENTAL INVOLVEMENT

CHAPTER 864

A.B. No. 1665

AN ACT to amend Sections 44670.5 and 52870 of, and to add Chapter 1.5 (commencing with Section 51100) to Part 28 of, the Education Code, relating to education.

[Approved by Governor September 26, 1998.]

[Filed with Secretary of State September 28, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1665, Torlakson. Education: parental involvement.

(1) Existing law requires each school that establishes a school development plan and that receives funds for that purpose, or that chooses to use certain provisions of law, to have a single plan to strengthen subject matter and instruction, as specified. As a part of the plan, schools may provide time for professional development activities, for a total of not more than 8 days per year.

Existing law requires the plan to include professional development programs for personnel employed at the school and requires the professional development programs to include certain elements.

This bill would require the plan to describe opportunities for parents and guardians of pupils to participate in professional development programs.

(2) Existing law requires the governing board of each school district, at the beginning of the first semester or quarter of the regular school term, to notify parents or guardians of specified rights or responsibilities of the parents or guardians.

This bill would provide that parents or guardians of pupils enrolled in public schools have specified rights and should have specified opportunities with regard to the education of their children.

This bill would also provide that the parents and guardians of pupils have the responsibility to work together in a mutually supportive and respectful partnership with schools, and would require the governing board of a school district to adopt a policy developed jointly with parents and guardians that outlines that working relationship. The policy would be required to include certain elements.

(3) Existing law places various responsibilities on the State Department of Education and the State Board of Education, including, among other duties, the development and distribution of various guidelines pertaining to school programs.

This bill would, upon approval by the State Board of Education, require the State Department of Education to make materials that describe a comprehensive partnership at schools that involves parents and guardians of pupils in the public schools of California on or before December 31, 1999. The materials would be required to include the responsibilities of each parent or guardian, and of each teacher, principal, and other school personnel in fostering and participating in parent involvement activities and programs. The materials would be required to include a statement that parent participation in activities and programs shall only apply to the extent that the participation does not conflict with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

(4) Existing law provides that, if a school district and school participate in school-based program coordination, any schoolsite advisory committee may elect to designate the schoolsite council to function as that advisory committee for all purposes.

This bill would require that, if the governing board of a school district adopts a policy establishing a schoolwide decisionmaking body at each school to promote continuous improvement through a single planning process that coordinates federal and state programs and services, then that body may be designated as the single decisionmaking or coordinating body, if the composition of the body meets specified requirements.

(5) This bill, by placing new duties on school districts relating to parental involvement in the education process, would thereby impose a state-mandated local program.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 44670.5 of the Education Code is amended to read:

44670.5. (a) Each school that is receiving funds for the purposes of this article or that chooses to utilize the provisions of this article shall have a single plan to strengthen subject matter and instruction, consistent with rules and regulations adopted by the school district governing board. If a school develops or has developed a school plan pursuant to Article 3 (commencing with Section 52850) of Chapter 12 of Part 28 of the School–Based Program Coordination Act, the planning requirements of this article shall be met by including within that plan the requirements specified in Section 44670.9 and by meeting the requirements of Sections 44670.3 and * * * this section.

(b) If a school develops or has developed a school plan pursuant to the School–Based Pupil Motivation and Maintenance Program and Dropout Recovery Act, Article 7 (commencing with Section 54720) of Chapter 9 of Part 29, or any other state or federal categorical education program, the provision of that school plan shall be included within the plan to strengthen subject matter and instruction, developed pursuant to this article and, in so doing, the school shall be deemed to have complied with the requirements of those programs. The plans shall include professional development of the personnel employed at the school necessary to meet the requirements of the plan. * * * The plan shall also describe opportunities for parents to participate in professional development programs. The professional development programs shall also include all of the following:

(1) Provide opportunities for all school personnel and interested parents or guardians of pupils enrolled in the school to participate in ongoing staff development activities pursuant to the objectives specified in Section 44670.3.

(2) Be designed and implemented under the direction of * * * parents and guardians of pupils enrolled in the school, classroom teachers, other participating school personnel, including the school principal and one or more mentor teachers, and, as appropriate, other nonadministrative certificated personnel, including, but not limited to, counselors, librarians, and nurses, and, as appropriate, in consultation with resource agencies or consortia established pursuant to Article 2 (commencing with Section 44680), institutions of higher education, and subject matter projects established pursuant to this code. Classroom teachers selected by teachers shall comprise the majority of any group designated to design professional development activities for instructional personnel.

(3) Allow for diversity in professional development activities, including, but not limited to, study of theory and rationale, observation of demonstration lessons, practice opportunities for peer coaching, consultation, and feedback in the classroom setting, and systematic observation during visits to other classrooms or schools.

(4) Be conducted during time that is set aside for that purpose throughout the year, including, but not limited to, time on a continuing basis when participating school personnel are released from their regular duties.

(5) Be evaluated and modified on a continuing basis by participating school personnel in consultation and, as appropriate, with regional resource consortia personnel and subject matter project personnel, based upon benefits to staff and pupils.

(6) Include the school principal and other administrative personnel as active continuing participants in one or more professional development activities implemented pursuant to a school development plan.

(7) Make available followup activities to assist participating staff in using newly acquired skills on the job.

(8) Promote the professional development of instructional paraprofessionals in the schools, including activities that will encourage instructional paraprofessionals to pursue the education and training necessary to become classroom teachers.

SEC. 2. Chapter 1.5 (commencing with Section 51100) is added to Part 28 of the Education Code, to read:

CHAPTER 1.5. PARENTAL INVOLVEMENT

51100. The Legislature finds and declares all of the following:

(a) It is essential to our democratic form of government that parents and guardians of schoolage children attending public schools and other citizens participate in improving public education institutions. Specifically, involving parents and guardians of pupils in the education process is fundamental to a healthy system of public education.

(b) Research has shown conclusively that early and sustained family involvement at home and at school in the education of children results both in improved pupil achievement and in schools that are successful at educating all children, while enabling them to achieve high levels of performance.

(c) All participants in the education process benefit when schools genuinely welcome, encourage, and guide families into establishing equal partnerships with schools to support pupil learning.

(d) Family and school collaborative efforts are most effective when they involve parents and guardians in a variety of roles at all grade levels, from preschool through high school.

51101. (a) Except as provided in subdivision (c), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. Although volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a bi-annual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

(c) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

51102. Upon approval of the materials by the State Board of Education, the State Department of Education shall make materials available that describe a comprehensive partnership at a schoolsite that involves parents and guardians of pupils in the public schools of California in the education of their children in a variety of roles at all grade levels on or before December 31, 1999. The materials shall include information about the possible roles of each teacher, principal, parent or guardian, and other school personnel in fostering and participating in parent involvement activities and programs. The materials shall also include a statement that the right of parents and guardians to participate in parent activities and programs shall only apply to the extent that the participation does not conflict with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

SEC. 4. Section 52870 of the Education Code is amended to read:

52870. (a) Notwithstanding any other provisions of this chapter, if a school district and school participate in the school-based program coordination, any schoolsite advisory committee may elect to designate the schoolsite council to function as that advisory committee for all purposes required by statute or regulations for a period of up to two years.

* * * (b) If the governing board of a school district adopts a policy that establishes a schoolwide decisionmaking body at each school to promote continuous improvement through a single planning process that coordinates federal and state programs and services, then that body may be designated as a single decisionmaking or coordinating body, if the composition of the body meets the requirements of Section 52852.

(c) It is the intent of the Legislature that, to the extent possible, the members of the schoolsite council represent the composition of the school's pupil population.

SEC. 5. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SCHOOLS AND SCHOOL DISTRICTS—CURRICULUM—REQUIREMENTS

CHAPTER 1031

A.B. No. 1216

AN ACT to amend Section 49063 of, and to add Chapter 6.6 (commencing with Section 49091.10) to Part 27 of, the Education Code, relating to schools.

[Approved by Governor September 30, 1998.]

[Filed with Secretary of State September 30, 1998.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1216, Kaloogian. School districts: parental, pupil, and teacher procedures.

Existing law grants pupils, parents, and guardians certain rights regarding the delivery of educational services. Existing law requires the governing board of each school district at the beginning of each school year to notify the parent or guardian of its minor pupils regarding the rights or the responsibilities of the parent or guardian under certain provisions of law, including the right to be excused from health, family life, and sex education instruction due to religious beliefs and the right to refuse a physical examination of pupils.

This bill would impose a state-mandated local program by requiring that all primary supplemental instruction materials and assessments be compiled and stored by the classroom

instructor and made available promptly for inspection by a parent or guardian of a pupil, and by granting the parent or guardian the right to observe the instruction and other school related activities that involve his or her child, in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

This bill would prohibit a pupil from being compelled to affirm or disavow any particular personally or privately held world view, religious doctrine, or political opinion. The bill would require that its provisions not be construed to affect a pupil's right or ability to obtain confidential medical care or confidential counseling relating to the diagnosis or treatment of a drug- or alcohol-related problem, or mental health treatment or counseling on an outpatient basis, without the consent of his or her parent or guardian. The bill would further require that its provisions not be construed to restrict the authority of school or law enforcement officials to investigate, or intervene in, cases of suspected child abuse. The bill would prohibit a pupil from being tested for a behavioral, mental, or emotional evaluation without the consent of his or her parent or guardian.

The bill would require the curriculum, including titles, descriptions, and instructional aims of every course offered by a public school, to be compiled at least once annually in a prospectus, thereby imposing a state-mandated local program. The bill would require the notice regarding the rights and responsibilities of parents or guardians to include notice of the availability of this prospectus, thereby imposing a state-mandated local program.

Existing law authorizes the governing board of a school district to provide a comprehensive educational counseling program for all pupils and requires confidentiality of information received while counseling a pupil 12 years of age or older, except as specified.

This bill would, notwithstanding provisions of law to the contrary, prohibit a school from requiring a pupil or a pupil's family to participate in any assessment, analysis, evaluation or monitoring of the quality or character of a pupil's home life, any form of parental screening or testing, any nonacademic home-based counseling program, parent training, or any prescribed family education service plan.

Existing law sets forth the rights and responsibilities of teachers.

The bill would provide that a teacher has the right to refuse to submit to any evaluation or survey conducted by the school district that addresses certain matters.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 49063 of the Education Code is amended to read:

49063. School districts shall notify parents in writing of their rights under this chapter upon the date of the pupil's initial enrollment, and thereafter at the same time as notice is issued pursuant to Section 48980. The notice shall be, insofar as is practicable, in the home language of the pupil. The notice shall take a form which reasonably notifies parents of the availability of the following specific information:

(a) The types of pupil records and information contained therein which are directly related to students and maintained by the institution.

(b) The position of the official responsible for the maintenance of each type of record.

(c) The location of the log or record required to be maintained pursuant to Section 49064.

(d) The criteria to be used by the district in defining "school officials and employees" and in determining "legitimate educational interest" as used in Section 49064 and paragraph (1) of subdivision (a) of Section 49076.

(e) The policies of the institution for reviewing and expunging those records.

(f) The right of the parent to access to pupil records.

(g) The procedures for challenging the content of pupil records.

(h) The cost if any which will be charged to the parent for reproducing copies of records.

(i) The categories of information which the institution has designated as directory information pursuant to Section 49073.

(j) Any other rights and requirements set forth in this chapter, and the right of the parent to file a complaint with the United States Department of Health, Education, and Welfare concerning an alleged failure by the district to comply with the provisions of Section 438 of the General Education Provisions Act (20 U.S.C.A. Sec. 1232g).

(k) The availability of the prospectus prepared pursuant to Section 49091.14.

SEC. 2. Chapter 6.6 (commencing with Section 49091.10) is added to Part 27 of the Education Code, to read:

CHAPTER 6.6. THE EDUCATION EMPOWERMENT ACT OF 1998

Article 1. Parental Review

49091.10. (a) All primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, tapes, and software shall be compiled and stored by the classroom instructor and made available promptly for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

(b) A parent or guardian has the right to observe instruction and other school activities that involve his or her child in accordance with procedures determined by the governing board of the school district to ensure the safety of pupils and school personnel and to prevent undue interference with instruction or harassment of school personnel. Reasonable accommodation of parents and guardians shall be considered by the governing board of the school district. Upon written request by the parent or guardian, school officials shall arrange for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe and in accordance with procedures determined by the governing board of the school district.

49091.12. (a) A pupil may not be compelled to affirm or disavow any particular personally or privately held world view, religious doctrine, or political opinion. This section does not relieve pupils of any obligation to complete regular classroom assignments.

(b) Nothing in this chapter shall be construed to affect a pupil's right or ability to ~~ob~~tain confidential medical care or confidential counseling relating to the diagnosis or treatment of a drug- or alcohol-related problem, or mental health treatment or counseling on an outpatient basis, without the consent of his or her parent or guardian. Nothing in this chapter shall be construed to restrict the authority of school officials or law enforcement officials to investigate, or intervene in, cases of suspected child abuse.

(c) A pupil may not be tested for a behavioral, mental, or emotional evaluation without the informed written consent of his or her parent or guardian.

(d) A general consent, including medical consent used to approve admission to or involvement in, a special education or remedial program or regular school activity, does not constitute written consent under this section.

49091.14. The curriculum, including titles, descriptions, and instructional aims of every course offered by a public school, shall be compiled at least once annually in a prospectus. Each schoolsite shall make its prospectus available for review upon request. When requested, the prospectus shall be reproduced and made available. School officials may charge for the prospectus an amount not to exceed the cost of duplication.

49091.16. It is the intent of the Legislature to encourage pupil-school-parent compacts that are voluntary.

49091.18. Notwithstanding any provision of law to the contrary, a school may not require a pupil or a pupil's family to submit to or participate in any of the following:

(a) Any assessment, analysis, evaluation, or monitoring of the quality or character of the pupil's home life.

(b) Any form of parental screening or testing.

(c) Any nonacademic home-based counseling program.

(d) Parent training.

(e) Any prescribed family education service plan.

(f) Nothing in this section shall be construed as preventing the screening, testing, or training of public school employees.

49091.19. No provision of this chapter shall be construed as restricting teachers in the assignment of homework.

Article 2. Teacher Rights

49091.24. A teacher shall have the right to refuse to submit to any evaluation or survey conducted by the school district concerning the following:

(a) Personal values, attitudes, and beliefs.

(b) Sexual orientation.

(c) Political affiliations or opinions.

(d) Critical appraisals of other individuals with whom the teacher has a family relationship.

(e) Religious affiliations or beliefs.

SEC. 3. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SCHOOLS AND SCHOOL DISTRICTS—COMPACTS—HIGH PRIORITY SCHOOLS GRANT PROGRAM FOR LOW PERFORMING SCHOOLS

CHAPTER 749

A.B. No. 961

AN ACT to amend Sections 51101, 52054, and 52058 of, to add Sections 52054.3 and 52055.51 to, and to add Article 3.5 (commencing with Section 52055.600) to Chapter 6.1 of Part 28 of, the Education Code and to amend Item 6110-123-0001 of Section 2.00 of the Budget Act of 2001, relating to schools, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Filed with Secretary of State October 12, 2001.]

Governor's reduction message follows this Chapter

LEGISLATIVE COUNSEL'S DIGEST

AB 961, Steinberg. Low-performing schools.

(1) Existing law requires the governing board of a school district to develop jointly with parents and guardians, and to adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite.

This bill would, consistent with federal law, require a school that participates in the High Priority Schools Grant Program for Low Performing Schools established by this bill and that maintains kindergarten or any of grades 1 to 5, inclusive, to jointly develop with parents or guardians for all children enrolled at that schoolsite a school-parent compact.

(2) Existing law establishes various programs designed to improve the academic achievement of pupils, including, among others, the Public Schools Accountability Act of 1999 which contains the Immediate Intervention/Underperforming Schools Program (IIUSP) and requires the Superintendent of Public Instruction to develop an Academic Performance Index (API) to measure the performance of schools. Existing law requires a school district that participates in the IIUSP to contract with an external evaluator to assist the school in the development of its school action plan.

This bill would add to the duties of the external evaluator the provision of technical assistance to the participating school and would, as an alternative to contracting with the external evaluator, allow a school district to contract with entities with proven expertise specific to the challenges inherent in low-performing schools. The bill would authorize a school selected on or after September 2001 to participate in the IIUSP to use an existing plan instead of the required action plan, as specified.

The bill would provide an alternative to the existing sanctions to which a school is subject if it does not meet its API growth target and fails to show significant growth.

This bill would establish the High Priority Schools Grant Program for Low Performing Schools within the Public Schools Accountability Act of 1999. The bill would require the Superintendent of Public Instruction to invite schools ranked in the 5 lowest deciles of the API to participate in the IIUSP and the High Priority Schools Grant Program for Low Performing Schools. Priority for participation would be given to schools ranked in the lowest deciles, as specified. Participation in the IIUSP would be required in order to receive funding under the program established by the bill. The bill would require a school to develop and submit an action plan containing specified components. The bill would require a school district to report certain information annually to the Superintendent of Public Instruction regarding a participating school's progress toward achieving specified goals.

The bill would, 24 months after receipt of funding, subject a participating school that has not met its growth targets each year to review by the State Board of Education. After a specified number of months of plan implementation, schools that do not meet their API growth targets and that fail to show significant growth would be subject to the sanctions existing under the IIUSP and the alternative sanctions established by this bill. A school participating in the High Priority Schools Grant Program for Low Performing Schools that meets or exceeds its API growth target would continue to receive funding under this program for a 4th year, as specified.

This bill would appropriate $3,000,000 from the General Fund to the State Department of Education to provide training, as specified, and for costs associated with the administration and oversight of the High Priority Schools Grant Program for Low Performing Schools and would authorize those funds to be expended to fund up to 18 positions in the department. The bill would reduce by $3,000,000 the appropriation made in the Budget Act of 2001 for purposes of low-performing schools.

This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 51101 of the Education Code is amended to read:

51101. (a) Except as provided in subdivision (d), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. Although volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a biannual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

(c) All schools that participate in the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 and that maintain kindergarten or any of grades 1 to 5, inclusive, shall jointly develop with parents or guardians for all children enrolled at that schoolsite, a school-parent compact pursuant to Section 6319 of Title 20 of the United States Code.

(d) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

SEC. 2. Section 52054 of the Education Code is amended to read:

52054. (a) Commencing in the 2001–02 fiscal year, by November 15 of the year that the school is selected to participate, the governing board of a school district having jurisdiction over a school selected for participation in the program * * * may do either of the following:

(1) Contract with an external evaluator from the list of external evaluators and shall appoint a broad-based schoolsite and community team, consisting of a majority of nonschool-site personnel. In a school that has a limited-English-proficient pupil population that constitutes at least 40 percent of the total pupil population, an external evaluator shall have demonstrated experience in working with a limited-English-proficient pupil population. Not less than 20 percent of the members of the team shall be parents or legal guardians of pupils in the school.

(2) Contract with any entity that has proven successful expertise specific to the challenges inherent in low-performing schools. These entities may include, but are not limited to:

(A) Institutions of higher education.

(B) County offices of education.

(C) School district personnel.

(b) The selected external evaluator or entity shall solicit input from the parents and legal guardians of the pupils of the school. At a minimum, the evaluator or entity shall do all of the following:

(1) Inform the parents and legal guardians, in writing, that the school has been selected to participate in the Immediate Intervention/Underperforming Schools Program due to its below average performance.

(2) Hold a public meeting at the school, in cooperation with the principal, to which all parents and legal guardians of pupils in the school receive a written invitation. The invitation to the meeting may be combined with the written notice required by paragraph (1).

(3) Solicit, at the public meeting, the recommendations and opinions of the participating parents and legal guardians of pupils in the school regarding actions that should be taken to improve the performance of the school. These opinions and recommendations shall be considered by the external evaluator or entity and the community team in the development or modification of the action plan pursuant to this section or Section 52054.3.

(4) Provide technical assistance to the schoolsite.

(5) Notify all parents and legal guardians of pupils in the school of their opportunity to provide written recommendations of actions that should be taken to improve the performance of the school which shall be considered by the external evaluator or entity and the community team in the development or modification of the action plan pursuant to this section or Section 52054.3. Notice required by this subdivision may be combined with the written notice required by paragraph (1).

(c) By February 15 of the school year in which the school is selected to participate, the selected external evaluator or entity, in collaboration with the broad-based schoolsite and community team selected pursuant to subdivision (a), shall complete a review of the school that identifies weaknesses that contribute to the school's below average performance, make recommendations for improvement, and begin to develop an action plan to improve the academic performance of the pupils enrolled at the school. The action plan shall include percentage growth targets at least as high as the annual growth targets adopted by the State Board of Education pursuant to Section 52052. The action plan shall include an expenditure plan and shall be of a scope that does not require expenditure of funds in excess of those provided pursuant to this article or otherwise available to the school. The action plan may not be of a scope that requires reimbursement by the Commission on State Mandates for its implementation.

(d) At a minimum, the action plan shall do all of the following:

(1) Review and include the school and district conditions identified in the school accountability report card pursuant to Section 33126.

(2) Identify the current barriers at the school and district toward improvements in pupil achievement.

(3) Identify schoolwide and districtwide strategies to remove these barriers.

(4) Review and include school and school district crime statistics, in accordance with Section 628.5 of the Penal Code.

(5) Examine and consider disaggregated data regarding pupil achievement and other indicators to consider whether all groups and types of pupils make adequate progress toward short-term growth targets and long-term performance goals. The disaggregated data to be included and considered by the plan shall, at a minimum, provide information regarding the achievement of English language learners, pupils with exceptional needs, pupils who qualify for free and reduced price meals, and all pupils, * * * in numerically significant subgroups.

(6) Set short-term academic objectives pursuant to Section 52052 for a two-year period that will allow the school to make adequate progress toward the growth targets established for

each participating school for pupil achievement as measured by all of the following to the extent that the data is available for the school:

(A) The achievement test administered pursuant to Section 60640.

(B) Graduation rates for grades 7 to 12, inclusive.

(C) Attendance rates for pupils and school personnel for elementary, middle, and secondary schools.

(D) Any other indicators approved by the State Board of Education.

(e) The school action plan shall focus on improving pupil academic performance, improving the involvement of parents and guardians, improving the effective and efficient allocation of resources and management of the school, and identifying and developing solutions that take into account the underlying causes for low performance by pupils.

(f) The team, in the development of the action plan, shall consult with the exclusive representatives of employee organizations, where they exist.

(g) The school action plan may propose to increase the number of instructional days offered at the schoolsite and also may propose to increase up to a full 12 months the amount of time for which certificated employees are contracted, if all of the following conditions are met:

(1) Provisions of the plan proposed pursuant to this subdivision shall not violate current applicable collective bargaining agreements.

(2) An agreement is reached with the exclusive representative concerning staffing specifically to accommodate the extended school year or 12–month contract.

(h) The team, in the development of the action plan, shall consult with the exclusive representatives of employee organizations, where they exist.

(i) Upon its completion, the action plan shall be submitted to the governing board of the school districts for its approval. * * * The approval may be conducted during a regularly scheduled public meeting.

* * *

SEC. 3. Section 52054.3 is added to the Education Code, to read:

52054.3. A school selected on or after September 2001 may elect to use an existing plan instead of the action plan required pursuant to Section 52054 if that plan meets the requirements specified pursuant to subdivisions (c), (d), (e), (f), (g), (h), and (i) of Section 52054. If an existing plan needs modification, the external evaluator or entity with which the school district contracts pursuant to Section 52054 shall provide technical assistance in making those modifications.

SEC. 4. Section 52055.51 is added to the Education Code, immediately following Section 52055.5, to read:

52055.51. (a) Instead of the actions specified in subdivision (c) of Section 52055.5, as that section read on January 1, 2001, and notwithstanding any other provision of law, the Superintendent of Public Instruction, with the approval of the State Board of Education, may require the district to enter into a contract with a school assistance and intervention team.

(b) Team members should possess a high degree of knowledge and skills in the areas of school leadership, curriculum, and instruction aligned to state academic content and performance standards, classroom management and discipline, academic assessment, parent-school relations, and evaluation and research-based reform strategies and have proven successful expertise specific to the challenges inherent in low-performing schools.

(c) The team shall provide intensive support and expertise to implement the school reform initiatives in the plan. Decisions about interventions shall be data driven. A school assistance and intervention team shall work with school staff, site planning teams, administrators, and district staff to improve pupil literacy and achievement by assessing the degree of implementation of the current action plan, refining and revising the action plan, and making recommendations to maximize the use of fiscal resources and personnel in achieving the goals of the plan. The district shall provide support and assistance to enhance the work of the team at the targeted schoolsites.

(2) A finding that the principal failed to take specific enumerated actions pursuant to paragraph (1).

(h) An action taken pursuant to subdivision (e), (f), or (g) shall not increase local costs or require reimbursement by the Commission on State Mandates.

(i) An action taken pursuant to subdivision (e), (f), or (g) shall be accompanied by specific findings by the Superintendent of Public Instruction and the State Board of Education that the action is directly related to the identified causes for continued failure by a school to meet its performance goals.

52055.655. (a) Notwithstanding subdivision (c) of Section 52055.650, a school participating in the High Priority Schools Grant Program for Low Performing Schools that meets or exceeds its API growth target shall continue to receive funding under this program in the amount specified in Sections 52054.5 and 52055.600 for one additional year of implementation, less the amount received pursuant to Section 52057.

(b) From funds made available to the State Department of Education pursuant to the act adding this section, the State Department of Education shall conduct a study on the issue of sustainability of funding for low-performing schools. The issues to be addressed in this study shall include, but are not limited to, the following:

(1) An objective rather than a comparative view of the necessity of sustaining supplemental funding over time to address the ongoing needs of low-performing pupils, and the impact of policies that only provide funding over a specified period of time.

(2) An analysis of the ability of a school to sustain growth in academic achievement, particularly when the pupil population that continuously attends the school manifests issues of poverty and low socioeconomic status, and other characteristics that are generally out of the direct control of the school.

SEC. 6. Section 52058 of the Education Code is amended to read:

52058. (a) Each school district with schools participating in the Immediate Intervention/Underperforming Schools Program established pursuant to Section 52053 and the High Priority Schools Grant Program for Low Performing Schools established pursuant to Section 52055.600 shall submit to the Superintendent of Public Instruction an evaluation of the impact, costs, and benefits of the program as it relates to the school district and the schools under its jurisdiction that are participating in the program and whether or not the schools met their growth targets, with an analysis of the reasons why the schools have or have not met those growth targets. Costs to develop and submit the evaluation shall be funded with resources provided pursuant to Article 3 (commencing with Section 52053). The evaluation shall be submitted by November 30, subsequent to the first full year of action plan implementation by participating schools, and on November 30, of each year thereafter.

(b) By January 15, 2000, the Superintendent of Public Instruction shall develop, and the State Board of Education shall approve, the guidelines for a request for proposal for an independent evaluator as described in this subdivision. By September 1, 2000, the Superintendent of Public Instruction shall contract with an independent evaluator to prepare a comprehensive evaluation of the implementation, impact, costs, and benefits of the Immediate Intervention/Underperforming Schools Program, the High Priority Schools Grant Program for Low Performing Schools, and the High Achieving/Improving Schools Program. The preliminary results of the evaluation shall be disseminated to the Legislature, the Governor, and interested parties no later than March 31, 2002, with a final report no later than June 30, 2002. The final report shall include recommendations for necessary or desirable modifications to the programs established pursuant to this chapter.

(c) The evaluations shall consider all of the following:

(1) Pupil performance data, including, but not limited to, results of assessments used to determine whether or not schools have made significant progress towards meeting their growth targets.

(2) Program implementation data, including, but not limited to, a review of startup activities, community support, parental participation, staff development activities associated with implementation of the program, percentage of fully credentialed teachers, percentage of teachers who hold emergency credentials, percentage of teachers assigned outside their

subject area of competence, the accreditation status of the school if appropriate, average class size per grade level, and the number of pupils in a multitrack year-round educational program.

(3)(A) Pupil performance data, and its impact on the API, for each of the following subgroups:

(i) English language learners.

(ii) Pupils with exceptional needs.

(iii) Pupils that qualify for free or reduced price meals and are enrolled in schools that receive funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100–290).

(B) Information concerning individual pupils may not be disclosed in the process of preparing pupil performance data pursuant to this subdivision.

(d) The Superintendent of Public Instruction shall recommend and the State Board of Education shall approve a schedule for biennial evaluations of the programs established pursuant to this chapter, subsequent to the evaluation required by this section. The biennial evaluations shall be submitted, with appropriate recommendations, by June 30 of every odd-numbered year, commencing with the year 2003.

SEC. 7. Item 6110–123–0001 of Section 2.00 the Budget Act of 2001 is amended to read:

6110—23-0001--For local assistance, Department of Education (Proposition 98), for implementation of the Public Schools Accountability Act, pursuant to Chapter 6.1 (commencing with Section 52050) of Part 28 of the Education Code 514,970,000

Schedule:

(1) 20.60.030.031–Immediate Intervention/Underperforming Schools Program	160,970,000
(2) 20.60.030.032–High Achieving/Improving Schools Program	157,000,000
(3) 20.60.030.034–Low-Performing Schools	197,000,000

Provisions:

1. Funds appropriated in Schedule (1) are provided solely for the purpose of implementing the Immediate Intervention/Underperforming Schools Program, pursuant to Article 3 of Chapter 6.1 (commencing with Section 52053) of Part 28 of the Education Code. Of this amount, $21,500,000 is for the purpose of providing planning grants of $50,000 each to a third cohort of new schools, and the remainder is provided to fully fund implementation grants for the first and second cohorts of schools that received planning grants under the program during the 1999–00 and 2000–01 fiscal years.
2. Funds appropriated in Schedule (2) are provided solely for the purpose of implementing the Governor's High Achieving/Improving Schools Program, pursuant to Article 4 of Chapter 6.1 (commencing with Section 52056) of Part 28 of the Education Code.
3. Funds appropriated in Schedule (3) are provided solely for the purpose of implementing a low-performing school program, pursuant to legislation enacted during the 2001–02 Regular Session.

SEC. 8. (a) Notwithstanding any other provision of law, funds appropriated in Schedule (3) of Item 6110–123–0001 of Section 2.00 of the Budget Act of 2001 shall be available through the 2003–04 fiscal year for implementation of the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 of the Education Code, including providing planning grants authorized by Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 of the Education Code and implementation grants authorized by Article 3 (commencing with Section 52053) of, and Article 3.5 (commencing with Section 52055.600) of, Chapter 6. 1 of Part 28 of the Education Code for those schools participating in each of those programs.

(b) The sum of three million dollars ($3,000,000) is hereby appropriated from the General Fund to the State Department of Education in augmentation of Item 6110–001–0001 of

Section 2.00 of the Budget Act of 2001 to provide training for individuals who wish to function as external evaluators pursuant to Section 52054 or as members of a school assistance and intervention team pursuant to Section 52055.51 and for costs associated with the administration and oversight of the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 of the Education Code and the Immediate Intervention/Underperforming Schools Program established pursuant to Article 3 (commencing with Section 52053 of Part 28 of the Education Code and may be expended to fund up to 18 positions in the department.

SEC. 9. It is the intent of the Legislature to appropriate funds for purposes of this article for the 2002–03 fiscal year and for subsequent fiscal years.

SEC. 10. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

California is experiencing a crisis with respect to the learning development and achievement of millions of pupils in California's public schools, and the program proposed by this act is designed and enacted to enable these pupils to progress and to succeed, and there is no time to waste in meeting the needs of these pupils. Therefore, in order to begin implementation of the High Priority Schools Grant Program for Low Performing Schools during the 2001–02 fiscal year, it is necessary that this act take effect immediately.

GOVERNOR'S REDUCTION MESSAGE

I am signing Assembly Bill 961, however I am reducing the appropriation made in section 8 of this bill by $2,142,000. This section would appropriate $3.0 million to the Department of Education for training and administration costs associated with this program. Absent a detailed expenditure plan from the Department of Education justifying this need, I am unable to support an augmentation in excess of that which I believe is necessary to begin implementation of this program.

While I am signing this bill, I am concerned that numerous sections within this bill are unclear and may be interpreted in a way not intended, potentially resulting in significant costs. I am signing this bill with the understanding that the author will introduce urgency legislation to clean up these issues.

GRAY DAVIS, Governor

EDUCATION—PARENTS RIGHTS ACT

CHAPTER 1037

S.B. No. 1595

AN ACT to amend Section 51101 of, and to add Sections 51101.1 and 51101.2 [1] to, the Education Code, relating to English learners.

[Filed with Secretary of State September 28, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1595, Escutia. Pupils: English learners.

Existing law gives the parents and guardians of pupils enrolled in public schools the right to be informed by the school and to participate in the education of their children and specifies the information they have a right to receive and the ways they may participate in the education of their children. Among the parental rights listed in a particular provision are the right to be informed in advance about school rules, attendance policies, dress codes, and procedures for visiting the school.

This bill would add disciplinary rules and procedures and retention and promotion policies, which are provided for in other provisions of existing law, to the list of things about which parents have a right to be informed. The bill would add to the list of rights the right to be notified, as early in the school year as practicable, and as required by existing law, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.

The bill would provide that a parent or guardian's lack of English fluency does not preclude a parent or guardian from exercising the rights guaranteed by existing law, would specify that a school district to take all reasonable steps to ensure that parents and guardians who speak a language other than English are notified, as required by existing law, of the rights and opportunities available to them pursuant to existing law, and would list rights and opportunities available to parents and guardians of pupils who speak a language other than English.

The people of the State of California do enact as follows:

SECTION 1. This act shall be known as the Parents Rights Act of 2002.

SEC. 2. Section 51101 of the Education Code is amended to read:

[1] Education Code § 51101.2 does not appear in enrolled bill.

51101. (a) Except as provided in subdivision (d), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. Although volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, including disciplinary rules and procedures pursuant to Section 35291, attendance, retention, and promotion policies pursuant to Section 48070.5, dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a biannual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

(16) To be notified, as early in the school year as practicable pursuant to Section 48070.5, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils, including those parents and guardians whose primary language is not English, shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of

pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

(c) All schools that participate in the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 and that maintain kindergarten or any of grades 1 to 5, inclusive, shall jointly develop with parents or guardians for all children enrolled at that schoolsite, a school-parent compact pursuant to Section 6319 of Title 20 of the United States Code.

(d) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

SEC. 3. Section 51101.1 is added to the Education Code, to read:

51101.1. (a) A parent or guardian's lack of English fluency does not preclude a parent or guardian from exercising the rights guaranteed under this chapter. A school district shall take all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to Section 48985, of the rights and opportunities available to them pursuant to this section.

(b) Parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and as follows:

(1) To receive, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the English language development test.

(2) To be given any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) To participate in school and district advisory bodies in accordance with federal and state laws and regulations.

(4) To support their children's advancement toward literacy. School personnel shall encourage parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language. School districts are encouraged to make available, to the extent possible, surplus or undistributed instructional materials to parents and guardians, pursuant to subdivision (d) of Section 60510, in order to facilitate parental involvement in their children's education.

(5) To be informed, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

(c) A school with a substantial number of English learners is encouraged to establish parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled.

EXHIBIT 3
COPIES OF CODE SECTIONS CITED

§ 11500. Legislative findings and declarations

The Legislature hereby finds and declares all of the following:

(a) Despite a substantial increase in school funding over the last five years, a significant percentage of the school-aged population, particularly in large urban areas, is learning well below the statewide average and is making only marginal progress at best.

(b) Parental involvement and support in the education of children is an integral part of improving academic achievement. Educational research has established that properly constructed parent involvement programs can play an important and effective role in the participation of parents in their children's schools and in raising pupil achievement levels.

(c) The federal government has recognized the critical role of parents in the educational process and now mandates parental involvement programs as a condition of eligibility for funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100–297).

(d) The State Board of Education has also adopted a policy urging the creation of parent involvement programs in all schools.

(e) California's School Improvement Program has historically maintained

(f) Research and experience have demonstrated that these programs succeed only when certain components are made part of the program.

§ 11501. Legislative intent

It is the intent of the Legislature in enacting this chapter to ensure that parent involvement programs are properly designed and implemented and to provide a focus and structure for these programs based on prior experience and research while maintaining sufficient local flexibility to design a program that best meets the needs of the local community.

§ 11502. Purpose

It is the purpose and goal of this chapter to do all of the following:

(a) To engage parents positively in their children's education by helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.

(b) To inform parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.

(c) To build consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

(d) To train teachers and administrators to communicate effectively with parents.

(e) To integrate parent involvement programs, including compliance with this chapter, into the school's master plan for academic accountability.

(Added by Stats.1990, c. 1400 (A.B.322), § 1.)

§ 11503. Parent involvement program; establishment; elements

The governing board of each school district shall establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100–290).[1] That program shall contain at least the following elements:

(a) Procedures to ensure that parents are consulted and participate in the planning, design, implementation, and evaluation of the program.

(b) Regular and periodic programs throughout the school year that provide for training, instruction, and information on all of the following:

(1) Parental ability to directly affect the success of their children's learning through the support they give their children at home and at school.

(2) Home activities, strategies, and materials that can be used to assist and enhance the learning of children both at home and at school.

(3) Parenting skills that assist parents in understanding the development needs of their children and in understanding how to provide positive discipline for, and build healthy relationships with, their children.

(4) Parental ability to develop consistent and effective communications between the school and the parents concerning the progress of the children in school and concerning school programs.

(c) An annual statement identifying specific objectives of the program.

(d) An annual review and assessment of the program's progress in meeting those objectives. Parents shall be made aware of the existence of this review and assessment through regular school communications mechanisms and shall be given a copy upon the parent's request.

§ 11504. Adoption of policy on parent involvement

The governing board of each school district shall adopt a policy on parent involvement, consistent with the purposes and goals set forth in Section 11502, for each school not governed by Section 11503.

(Added by Stats.1990, c. 1400 (A.B.322), § 1.)

§ 11506. Receipt of funds; eligibility; compliance with chapter

Schools that receive federal funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (P.L. 100–297),[1] and receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29, may receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 or economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29 only if they comply with this chapter.

§ 49091.10. **Parental right to inspect instructional materials and observe school activities**

(a) All primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, tapes, and software shall be compiled and stored by the classroom instructor and made available promptly for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

(b) A parent or guardian has the right to observe instruction and other school activities that involve his or her child in accordance with procedures determined by the governing board of the school district to ensure the safety of pupils and school personnel and to prevent undue interference with instruction or harassment of school personnel. Reasonable accommodation of parents and guardians shall be considered by the governing board of the school district. Upon written request by the parent or guardian, school officials shall arrange for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe and in accordance with procedures determined by the governing board of the school district.

(Added by Stats.1998, c. 1031 (A.B.1216), § 2.)

§ 49091.14. **Prospectus of school curriculum**

The curriculum, including titles, descriptions, and instructional aims of every course offered by a public school, shall be compiled at least once annually in a prospectus. Each schoolsite shall make its prospectus available for review upon request. When requested, the prospectus shall be reproduced and made available. School officials may charge for the prospectus an amount not to exceed the cost of duplication.

(Added by Stats.1998, c. 1031 (A.B.1216), § 2.)

§ 51101. Rights of parents and guardians to information; mutually supportive partnership between parents and educators; policy development

(a) Except as provided in subdivision (d), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. Although volunteer parents may assist with instruction, primary instructional responsibility shall remain with the teacher.

(4) To be notified on a timely basis if their child is absent from school without permission.

(5) To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

(6) To request a particular school for their child, and to receive a response from the school district. This paragraph does not obligate the school district to grant the parent's request.

(7) To have a school environment for their child that is safe and supportive of learning.

(8) To examine the curriculum materials of the class or classes in which their child is enrolled.

(9) To be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

(10) To have access to the school records of their child.

(11) To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

(12) To be informed in advance about school rules, <u>including disciplinary rules and procedures pursuant to Section 35291,</u> attendance, <u>retention, and promotion</u> policies <u>pursuant to Section 48070.5,</u> dress codes, and procedures for visiting the school.

(13) To receive information about any psychological testing the school does involving their child and to deny permission to give the test.

(14) To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. In order to facilitate parental participation, schoolsite councils are encouraged to schedule a biannual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions. The meetings should be scheduled on weekends, and prior notice should be provided to parents.

(15) To question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

<u>(16) To be notified, as early in the school year as practicable pursuant to Section 48070.5, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.</u>

(b) In addition to the rights described in subdivision (a), parents and guardians of pupils, <u>including those parents and guardians whose primary language is not English,</u> shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social

development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

(c) All schools that participate in the High Priority Schools Grant Program for Low Performing Schools established pursuant to Article 3.5 (commencing with Section 52055.600) of Chapter 6.1 of Part 28 and that maintain kindergarten or any of grades 1 to 5, inclusive, shall jointly develop with parents or guardians for all children enrolled at that schoolsite, a school-parent compact pursuant to Section 6319 of Title 20 of the United States Code.

(d) This section may not be construed so as to authorize a school to inform a parent or guardian, as provided in this section, or to permit participation by a parent or guardian in the education of a child, if it conflicts with a valid restraining order, protective order, or order for custody or visitation issued by a court of competent jurisdiction.

(Added by Stats.1998, c. 864 (A.B.1665), § 2. Amended by Stats.2001, c. 749 (A.B.961), § 1, eff. Oct. 12, 2001; Stats.2002, c. 1037 (S.B.1595), § 2.)

§ 51101.1. Rights of parents and guardians who lack English fluency; participation in educational process; information and communication

(a) A parent or guardian's lack of English fluency does not preclude a parent or guardian from exercising the rights guaranteed under this chapter. A school district shall take all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to Section 48985, of the rights and opportunities available to them pursuant to this section.

(b) Parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and as follows:

(1) To receive, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the English language development test.

(2) To be given any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) To participate in school and district advisory bodies in accordance with federal and state laws and regulations.

(4) To support their children's advancement toward literacy. School personnel shall encourage parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language. School districts are encouraged to make available, to the extent possible, surplus or undistributed instructional materials to parents and guardians, pursuant to subdivision (d) of Section 60510, in order to facilitate parental involvement in their children's education.

(5) To be informed, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

(c) A school with a substantial number of English learners is encouraged to establish parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled.

(Added by Stats.2002, c. 1037 (S.B.1595), § 3.)

DEPARTMENT OF FINANCE
ARNOLD SCHWARZENEGGER, GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

April 28, 2004

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Higashi:

As requested in your letter of October 7, 2003, the Department of Finance has reviewed the test claim submitted by the San Jose Unified School District, claimant, asking the Commission to determine whether specified costs incurred under various statutes are reimbursable State mandated costs (Claim No. CSM-03-TC-16 "Parental Involvement Programs"). Commencing with page 20 of the test claim, the claimant asserts the following activities are reimbursable State mandates:

1) Pursuant to Chapter 16 commencing with Education Code (EC) Section 11500:
   - EC Section 11502(a), engaging parents positively in their children's education by helping parents develop skills to use at home.
   - EC Section 11502(b), informing parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.
   - EC Section 11502(c), building consistent and effective communication between the home and the school.
   - EC Section 11502(d), training teachers and administrator to communicate effectively with parents.
   - EC Section 11502(e), integrating parent involvement programs into the school's master plan for academic accountability.
   - EC Section 11504, adopting a policy on parent involvement, consistent with the purposes and goals set forth in EC Section 11502, for schools that are not required to establish a parental involvement program under EC Section 11503.

2) Pursuant to EC Section 49091.10:
   - Subdivision (a), making all primary supplemental instructional materials available for inspection by a parent or guardian.
   - Subdivision (b), upon written request by a parent or guardian, arranging for the parental observation of the requested class or classes or activities.

3) Pursuant to EC Section 49091.14:
   - Compiling and making available a prospectus at least once annually and, upon request, reproducing and making copies available.

4) Pursuant to EC Section 51101(a) informing parents and guardians and where appropriate, allowing the participation by parents and guardians, as follows:
   - Allowing the observation of the classroom in which their child is enrolled.
   - Enabling the teacher and the principal to meet with the parent or guardian within a reasonable time after a request for such a meeting.
   - Supervising parents and guardians who volunteer their time and resources for improvement of school facilities and programs.

5) Pursuant to EC Section 51101(a) (4) and (5):
   - Notifying parents and guardians if their child is absent from school without permission.
   - Providing to parents and guardians results of their child's performance on standardized tests and statewide tests and providing information on the performance of the school that their child attends on standardized statewide tests.

6) Pursuant to EC Section 51101(a) (6) and (7):
   - Responding to requests of parents and guardians that their child be enrolled in a particular school.
   - Providing a school environment that is safe and supportive of learning.

7) Pursuant to EC Section 51101(a), (8) to (13) and (15) to (16):
   - Allowing parents and guardians to examine curriculum materials.
   - Informing parents and guardians of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.
   - Providing parents and guardians with access to the school records of their child.
   - Providing parents and guardians with information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.
   - Informing parents and guardians, in advance, about school rules.
   - Providing parents and guardians with information about any psychological testing the school does involving their child and to cease such testing when they deny permission to give the test.
   - Responding to parent's and guardian's questions about anything in their child's record that they may feel is inaccurate or misleading or is an invasion of privacy.
   - Notifying parents and guardians of their rights as early in the school year as practicable pursuant to EC Section 48070.5 if their child is identified as being at risk of retention.

8) Pursuant to EC Section 51101(a) (14):
   - Scheduling and implementing a biannual open forum for the purpose of informing parents about current school issues and answering parents' questions.

9) Pursuant to EC Section 51101(b):
   - Working with parents and guardians to help children succeed in school
   - Developing jointly with parents and guardians and adopting a policy that outlines how parents and guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite.

10) Pursuant to EC Section 51101.1(a) and (b):
   - Taking all reasonable steps to ensure all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language of rights and opportunities available to them.

- Providing results of a child's standardized test.
- Giving any required written notification in English and the pupil's home language.
- Allowing participation in school and district advisory bodies in accordance with federal and state laws and regulations.
- Encouraging parents and guardians of English learners to support their child's progress.
- Informing parents and guardians about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

11) Pursuant to EC Section 51101.1(c):
- Establishing parent centers with personnel who can communicate with the parents and guardians of these children when a school has a substantial number of English learners.

Finance notes the following points:

1) With regard to Chapter 16, commencing with EC Section 11500:
- EC Section 11502 only states the purpose and goal of the chapter, and does not create a mandate for a new program or higher level of service. EC Section 11503 does mandate the establishment of parent involvement programs. However, it is clear that the establishment of a parental involvement program is only required for schools which receive federal funds. Since the decision to receive the federal funds is an option, the costs are not reimbursable. This is consistent with previous Commission rulings wherein if participation in the overall program is optional or voluntary, that any succeeding requirement would not result in a state-mandate. Specifically, EC Section 11502 states: "The governing board of each school district shall establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988."
- Since the statute simply implemented a federal law and resulted in costs mandated by the federal government, the costs would not be reimbursable. GC Section 17556(c) states that a statute or executive order which implements a federal law or regulation and results in costs mandated by the federal government, will not result in a State-mandated local program. EC Section 11500(c) states: "The federal government has recognized the critical role of parents in the education process and now mandates parental involvement programs as a condition of eligibility for funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988."
- EC Section 11504 requires the governing board of each school district that is not required to establish a parental involvement program under EC Section 11503 to adopt a policy on parent involvement consistent with the purposes set forth in EC Section 11502. The cost to a governing board to adopt such a policy is minimal and one-time, and does not necessarily impose a higher level of service on the schools.

2) With regard to EC Section 49091.10:
- Schools must, as a practical matter, currently store the existing instructional materials. Therefore, storing and compiling them for inspection is not imposing a higher level of service. Similarly, arranging for parent class observation and inspection of materials does not represent a higher level of service imposed on the schools, and the costs should be minimal to none.

3) With regard to EC Section 49091.14:
   - The development of a curriculum is a public process and schools already have titles, descriptions, and instructional aims of courses, thus making these existing materials available for parents does not constitute a new program or higher level of service. Additionally, school officials were given the authority to charge a fee for the cost of duplication, thus the costs are not reimbursable per GC Section 17556(d).

4) With regard to EC Section 51101(a):
   - Allowing for parent observation of classrooms is not a higher level of service imposed on the schools, and the costs of arranging and accommodating these observations should be minimal to none. With respect to accommodating requests for meetings with teachers and administrators, the law does not prescribe when these meetings must take place. Thus we believe that the meetings can normally be accommodated during normal /base pay working hours for teachers and principals. To claim costs, districts should have to show that they have so many requested meetings with parents that it is not feasible to accommodate the requests during normal working hours.
   - Schools also have to approve the volunteer activities of the parent. The school has a choice whether or not to allow the activities, and thus the cost of supervision is not reimbursable.

5) With regard to EC Section 51101(a) (4) and (5):
   - We concur that requiring schools to notify parents and guardians of unexcused absences is a higher level of service required of the schools, thus the costs associated with the notification are reimbursable. However we note the costs should be minimal, as schools already collect absence records, and can notify parents by phone call or mailed form letter. We note that such notices are already provided under EC Section 48263 and reimbursed under the Notification of Truancy and Habitual Truant mandates.

6) With regard to EC Section 51101(a) (6) and (7):
   - EC Section 48980(j) already requires schools to notify parents of all current statutory attendance options and local attendance options available in the school district. Therefore this does not constitute a new program or higher level of service. Furthermore providing a safe and supportive learning environment has always been a general goal of public education and does not constitute a new program of higher level of service. The statute prescribes no specific methods or activities that must be implemented to provide a safe and supportive learning environment, thus there are no mandated activities.

7) With regard to EC Section 51101(a), (8) to (13) and (15) to (16):
   - Schools already keep curriculum materials and student records, thus allowing parents to examine them do not constitute a higher level of service. Schools were already required under EC Section 48980 to notify parents of their child's progress, school rules, available programs, and other options. Therefore, this does not constitute a new program or higher level of service.

8) With regard to EC Section 51101(a) (14):
   - This section states that scheduling a biannual open forum is encouraged, not required. Therefore, the activity is not reimbursable.

9) With regard to EC Section 51101(b):
   - We concur that the costs of developing and adopting these policies <u>in schools that do not receive federal funds</u> constitutes a higher level of service. However, similar to the

policy development required by Education Code Section 11504, these costs are one-time and would be minimal.

10) With regard to EC Section 51101.1 (a) and (b):
- EC Section 48985 already requires all notices, reports, statements, or records sent to parents or guardians be sent in their primary language if other than English, therefore this does not constitute a new program or higher level of service and thus is not reimbursable.
- Providing parents results of state-mandated standardized tests is already provided for in the State's funding for those programs, and is covered by mandate test claims for those exams.

11) With regard to EC Section 51101.1(c):
- We note that in EC Section 51101.1(c) the establishment of parent centers in schools with a substantial number of English learners is encouraged, not required, and thus is not reimbursable.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list which accompanied your October 7, 2003, letter have been provided with copies of this letter via either United States Mail or, in the case of other State agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Matt Aguilera, Principal Program Budget Analyst at (916) 445-0328 or Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Jeannie Oropeza

Jeannie Oropeza
Program Budget Manager

Attachment

Attachment A

DECLARATION OF MATT AGUILERA
DEPARTMENT OF FINANCE
CLAIM NO. CSM-03-TC-16, PARENTAL INVOLVEMENT PROGRAMS

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the various statutes sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

4/28/04
at Sacramento, CA

Matt Aguilera

PROOF OF SERVICE

Test Claim Name: Parental Involvement Programs
Test Claim Number: CSM-03-TC-16

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 7th Floor, Sacramento, CA 95814.

On April 28, 2004, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and non-state agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 7th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

B-8
State Controller's Office
Division of Accounting & Reporting
Attention: Michael Havey
3301 C Street, Room 500
Sacramento, CA 95816

B-29
Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

E-8
Department of Education
Fiscal and Administrative Services Division
Attention: Gerald Shelton
1430 N Street, Suite 2213
Sacramento, CA 95814

Spector, Middleton, Young, Minney, LLP
Attention: Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Reynolds Consulting Group, Inc.
Attention: Sandy Reynolds, President
P.O. Box 987
Sun City, CA 92586

Shields Consulting Group, Inc.
Attention: Steve Shields
1536 36th Street
Sacramento, CA 95816

San Diego Unified School District
Attention: Arthur Palkowitz
4100 Normal Street, Room 3159
San Diego, CA 92103-8363

Centration, Inc.
Attention: Beth Hunter
8316 Red Oak Street, Suite 101
Rancho Cucamonga, CA 91730

Education Mandated Cost Network
C/O School Services of California
Attention: Dr. Carol Berg, PhD
1121 L Street, Suite 1060
Sacramento, CA 95814

Sixten & Associates
Attention: Keith Petersen
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

San Jose Unified School District
Attention: Patrick Day
855 Lenzen Avenue
San Jose, CA 95126-2736

Mandate Resource Services
Attention: Harmeet Barkschat
5325 Elkhorn Blvd., Suite 307
Sacramento, CA 95842

Steve Smith Enterprises, Inc.
Attention: Steve Smith
One Capitol Mall, Suite 200
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 28, 2004, at Sacramento, California.

Jennifer Nelson

SixTen and Associates
Mandate Reimbursement Services

KEITH B. PETERSEN, MPA, JD, President
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Telephone: (858) 514-8605
Fax: (858) 514-8645
E-Mail: Kbpsixten@aol.com

May 25, 2004

Paula Higashi, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 03-TC-16
San Jose Unified School District
Parental Involvement Programs

Dear Ms. Higashi:

I have received the comments of the Department of Finance ("DOF") dated April 28[1], 2004, to which I now respond on behalf of the test claimant.

A. The Comments of DOF are Incompetent and Should be Excluded

Test claimant objects to the comments of DOF, in total, as being legally incompetent and move that they be excluded from the record. Title 2, California Code of Regulations, Section 1183.02(d) requires that any:

> "...written response, opposition, or recommendations and supporting documentation shall 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 or information or belief."

Furthermore, the test claimant objects to any and all assertions or representations of fact made in the response since DOF has failed to comply with Title 2, California Code of Regulations, Section 1183.02(c)(1) which requires:

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[1] Although the Proof of Service attached to the comments of DOF states that the document was mailed on April 28, 2004, the envelope in which the document was received is postmarked May 3, 2004.

> "If assertions or representations of fact are made (in a response), they must be supported by documentary evidence which shall be submitted with the state agency's response, opposition, or recommendations. All documentary evidence shall be authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so and must be based on the declarant's personal knowledge or information or belief."

The comments of DOF do not comply with these essential requirements. Since the Commission cannot use unsworn comments or comments unsupported by declarations, but must make conclusions based upon an analysis of the statutes and facts supported in the record, test claimant requests that the comments and assertions of DOF not be included in the Staff's analysis.

B. Education Code Sections 11500 et seq.

Education Code Section 11502 provides that it is the purpose and goal of the chapter to do all of the following:

(a) To engage parents positively in their children's education by helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of our society.

(b) To inform parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.

(c) To build consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.

(d) To train teachers and administrators to communicate effectively with parents.

(e) To integrate parent involvement programs, including compliance with this chapter, into the school's master plan for academic accountability.

DOF argues that Section 11502 only states the purpose and goal of the chapter and does not create a mandate for a new program or higher level of service. DOF overlooks section 11504 which requires school districts to adopt a policy on parent involvement, consistent with the purposes and goals set forth in Section 11502, for each school not governed by Section 11503. Therefore, read in conjunction with section 11504, section 11502 creates a new program or higher level of service.

Education Code Section 11503 provides that the governing board of each school district shall establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 and that the program is required to contain at least several identified elements.

DOF agrees that Education Code Section 11503 mandates the establishment of parent involvement programs, but argues that the establishment of those programs is only required for schools that receive federal funds under the cited Act, as amended. DOF therefore, claims that since the decision to receive federal funds is an option, the costs of the mandated activities are not reimbursable. DOF avoids the obvious conclusion that, even if a school district should "elect" not to receive these federal funds, it would be required to establish a parent involvement program under Education Code Sections 11502 and 11504 anyway.

DOF also overlooks the ruling in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 (hereinafter "*Sacramento II*") which holds that a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate.

(1) *Sacramento II* Facts:

The adoption of the Social Security Act of 1935 provided for a Federal Unemployment Tax ("FUTA"). FUTA assesses an annual tax on the gross wages paid by covered private employers nationwide. However, employers in a state with a federally "certified" unemployment insurance program receive a "credit" against the federal tax in an amount determined as 90 percent of contributions made to the state system. A "certified" state program also qualifies for federal administrative funds.

California enacted its unemployment insurance system in 1935 and has sought to maintain federal compliance ever since.

In 1976, Congress enacted Public Law number 94-566 which amended FUTA to require, for the first time, that a "certified" state plan include coverage of public employees. States that did not alter their unemployment compensation laws accordingly faced a loss of both the federal tax credit and the administrative subsidy.

In response, the California Legislature adopted Chapter 2, Statutes of 1978 (hereinafter chapter 2/78), to conform to Public Law 94-566, and required the state and all local governments to participate in the state unemployment insurance system on behalf of

their employees.

(2) *Sacramento I* Litigation

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control seeking state subvention of the costs imposed on them by chapter 2/78. The State Board denied the claim. On mandamus, the Sacramento Superior Court overruled the Board and found the costs to be reimbursable. In *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 (hereinafter *Sacramento I*) the Court of Appeal affirmed concluding, *inter alia*, that chapter 2/78 imposed state-mandated costs reimbursable under section 6 of article XIII B. It also held, however, that the potential loss of federal funds and tax credits did not render Public Law 94-566 so coercive as to constitute a "mandate of the federal government" under Section 9(b).[2]

In other words, *Sacramento I* concluded, *inter alia*, that the loss of federal funds and tax credits did not amount to "compulsion."

(3) *Sacramento II* Litigation

After remand, the case proceeded through the courts again. In *Sacramento II*, the Supreme Court held that the obligations imposed by chapter 2/78 failed to meet the "program" and "service" standards for mandatory subvention because it imposed no "unique" obligation on local governments, nor did it require them to provide new or increased governmental services to the public. The Court of Appeal decision, finding the expenses reimbursable, was overruled.

However, the court also overruled that portion of *Sacramento I* which held that the loss of federal funds and tax credits did not amount to "compulsion."

(d) *Sacramento II* "Compulsion" Reasoning

Plaintiffs argued that the test claim legislation required a clear legal compulsion not present in Public Law 94-566. Defendants responded that the consequences of

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[2] Section 1 of article XIII B limits annual "appropriations". Section 9(b) provides that "appropriations subject to limitation" do not include "appropriations required to comply with mandates of the courts or the federal government which, without discretion, require an expenditure for additional services or which unavoidably make the provision of existing services more costly."

California's failure to comply with the federal "carrot and stick" scheme were so substantial that the state had no realistic "discretion" to refuse.

In disapproving *Sacramento I*, the court explained:

> "If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments." (Opinion, at page 74)

Plaintiffs argued that California was not compelled to comply because it could have chosen to terminate its own unemployment insurance system, leaving the state's employers faced only with the federal tax. The court replied to this suggestion:

> "However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends. (¶) ...The alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards." (Opinion, at page 74, emphasis supplied)

In other words, terminating its own system was not an acceptable option because it was so far beyond the realm of practical reality so as to be a draconian response, leaving the state without discretion. The only reasonable alternative was to comply with the new legislation, since the state was practically "without discretion" to do otherwise.

The Supreme Court in *Sacramento II* concluded by stating that there is no final test for a determination of "mandatory" versus "optional":

> "Given the variety of cooperative federal-state-local programs, we here attempt no final test for 'mandatory' versus 'optional' compliance with federal law. A determination in each case must depend on such factors as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal." (Opinion, at page 76)

The test for determining the existence of a mandate is whether compliance with the test claim legislation is a matter of true choice, that is, whether participation is truly voluntary. *Hayes v. Commission on State Mandates*, (1992) 11 Cal.App.4th 1564,

1582

The process for such a determination is found in *Sacramento II*, that is, the determination in each case must depend on such factors as the nature and purpose of the program; whether its design suggests an intent to coerce; when district participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.

DOF has not attempted to apply this analysis to any portion of the test claim legislation. Therefore, its argument lacks any foundation when claiming that any of the test claim statutes contain no reimbursable mandates because the test claim activities are discretionary.

C. Education Code Section 49091.10

Education Code Section 49091.10, subdivision (a), requires that all primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, tapes, and software *shall be* compiled and stored and made available promptly for inspection by a parent or guardian.

As to these mandated requirements, DOF argues that schools, "as a practical matter" already store these materials and, therefore, the mandate does not impose a higher level of service.

Education Code Section 49091.10, subdivision (b), states that a parent or guardian has the right to observe instruction and other school activities that involve his or her child and reasonable accommodation of parents and guardians *shall be* considered; and upon written request by the parent or guardian, school officials shall arrange for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe.

As to these mandated requirements, DOF also argues that "[S]imilarly, arranging for parent class observation and inspection of materials does not represent a higher level of service imposed on the schools..."

Test claimant first points out that DOF does not argue that these activities are not "new," therefore any argument that they do not represent a higher level of service does not bar a finding of a reimbursable mandate. Government Code Section 17514 defines

"costs mandated by the state" to be costs incurred as a result of *either* a new program *or* higher level of service.

Test claimant next responds by reminding DOF that Government Code Section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Therefore, even if school districts have been performing some of the mandated activities "as a practical matter," the state is required to reimburse the school district for performing those activities once they become mandated.

Finally, DOF argues that any costs "should be minimal to none." This is not one of the recognized exceptions to a finding of a mandate set forth in Government Code Section 17556. Also, this is an unverified statement of the DOF which attempts to contradict the sworn declaration supporting the test claim which estimates that school districts will incur more than $1,000 in costs by complying with the test claim legislation.

D. Education Code Section 49091.14

Education Code Section 49091.14 requires that the curriculum, including titles, descriptions, and instructional aims of every course offered *shall be compiled* at least once annually in a prospectus and that each schoolsite *shall make* its prospectus available for review upon request. When requested, the prospectus *shall be reproduced and made available*. School officials may charge an amount not to exceed the cost of duplication of the prospectus.

DOF argues that the development of a curriculum is a school process. The reply to this argument is simple, the test claim does not seek reimbursement for the development of a curriculum.

DOF next argues that schools already have titles, descriptions and instructional aims of courses and that schools already make these materials available for parents and, therefore, these activities do not constitute a new program of higher level of service. The reply to this argument is, again, reminding DOF that Government Code Section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Therefore, even if school districts have been performing some of the mandated activities set forth in Education Code Section 49091.14, the state is required to reimburse school districts for

performing those activities once they become mandated.

Finally, DOF argues that since school officials were given the authority to charge a fee for the cost of duplication, the costs are not reimbursable, citing Government Code Section 17556(d).

Subdivision (d) of Government Code Section 17556 provides:

> "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 that:...
>
> (d) The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service...."

Since DOF does not offer any evidence that the fees for the cost of duplication is in an amount sufficient to pay for the mandated program or increased level of service, its argument in this regard fails. Any fees received for the cost of duplicating the prospectus will be an offset to the total program costs, a fact recognized in the test claim at page 30, lines 3-6.

E. Education Code Section 51101(a)(1)(2)(3)

Education Code Section 51101, subdivision (a), subparagraphs (1), (2) and (3) provide that parents and guardians have the right to be informed by the school, and to participate in the education of their children, as follows:

(1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs.

(2) Within a reasonable time of their request, to meet with their child's teacher or teachers and the principal of the school in which their child is enrolled.

(3) To volunteer their time and resources for the improvement of school facilities and school programs.

DOF first agues that allowing parent observation is not a higher level of service. DOF does not argue that the required activities are not new, therefore any argument that they do not represent a higher level of service does not bar a finding of a reimbursable mandate. Government Code Section 17514 defines "costs mandated by the state" to be

costs incurred as a result of *either* a new program *or* higher level of service.

DOF next argues that the costs of arranging and accommodating these observations should be minimal to none. This is not one of the recognized exceptions to a finding of a mandate set forth in Government Code Section 17556. Also, this is an unverified statement of the DOF which attempts to contradict the sworn declaration supporting the test claim which estimates that school districts will incur more than $1,000 in costs by complying with the test claim legislation.

Next, DOF states that it "believes" that the required meetings can normally be accommodated during normal/base pay working hours for teachers and principals and, that to claim costs, districts should have to show that they have so many requested meetings with parents that it is not feasible to accommodate the request during normal working hours. Again this is not a recognized ground for the denial of reimbursement for a mandated activity. The DOF is asserting a standard which does not exist in law.

Finally, DOF argues that schools have to approve volunteer activities and have a choice whether or not to allow voluntary activities. DOF apparently ignores the provision in subdivision (a) that declares that parents have *the right* to participate in the education of their children by volunteering their time and resources for the improvement of school facilities and school programs. Therefore, schools are required to honor the rights of parents.

F. Education Code Section 51101(a)(4)(5)

Education Code Section 51101, subdivision (a)(4) provides that parents have the right to be informed by the school by being notified on a timely basis if their child is absent from school without permission.

Subdivision (a)(5) provides that parents have the right to be informed by the school by receiving the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests.

DOF concurs that these activities require a higher level of service but argues that the costs should be minimal. This is not one of the recognized exceptions to a finding of a mandate set forth in Government Code Section 17556. Also, this is an unverified statement of the DOF which attempts to contradict the sworn declaration supporting the test claim which estimates that school districts will incur more than $1,000 in costs by

complying with the test claim legislation.

DOF also argues that the notices are already required by Education Code Section 48263[3] and are already reimbursed under the Notification of Truancy[4] and Habitual Truant[5] mandates. Neither of those existing Commission approved mandates require notification on a timely basis if a child is absent from school without permission or requires informing parents of the results of their child's performance on standardized tests and statewide tests or requires the provision of information on the performance of the school that their child attends on standardized statewide tests.

G. Education Code Section 51101(a)(6)(7)

Education Code Section 51101, subdivision (a)(6) permits parents to request a particular school for their child, and to receive a response from the school district.

Education Code Section 51101, subdivision (a)(7) provides that parents and guardians have the right to participate in the education of their children by having a school

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[3] Education Code Section 48263 requires that the minor and the parents or guardians of the minor be notified in writing of the name and address of the board or probation department when the minor pupil is referred to a school attendance review board or to the probation department when the minor pupil is an habitual truant, or is irregular in attendance at school, or is habitually insubordinate or disorderly during attendance at school.

[4] The Notification of Truancy mandate requires a district, upon a pupil's initial classification as a truant, to notify a pupil's parent or guardian of (1) the pupil's truancy; (2) that the parent or guardian is obligated to compel the pupil's attendance; and (3) that parents or guardians who fail to meet this obligation may be guilty of an infraction. A truancy occurs when a student is absent from school without a valid excuse more than three (3) days or is tardy in excess of thirty (30) minutes on each of more than three (3) days in one school year.

[5] The Habitual Truant mandate requires school districts to make a conscientious effort to schedule a conference with the parent or guardian of a pupil who has been determined to be a habitual truant by sending a notice to the pupil's parent or guardian and the pupil and, when necessary, by making a final effort to schedule a conference by making a telephone call to the parent or guardian. A pupil is declared to be a habitual truant upon the pupil's fourth truancy within the same school year.

environment for their child that is safe and supportive of learning.

Commenting on subdivision (a)(6), DOF cites subdivision (j)[6] of Education Code Section 48980 to argue that schools are already required to notify parents of all current statutory and local attendance options. DOF misses the point. The test claim statute states that parents have the right to request a particular school for their child without establishing any of the conditions of existing statutory programs. It is an unfettered right to make the request and to receive a response.

Commenting on subdivision (a)(7), DOF argues that providing a safe and supportive learning environment has always been the "general goal" of public education and, therefore, does not constitute a new program or higher level of service. The reply to this argument is, again, reminding DOF that Government Code Section 17565 provides that, if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Therefore, even if it has always been the "general goal" of districts to provide a safe and supportive learning environment, the state is required to reimburse the school district for performing those activities once they become mandated. The DOF is again reminded that asserting uncodified "requirements", such as their "general goal" theory, is pointless.

H. Education Code Section 51101 (a)(8)(9)(10)(11)(12)(13)(15)(16)

Education Code Section 51101, subdivision (a)(8), provides that parents have the right to be informed and to participate in the education of their children by examining the curriculum materials of the class or classes in which their child is enrolled.

Education Code Section 51101, subdivision (a)(9), provides that parents have the right to be informed and to participate in the education of their children by being informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child.

Education Code Section 51101, subdivision (a)(10), provides that parents have the right to be informed and to participate in the education of their children by having access to the school records of their child.

Education Code Section 51101, subdivision (a)(11), provides that parents have the

[6] This citation is incorrect. The correct citation should be to subdivision (i).

right to be informed and to participate in the education of their children by receiving information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish.

Education Code Section 51101, subdivision (a)(12), provides that parents have the right to be informed and to participate in the education of their children by being informed in advance about school rules, including disciplinary rules and procedures, attendance, retention, and promotion policies, dress codes, and procedures for visiting the school.

Education Code Section 51101, subdivision (a)(13), provides that parents have the right to be informed and to participate in the education of their children by receiving information about any psychological testing the school does involving their child and to deny permission to give the test.

Education Code Section 51101, subdivision (a)(15), provides that parents have the right to be informed and to participate in the education of their children by being able to question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school.

Education Code Section 51101, subdivision (a)(16), provides that parents have the right to be informed and to participate in the education of their children by being notified, as early in the school year as practicable, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child.

As to all of the above mandated activities, DOF first argues that schools already keep curriculum materials and student records, thus allowing parents to examine them do not constitute a higher level of service. Allowing parents to examine records is not the same as being required to do so. Therefore, the activities are new programs. Test claimant again reminds DOF that Government Code Section 17565 provides that if a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the school district for those costs incurred after the operative date of the mandate. Therefore, even if school districts have been "allowing" parents to examine curriculum materials and student records, the state is required to reimburse the school district for performing those activities once they become mandated.

DOF also argues that Education Code Section 48980 already requires schools to notify

parents of their child's progress, school rules, available programs, and other options. DOF is incorrect. Section 48980 only pertains to:

(a) Rules of discipline; rights to be excused for religious reasons; excused absences; residency requirements for hospitalized students with temporary disabilities; parent's notifications of their child's temporary disabilities; the administration of immunization agents; the administration of prescribed medications; a parent's right to refuse consent for physical examination; medical and hospital services; comprehensive sexual health education; and communication devices in classrooms.

(b) The availability of individualized instruction.

(c) The schedule of minimum days and pupil-free staff development days.

(d) The importance of investing for future college or university education for their children and appropriate investment options.

(e) The requirement to successfully pass the high school exit examination.

(f) An election to provide a fingerprinting program.

(g) Including in each annual notice a copy of the district's written policy on sexual harassment.

(h) Including in each annual notice a copy of the written policy of the school district regarding access by pupils to internet and online sites.

(i) Advising the parent or guardian of all existing statutory attendance options and local attendance options available in the school district.

(j) Making enrollment options available to the pupils within their districts.

(k) Advising parents that no pupil may have his or her grade reduced or lose academic credit for any absence or absences excused if missed assignments and tests that can reasonably be provided are satisfactorily completed within a reasonable period of time.

(l) Advising parents of the availability of state funds to cover the costs of advanced placement examination fees.

As can be seen, the requirements of the test claim legislation differ substantially from the requirements of Education Code Section 48980.

I. Education Code Section 51101(a)(14)

Education Code Section 51101, subdivision (a)(14), provides that parents have the right to be informed by the school through participation as a member of a parent advisory committee, schoolsite council, or site-based management leadership team. The subdivision goes on to say that in order to facilitate that parental participation, schoolsite councils are encouraged to schedule a biannual open forum for the purpose of informing parents about current school issues and activities and answering parents' questions and that the meetings should be scheduled on weekends, and prior notice should be provided to parents.

DOF argues that scheduling a biannual open forum is encouraged but not required.

This argument of DOF ignores nearly all of the mandated activities such as participation as a member of a parent advisory committee, schoolsite council, or site-based management leadership team. It also ignores the meetings should be scheduled on weekends, and prior notice should be provided to parents. In as much as the right to participate is *the right* of the parent, arguing that schoolsite councils are only "encouraged" to schedule biannual open forums is not a persuasive argument. Even if the Commission makes that determination, all of the other described activities are still mandated and subject to reimbursement.

J. Education Code Section 51101(b)

Education Code Section 51101(b) requires that parents and guardians, including those whose primary language is not English, shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in school. Each governing board of a school district is required to develop jointly with parents and guardians, and shall adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. The policy shall include, but is not necessarily limited to, the following:

(1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

(2) A description of the school's responsibility to provide a high quality

curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

DOF concurs that the costs of developing and adopting these policies in schools that do not receive federal funds constitutes a higher level of service but that these costs are one-time and would be minimal.

DOF does not elucidate as to why these costs are limited to schools that do not receive federal funds.

The unverified statement of DOF that these costs are one-time is not correct. The above description of the activities show that they will change from time to time to meet the fluid changes that may be required to remain effective.

The argument of DOF that the costs should be minimal is not one of the recognized exceptions to a finding of a mandate set forth in Government Code Section 17556. Also, this is an unverified statement of the DOF which attempts to contradict the sworn declaration supporting the test claim which estimates that school districts will incur more than $1,000 in costs by complying with the test claim legislation.

K. Education Code Section 51101.1(a)(b)

Education Code Section 51101.1, subdivision (a), provides that a parent or guardian's lack of English fluency does not preclude a parent or guardian from exercising the rights guaranteed under this chapter and requires school districts to take all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language of the rights

and opportunities available to them pursuant to this section.

Education Code Section 511101.1, subdivision (b), provides that parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and as follows:

(1) To receive, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the English language development test.

(2) To be given any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.

(3) To participate in school and district advisory bodies in accordance with federal and state laws and regulations.

(4) To support their children's advancement toward literacy. School personnel shall encourage parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language. School districts are encouraged to make available, to the extent possible, surplus or undistributed instructional materials to parents and guardians, pursuant to subdivision (d) of Section 60510, in order to facilitate parental involvement in their children's education.

(5) To be informed, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

DOF argues that Education Code Section 48985 already requires all notices, reports, statements, or records be sent to parents or guardians in the primary language if other than English.

Education Code Section 48985 provides that when 15 percent or more of the pupils enrolled in a public school speak a single primary language other than English, all notices, reports, statements, or records sent to the parent or guardian shall, in addition to being written in English, be written in such primary language, and may be responded to either in English or the primary language.

The test claim legislation is not limited to the 15 percent floor and goes far beyond just notices, reports, statements or records.

DOF also argues that providing parents with results of state-mandated standardized tests is already provided for in the State's funding for those programs. Without a reference to the state-mandated standardized tests to which DOF refers and the specific rules for notification to parents, it is impossible to reply to DOF's assertions.

L. Education Code Section 51101.1(c)

Education Code Section 51101.1, subdivision (c), provides that a school with a substantial number of English learners is encouraged to establish parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled.

DOF argues that this activity is encouraged, but not required.

Section 51101.1 is part of a Parental Involvement Program added to the Education Code in 1998. Section 51100 sets forth the findings and declarations of the Legislature:

> "(a) It is essential to our democratic form of government that parents and guardians of schoolage children attending public schools and other citizens participate in improving public education institutions. Specifically, involving parents and guardians of pupils in the education process is fundamental to a healthy system of public education.
>
> (b) Research has shown conclusively that early and sustained family involvement at home and at school in the education of children results both in improved pupil achievement and in schools that are successful at educating all children, while enabling them to achieve high levels of performance.
>
> (c) All participants in the education process benefit when schools genuinely welcome, encourage, and guide families into establishing equal partnerships with schools to support pupil learning.
>
> (d) Family and school collaborative efforts are most effective when they involve parents and guardians in a variety of roles at all grade levels, from preschool through high school."

Section 51101 established that parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children.

Section 51101.1 was added to the Parental Involvement Program in 2002 as part of the

Parents Rights Act of 2002.[7] In addition to amending Section 51101, the 2002 Act recognized a special need for families with a substantial number of English learners. Because of the specialized needs of these families, in addition to other rights such as communication in native languages, the Legislature "encouraged" the establishment of parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled. And, although subdivision (c) "encourages" parent centers, subdivision (a) requires that all school districts take all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and their home language of their rights and opportunities available to them pursuant to this section.

In view of the above quoted Legislative findings and declarations and the grant to parents of *the right* to be informed and to participate, and the additional rights granted to parents and guardians of English learners, it is unrealistic for DOF to suggest that the establishment of parent centers to assist the parents of children with special needs is not legally required. Test claimant refers the Commission again to its reply proving that legal compulsion is not necessarily required for a finding of a mandate, above, beginning at page 3, and strongly suggests that this situation fits perfectly within the "legal and practical consequences of nonparticipation" portion of the *Sacramento II* test for determining whether strict legal compulsion is required.

CERTIFICATION

I certify by my signature below, under penalty of perjury under the laws of the State of California, that the statements made in this document are true and complete to the best of my own personal knowledge or information or belief.

Sincerely,

Keith B. Petersen

C: Per Mailing List Attached

[7] Chapter 1037, Statutes of 2002

DECLARATION OF SERVICE

RE: Parental Involvement Programs 03-TC-16
CLAIMANT: San Jose Unified School District

I declare:

I am employed in the office of SixTen and Associates, which is the appointed representative of the above named claimant(s). I am 18 years of age or older and not a party to the within entitled matter.

On the date indicated below, I served the attached: letter of May 25, 2004 , addressed as follows:

Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

FAX: (916) 445-0278

AND per mailing list attached

❑ **U.S. MAIL:** I am familiar with the business practice at SixTen and Associates for the collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at SixTen and Associates is deposited with the United States Postal Service that same day in the ordinary course of business.

❑ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

(Describe)

❑ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (858) 514-8645, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) was(were) transmitted by facsimile transmission and the transmission was reported as complete and without error.

☐ A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

❑ **PERSONAL SERVICE:** By causing a true copy of the above-described document(s) to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 5/25/04 , at San Diego, California.

Diane Bramwell

Original List Date: 10/3/2003
Last Updated:
List Print Date: 10/07/2003
Claim Number: 03-TC-16
Issue: Parental Involvement Programs

Mailing Information: Completeness Determination

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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Hearing Date: December 7, 2012
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ITEM _

TEST CLAIM
DRAFT STAFF ANALYSIS

AND

PROPOSED STATEMENT OF DECISION

Education Code Sections 11500, 11501, 11502, 11503, 11504, 11506, 49091.10, 49091.14, 51101, 51101.1

Statutes 1990, Chapter 1400; Statutes 1998, Chapter 864; Statutes 1998, Chapter 1031; Statutes 2001, Chapter 749; and Statutes 2002, Chapter 1037

Parental Involvement Programs

03-TC-16

San Jose Unified School District, Claimant

Attached is the draft proposed statement of decision for this matter. This draft proposed statement of decision also functions as the draft staff analysis, as required by section 1183.07 of the Commission's regulations.

EXECUTIVE SUMMARY

Overview

This test claim addresses activities associated with parent involvement and rights with regard to the education of their children pursuant to various Education Code sections. The reimbursable activities alleged by the claimant include the adoption of parent involvement policies, providing parents access to classrooms and class materials, and providing notice to parents of specific education related rights.

Before the enactment of the test claim statutes, existing state laws provided for the encouragement of parental involvement in the education of their children in the context of specific programs.[1] In addition, prior to the enactment of the test claim statutes, various code sections provided parents specific rights regarding parents' involvement in their children's education, including the provision of notice. In fact, some of these rights were the subject of prior test claims heard and decided by the Commission.

Additionally, existing federal law also requires parental involvement components as a condition of receiving federal funds. For example, programs funded under Chapter 1 of the Elementary and Secondary Education Act of 1965 (ESEA) as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988

[1] For example, the School Improvement Plans (SIP) program (former Ed. Code, § 52000 et seq.) and the High Priority Schools Grant program (Ed. Code, § 52055.600 et seq.). Funding for SIP activities is currently found in the "School and Library Improvement Block Grant" at Education Code section 41570 et seq.

(Pub. L. No. 100-297) were required to include parent involvement components in programs funded with Chapter 1 funds.

In the context of the existing patchwork of state and federal laws addressing parental involvement in education, the Legislature enacted the test claim statutes, which restate, supplement, and add to the rights afforded parents and guardians.

Procedural History

The *Parental Involvement Programs* (03-TC-16) test claim was filed on September 25, 2003. As a result, the reimbursement period for any reimbursable state-mandated new program or higher level of service found in this test claim begins on July 1, 2002.[2] On April 28, 2004, the Department of Finance (Finance) filed comments to the test claim. On May 25, 2004, the claimant filed comments in response to Finance's comments.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[3]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

Subject	Description	Staff Recommendation
Education Code sections 11500, 11501, 11502, 11503, 11504, 11506	These code sections address the importance of parent involvement in education and require the adoption of a parent involvement policy in education.	*Partially Approve*: (1) the plain language of most of the code sections do not impose any activities on schools; (2) the activity required under section 11503 is triggered by a school's underlying discretionary decision; (3) section 11504 imposes a reimbursable state-

[2] Government Code section 17557(e).

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

		mandated new program or higher level of service for the one-time activity to adopt a parent involvement policy. School districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year are eligible for reimbursement for this activity.
Education Code sections 49091.10 and 49091.14	These code sections address parental review of instructional materials, classrooms, school activities, and curriculum.	*Partial Approve*: Section 49091.10 imposes a reimbursable state-mandated new program or higher level of service on schools to make pupil assessments available to parents upon request and to arrange for parental observation of classes. Section 49091.14, which requires compiling and producing the school curriculum at the request of a parent, does not impose a new program or higher level of service.
Education Code sections 51101 and 51101.1	These code sections set forth a list of parent education related rights, and restate these rights for parents of English learners. Also, the code sections require the adoption of a policy regarding parent involvement in education. Additionally, they require the notification of parents of English learners of specific rights.	*Partial Approve*: Section 51101 imposes a reimbursable state-mandated new program or higher level of service on school districts for the one-time activity to adopt of a policy regarding the involvement of parents in education. Section 51101.1 imposes a reimbursable state-mandated activity on school districts to notify parents of English learners, under specified conditions, of specific rights.

Analysis

1. Programs to Encourage Parental Involvement (Ed. Code, §§ 11500, 11501, 11502, 11503, 11504, and 11506):

   These code sections address the importance of parent involvement in education and require the adoption of a parent involvement policy in education. The plain language of sections 11500, 11501, 11502, and 11506 do not impose any requirements on school districts.

   Section 11503 requires each school district to establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297). Section 11503 requires the parent involvement program to contain, at a minimum, elements specified by the section. Chapter 1 of the ESEA provides voluntary grant funding to schools for the purpose of improving educational opportunities of educationally deprived children at the preschool, elementary, and secondary levels. However, because the receipt of Chapter 1 funding is voluntary, any requirement imposed by section 11503 is triggered by an underlying discretionary decision by a school district. Thus, staff finds that section 11503 does not impose a reimbursable state-mandated new program or higher level of service.

   Section 11504 requires each school district to adopt a *policy* on parent involvement consistent with the purposes and goals set forth in section 11502 for each school that *does not* receive funds under Chapter 1 of the ESEA. Staff finds that section 11504 imposes a reimbursable state-mandated new program or higher level of service for the one-time activity to adopt a parent involvement policy. School districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year are eligible for reimbursement for this activity.

2. Parental Review of Instructional Materials, School Activities, and Curriculum (Ed. Code, §§ 49091.10 and 49091.14)

   These code sections require schools, upon request of a parent, to provide instructional materials, assessments and curriculum for review and to arrange for an opportunity to view classrooms and school activities.

   Staff finds that section 49091.10 imposes a reimbursable state-mandated new program or higher level of service on schools to make pupil assessments available to parents upon request and to arrange for parental observation of classes. However, staff finds that the requirement to provide the instructional materials for review is not new and so does not impose a reimbursable state-mandated new program or higher level of service.

   Additionally, the requirement that schools compile and produce the school curriculum at the request of a parent under section 49091.14, was required prior to the enactment of the test claim statute. As a result, staff finds that section 49091.14 does not impose a reimbursable state-mandated new program or higher level of service.

3. Rights of Parents and Guardians (Ed. Code, §§ 51101 and 51101.1)

   These code sections set forth a list of parental education related rights. Also, section 51101 requires the adoption of a policy for each school in a district regarding the involvement of parents and guardians in the education of their children. Section 51101.1 restates the rights of parents for parents of English learners and requires schools to notify such parents of their rights.

   Staff finds that section 51101 imposes a reimbursable state-mandated new program or higher level of service on school districts for the one-time activity to adopt a policy regarding the involvement of parents in education. Although, Education Code section 11504 also requires the adoption of a parent involvement policy, section 51101 includes specific components not required by Education Code section 11504. School districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year are eligible for reimbursement for this activity.

   In addition, schools were already required to provide notice of some of the rights set forth in sections 51101(a) and 51101.1(b). As a result, staff finds that section 51101.1 imposes a reimbursable state-mandated activity on school districts to notify parents of English learners, under specified conditions, of only some of the rights listed in sections 51101(a) and 51101.1(b).

Conclusion

For the reasons discussed above, staff finds the plain language of some of the code sections does not impose any requirements on school districts. In addition, some of the activities associated with notifying parents of specific rights or providing specific information to parents are not new as compared to the requirements in effect immediately prior to the enactment of the code sections. As a result, the Commission concludes that some of the activities do not constitute state-mandated new programs or higher levels of service.

However, the Commission finds that Education Code sections 11504, 49091.10(b), 51101(b), and 51101.1(a), as added or amended by the test claim statutes, impose a partial reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514 for the activities listed on pages 43 through 44, under section V of the analysis titled "Conclusion."

Staff Recommendation

Therefore, staff recommends that the Commission adopt the proposed statement of decision to partially approve this test claim.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 11500, 11501, 11502, 11503, 11504, 11506, 49091.10, 49091.14, 51101, 51101.1 Statutes 1990, Chapter 1400; Statutes 1998, Chapter 864; Statutes 1998, Chapter 1031; Statutes 2001, Chapter 749; and Statutes 2002, Chapter 1037 Filed on September 25, 2003 By San Jose Unified School District, Claimant.	Case No.: 03-TC-16 *Parental Involvement Programs* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Proposed for Adoption: December 7, 2012*)

DRAFT PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 7, 2012. [Witness list will be included in the final statement of decision.]

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

The Commission [adopted/modified] the proposed statement of decision to [approve/deny] the test claim at the hearing by a vote of [vote count will be included in the final statement of decision].

Summary of the Findings

This test claim addresses activities associated with parent involvement and parent rights in the education of their children pursuant to various Education Code sections. The activities include the adoption of parent involvement policies, providing parents access to classrooms and class materials, and providing notice to parents of specific education related rights.

The Commission finds that the plain language of some of the code sections does not impose any requirements on school districts. In addition, some of the activities associated with notifying parents of specific rights or providing specific information to parents are not new as compared to the requirements in effect immediately prior to the enactment of the code sections. As a result,

the Commission concludes that some of the activities do not constitute state-mandated new programs or higher levels of service.

However, the Commission finds that Education Code sections 11504, 49091.10(b), 51101(b), and 51101.1(a), as added or amended by the test claim statutes, impose a partial reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514 for the activities listed on pages 46 through 47, under section V of the analysis titled "Conclusion."

COMMISSION FINDINGS

I. Chronology

09/25/2003	Claimant, San Jose Unified School District, filed test claim *Parental Involvement Programs* (03-TC-16) with the Commission on State Mandates (Commission).[4]
10/28/2003	The Department of Finance (Finance) filed request for extension of time for comments on test claim.
11/07/2003	Commission staff granted Finance's extension of time for comments to February 7, 2004.
02/13/2004	Finance filed request for extension of time for comments on test claim.
02/18/2004	Commission staff granted Finance's extension of time for comments to March 19, 2004.
04/28/2004	Finance filed comments on the test claim.
05/25/2004	Claimant filed response to Finance's comments.
06/25/2008	Claimant filed for postponement of test claim *Parental Involvement Programs* (03-TC-16) until new representation is identified.
08/17/2012	Claimant representative submitted comments clarifying that representation for *Parental Involvement Programs* (03-TC-16) did not change.

II. Introduction

This test claim addresses activities associated with parent involvement and parent rights with regard to the education of their children pursuant to various Education Code sections. The reimbursable activities alleged by the claimant include the adoption of parent involvement policies, providing parents access to classrooms and class materials, and providing notice to parents of specific education related rights.

Before the enactment of the test claim statutes, existing state laws provided for the encouragement of parental involvement in the education of their children in the context of specific programs.[5] In addition, prior to the enactment of the test claim statutes, various code

[4] Potential period of reimbursement begins on July 1, 2002, the start of the 2002-2003 fiscal year. See Government Code section 17557(e).

[5] For example, the School Improvement Plans (SIP) program (former Ed. Code, § 52000 et seq.) and the High Priority Schools Grant program (Ed. Code, § 52055.600 et seq.). Funding for SIP

sections provided parents specific rights regarding involvement in their children's education, including the provision of notice.[6] In fact, some of these rights were the subject of prior test claims heard and decided by the Commission.[7]

Additionally, existing federal law also requires parental involvement components as a condition of receiving federal funds. For example, programs funded under Chapter 1 of the Elementary and Secondary Education Act of 1965 (ESEA) as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297) were required to include parent involvement components in programs funded with Chapter 1 funds.[8]

In the context of the existing patchwork of state and federal laws addressing parental involvement in education, the Legislature enacted the test claim statutes, which restate, supplement, and add to, the rights afforded parents and guardians.

III. Positions of the Parties

A. Claimant's Position

The claimant contends that the test claim statutes impose reimbursable state-mandated costs for school districts to provide state-mandated new programs or higher levels of service related to encouraging parental involvement in the education of children. The activities alleged to be reimbursable include developing polices to encourage parental involvement in education, adopting these policies, implementing these policies, informing parents that they can directly affect the success of their children's learning, training teachers and administrators to communicate effectively with parents, making primary supplemental instructional materials and

activities is currently found in the "School and Library Improvement Block Grant" at Education Code section 41570 et seq.

[6] For example, Education Code section 48980 which provided for annual parental notification of specific school rules, and parent and student rights. Also, Education Code section 49063 which provides parents the ability to view and contest the contents of their child's pupil records.

[7] Education Code section 49063 was the subject of the *Annual Parent Notification – 1998-2000 Statutes* (99-TC-09/00-TC-12) test claim, on which the Commission has made a final decision. Statement of decision for *Annual Parent Notification – 1998-2000 Statutes* (99-TC-09/00-TC-12) test claim, adopted December 12, 2001, at <http://www.csm.ca.gov/sodscan/139.pdf> as of October 16, 2012. See also, the test claims surrounding the School Accountability Report Card (SARC) which requires notifying parents about specific information about the school. *School Accountability Report Cards* (97-TC-21), *Reconsideration of School Accountability Report Cards I* (04-RL-9721-11), *Reconsideration of School Accountability Report Cards II* (05-RL-9721-03), and *School Accountability Report Cards II and III* (00-TC-09, 00-TC-13, 02-TC-32) test claims and reconsiderations, <http://www.csm.ca.gov/sod_scan.shtml#s2> as of October 16, 2012.

[8] ESEA as reauthorized by the Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297, § 1016) codified at former 20 United States Code section 2726. Currently, reauthorized by the NCLB ((Pub. L. No. 107-110, § 1118) (20 U.S.C. § 6318)).

assessments available for inspection by a parent in a reasonable timeframe upon request, and allowing parents to observe classes or activities in a reasonable timeframe, upon request.

On May 25, 2004, in response to Finance's comments, the claimant argues that legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate, and suggests that in the absence of legal compulsion it is Finance's burden to show that practical compulsion *does not* exist. In addition, the claimant notes that Finance's assertion regarding costs being minimal for some of the activities is not an exception to reimbursement set forth in Government Code section 17556.

B. The Department of Finance's Position

Finance generally argues that most of the Education Code sections pled by the claimant do not impose a state-mandated activity or a *new* program, and therefore, are not reimbursable. To the extent that some of the code sections impose state-mandated activities, Finance asserts that the costs of these activities should be minimal.

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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 such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 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."[9] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[10]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[11]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[12]

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

[10] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[11] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, at p. 874.

[12] *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[13]

4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [14]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[15] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[16] 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."[17]

A. Some of the Test Claim Statutes Impose State-Mandated New Programs or Higher Levels of Service on School Districts within the Meaning of Article XIII B, Section 6.

Although the Education Code sections pled by the claimant are related because they address parental rights and involvement in education, some of the code sections represent separate efforts to address these issues. As a result, this analysis will address the code sections as follows: (1) Programs to Encourage Parental Involvement (Ed. Code, §§ 11500, 11501, 11502, 11503, 11504, and 11506); (2) Parental Right to Inspect Instructional Materials and School Curriculum, and to Observe School Activities (Ed. Code, §§ 49091.10 and 49091.14); (3) Rights of Parents and Guardians (Ed. Code, §§ 51101 and 51101.1); and (4) Summary of State-Mandated New Programs or Higher Levels of Service.

(1) Programs to Encourage Parental Involvement (Ed. Code, §§ 11500, 11501, 11502, 11503, 11504, and 11506)

Education Code sections 11500, 11501, 11502, 11503, 11504, and 11506 address the statewide framework for parental involvement programs in education.

[13] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

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

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

[16] *County of San Diego, supra,* 15 Cal.4th 68, 109.

[17] *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.

a. Requirements imposed by Education Code Sections 11500, 11501, 11502, 11503, 11504, and 11506.

Education Code section 11500 sets forth legislative findings regarding parental involvement in education. The Legislature found that although there has been a "substantial increase in school funding [from 1985-1990], a significant percentage of the school-aged population ... is learning well below the statewide average and is making only marginal progress at best."[18] The Legislature continued to find that parental involvement and support in the education of children is an integral part of improving academic achievement and that educational research has shown that properly constructed parent involvement programs can play a role in raising pupil achievement.[19] The Legislature noted that the critical role of parents in education has been recognized by the federal government, which mandates parental involvement programs as a condition of eligibility for funds under the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297). Additionally, the Legislature notes the State Board of Education's policy urging the creation of parent involvement programs in all schools and the existence of parental involvement components in existing state educational programs.[20]

In this context, section 11501 provides that it is the Legislature's intent in enacting Education Code section 11500 et seq., to ensure that parent involvement programs are properly designed and implemented and to provide a focus and structure for these programs based on prior experience and research while maintaining sufficient local flexibility to design a program that best meets the needs of the local community.

Section 11502 provides that it is the purpose and goal of Education Code sections 11500-11506 to do all of the following: (1) to engage parents positively in their children's education by helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of society; (2) to inform parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home; (3) to build consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities; (4) to train teachers and administrators to communicate effectively with parents; and (5) to integrate parent involvement programs, including compliance with Education Code sections 11500-11506, into the school's master plan for academic accountability.

Section 11503 requires each school district to establish a parent involvement program for each school in the district that receives funds under Chapter 1 of the federal Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297). Section 11503 requires the parent involvement program to contain, at a minimum,

[18] Education Code section 11500(a).

[19] Education Code section 11500(b).

[20] Education Code section 11500(c)-(e).

elements specified by the section.[21] Chapter 1 of the ESEA provides voluntary grant funding to schools for the purpose of improving educational opportunities of educationally deprived children at the preschool, elementary, and secondary levels.[22] This purpose is to be accomplished by various educational programs including the increased involvement of parents in their children's education, which is a required element of programs funded through the ESEA.[23]

Section 11504 requires each school district to adopt a *policy* on parent involvement consistent with the purposes and goals set forth in section 11502 for each school *not governed by section 11503*. Thus, school districts are only required to engage in the one-time activity of adopting a *policy* only for schools in the district that *do not* receive funds under Chapter 1 of the ESEA.

The claimant interprets sections 11502, 11503, and 11504, to require school districts to adopt parent involvement *programs* regardless of whether schools within the district receive funding under Chapter 1 of the ESEA. Specifically, the claimant asserts, "even if a school district should 'elect' not to receive these federal funds [as described in Ed. Code, § 11503], it would be required to establish a parental involvement program under Education Code sections 11502 and 11504 anyway."[24] However, this interpretation is inconsistent with the plain language of the code sections, which identify a legislative intent to treat schools in receipt of Chapter 1 federal funds differently than schools not receiving Chapter 1 funding.

As discussed above, section 11503 requires school districts to "establish ... parent involvement *program[s]*" only for schools receiving funding under Chapter 1 of the ESEA. In contrast, section 11504 requires a school district to "adopt a *policy* on parent involvement" for schools *not*

[21] Education Code section 11503 requires parent involvement programs to contain, at minimum, the following: (a) procedures to ensure that parents are consulted and participate in the planning, design, implementation, and evaluation of the program; (b) regular and periodic programs throughout the school year that provide for training, instruction, and information on (1) parental ability to directly affect the success of their children's learning through the support they give their children at home and at school, (2) home activities, strategies, and materials that can be used to assist and enhance the learning of children both at home and at school, (3) parenting skills that assist parents in understanding the development needs of their children and in understanding how to provide positive discipline for, and build healthy relationships with, their children, and (4) parental ability to develop consistent and effective communications between the school and the parents concerning the progress of the children in school and concerning school programs; (c) an annual statement identifying specific objectives of the program; and (d) an annual review and assessment of the program's progress in meeting those objectives. Parents shall be made aware of the existence of this review and assessment through regular school communications mechanisms and shall be given a copy upon the parent's request.

[22] Public Law Number 100-297, section 1001 (former 20 U.S.C. §2701). The ESEA was reauthorized in 2002 as the No Child Left Behind Act of 2001 (NCLB) (Pub. L. No. 107-110 (20 U.S.C. § 6301)).

[23] Public Law Number 100-297, section 1016 (former 20 U.S.C. § 2726). Reauthorized by Public Law Number 107-110 (20 U.S.C. § 6318).

[24] Exhibit C, comments filed by the claimants in response to Finance comments, dated May 25, 2004, p. 3.

governed by Section 11503. The establishment of a program is distinct from the adoption of a policy. If the terms of a statute are unambiguous, the plain meaning of the language governs, and an intent not found in the words of the statute cannot be found to exist.[25] In addition, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning.[26] Thus, the Commission finds that section 11503 requires school districts to establish a parent involvement *program* only for schools that receive funding under Chapter 1 of the ESEA. In contrast, the Commission finds that section 11504 requires a school district to engage in the one-time activity of adopting a parent involvement *policy* consistent with the purposes and goals set forth in section 11502 for schools not receiving these federal funds.

Section 11506 provides that compliance with sections 11500-11506 is necessary for receipt of specified state grant funds, but does not in and of itself require school districts to engage in any activities.[27] The claimant does not allege that section 11506 imposes any state-mandated new program or higher level of service. Instead, the claimant has pled section 11506 to identify possible sources of offsetting revenue for the state-mandated new programs or higher levels of service alleged by the claimant. Thus, the Commission finds that section 11506 does not require school districts to engage in any activities. The extent to which the funds described in section 11506 can constitute offsetting revenue for any new programs or higher levels of service found in this test claim will be discussed below in section B of this analysis.

b. Section 11504 Imposes a State-Mandated New Program or Higher Level of Service.

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[28] The court held that when analyzing state mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[29] In addition, the court in *Kern High School Dist*. left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled.[30] The court in *Department of Finance v. Commission on State Mandates* (*POBRA*) explained further that a finding of "practical

[25] *Estate of Griswold*, (2001) 25 Cal.4th 904, 910-911.

[26] *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497.

[27] Education Code section 11506 provides that schools may receive funds for school improvement plans pursuant to Chapter 6 (commencing with Section 52000) of Part 28 of the Education Code and economic impact aid pursuant to Article 2 (commencing with Section 54020) of Chapter 1 of Part 29 of the Education Code only if they comply with sections 11500-11506.

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

[29] *Id.* at p. 743.

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

compulsion" requires a concrete showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties.[31]

Section 11503 requires school districts to adopt a parent involvement program that contains specific elements only for schools that receive federal grant funding under Chapter 1 of the ESEA. As noted above, school districts voluntarily apply for grant funding under Chapter 1 of the ESEA. Thus, the activity of adopting a parent involvement program is triggered by a school districts underlying discretionary decision to apply for grant funding under Chapter 1 of the ESEA, and therefore, school districts are not legally compelled to adopt parent involvement programs.

The claimant argues that legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate.[32] However, absent legal compulsion the claimant bears the burden of providing evidence to support the allegation that school districts face practical compulsion or no true choice but to engage in an activity that districts are not legally compelled to engage in. Absent any evidence of practical compulsion, the Commission cannot make a finding that practical compulsion exists.[33] The claimant has not provided evidence that school districts face certain and severe penalties for failing to apply for and receive federal grant funding under Chapter 1 of the ESEA such that they are practically compelled to receive those funds and establish a parent involvement program. In fact, as further discussed below, section 11504 provides for instances in which schools *do not* receive funding under Chapter 1 of the ESEA. Additionally, the claimant's argument that schools face practical compulsion to receive federal grant funding leads to a conclusion that the conditions to receive the federal grant funding constitute federal mandates. These conditions include the adoption of parental involvement programs and policies.[34] Thus, even assuming the claimant's interpretation was correct, the establishment of parental involvement programs would then constitute a federal mandate. Thus, the Commission finds that Education Code section 11503 does not impose a state-mandated activity.

In contrast to section 11503, the requirement imposed by section 11504 is not triggered by a district's underlying discretionary decision. Rather, in the absence of any discretionary action by a school district, section 11504 requires school districts to adopt a parent involvement policy consistent with the purposes and goals in section 11502 for schools in the district not in receipt of funding under Chapter 1 of the ESEA. Additionally, this activity imposes a unique activity on school districts to implement a state policy of promoting parental involvement in education.[35]

[31] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, at pgs. 1366-1369, (*POBRA*).

[32] Exhibit C, claimant's comments in response to Finance comments, *supra*, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 (*Sacramento II*).

[33] *POBRA, supra,* 170 Cal.App.4th at pgs. 1366-1369.

[34] Public Law Number 100-297 section 1016, codified at former 20 U.S.C. section 2726; currently Public Law Number 107-110, codified at 20 U.S.C. section 6318.

[35] See Education Code sections 11500-11502, setting forth the importance of parent involvement in education.

Also, prior to the enactment of section 11504 in 1990,[36] school districts were not required to adopt a policy on parent involvement consistent with the purpose and goals set forth in section 11502. Thus, the activity constitutes a state-mandated new program or higher level of service.

It must be noted that the adoption of a policy is a one-time activity that was first operative January 1, 1991. As a result, the mandate to adopt a policy was imposed and the activity was required to have occurred outside of the reimbursement period that starts on July 1, 2002.[37] Thus, for school districts and schools that existed before July 1, 2002, reimbursement is not required. However, new district or school formation may have occurred after July 1, 2002 and during the period of reimbursement, and thus, those newly formed districts or districts with newly formed schools are eligible for reimbursement for the activity of adopting policies.

Based on the above discussion, the Commission finds that the following one-time activity imposed by section 11504 constitutes a state-mandated new program or higher level of service for school districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year:[38]

> Adopt a policy on parent involvement, consistent with the purposes and goals set forth in Education Code section 11502 (Stats. 1990, ch. 1400), for each school that does not receive funding under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297). (Ed. Code, § 11504 (Stats. 1990, ch. 1400).)

(2) Parental Review of Instructional Materials, School Activities, and Curriculum (Ed. Code, §§ 49091.10 and 49091.14)

The plain language of Education Code sections 49091.10 and 49091.14 requires schools to engage in the following activities:

1. Promptly make all primary supplemental instructional materials and assessments available for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district. Includes textbooks, teacher's manuals, films, tapes, and software.[39] (Ed. Code, § 49091.10(a) (Stats. 1998, ch. 1031).)
2. Arrange for the parental observation of the requested class or classes or activities by a parent or guardian within a reasonable timeframe and in accordance with procedures determined by the governing board of the school district upon written request by the parent or guardian. (Ed. Code, § 49091.10(b) (Stats. 1998, ch. 1031).)

[36] Statutes 1990, chapter 1400 (A.B. 322).

[37] Government Code section 17557(e).

[38] *San Diego Unified School Dist. v. Commission on State Mandates, supra*, 33 Cal.4th at p. 874.

[39] In 2009, the Legislature made a non-substantive amendment to section 49091.10 in order to modernize existing statutory references to audio or video recordings. Specifically, the Legislature replaced "tapes" with "audio video records." (Stats. 2009, ch. 88.)

3. Compile the curriculum, including titles, descriptions, and instructional aims of every course offered by a public school, at least once annually in a prospectus. (Ed. Code, § 49091.14 (Stats. 1998, ch. 1031).)
4. Reproduce and make the curriculum prospectus available upon request.[40] (Ed. Code, § 49091.14 (Stats. 1998, ch. 1031).)

The activities required by sections 49091.10 and 49091.14 are not required by federal law and are not triggered by a discretionary activity by a school. As a result, the Commission finds that the above activities constitute state-mandated activities. However, some of the activities mandated by sections 49091.10 and 49091.14 do not constitute new programs or higher levels of service.

As described below, prior to the enactment of sections 49091.10 and 49091.14 in 1998,[41] schools were required to compile the school's curriculum, allow public inspection of instructional materials and the school's curriculum, and to provide copies of the school's curriculum upon request.

Immediately prior to the enactment of section 49091.14, the governing board of every school district was required to prepare and keep on file for public inspection the courses of study prescribed for the schools under its jurisdiction.[42] Although "curriculum" is not defined for purposes of section 49091.14, the plain meaning of "curriculum" is all of the courses of study offered in a school.[43] Thus, school districts were required to compile the curriculum for public inspection before the enactment of section 49091.14. As a result, the Commission finds that the requirement to compile the curriculum annually in a prospectus does not constitute a new program or higher level of service.

In regard to allowing public inspection of instructional materials and the school's curriculum, the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq.) provides that public records maintained by a state or local agency are open to public inspection at all times during office hours of the agency.[44] Schools have been subject to the CPRA since 1968.[45] Additionally, the

[40] Education Code section 49091.14 gives school officials fee authority in an amount not to exceed the cost of duplicating the prospectus.

[41] Statutes 1998, chapter 1031 (A.B. 1216).

[42] Education Code section 51040 (Stats. 1976, ch. 1010), derived from former Education Code section 8001 (Stats. 1974, ch. 905).

[43] Webster's 2d New College Dictionary. (1999) p. 277. See also, Education Code section 51013, which defines "curriculum" for purposes of Education Code sections 51000-54760. Section 51013 defines "curriculum" to mean the courses of study, subjects, classes, and organized group activities provided by a school. Se defines "curriculum" for the purposes of Education Code sections 51000-54760.

[44] Government Code section 6253(a), derived from former Government Code section 6253 (Stats. 1968, ch. 1473).

[45] Government Code section 6252(a), defining "local agency" to include a "school district ... [and] other local public agency." (Added by Stats. 1968, ch. 1473.)

CPRA requires local agencies to provide a copy of public records upon request and gives local agencies fee authority covering the direct costs of duplication.[46]

The CPRA defines "public records" for the purposes of the CPRA to include:

> [A]ny writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.[47]

"Writing" is defined as:

> [A]ny handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.[48]

However, the CPRA specifically exempts from disclosure:

> Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code[, addressing the disclosure of standardized tests].

As relevant here, instructional materials, a school's curriculum, and assessments that constitute standardized tests as defined by Education Code sections 99151, are writings containing information relating to the conduct of the public's business. Specifically, these writings relate to the public's business of the education of students.[49] These writings are prepared, owned, used or retained by the school and have been required to be open to inspection since 1968 under the CPRA. Additionally, schools have been required to provide a copy of its curriculum upon request since 1968 under the CPRA. As a result, the Commission finds that compiling the school's curriculum; allowing public inspection of instructional materials, standardized tests as described in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code, and the school's curriculum; and providing copies of the school's curriculum upon request do not constitute new programs or higher levels of service.

[46] Government Code section 6253(b), derived from former Government Code sections 6256 and 6257 (Stats. 1968, ch. 1473).

[47] Government Code section 6252(e) (Stats. 2004, ch. 937), derived from former section 6252(d) (Stats. 1968, ch. 1473).

[48] Government Code section 6252(g) (Stats. 2004, ch. 937), derived from former section 6252(d) (Stats. 1968, ch. 1473).

[49] *Long Beach Unified School Dist. v. State of California* (1990) 275 Cal.App.3d 155, 172, finding, "[A]lthough numerous private schools exist, education in our society is considered to be a peculiarly governmental function. .... Further, public education is administered by local agencies to provide service to the public." (Citation omitted.)

In contrast, assessments, which are mandated to be made available for inspection by Education Code section 49091.10, are specifically exempt from the disclosure requirement of the CPRA.[50] As noted above, this exemption excludes standardized tests as provided for in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code. In the context of education, the plain meaning of an assessment is an evaluation, or in other words, a test.[51] As a result, the mandate to make assessments available for inspection, excluding standardized tests described in Education Code sections 99150-99164, is a new requirement as compared to the law in effect immediately prior to the enactment of Education Code section 49091.10. Thus, the Commission finds the activity of making assessments (other than standardized tests) available for inspection constitutes a new program or higher level of service.

Additionally, immediately prior to the enactment of Education Code section 49091.10(b) in 1998, schools were not required to arrange for the parental observation of the requested class, classes, or activities within a reasonable timeframe and in accordance with procedures determined by the governing board of the school district. Thus, the activity mandated section 49091.10(b) constitutes a new program or higher level of service.

Based on the above discussion, the Commission finds that Education Code section 49091.10 mandates the following new programs or higher levels of service:

1. Promptly make all assessments, excluding standardized tests described in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code, available for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.[52] (Ed. Code, § 49091.10(a) (Stats. 1998, ch. 1031).)
2. Upon written request by a parent or guardian, arrange for the parental observation of the requested class or classes or activities by the parent or guardian within a reasonable timeframe and in accordance with procedures determined by the governing board of the school district. (Ed. Code, § 49091.10(b) (Stats. 1998, ch. 1031).)

(3) Rights of Parents and Guardians (Ed. Code, §§ 51101 and 51101.1)

Education Code sections 51101 and 51101.1 address a parent or guardian's education related right and the adoption of a policy for parent involvement in education. Section 51101.1 focuses specifically on parents or guardians who lack English fluency.

a. Section 51101(b) Imposes a State-Mandated New Program or Higher Level of Service to Adopt a Parental Involvement Policy in Education

(i) Section 51101(a)

[50] Government Code section 6254(g).

[51] Webster's 2d New College Dictionary. (1999) p. 67.

[52] In 2009, the Legislature made a non-substantive amendment to section 49091.10 in order to modernize existing statutory references to audio or video recordings. Specifically, the Legislature replaced "tapes" with "audio video records." (Stats. 2009, ch. 88.)

Section 51101(a) prefaces a list of parental education related rights with the following:

> Except as provided in subdivision (d), the parents and guardians of pupils enrolled in public schools have the right and should have the opportunity, as mutually supportive and respectful partners in the education of their children within the public schools, to be informed by the school, and to participate in the education of their children, as follows . . . .[53]

Section 51101(a) then sets forth the following 16 ways to be informed by a school and participate in the education of their children:

(1) to observe the classroom in which their child is enrolled;

(2) to meet with their child's teacher and principal;

(3) to volunteer their time and resources;

(4) to be notified if their child is absent from school without permission;

(5) to receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on such tests;

(6) to request a particular school for their child and receive a response from the school district;

(7) to have a school environment for their child that is safe and supportive of learning;

(8) to examine the curriculum materials of the class or classes in which their child is enrolled;

(9) to be informed of their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child;

(10) to have access to the school records of their child;

(11) to receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish;

(12) to be informed in advance about school rules, including disciplinary rules and procedures pursuant to Education Code section 35291, attendance, retention, and promotion policies pursuant to Education Code section 48070.5, dress codes, and procedures for visiting the school;

(13) to receive information about any psychological testing the school does involving their child and to deny permission to give the test;

(14) to participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team;

(15) to question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school; and,

[53] Subdivision (d) of section 51101 provides that section 51101 may not be construed to authorize schools to inform, or allow participation by, a parent or guardian in the education of a child if it conflicts with a valid restraining order, protective order, or order for custody or visitation.

(16) to be notified if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child pursuant to Education Code section 48070.5.

The claimant interprets the sentence preceding the list of parental rights as requiring schools to *inform* parents and to *allow* participation by parents and guardians as indicated by the list of rights. The Commission disagrees with the claimant's interpretation of section 51101(a). The Commission finds that the plain language of section 51101(a) does not impose any specific activities on schools to effectuate these rights. Rather, the plain language of section 51101(a) is a declaration of rights that parents have in education that are effectuated elsewhere in the Education Code.

For example, the right of parents to have access to school records of their children and to question anything in their child's record that the parent feels is inaccurate as set forth in section 51101(a)(10) and (15), is effectuated by the specific requirements imposed on school districts *by Education Code sections 49063 and 49070*, which address a parent's right to access pupil records. Similarly, the right of parents set forth by section 51101(a)(5) to receive the results of their child's performance on standardized tests and statewide tests and information on performance of the school that their child attends on standardized statewide tests is effectuated by the code sections establishing the provision of the various standardized tests provided in schools. For example, the Education Code sections and implementing regulations that establish the Standardized Testing and Reporting Program (STAR Program) and the California English Language Development Test (CELDT) require the reporting of individual results of the STAR Program and CELDT to the pupils' parents or guardians.[54] Also, school districts are required to include in the school accountability report card (SARC) required by Proposition 98 to provide parents data by which parents can make a meaningful comparison between public schools including pupil achievement by grade level, as measured by standardized testing and reporting programs pursuant to the STAR Program.[55]

In fact, some of the code sections that effectuate the rights set forth in Education Code section 51101(a) were specifically pled by the claimant. For example, in regard to the right of parents to observe the classroom of their child as set forth in section 51101(a)(1), Education Code section 49091.10 imposes the requirement on schools to arrange for parental observation of the requested class within a reasonable timeframe. Similarly, the right to examine curriculum materials of the class in which their child is enrolled as set forth in section 51101(a)(8), is effectuated by the Education Code section 49091.14.[56]

The Commission's interpretation is also supported by the fact that some of the rights delineated by Education Code section 51101(a) have already been analyzed in prior Commission decisions. In these decisions the Commission has found some of the activities alleged to be mandated by section 51101(a) to already be reimbursable under *other* Education Code sections. For instance, the claimant alleges section 55101(a)(16) requires schools to notify parents as early in the school

[54] For STAR see Education Code section 60641 and California Code of Regulations, title 5, section 863. For CELDT see California Code of Regulations, title 5, sections 11511.5

[55] Education Code sections 33126 and 35256.

[56] As discussed above, the CPRA already provided access to the curriculum as a "public record."

year as practicable if their child is identified as being at risk of retention and of the opportunity to consult with the teacher responsible for the decision. However, the Commission has already found this activity to constitute a reimbursable state-mandate imposed by Education Code section 48070.5 in the *Pupil Promotion and Retention* (98-TC-19) test claim.[57] Similarly, the claimants allege that section 51101(a)(4) requires schools to notify parents and guardians on a timely basis if their child is absent from school without permission. However, the Commission has already found activities associated with this right to be mandated by Education Code section 48260 in the *Notification of Truancy* (CSM 4133) test claim.[58, 59]

Based on the above discussion, the Commission finds that Education Code section 51101(a) does not require schools or school districts to engage in any activities.

(ii) Section 51101(b)

In contrast, section 51101(b) provides:

> In addition to the rights described in subdivision (a), parents and guardians of pupils, including those parents and guardians whose primary language is not English, shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in schools. Each governing board of a school district shall develop jointly with parents and guardians, and shall adopt, a policy that outlines the manner in which parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. This policy shall include, but is not necessarily limited to, the following:
>
> (1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.
>
> (2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.
>
> (3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:
>
> (A) Monitoring attendance of their children.

[57] Statement of decision for *Pupil Promotion and Retention* (98-TC-19) test claim, adopted May 23, 2002, at <http://www.csm.ca.gov/sodscan/98tc19sod.pdf> as of September 17, 2012.

[58] Parameters and guidelines for *Notification of Truancy* (CSM) test claim, amended May 27, 2010, at <http://www.csm.ca.gov/sodscan/282.pdf> as of September 17, 2012.

[59] The Commission notes the STAR Program, CELDT, and SARC were also the subject of multiple test claims on which the Commission has issued statement of decisions. See Commission decisions at <http://www.csm.ca.gov/sod_scan.shtml#c2> as of September 17, 2012.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at the school.

(G) Participating, as appropriate, in decisions relating to the education of their own child or the total school program.

The above language requires school districts to jointly develop with parents and guardians, and to adopt, a policy that outlines the manner in which parents or guardians or pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. In addition, the policy is required to include specific elements regarding a parent or guardian's participation in their child's education.

The claimant argues the following language requires school districts to work together with parents and guardians in a mutually supportive and respectful partnership to help their children succeed in school:[60]

> In addition to the rights described in subdivision (a), parents and guardians of pupils, including those parents and guardians whose primary language is not English, shall have the opportunity to work together in a mutually supportive and respectful partnership with schools, and to help their children succeed in schools.[61]

The Commission disagrees with the claimant's interpretation. Like the language of subdivision (a), the language in subdivision (b) does not impose any activity on schools or school districts. Instead, the language describes a right of parents and guardians. As required by law, the Commission can only presume the lawmakers meant what they said, and cannot insert requirements into the language of a statute that is not plainly there.[62] This interpretation does not leave parents with a right absent meaning, as this right is effectuated by the language immediately following the language quoted above. Specifically, school districts are required to jointly develop with parents and guardians, and to adopt, a policy that outlines the manner in which parents or guardians or pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite. Thus, section 51101(b) only requires the joint development and the adoption of a policy with specific content.

[60] Exhibit A, test claim, dated September 25, 2003, p. 25.

[61] Education Code section 51101(b).

[62] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911 and 917.

The activity required by section 51101(b) is not required by federal law or triggered by a voluntary decision on the part of a school district. As a result, the activity to jointly develop and adopt a policy with specific content constitutes a state-mandated activity. In addition, this activity carries out the governmental function of providing a service to the public by encouraging parental involvement in education, and thus, constitutes a "program."[63]

In addition, the activity mandated by section 51101(b) is new. Section 51101 was enacted in 1998.[64] Immediately prior to the enactment of section 51101(b), Education Code section 11504, which was analyzed above, required school districts to adopt a parent involvement policy for schools in the district that *do not* receive funding under Chapter 1 of the ESEA.[65] Section 51101(b) requires school districts to adopt a policy for schools in the district that must contain specific elements addressing parent involvement in the education and academic success of their children. Because of the similarity in the activities, it is necessary to compare the parent involvement policy required by section 11504 and the policy required by section 51101(b) in order to determine if the activity imposed by section 51101(b) is new.

Although the requirements imposed by section 11504 and 51101(b) are similar, the requirement to adopt a policy pursuant to section 51101(b) differs from the requirement imposed by section 11504 in the following two ways: (1) the requirement to adopt a policy under section 51101(b) is imposed for *all* schools in a district, including those receiving funding under Chapter 1 of the ESEA; and (2) section 51101(b) requires specific content to be included in the policy regarding parent involvement, which may meet the requirements of section 11504, but are not specifically required by section 11504. As further discussed below, due to these differences, the requirement to adopt a policy under section 51101(b) for *each* school in the district constitutes a new program or higher level of service on school districts, regardless of the receipt of funding under Chapter 1 of the ESEA.

Section 11504 requires school districts to adopt a parent involvement policy *only* for schools that receive funding under Chapter 1 of the ESEA. In contrast, section 51101(b) applies to all schools in school districts regardless of a school's receipt of Chapter 1 funding. In effect, section 51101(b) extends the requirement to adopt a parent involvement policy to schools receiving funding under Chapter 1 of the ESEA. Even though schools agree to adopt parent involvement policies as a condition for receipt of Chapter 1 funds, schools receive and accept the conditions for receiving Chapter 1 grant funding on a voluntary basis. Where a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state is required to reimburse the school district for those costs incurred after the operative date of the state mandate.[66] Thus, school districts with schools receiving funding under Chapter 1 of the ESEA were mandated to adopt a policy for those schools only *after* the enactment of section

[63] *Long Beach Unified School Dist. v. State of California* (1990) 275 Cal.App.3d 155, 172, finding, "[A]lthough numerous private schools exist, education in our society is considered to be a peculiarly governmental function. .... Further, public education is administered by local agencies to provide service to the public." (Citation omitted.)

[64] Statutes 1998, chapter 864.

[65] Statutes 1990, chapter 1400.

[66] Government Code section 17565.

51101(b) in 1998. As a result, section 51101(b) imposes a state-mandated new program or higher level of service on school districts to adopt a policy with content addressing parent involvement, specified by section 51101(b), for each school in the district receiving federal funding under Chapter 1 of the ESEA.

In addition, section 51101(b) imposes a new program or higher level of service on school districts for schools that *do not* receive funding under Chapter 1 of the ESEA. Under section 11504, schools that do not receive funding under Chapter 1 of the ESEA are mandated to adopt a parent involvement policy consistent with purposes and goals set forth in section 11502. The purpose and goals set forth in section 11502 include engaging parents in the education of their children, build communication between parents and schools, and to incorporate parent involvement programs in a school's master plan for academic accountability.[67] Although, schools that do not receive funding under Chapter 1 of the ESEA were mandated to adopt a parent involvement policy under section 11504, this policy is only required to be "*consistent* with the purposes and goals set forth in section 11502."[68] Section 11504 does not require school districts to include specific content that is consistent with the purposes and goals in these policies.

In contrast, section 51101(b) provides specifically what, at minimum, is required to be included in the policy adopted by a school district. Section 51101(b) provides:

> The policy shall include, but is not necessarily limited to, the following:
>
> (1) The means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school.

[67] Emphasis added. Education Code section 11502 provides:

> It is the purpose and goal of this chapter to do all of the following:
>
> (a) To engage parents positively in their children's education by helping parents to develop skills to use at home that support their children's academic efforts at school and their children's development as responsible future members of society.
>
> (b) To inform parents that they can directly affect the success of their children's learning, by providing parents with techniques and strategies that they may utilize to improve their children's academic success and to assist their children in learning at home.
>
> (c) To build consistent and effective communication between the home and the school so that parents may know when and how to assist their children in support of classroom learning activities.
>
> (d) To train teachers and administrators to communicate effectively with parents.
>
> (e) To integrate parent involvement programs, including compliance with [Education Code sections 11500-11506], into the school's master plan for academic accountability.

[68] Education Code section 11504.

(2) A description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school.

(3) The manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to, the following:

(A) Monitoring attendance of their children.

(B) Ensuring that homework is completed and turned in on a timely basis.

(C) Participation of the children in extracurricular activities.

(D) Monitoring and regulating the television viewed by their children.

(E) Working with their children at home in learning activities that extend learning in the classroom.

(F) Volunteering in their children's classrooms, or for other activities at school.

(G) Participating, as appropriate, in decisions relating to the education of their children or the total school program.

The above content may be consistent with the purposes and goals set forth in section 11502, and thus, the policy adopted under section 51101(b) may meet the requirement to adopt a parent involvement policy under section 11504. However, the specific content was not *required* in 1990 by section 11504. Thus, school districts which may, at their option, include this content in their parent involvement policies under section 11504, are now mandated to include this content in their policies under section 51101(b). Because section 51101(b) requires specific content, not required by section 11504, the Commission finds that the requirement to adopt a policy with the content specified by section 51101(b) for each school in a school district constitutes a new program for school districts that were required to adopt a parent involvement policy for schools under section 11504.

It must be noted that the policy mandated to be adopted by section 51101(b) is not specifically linked to the parent involvement policy mandated section 11504. Rather, the Legislature enacted section 51101 without reference to section 11504. Although school districts can comply with both code sections by adopting a single policy that includes the content required by section 51101(b) and is also consistent with the purposes and goals set forth in section 11502, school districts are not required to do so. Instead, sections 11504 and 51101(b) impose separate requirements to adopt policies.

In addition, the Commission notes that the adoption of a policy is a one-time activity that was first operative January 1, 1999.[69] Thus, the mandate to adopt a policy was imposed and the

[69] Education Code section 51101 as added by Statutes 1998, chapter 864. This section was not substantively amended by later amendments in 2003 and 2004 (Stats. 2003, ch. 91; and Stats 2004, ch. 89).

activity was required to have occurred outside of the reimbursement period that starts on July 1, 2002.[70] Thus, no reimbursement is required for school districts and schools that existed before July 1, 2002. However, new district or school formation may have occurred after July 1, 2002 and during the period of reimbursement. As a result, the Commission finds that the one-time activity imposed by section 51101(b) constitutes a state-mandated new program or higher level of service for school districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted a policy prior to the 2002-2003 fiscal year.

(iii) Section 51101(c) and (d)

Subdivision (c) of section 51101 provides that schools that participate in the High Priority Schools Grant Program established pursuant to Article 3.5 (commencing with Ed. Code, § 52055.600) of Chapter 6.1 of Part 28 and that maintain kindergarten or any of grades 1 to 5, inclusive, shall jointly develop with parents or guardians for all children enrolled at that schoolsite, a school-parent compact pursuant to Section 6319 of Title 20 of the United States Code. However, Education Code section 52055.600 expressly provides that participation in the High Priority Schools Grant Program is voluntary.[71] As a result, the Commission finds that the activity required by subdivision (c) of section 51101 is triggered by an underlying discretionary decision by school districts, and thus, is not mandated by the state under *Kern High School Dist.*[72]

Subdivision (d) of section 51101 provides that section 51101 may not be construed to authorize schools to inform, or allow participation by, a parent or guardian in the education of a child if it conflicts with a valid restraining order, protective order, or order for custody or visitation. The plain language of the subdivision does not impose any requirements on school districts.

(iv) Conclusion

Based on the discussion above, the Commission finds that Education Code section 51101(b) imposes the following state-mandated new program or higher level of service for school districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted a policy prior to the 2002-2003 fiscal year:

> Develop jointly with parents and guardians, and adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite.
>
> The policy must include the following: (1) the means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school; (2) a description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective learning environment that enables all pupils to meet the academic expectations of the school; and (3) the

[70] Government Code section 17557(e).

[71] Education Code section 52055.600(a) provides, "The High Priority Schools Grant Program is hereby established. Participation in this program is voluntary."

[72] *Kern High School Dist., supra,* 30 Cal.4th at 743.

manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to: (a) monitoring attendance of their children, (b) ensuring that homework is completed and turned in on a timely basis, (c) participation of the children in extracurricular activities, (d) monitoring and regulating the television viewed by their children, (e) working with their children at home in learning activities that extend learning in the classroom, (f) volunteering in their children's classrooms, or for other activities at the school, (g) participating, as appropriate, in decisions relating to education of their own child or the total school program. (Ed. Code, § 51101(b) (Stats. 1998, ch. 864).)

b. Section 51101.1(a) Imposes a Partial State-Mandated New Program or Higher Level of Service.

Section 51101.1 was enacted in 2002, four years after the enactment of section 51101. Like section 51101, section 51101.1 sets forth a list of parent's education related rights, most of which are stated in section 51101. However, section 51101.1 restates these rights for parents or guardians of pupils who speak a language other than English. Additionally, section 51101.1 is distinguished from section 51101 in that section 51101.1 not only states a list of parent rights, but also requires school districts to take all reasonable steps to ensure that the parents or guardians of these pupils are notified of these rights. Section 51101.1 also encourages schools with a substantial number of English learners to establish parent centers with personnel who can communicate with the parents and guardians of English learners to encourage understanding of, and participation, in the educational programs in which their children are enrolled.

The claimant argues that section 51101.1(a) and (b) imposes the following two reimbursable activities: (1) take "all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and in their home language, pursuant to Section 48985, of the rights and opportunities available to them pursuant to [section 51101.1];" and (2) to ensure "participation of parents and guardians of English learners pursuant to Section 51101 ..." as specified by section 51101.1(b).[73] In addition, the claimant alleges that section 51101.1(c) requires schools with a substantial number of English learners to establish parent centers with personnel who can communicate with parents and guardians of English learners to encourage understanding of and participation in the educational programs in which their children are enrolled. The Commission disagrees with the claimant's interpretation of the statute.

As further discussed below, section 51101.1(a) *only* requires the *notification* of the rights and opportunities set forth in section 51101.1(b) *and* this notification is subject to the limitations set forth in Education Code section 48985, as are all notices, reports, statements, or records sent to parents or guardians. In addition, schools were already required to provide parents and guardians of English learners notification of some of these rights prior to the enactment of section 51101.1. Also, the plain language of 51101.1(c) does not impose any requirements on schools. As a result, section 51101.1 imposes a much more limited state-mandated new program or higher level of service than that alleged by the claimant.

[73] Exhibit A, test claim, dated September 25, 2003, p. 27-28.

(i) Section 51101.1(a) Requires the Notification of Parents and Guardians of Rights and Opportunities Set Forth in the Section 51101.1 Subject to the Limitations of Education Code section 48985.

Section 51101.1(a) provides in relevant part:

> A school district shall take all reasonable steps to ensure that all parents and guardians of pupils who speak a language other than English are properly notified in English and their home language, pursuant to [Education Code] Section 48985, of the rights and opportunities available to them pursuant to this section.[74]

Education Code section 48985 provides in relevant part:

> If 15 percent or more of the pupils enrolled in a public school that provides instruction in kindergarten or any of grades 1 to 12, inclusive, speak a single primary language other than English, . . . , all notices, reports, statements, or records sent to the parent or guardian of any such pupil by the school or school district shall, in addition to being written in English, be written in the primary language . . . .[75]

Subdivision (b) of section 51101.1 sets forth the rights and opportunities that school districts are to ensure that parents and guardians are notified about. Section 51101.1(b) provides:

> Parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and as follows:
>
> (1) To receive, pursuant to paragraph (5) of subdivision (a) of Section 51101, the results of their child's performance on standardized tests, including the English language development test.
>
> (2) To be given any required written notification in English and the pupil's home language pursuant to Section 48985 and any other applicable law.
>
> (3) To participate in school and district advisory bodies in accordance with federal and state laws and regulations.
>
> (4) To support their children's advancement toward literacy. School personnel shall encourage parents and guardians of English learners to support their child's progress toward literacy both in English and, to the extent possible, in the child's home language. School districts are encouraged to make available, to the extent possible, surplus or undistributed instructional materials to parents and guardians, pursuant to subdivision (d) of Section 60510, in order to facilitate parental involvement in their children's education. (Cal. Code Regs., tit. 5, § 11303(c).)
>
> (5) To be informed, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts.

[74] Education Code section 51101.1(a).

[75] Education Code section 48985(a).

The claimant asserts that the requirement of section 51101.1 is not limited by the "15 percent floor [of Education Code section 48985] and goes far beyond just notices, reports, statements or records."[76] However, this interpretation is contrary to the plain language of section 51101.1(a). The plain language of section 51101.1 requires school districts to ensure that all parents and guardians of pupils who speak a language other than English "are *properly notified* in English and in their home language, *pursuant to Section 48985*," of the rights set forth in sections 51101 and 51101.1(b). Section 48985 limits the requirement to provide notification in English and a pupil's primary language to parents and guardians where that language is the primary language of 15 percent or more of pupils in the school. Read together, section 51101.1 requires school districts to provide *notice* to parents and guardians in English and a pupil's primary language of the rights set forth in this section *only* if 15 percent or more of the pupils in the school speak that primary language.

The parental rights that school districts are required to provide notice of are set forth in section 51101.1(b), which incorporates by reference the rights set forth in section 51101. The claimant alleges that section 51101.1(b) requires schools to ensure the participation of parents and guardians of English learners pursuant to the rights listed in section 51101.1(b).[77] However, the plain language of section 51101.1(b) *does not* require school districts to ensure the participation of parents and guardians in education or to engage in any other activity. Rather, like section 51101(a), section 51101.1(b) only sets forth existing parent and guardian rights. Thus, the rights listed in section 51101.1(b) do not, in and of themselves, impose any requirements on schools.

Section 51101.1(c) provides:

> A school with a substantial number of English learners is encouraged to establish parent centers with personnel who can communicate with the parents and guardians of these children to encourage understanding of and participation in the educational programs in which their children are enrolled.

The claimant argues that despite the plain language of subdivision (c) providing that schools are *encouraged* to establish parent centers, schools are *legally required* to do so.[78] The claimant reasons that in light of legislative findings and declarations regarding the importance of parent involvement in education and the requirement of parents and guardians to be notified of their rights pursuant to section 51101.1, that subdivision (c) requires the establishment of parent centers. The claimant is incorrect. If the terms of a statute are unambiguous, the plain meaning of the language governs, and an intent that cannot be found in the words of the statute cannot be found to exist.[79] Rather, the Legislature is presumed to have meant what it said.[80] Resort to

[76] Exhibit C, comments filed by the claimant in response to comments filed by the Department of Finance, dated May 25, 2004, p. 16.

[77] Exhibit A, test claim, dated September 25, 2003, p. 27-28.

[78] Exhibit C, comments filed by the claimant in response to comments filed by the Department of Finance, dated May 25, 2004, pgs. 17-18.

[79] *Estate of Griswold*, (2001) 25 Cal.4th 904, 910-911.

legislative findings is unnecessary here as the language of subdivision (c) is clear. Specifically, the language of subdivision (c) unambiguously provides that schools are "encouraged" to establish parent centers.

The claimant also suggests that even if schools are not legally compelled to establish parent centers, schools face practical compulsion to do so.[81] However, there are no legal consequences or penalties to suggest that schools face certain and severe penalties for failing to establish parent centers. As a result, the Commission finds that section 51101.1(c) does not require schools to engage in any activities.

Based on the above discussion, section 51101.1(a) requires school districts to provide notice of the rights set forth in Education Code sections 51101(a) and 51101.1(b) to parents and guardians in English and a single primary language other than English, if 15 percent or more of the pupils in the school speak that single primary language other than English.[82]

In order to determine whether the activity required by section 51101.1(a) constitutes a reimbursable activity, the Commission must determine whether the activity imposes a state-mandated new program or higher level of service. The follow discussion addresses this issue.

(ii) Section 51101.1(a) Imposes a State-Mandated New Program or Higher Level of Service to Provide Notice to Specific Parents of Some of the Rights Set Forth in Sections 51101(a) and 51101.1(b).

The activity required by section 51101.1(a) has two components that must be analyzed to determine whether the requirement imposed by section 51101.1(a) constitutes a state-mandated new program or higher level of service. The first component is the provision of a notice to parents and guardians in English *and* a pupil's primary language if 15 percent or more of the pupils in the school speak that primary language. The second component is the provision of notice to parents and guardians of the rights specified in Education Code sections 51101(a) and 51101.1(b).

In regard to the first element, since 1977, Education Code section 48985 has required *all* notices, reports, statements, or records sent to parents or guardians by a school or school district to be provided in English *and* a pupil's primary language if 15 percent or more of the pupils enrolled in the school speak that primary language.[83] Thus, immediately prior to the enactment of section 51101.1(a) in 2002,[84] school districts were already required to provide notices in English *and* a pupil's primary language subject to the conditions of section 48985. As a result, the Commission finds that the provision of a notice to parents and guardians in English *and* a pupil's

[80] *Los Angeles County Dept. of Children and Family Services v. Superior Court* (2001) 87 Cal.App.4th 1161, 1165.

[81] Exhibit C, comments filed by the claimant in response to comments filed by the Department of Finance, dated May 25, 2004, p. 18.

[82] Education Code section 51101.1(a) (Stats. 2002, ch. 1037).

[83] Education Code section 48985 (Stats. 1977, ch. 36).

[84] Education Code section 51101.1(a) (Stats. 2002, ch. 1038).

primary language does not constitute a new program or higher level of service. What remains from the requirement imposed by section 51101.1(a) is as follows:

> Provide notice of the rights set forth in Education Code sections 51101(a) and 51101.1(b) to the parents and guardians of pupils that speak a single primary language other than English if 15 percent or more of the pupils in the school speak that single primary language. (Ed. Code, § 51101.1(a) (Stats. 2002, ch. 1037).)

In regard to the second element, prior to the enactment of section 51101.1(a) in 2002, schools were required by state or federal law to provide notice of the some of the rights set forth in sections 51101(a) and 51101.1(b), but not all of the rights. The following discussion will first set forth the rights that schools are required to provide notice of pursuant to section 51101.1, and by incorporation, section 51101. Second, the discussion will analyze which specific rights schools were required by state or federal law to provide notice of prior to the 2002 enactment of section 51101.1, and thus, do not constitute state-mandated new programs or higher levels of service.

(a) Rights that Schools are Required to Provide Notice of to Parents and Guardians.

Education Code section 51101.1(a) requires school districts to provide parents of English learners notice of the rights set forth in the section under the specific circumstances discussed above. Section 51101.1(b) provides, "Parents and guardians of English learners are entitled to participate in the education of their children pursuant to Section 51101 and as follows ... ." Subdivision (b) then sets forth five specific ways in which parents are entitled to participate in their child's education. With this language, section 51101.1(b) incorporates the rights set forth in section 51101 into section 51101.1. The rights set forth in section 51101 are found in subdivision (a) of that section. Thus, based on the language of section 51101.1(a), schools are required to provide notice of the rights set forth in section 51101.1(b) *and* section 51101(a).

These sections, read together, provide that if 15 percent or more pupils enrolled in the school speak a single primary language other than English, the school is required to provide notice to parents and guardians of pupils that speak that primary language of the following parental rights:

1. To observe, within a reasonable time following a request, the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs. (Ed. Code, § 51101.1(a) read in conjunction with 51101(a)(1).)
2. To meet with their child's teacher or teachers and the principal of the school in which their child is enrolled. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(2).)
3. To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(3).)
4. To be notified on a timely basis if their child is absent from school without permission. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(4).)

5. To receive the results of their child's performance on standardized tests and statewide tests and information on the performance of the school that their child attends on standardized statewide tests. (Ed. Code, §§ 51101.1(a), read in conjunction with § 51101(a)(5), and 51101.1(b)(1).)
6. To request a particular school for their child, and to receive a response from the school district. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(6).)
7. To have a school environment for their child that is safe and supportive of learning. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(7).)
8. To examine the curriculum materials examine the curriculum materials of the class or classes in which their child is enrolled. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(8).)
9. To be informed their child's progress in school and of the appropriate school personnel whom they should contact if problems arise with their child. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(9).)
10. To have access to the school records of their child. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(10).)
11. To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(11).)
12. To be informed in advance about school rules, including disciplinary rules and procedures pursuant to Education Code section 35291, attendance, retention, and promotion policies pursuant to Education Code section 48070.5, dress codes, and procedures for visiting the school. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(12).)
13. To receive information about any psychological testing the school does involving their child and to deny permission to give the test. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(13).)
14. To participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations. (Ed. Code, §§ 51101.1(a), read in conjunction with § 51101(a)(14), and 51101.1(b)(3).)
15. To question anything in their child's record that the parent feels is inaccurate or misleading or is an invitation of privacy and to receive a response from the school. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(15).)
16. To be notified, as early in the school year as practicable pursuant to Education Code section 48070.5, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(16).)

17. To be given any required written notification in English and the pupil's home language pursuant to Education Code section 48985 and any other applicable law. (Ed. Code, § 51101.1(a) read in conjunction with § 51101.1(b)(2).)

18. To support their children's advancement toward literacy. (Ed. Code, § 51101.1(a) read in conjunction with § 51101.1(b)(4).)

19. To be informed, pursuant to Education Code sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures and school improvement efforts. (Ed. Code, § 51101.1(a) read in conjunction with § 51101.1(b)(5).)

(b) Notices of Parent and Guardian Rights that were Required by State and Federal Law Prior to the Enactment of Section 51101.1.

Prior to the enactment of section 51101.1 in 2002, various state and federal laws required school districts to provide notice to parents and guardians of some of the rights listed above. The following discussion will address these requirements prior to the enactment of section 51101.1. For ease of discussion, the analysis below groups together some of the above rights based on subject matter.

1) Right to Receive Pupil and School Results on Standardized and Statewide Tests and to be Informed about Statewide and Local Academic Standards, Testing, Accountability Measures, and School Improvement Efforts.

Section 51101.1(a), when read in conjunction with section 51101(a)(5), and section 51101.1(b)(1) requires schools to notify parents and guardians of the right to receive the results of their child's performance on standardized tests, and statewide tests and information on the performance of the school that their child attends on standardized and statewide tests. In addition, section 51101.1(b)(5) requires schools to notify parents and guardians of their right to "be informed, pursuant to Sections 33126 and 48985, about statewide and local academic standards, testing programs, accountability measures, and school improvement efforts."

Education Code section 33126 sets forth information that is required to be included in a school's School Accountability Report Card (SARC). This information includes a school's performance on standardized tests, state and local academic standards, accountability measures, and school improvement efforts. As discussed above, Education Code section 48985 requires schools and school districts to provide any notice issued to parents and guardians in English and a pupil's primary language, if that primary language is spoken by at least 15 percent of the pupils enrolled in the public school.

Since 1977 Education Code section 49063 required schools to keep and notify parents of the availability of their child's records, which have been required to include the results of standardized tests of a pupil under California Code of Regulations, title 5, section 432(b)(2)(I).[85]

[85] Education Code section 49063 (Added by Stats. 1976, ch. 1010; last amended by Stats. 1998, ch. 1031); and California Code of Regulations, title 5, section 432(b)(2)(I) (Register 77, No. 39). The Commission notes that Education Code section 49063 was the subject of the *Annual Parent Notification – 1998-2000 Statutes* (99-TC-09/00-TC-12) test claim, on which the Commission has made a final decision. Statement of decision for *Annual Parent Notification – 1998-2000*

In addition, Education Code section 35256 has required schools to notify parents of the right to receive the SARC since 1988. Thus, notifying parents and guardians of their right to receive the information discussed in this section is not new.

Based on the above discussion, the Commission finds the requirement imposed by section 51101.1(a) to notify parents and guardians of children that speak a single primary language other than English of the right to receive the information identified by sections 51101(a)(5) and 51101.1(b)(1) does not constitute a new program or higher level of service.

2) Right to Request a Particular School for Child

Section 51101.1(a), read in conjunction with section 51101(a)(6), requires schools to notify parents and guardians of their right to request a particular school for their child, and to receive a response from the school. However, prior to 2002 schools were already required to notify parents and guardians of this right under Education Code section 48980(h). That section requires schools to advise parents or guardians of all existing statutory attendance options and local attendance options available in the school district.[86] Thus, the Commission finds that the requirement imposed by section 51101.1(a), when read in conjunction with section 51101(a)(6), does not constitute a new program or higher level of service.

3) Right to School Environment that is Safe and Supportive of Learning

Section 51101.1(a), read in conjunction with section 51101(a)(7), requires schools to notify parents and guardians of the right to have a school environment for their child that is safe and supportive of learning. However, since 1997, schools have been required to adopt a comprehensive school safety plan due to the enactment of former Education Code section 35294.6.[87] This plan has been required to include specific components, including, a safe and orderly environment conducive to learning at school.[88] In addition, since 2000, schools have been required to include a description of the key elements of the comprehensive school safety plan in the annual SARC.[89] As discussed above, schools are required to notify parents of their right to receive the SARC since 1988. Thus, the Commission finds that the requirement imposed

Statutes (99-TC-09/00-TC-12) test claim, adopted December 12, 2001, at <http://www.csm.ca.gov/sodscan/139.pdf> as of October 16, 2012.

[86] Education Code section 48980(h), formerly section 48980(g), as amended by Statutes 1993, chapter 1296. This code section was the subject of the *Annual Parent Notification* (CSM 4461) test claim, on which the Commission has made a final decision. Statement of decision for *Annual Parent Notification* (CSM 4461) test claim, adopted December 12, 2001, at <http://www.csm.ca.gov/sodscan/139.pdf> as of October 16, 2012.

[87] Former Education Code section 35294.6, as added by Statutes 1997, chapter 736. Renumbered to Education Code section 32286 by Statutes 2003, chapter 828.

[88] Former Education Code section 35294.2(a)(2)(H) (Stats. 1997, ch. 736). Renumbered to Education Code section 32282(a)(2)(H) (Stats. 2003, ch. 828).

[89] Former Education Code section 35294.6 (as amended by Stats. 1999, ch. 996).

by section 51101.1(a), when read in conjunction with section 51101(a)(7), does not constitute a new program or higher level of service.

4) Right to View Curriculum Materials, Pupil Progress, and Records and to Dispute the Content of Pupil Records

Section 51101.1(a), read in conjunction with section 51101(a)(8), (9), (10), and (15), requires schools to notify parents and guardians of their right to: (1) examine curriculum materials of the class or classes in which their child is enrolled; (2) be informed of their child's progress in school and of the appropriate personnel whom they should contact if problems arise with their child; (3) have access to the school records of their child; and (4) question anything in their child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and to receive a response from the school. Prior to 2002, schools were already required to provide parents notice of these rights. Specifically, Education Code section 49063(k) has required schools to provide parents notice of their right to view curriculum materials since 1998.[90] Also, Education Code section 49063 has required schools to keep and notify parents of the availability of their child's records and the position of the official responsible for the maintenance of each type of record, which have been required to include pupil progress slips and notices under California Code of Regulations, title 5, section 432(b)(2)(E).[91] Additionally, prior to 2002 Education Code section 49063 required schools to provide parents with notice of their right to have access pupil records and the procedures for challenging the content of pupil records. Thus, the Commission finds that the requirement imposed by section 51101.1(a), when read in conjunction with section 51101(a)(8), (9), (10), and (15), does not constitute a new program or higher level of service.

5) Right to be Notified of School Rules

Section 51101.1(a), read in conjunction with section 51101(a)(12), requires schools to notify parents and guardians of their right to be informed in advance about school rules, including disciplinary rules and procedures pursuant to Education Code section 35291, attendance, retention and promotion policies pursuant to Education Code section 48070.5, dress codes, and procedures for visiting the school. However, as discussed below, schools have been required to notify parents and guardians of their right to be informed about all of these rules in advance *except* the retention and promotion policies pursuant to Education Code section 48070.5.

Immediately prior to the enactment of section 51101.1 in 2002, Education Code section 48980 provided in relevant part:

> At the beginning of the first semester or quarter of the regular school term, the governing board of each school district shall notify the parent or guardian of its minor pupils regarding the right or responsibility of the parent or guardian under [Education Code section] 35291 ... .[92]

[90] Education Code section 49063(k), as amended by Statutes 1998, chapter 1031.

[91] Education Code section 49063 (Added by Stats. 1976, ch. 1010; last amended by Stats. 1998, ch. 1031); and California Code of Regulations, title 5, section 432(b)(2)(E) (Register 77, No. 39).

[92] Education Code section 48980 as amended by Statutes 2000, chapter 73.

Thus, immediately before the enactment of section 51101.1, section 48980 required schools to provide parents or guardians notice of school disciplinary rules pursuant to section 35291. This is further indicated by the fact the Legislature made a subsequent non-substantive amendment to section 51101(a)(12) in 2004 to replace the reference to Education Code section 35291 to section 48980.[93] Courts have held that an amended statute may be looked to in construing a prior statute.[94] In 2004, the Legislature amended Education Code section 51101 as part of an omnibus clean-up bill that made "a number of non-controversial, conforming, and technical changes to various education statutes and Budget items."[95] The Legislature made this technical, non-substantive, amendment to section 51101(a)(12) to clarify that the right to be informed of school disciplinary rules is done in accordance with the pre-existing requirement of section 48980. As a result, the Commission finds that notifying parents and guardians of their right to be informed of a school's disciplinary rules is not new as compared to pre-existing law.

In regard to providing notice to parents and guardians of their right to be informed of a school's disciplinary rules and procedures, dress code, and procedures for visiting the school, since 1997 schools have been required to adopt a comprehensive school safety plan due to the enactment of former Education Code section 35294.6.[96] This plan has been required to include specific components, including, the schools dress code and procedures for safe ingress and egress of pupils, parents, and school employees to and from school.[97] In addition, since 2000 schools have been required to include a description of the key elements of the comprehensive school safety plan in the annual SARC.[98] As discussed above, schools are required to notify parents of their right to receive the SARC since 1988. Thus, the Commission finds that providing notice to parents and guardians of their right to be informed of school dress codes and procedures for visiting the school does not constitute a new program or higher level of service.

In contrast, prior to 2002, schools were not required to provide notice to parents and guardians regarding retention and promotion policies pursuant to Education Code section 48070.5. Although Education Code section 48070.5 requires schools to provide notice to parents of specific pupils identified as being at risk of retention, schools were not required to provide notice to parents and guardians of *all* pupils regarding retention and promotion policies. Thus, the Commission finds that providing notice to parents and guardians of pupils that speak a single primary language other than English, when at least 15 percent of the pupils at the school speak that language, of their right to be informed of a school's retention and promotion policies is new as compared to the law in effect immediately prior to the enactment of section 51101.1(a).

[93] Education Code section 51101 as amended by Statutes 2004, chapter 896.

[94] *Fahey v. City Council of City of Sunnyvale* (1962) 208 Cal.App.2d 667, 675-676.

[95] Assembly Floor Analyses, Assembly Bill 2525 (2003-2004 Reg. Sess.) as amended August 27, 2004.

[96] Former Education Code section 35294.6, as added by Statutes 1997, chapter 736. Renumbered to Education Code section 32286 by Statutes 2003, chapter 828.

[97] Former Education Code section 35294.2(a)(2)(F) and (G) (Stats. 1997, ch. 736). Renumbered to Education Code section 32282(a)(2)(F) and (G) (Stats. 2003, ch. 828).

[98] Former Education Code section 35294.6 (as amended by Stats. 1999, ch. 996).

6) Right to Receive Information about Psychological Testing and to Deny Permission

Section 51101.1(a), read in conjunction with section 51101(a)(13), requires schools to notify parents and guardians of their right to receive information about psychological testing the school does involving their child and the right to deny permission to give the test to their child. However, as discussed below, schools are mandated by federal law to provide parents notice of this information, and thus, this requirement does not constitute a state-mandated new program or higher level of service.

The federal Protection of Pupil Rights Amendment (PPRA)[99] was enacted as part of the General Education Provisions Act (GEPA), which set forth general conditions which schools and school districts must comply with to receive federal education funds under programs administered by the Secretary of Education or the U.S. Department of Education.[100] However, because the requirements of the PPRA are conditions for the receipt of federal funds, school districts are not obligated to accept the conditions, and may choose not to receive federal funds and thus avoid the conditions imposed by PPRA. Thus, school districts are not *legally* compelled to comply with the provisions of PPRA. Therefore, it is necessary to determine whether K-12 school districts are *practically* compelled to comply with the provisions of PPRA.

The court in *Hayes v. Commission on State Mandates* discussed this type of "cooperative federalism" scheme employed by FERPA noting that:

> [T]he vast bulk of cost-producing federal influence on state and local government is by inducement or incentive rather than direct compulsion. … However, "certain regulatory standards imposed by the federal government under 'cooperative federalism' schemes are coercive on the states and localities in every practical sense." [101]

The court went on to say that "[t]he test for determining whether there is a federal mandate is whether compliance with federal standards 'is a matter of true choice.'"[102] To make this determination the court set out various factors, including: (1) the nature and purpose of the federal program, (2) whether its design suggests an intent to coerce, and (3) when state and/or local participation began.[103]

Here, the nature and purpose of the PPRA is to provide pupil and parental privacy rights by limiting what information a school can gather about a student absent meeting specific notice requirements to parents and providing an opportunity to opt the student out of participating in the information gathering.[104] The Sixth Circuit Court of Appeals noted Congress' high regard for

[99] 20 United States Code section 1232h.

[100] 20 United States Code section 1221-1234i.

[101] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1581-1582, citing to *Sacramento II*, *supra*, 50 Cal.3d at p. 73-74.

[102] *Ibid*.

[103] *Ibid*.

[104] 20 U.S.C. section 1232h(c)(2)(A).

the privacy rights of students when discussing the Family Educational and Privacy Rights Act (FERPA) in *United States v. Miami University*.[105] The FERPA, like the PPRA, was enacted as part of the GEPA, and protects parent and student rights to privacy by limiting the transferability of their records without their consent. Citing to 20 U.S.C. section 1232i, which sets forth limitations on withholding federal education funds for failing to meet the requirements of the FERPA and PPRA, the court stated:

> Because Congress holds student privacy interests in such high regard[, "]the refusal of a[n] … educational agency or institution … to provide personally identifiable data on students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance.["] In other words, Congress places the privacy interests of students and parents above the federal government's interest in obtaining necessary data and records.[106]

With regard to whether the design of the federal program suggests an intent to coerce, as noted above, the receipt of all federal education funds by schools is conditioned on compliance with the provisions of the PPRA. Failure to comply with the provisions of PPRA would jeopardize funds which have been made available under programs administered by the Secretary of State.[107] As noted by the court in *Hayes v. Commission on State Mandates*, federal funding to education is pervasive.[108]

In addition, schools have received federal education funds for a significant period of time. This is evidenced by Education Code section 49060. Section 49060 sets forth the legislative intent of Education Code sections 49060 – 49085, which addresses parental access to, and the confidentiality of, pupil records. As enacted in 1976, Education Code section 49060 provided in relevant part:

> It is the intent of the Legislature to resolve potential conflicts between California law and the provisions of Public Law 93-380 [FERPA] regarding parental access to, and the confidentiality of, pupil records in order to insure the *continuance of federal education funds* to public educational institutions within the state … .[109] (Italics added.)

The language of section 49060, as enacted in 1976, was made operative on April 30, 1977. Thus, section 49060 indicates the reliance on federal education funds for at least 30 years. As discussed above, failure to comply with the provisions of the PPRA would result in a loss of all federal education funding received by schools.

[105] *United States v. Miami University* (6th Cir. 2002) 294 F.3d 797.

[106] *Id* at 807.

[107] 20 U.S.C. sections 1234-1234i and 34 Code of Federal Regulations part 76.901.

[108] *Hayes v. Commission on State Mandates*, supra, 11 Cal.App.4th 1564, 1584.

[109] Education Code section 49060 (Stats. 1976, ch. 1010).

In sum, because of the purpose of the PPRA to protect the privacy rights of parents and students and Congress' high regard for these rights, and the loss of all federal funds by schools, and the extent to which these funds are relied upon, the requirements of the PPRA (20 U.S.C. § 1232h) constitute federal mandates on schools. Under the PPRA schools are required to provide notice to parents regarding psychological testing and to offer an opportunity for the parent to opt the student out of participation of such testing.[110] Thus, the Commission finds that the requirement imposed by section 51101.1(a), when read in conjunction with section 51101(a)(13), does not constitute a new program or higher level of service.

7) Right to Participate in Parent Advisory Committees, Schoolsite Councils, or Site-Based Management Leadership Teams

Section 51101.1(a), when read in conjunction with sections 51101(a)(14) and 51101.1(b)(3), requires schools to notify parents and guardians of their right to participate as a member of a parent advisory committee, schoolsite council, or site-based management leadership team, in accordance with any rules and regulations governing membership in these organizations.

The rules and regulations governing membership in these organizations, however, already require schools to notify parents and guardians of their right o participate in these organizations. For example, schools that participate in school-based program coordination are required to establish a schoolsite council under Education Code section 52852. Under Education Code section 52852.5, school districts are required to provide parents information regarding the School-Based Coordination Program, including the right to participate in a schoolsite council created in a school that participates in school-based program coordination. Similarly, former Education Code sections 52011 and 54725, which addressed the provision of information about the School Improvement Program and Motivation and Maintenance Program, require schools to provide parents information about these programs, including the right of parents to participate in a schoolsite council created in schools that participate in these programs.[111, 112]

[110] PPRA as amended by NCLB (Pub. L. No. 107-110, § 1061), codified at 20 United States Code section 1232h(c)(2)(A), January 8, 2002. PPRA as amended by Goals 2000: Educate America Act (Pub. L. No. 103-227, § 1017), codified at Former 20 United States Code section 1232g(b)(2) and (c), March 31, 1994.

[111] Former Education Code section 52011, as added by Statutes 1977, chapter 894, was repealed by Statutes 2004, chapter 871, operative January 1, 2006. Former Education Code section 54725, as added by Statutes 1985, chapter 1431, was repealed by Statutes 2004, chapter 871, operative January 1, 2006.

[112] The Commission notes that the schoolsite councils established under the School-Based Coordination Program, School Improvement Program, and the Motivation and Maintenance Program were the subject of the *School Site Councils and Brown Reform Act* (CSM 4501 and Portions of CSM 4469) test claim on which the Commission has issued statement of decisions. Statement of decision for *School Site Councils and Brown Reform Act* (CSM 4501 and Portions of CSM 4469) test claim, adopted April 27, 2000, at <http://www.csm.ca.gov/sodscan/4501sod.pdf> as of October 16, 2012.

Based on the above discussion, the Commission finds that the requirement imposed by section 51101.1(a), when read in conjunction with sections 51101(a)(14) and 51101.1(b)(3), does not constitute a new program or higher level of service.

(c) Notices of Parent and Guardian Rights that Constitute State-Mandated New Programs or Higher Levels of Service.

Prior to the enactment of Education Code section 51101.1, schools were not required to provide notice to parents and guardians of pupils that speak a primary language other than English, of the following rights set forth in Education Code section 51101(a) and 51101.1(b):

1. To observe, within a reasonable time following a request, the classroom or classrooms in which their child is enrolled or for the purpose of selecting the school in which their child will be enrolled in accordance with the requirements of any intradistrict or interdistrict pupil attendance policies or programs. (Ed. Code, § 51101.1(a) read in conjunction with 51101(a)(1).)
2. To meet with their child's teacher or teachers and the principal of the school in which their child is enrolled. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(2).)
3. To volunteer their time and resources for the improvement of school facilities and school programs under the supervision of district employees, including, but not limited to, providing assistance in the classroom with the approval, and under the direct supervision, of the teacher. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(3).)
4. To be notified on a timely basis if their child is absent from school without permission. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(4).)
5. To receive information concerning the academic performance standards, proficiencies, or skills their child is expected to accomplish. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(11).)
6. To be informed in advance about retention and promotion policies pursuant to Education Code section 48070.5. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(12).)
7. To be notified, as early in the school year as practicable pursuant to Education Code section 48070.5, if their child is identified as being at risk of retention and of their right to consult with school personnel responsible for a decision to promote or retain their child and to appeal a decision to retain or promote their child. (Ed. Code, § 51101.1(a) read in conjunction with § 51101(a)(16).)
8. To be given any required written notification in English and the pupil's home language pursuant to Education Code section 48985 and any other applicable law. (Ed. Code, § 51101.1(a) read in conjunction with § 51101.1(b)(2).)
9. To support their children's advancement toward literacy. (Ed. Code, § 51101.1(a) read in conjunction with § 51101.1(b)(4).)

As a result, providing notice of all of the above rights to parents and guardians of pupils that speak a single primary language other than English, if at least 15 percent of the pupils in the school speak that single primary language, is new as compared with the legal requirements in effect immediately before the enactment of section 51101.1. Also, providing notice of these

rights carry out the governmental function of education by encouraging parental involvement in education, and thus, constitute a "program."[113] As a result, the Commission finds that the following activity constitutes a state-mandated new program or higher level of service:

> Provide notice of the rights set forth in Education Code section 51101(a)(1), (a)(2), (a)(3), (a)(4), (a)(11), retention and promotion policies as provided in (a)(12) and (a)(16) (Stats. 2002, ch. 1037) and Education Code section 51101.1(b)(2) and (b)(4) (Stats. 2002, ch. 1037) to the parents and guardians of pupils that speak a single primary language other than English if 15 percent or more of the pupils in the school speak that single primary language. (Ed. Code, § 51101.1(a) (Stats. 2002, ch. 1037).)

B. The State-Mandated New Programs or Higher Levels of Service Impose Costs Mandated by the State within the Meaning of Government Code Sections 17514 and 17556.

The final issue is whether the state-mandated activities impose costs mandated by the state,[114] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. 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 that mandates a new program or higher level of service." "Any increased costs" for which a claimant may seek reimbursement include both direct and indirect costs.[115] Government Code section 17564 requires reimbursement claims to exceed $1,000 to be eligible for reimbursement.

The claimant estimates that the San Jose Unified School District "incurred more than $1,000 for the fiscal year of July 1, 2002 through June 30, 2003" to implement all duties alleged by the claimant to be mandated by the state.[116] Thus, the claimant has met the minimum burden of showing costs necessary to file a test claim pursuant to Government Code section 17564.

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if the statute, executive order, or an appropriation in a Budget Act or other bill that includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate. Here, there is no evidence that any funds, in an amount sufficient to cover the costs of the mandated activities, have been specifically appropriated for the cost of the state-mandated activities found in this test claim.

Although various federal and state grant programs provide funding that schools can use for the state-mandated parent involvement activities found in this analysis, schools are not *required* to

[113] *Long Beach Unified School Dist. v. State of California* (1990) 275 Cal.App.3d 155, 172, finding, "[A]lthough numerous private schools exist, education in our society is considered to be a peculiarly governmental function. .... Further, public education is administered by local agencies to provide service to the public." (Citation omitted.)

[114] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[115] Government Code section 17564.

[116] Exhibit A, test claim, dated September 25, 2003, Exhibit 1, "Declaration of Don Iglesias" p. 37-45.

participate in the grant programs, or to use the grant funding for the state-mandated activities found in this test claim if they do participate. For example, schools that voluntarily receive federal funds under Chapter 1 of the ESEA, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297) are required to have parental involvement components in programs assisted by such funds.[117] However, no funds are specifically required to be used for this purpose. Similarly, federal funds voluntarily received under Title III of the ESEA, for the purpose of ensuring that children attain English proficiency, requires a parental involvement component in programs funded by Title III, but does not require funds to be expended specifically for this purpose.[118]

Like federal law, state law provides for various categorical education programs which require a parental involvement component in programs funded with these funds. For example, schools that receive funding under the School Improvement Plans (SIP) program and the High Priority Schools Grant program are required to have parental involvement components for programs funded through these programs.[119] However, schools that received this funding were not specifically required to use those funds for the state-mandated activities found in this test claim.

Based on the above discussion, none of the statutory exceptions listed in Government Code section 17556 apply to the state-mandated new programs or higher levels of service found in the analysis above. However, to the extent that a school receives federal or state funding that can be used for the state-mandated parent involvement activities found in this test claim, *and* the school uses that funding for these activities, that funding constitutes offsetting revenue.

The following funding sources will be identified as possible sources of offsetting revenue:

1. Chapter 1 of the ESEA, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297).[120] Excluding the state-mandated activity imposed by section 11504 which applies *only* for schools that *do not* receive funds under Chapter 1.
2. Title III of the ESEA (Pub. L. No. 107-110, Title III, § 301 (20 U.S.C., § 6801 et seq.).

[117] ESEA as reauthorized by the Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297, § 1016) codified at former 20 United States Code section 2726. Currently, reauthorized by the NCLB ((Pub. L. No. 107-110, § 1118) (20 U.S.C. § 6318)).

[118] 20 United States Code sections 6801 and 7012.

[119] For SIP see former Education Code section 52000 et seq. (as added by Stats. 1977, ch. 894). Funding for SIP activities is currently found in the "School and Library Improvement Block Grant" at Education Code section 41570 et seq. For the High Priority Schools Grant program see Education Code section 52055.600 et seq.

[120] ESEA as reauthorized by the Augustus F. Hawkins–Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297, § 1016) codified at former 20 United States Code section 2726. Currently, reauthorized by the NCLB ((Pub. L. No. 107-110, § 1118) (20 U.S.C. § 6318)).

3. School Improvement Plans program.[121]
4. High Priority Schools Grant program.[122]

This list is not an exhaustive list of all possible sources of offsetting revenue.

Accordingly, none of the statutory exceptions listed in Government Code section 17556 apply that would deny the state-mandated new programs or higher levels of service found in the analysis above.

Based on the above discussion, the Commission finds that the state-mandated new programs or higher levels of service impose costs mandated by the state on employers within the meaning of article XIII B, section 6, and Government Code sections 17514 and 17556.

V. Conclusion

For the reasons discussed above, the Commission finds that the following activities constitute reimbursable state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514:

1. Parent Involvement Policies (Ed. Code, §§ 11504 and 51101(b))

   a. For school districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year, engage in the following one-time activity:

      Adopt a policy on parent involvement, consistent with the purposes and goals set forth in Education Code section 11502 (Stats. 1990, ch. 1400), for each school that does not receive funding under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (Pub. L. No. 100-297). (Ed. Code, § 11504 (Stats. 1990, ch. 1400).)

   b. For school districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted a policy prior to the 2002-2003 fiscal year, engage in the following one-time activity:

      Develop jointly with parents and guardians, and adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite.

      The policy must include the following: (1) the means by which the school and parents or guardians of pupils may help pupils to achieve academic and other standards of the school; (2) a description of the school's responsibility to provide a high quality curriculum and instructional program in a supportive and effective

[121] Former Education Code section 52000 et seq. (as added by Stats. 1977, ch. 894). Funding for SIP activities is currently found in the "School and Library Improvement Block Grant" at Education Code section 41570 et seq.

[122] Education Code section 52055.600 et seq.

learning environment that enables all pupils to meet the academic expectations of the school; and (3) the manner in which the parents and guardians of pupils may support the learning environment of their children, including, but not limited to: (a) monitoring attendance of their children, (b) ensuring that homework is completed and turned in on a timely basis, (c) participation of the children in extracurricular activities, (d) monitoring and regulating the television viewed by their children, (e) working with their children at home in learning activities that extend learning in the classroom, (f) volunteering in their children's classrooms, or for other activities at the school, (g) participating, as appropriate, in decisions relating to education of their own child or the total school program. (Ed. Code, § 51101(b) (Stats. 1998, ch. 864).)

2. Parent Involvement Opportunities (Ed. Code, § 49091.10)

   a. Promptly make all assessments, excluding standardized tests described in Chapter 3 (commencing with Section 99150) of Part 65 of Division 14 of Title 3 of the Education Code, available for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.[123] (Ed. Code, § 49091.10(a) (Stats. 1998, ch. 1031).)

   b. Upon written request by a parent or guardian, arrange for the parental observation of the requested class or classes or activities by the parent or guardian within a reasonable timeframe and in accordance with procedures determined by the governing board of the school district. (Ed. Code, § 49091.10(b) (Stats. 1998, ch. 1031).)

3. Notice of Parent and Guardian Education Related Rights (Ed. Code, § 51101.1)

   a. Provide notice of the rights set forth in Education Code section 51101(a)(1), (a)(2), (a)(3), (a)(4), (a)(11), retention and promotion policies as provided in (a)(12) and (a)(16) (Stats. 2002, ch. 1037) and Education Code section 51101.1(b)(2) and (b)(4) (Stats. 2002, ch. 1037) to the parents and guardians of pupils that speak a single primary language other than English if 15 percent or more of the pupils in the school speak that single primary language. (Ed. Code, § 51101.1(a) (Stats. 2002, ch. 1037).)

Any other test claim statutes and allegations not specifically approved above, do not impose a reimbursable state mandated program subject to article XIII B, section 6 of the California Constitution.

[123] In 2009, the Legislature made a non-substantive amendment to section 49091.10 in order to modernize existing statutory references to audio or video recordings. Specifically, the Legislature replaced "tapes" with "audio video records." (Stats. 2009, ch. 88.)

Exhibit E

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November 13, 2012

Heather Halsey, Executive Director
Commission on State Mandates
U.S. Bank Plaza Building
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Test Claim 03-TC-16
Education Code Sections 11500 et al.
San Jose Unified School District
Parental Involvement Programs

Dear Ms. Halsey:

I have received the Commission's Draft Staff Analysis (DSA) dated October 23, 2012, for the above-referenced test claim to which I respond on behalf of the test claimant. Issues raised by the DSA, but not responded to by this letter, are not waived.

The DSA relies on four erroneous standards to determine whether the various Education Code sections pled in the test claim are reimbursable.

1. NEW PROGRAM STANDARD OF REVIEW

The DSA (10) states that to determine if a program is new or imposes a higher level of service, the statutes pled must be "compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order." This standard is applied for the analysis of several code sections pled in the test claim. This is incorrect. The test claim was filed September 25, 2003. The filing was effective prior to the September 30, 2003, effective date of Statutes of 2002, Chapter 1124 (for mandates that became effective before January 1, 2002)[1], which first established at

[1] Statutes of 2002, Chapter 1124, is generally effective September 30, 2002. However, the amendment that added Government Code Section 17551,

Government Code section 17551, subdivision (c), time limits for filing on statutes enacted after December 31, 1974. Based on the date the test claim was submitted, the standard of review is to compare the statutes pled on the effective date of the test claim filing to the status of the law as of December 31, 1974, pursuant to Government Code section 17514.

The Commission, however, decided to the contrary on this issue in the March 24, 2011, Statement of Decision for 02-TC-25/31/46, Discrimination Complaint Procedures, relying upon *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859. The legal issue here is identical to that in the Discrimination Complaint Procedures test claim. The test claimant raises it here for purposes of the record and does not waive the issue.

2. PRACTICAL COMPULSION FOR PARENTAL INVOLVEMENT PROGRAMS

In the May 25, 2004, rebuttal to the Department of Finance response to the test claim, the test claimant asserted the foundation argument that school districts are practically compelled to adopt and operate the state statutory version of a parent involvement program in order to continue implementing the federal Title 1 program. The DSA determination that some of the relevant Education Code sections pled in the test claim are not mandated relies upon this threshold issue. It is the magnitude of coercion created by the loss of federal funds and inability to continue the program, not any proof of an actual penalty, that is the measure of the issue. Sections 11500 et seq., were adopted in 1990, after the Hawkins-Stafford amendments (1988), which were in turn subsequent to the original adoption of the ESEA (1965). The federal program funds are substantial and have resulted in institutionalized and continuous comprehensive services to students. Districts would be required to discontinue the historic and significant ESEA services to students just to avoid establishing and operating the state parental involvement program.

However, the Commission has consistently decided to the contrary for these types of funding and subsequent mandate circumstances in other test claim determinations. The test claimant raises it here for purposes of the record and does not waive the issue.

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subdivision (c), delayed the effective date of that subdivision for mandates effective before January 1, 2002, by one year to September 30, 2003:

(c) Local agency and school district test claims shall be filed not later than three years following the date the mandate became effective, *or in the case of mandates that became effective before January 1, 2002,* the time limit shall be one year from the effective date of this subdivision. (Emphasis added)

3. POLICIES NOT IMPLEMENTED ARE MEANINGLESS

Relying upon the "plain meaning" of the code language, the DSA (13) concludes that the mandate to adopt a Section 11503 or 11504 policy is not a mandate to establish or operate a parent involvement program. The requirement to establish a policy compels implementation as a practical matter or it is without legal or practical significance. The DSA interpretation would mean that the Legislature mandated that districts adopt policies stating affirmative duties with no requirement to implement those duties.

Section 51101(a) requires the schools to inform parents of enumerated rights, but the DSA (20) concludes that the Section does not impose "any specific activities on schools to effectuate these rights," rather, that these rights are "effectuated elsewhere in the Education Code." However, Section 51101 (a) neither states that the linkage exists nor uniformly cites other code sections where these programs may exist. The notice and enumeration of rights in Section 51101(a) compels implementation as a practical matter or it is without practical significance.

Similarly, the DSA (22) concludes that Section 51101 (b) only requires the district to work with parents to develop and adopt a policy that outlines the manner in which the school staff and parents will share responsibility for the program activities, but not that the district actually has to implement the program policies, because implementation is not specifically stated in the code section.

For all these code sections, the DSA analyzes the legislation into absurdity by isolating the policy language from the new program language. The DSA should consider the legislation in its totality.

4. INFERRED "LINKAGE" IS CONTRIVED

The DSA has created a doctrine of inferred linkage and then parses the Legislature's language into inertness using contradictory reliance on the "plain meaning" of statutes in order to accommodate the conclusions reached in the DSA. Creating a doctrine of inferred linkage is the purview of an appellate court and not within the purview of an administrative law agency.

Contrary to the artificial linkage by the DSA (20) to other, but not cited, Education Code sections, Section 51101 stands alone as an enforceable mandate. To assume some unstated linkage occurs with other code sections is to abandon the precarious reliance on the "plain meaning" of the language of the statute, since there is no language in Section 51101(a) establishing this "effectuating" linkage. This violates the rule that the Commission "can only presume the lawmakers meant what they said, and cannot insert requirements into the language of a statute that is not plainly there." (DSA 22) Further, as a practical matter, if those other code sections were repealed, Section 51101(a) would remain without the other sections to "effectuate" the mandate, and the DSA

reliance on those sections would fail. Section 51101(a) does not rely upon those other code sections as a source of the mandate, so the DSA has no basis to conjure up this novel linkage.

Nor is the DSA (20) conclusion that these rights are "effectuated" in other code sections is "supported by the fact that some of the rights delineated by Education Code section 51101(a) have already been analyzed in prior commission decisions." There is no indication that Section 51101(a) was considered in those decisions. Whether the similar activities are currently reimbursed by other approved mandates is a parameters and guidelines issue, not a legal threshold issue for the test claim.

Pleading Sections 49091.10 and 49091.14 in the test claim as a separate source of the mandated activities does not establish the linkage of "effectuation" desired by the DSA (20). Rather, the fact that newer legislation (1998) may seem redundant to existing law is actually an argument against the concept of any purposeful linkage by the Legislature. For a contrary example, note that the DSA (25) states that "(i)t must be noted that the policy mandated to be adopted in section 51101 (b) is not specifically linked to the parent involvement policy mandated [by] section 11504 "and concludes that "the Legislature enacted section 51101 without reference to section 11504." In this case, where there is no stated linkage, the DSA does not infer a linkage even though the DSA states that "school districts can comply with both code sections by adopting a single policy that includes the content required by section 51101(b) and is also consistent with the purposes and goals set forth in section 11502." Thus, even though the "purposes and goals" of the two sections are essentially the same, the DSA finds no inferred linkage. Strangely, there was no stated linkage to Section 51101 in Sections 49091.10 and .14, but the DSA concluded there was some "effectuating" linkage, even though those sections were also enacted "without reference" to each other. The DSA reasoning is not consistent.

The DSA should be modified to analyze the code sections for reimbursement without utilizing the inferred linkage.

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Certification

By my signature below, I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this submission is true and complete to the best of my own knowledge or information or belief, and that the attached documents, if any, are true and correct copies of documents received from or sent by the state agency which originated the document.

Executed on November 13, 2012, at Sacramento, California, by

Keith B. Petersen

C: Commission electronic service list

DEPARTMENT OF FINANCE

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November 15, 2012

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814
And Interested Parties and Affected State Agencies (See Mailing List)

RE: Comments on the Draft Staff Analysis
Parental Involvement Programs, 03-TC-16
Education Code Sections 11500 et al.
San Jose Unified School District, Claimant

Dear Ms. Halsey:

As requested in your letter of October 23, 2012, the Department of Finance (Finance) has reviewed the Commission on State Mandate's (CSM) Draft Staff Analysis and Proposed Statement of Decision to partially approve the test claim submitted by the San Jose Unified School District regarding *Parental Involvement Programs*, 03-TC-16.

The Draft Staff Analysis concluded that specific activities contained within Education Code sections 11504, 49091.10(a), 49091.10(b), 51101(b), and 51101.1(a), as added or amended by the test claim statutes, impose a partial reimbursable state-mandated program or higher level of service on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Thus, staff recommended that the CSM adopt the Proposed Statement of Decision to partially approve this test claim as specified below:

1) Education Code section 11504: School districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year, and that do not receive federal funding, are eligible for reimbursement for the one-time activity to adopt a parent involvement policy consistent with purposes and goals set forth in Education Code section 11502.

2) Education Code section 49091.10(a): School districts are eligible for reimbursement for promptly making all pupil assessments, excluding standardized tests, available for inspection by a parent or guardian, upon request, in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

3) Education Code section 49091.10(b): School districts are eligible for reimbursement to arrange for the parental observation of the requested class or classes or activities by the parent or guardian, upon written request, within a reasonable timeframe and in accordance with procedures determined by the governing board of the school district.

Received
November 16, 2012
Commission on
State Mandates

4) Education Code section 51101(b): All school districts formed, or school districts with schools formed, during the reimbursement period that could not have adopted parent involvement policies prior to the 2002-2003 fiscal year are eligible for reimbursement for the one-time activity to develop jointly with parents and guardians, and adopt, a policy that outlines how parents or guardians of pupils, school staff, and pupils may share the responsibility for continuing the intellectual, physical, emotional, and social development and well-being of pupils at each schoolsite, as specified in subsections (1) through (3).

5) Education Code section 51101.1(a): School districts that contain a school where 15 percent or more of the pupils in a particular school speak a language other than English at home are eligible for reimbursement to notify parents and guardians of English learners of certain rights as specified in Education Code subsections 51101(a)(1), (a)(2), (a)(3), (a)(4), and (a)(11). In addition, these schools must notify such parents of the retention and promotion policies as specified in Education Code subsections 51101(a)(12) and (a)(16) and in Education Code subsections 51101.1(b)(2) and (b)(4).

Finance notes the following points:

1) With regard to Education Code section 11504, we acknowledge that certain school districts are eligible for reimbursement for the one-time activity to adopt a parent involvement policy consistent with purposes and goals set forth in Education Code section 11502. However, the cost to a governing board to adopt such a policy is minimal.

2) With regard to Education Code section 49091.10(a), we disagree with the staff's determination that the requirement to make pupil assessments, other than standardized tests, available for inspection by a parent or guardian constitutes a new program or higher level of service.

   Education Code section 49069 (Stats. 1976, Ch. 1010) states:

   > *Parents of currently enrolled or former pupils have an absolute right to access to any and all pupil records related to their children that are maintained by school districts or private schools.* The editing or withholding of any of those records, except as provided for in this chapter [Ch. 6.5, Pupil Records, addressing certain non-material exceptions], is prohibited. Each school district shall adopt procedures for the granting of requests by parents for copies of all pupil records pursuant to Section 49065 [addressing the reasonable charge for transcripts], or to inspect and review records during regular school hours, provided that the requested access shall be granted no later than five business days following the date of the request. Procedures shall include the notification to the parent of the location of all official pupil records if not centrally located and the availability of qualified certificated personnel to interpret records if requested.

   Education Code section 49061(a) defines a "parent" to mean a natural parent, an adopted parent, or legal guardian. Education Code section 49061(b) defines "pupil record" *to mean any item of information directly related to an identifiable pupil*, other than directory information, that is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means. Education Code section 49061(e) defines "access" to mean a personal inspection and review of a record or an accurate copy of a record, or

Received
November 16, 2012
Commission on
State Mandates

receipt of an accurate copy of a record, an oral description or communication of a record or an accurate copy of a record, and a request to release a copy of any record.

We assert that "assessments" fall under the definition of pupil records and parents or guardians already have a right to inspect these. For example, an individual parent can make a request to see their child's test. In addition, Education Code section 49070 allows parents or guardians to challenge the content of any pupil record and describes the administrative proceedings to do so, including the superintendent's authority to order a pupil's grade to be changed. Without access to assessments, or tests, under the definition of pupil records, a parent would not be able to challenge a grade. The requirement for schools districts to make pupil records, including assessments, available for inspection by a parent or guardian existed prior to January 1, 1975. Therefore, Education Code section 49091.10(a) does not constitute a new program or higher level of service beyond what was required by the former statutes and would not require a subvention of funds pursuant to section 6 of Article XIII B of the California Constitution.

3) With regard to Education Code section 49091.10(b), we disagree with the staff's determination that arranging for a parental observation of a requested class or activity constitutes a new program or higher level of service. The law does not prescribe when these meetings must take place and since any observation of a class or school activity would be within the normal working hours of the school, districts should be able to accommodate these requests without incurring additional costs.

4) With regard to Education Code section 51101(b), we acknowledge that school districts are eligible for reimbursement for the one-time activity to develop jointly with parents and guardians, and adopt, a policy with specific content related to parental involvement. However, we note the law requires **one** policy to be developed and adopted at a district level, not a separate policy for each school site. Thus, we assert that the cost to a governing board is minimal.

Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations, "documents that are e-filed with the Commission on State Mandates need not be otherwise served on persons that have provided an e-mail address for the mailing list."

If you have any questions regarding this letter, please contact Elisa Wynne, Principal Program Budget Analyst at (916) 445-0328.

Sincerely,

NICK SCHWEIZER
Program Budget Manager

33 Cal.App.4th 489, 39 Cal.Rptr.2d 348
(Cite as: 33 Cal.App.4th 489)

KENNETH L. CAMPBELL, Plaintiff and Appellant,
v.
FRANK S. ZOLIN, as Director, etc., Defendant and Respondent.

No. H012143.

Court of Appeal, Sixth District, California.
Mar 24, 1995.

[Opinion certified for partial publication. FN*]

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, IV, and V of the Discussion.

SUMMARY

The Department of Motor Vehicle suspended defendant's driver's license for failure to comply with the Financial Responsibility Laws following an accident with another vehicle in a parking lot. (Superior Court of Santa Clara County, No.734178, James H. Chang, Judge.)

The Court of Appeal affirmed. The court held that under Veh. Code, §§ 16000 and 16000.1, which expanded the Financial Responsibility Laws to include specified ñoff-highway accidents,ò the exclusion under Veh. Code, § 16000.1, subd. (b), was intended to apply only where there is a single-car accident in which all of the damage occurs to the property of the driver or owner of the single vehicle involved. A construction permitting application of the exclusion to multiple-car accidents could make the reportability of an accident vary depending upon the perspective of each driver involved. Accordingly, the court held that since defendant was involved in an accident on private property with another vehicle that sustained over $500 damage, defendant's license was properly suspended by the Department of Motor Vehicles for noncompliance with the Financial Responsibility Laws. (Opinion by Mihara, J., with Cottle, P. J., and Wunderlich, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Automobiles and Highway Traffic § 15--Operators' Licenses--Revocation or Suspension--Administrative Hearing--Review.

When an administrative agency initiates an action to suspend or revoke a driver's license, the burden of proving the facts necessary to support the action rests with the agency making the allegation. Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond. Since the retention of a driver's license constitutes a fundamental vested right, the trial court must exercise its independent judgment to determine whether the weight of the evidence supported the administrative decision.

(2) Mandamus and Prohibition § 74--Mandamus--Judicial Review--Construction of Statute.

In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible, and competent evidence. This limitation, however, is inapplicable to the construction of a statute, an issue which constitutes a question of law. In such cases the appellate court is not bound by the trial court's decision, but may make its own determination.

(3a, 3b) Automobiles and Highway Traffic § 13--Operators' Licenses-- Revocation or Suspension--Grounds--Lack of Insurance--Reportable Off-highway Accident--Statutory Construction.

Under Veh. Code, §§ 16000 and 16000.1, which expanded the Financial Responsibility Laws to include specified ñoff-highway accidents,ò the exclusion under Veh. Code, § 16000.1, subd. (b), was intended to apply only where there is a single-car accident in which all of the damage occurs to the property of the driver or owner of the single vehicle involved. A construction permitting application of the exclusion to multiple-car accidents could make the reportability of an accident vary depending upon the perspective of each driver involved. Accordingly, the license of an uninsured driver, who was involved in an accident on private property with another vehicle that sustained over $500 damage, was properly suspended by the

33 Cal.App.4th 489, 39 Cal.Rptr.2d 348
(Cite as: 33 Cal.App.4th 489)

Department of Motor Vehicles for noncompliance with the Financial Responsibility Laws.
[See 6 **Witkin,** Summary of Cal. Law (9th ed. 1988), Torts § 1114.]
(4) Statutes § 45--Construction--Presumptions--Different Words.

Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning.

COUNSEL

Kenneth L. Campbell, in pro. per., for Plaintiff and Appellant. ***491**

Daniel E. Lungren, Attorney General, Henry G. Ullerich, Assistant Attorney General, Jose R. Guerrero and Robert R. Buell, Deputy Attorneys General, for Defendant and Respondent.

MIHARA, J.

Introduction

Kenneth Campbell appeals from a judgment denying a petition for mandamus following the Department of Motor Vehicle's suspension of his driving license for failure to comply with the financial responsibility laws. We affirm.

Facts

On December 29, 1992, while driving an automobile owned by his mother, Lee Campbell, appellant was involved in a traffic accident with a car owned and operated by Teawood Kung. The accident occurred in the parking lot of the apartment complex where appellant resided.

On January 9, 1993, Kung prepared and signed a ñReport of Traffic Accidentò (Department of Motor Vehicles form SR 1A) notifying the Department of Motor Vehicles (DMV) of the accident, providing information concerning his insurance coverage, and estimating the cost of repairs to his vehicle to be $550. [FN1] Kung stated that the accident did not result in any injuries.

FN1 Vehicle Code section 16000, subdivision (a), requires the filing of such a report within 10 days after the accident.

Lee Campbell signed a similar report on February 17, 1993, wherein she estimated the cost of repairs to her vehicle to be $1,200 and asserted that Kung's car suffered only $100 in damages. Campbell admitted that her car was not insured at the time of the accident. As had Kung, Campbell reported no injuries resulting from the collision.

On March 12, 1993, the DMV sent appellant notice of its intent to suspend his driving privilege for failure to comply with the financial responsibility laws. (See Veh. Code, [FN2] § 16070.) Following appellant's timely request, the suspension was stayed pending an administrative hearing. (§ 16075, subd. (b).) ***492**

FN2 All unspecified section references are to the Vehicle Code.

At the administrative hearing conducted on June 9, 1993, appellant submitted a written demurrer to the order of suspension in which he contested the jurisdiction of the DMV on the ground that the accident had occurred on private property. In the demurrer, appellant admitted that on the date in question, he was operating a motor vehicle and was involved in a collision with a second vehicle driven by Teawood Kung.

During questioning by the hearing officer, appellant reiterated that he was the driver of the vehicle involved in the accident and also conceded that he did not have any ñfinancial responsibility insurance in effectò at the time of the incident. Appellant testified that the cost of repairs to his mother's vehicle was between $1,000 and $1,200, and introduced a copy of a check in the amount of $618.47 issued to him by Kung's insurance company as payment for the damages. The hearing officer introduced into evidence as a departmental exhibit a repair estimate of $542.66 for Kung's vehicle. Additional estimates of $684.40 and $699.49 were also submitted. [FN3]

FN3 At oral argument, we granted appellant's request to augment the record on appeal to include these additional repair estimates. (Evid. Code, § 459.)

It was uncontroverted that there were no deaths or injuries resulting from the accident. The only con-

tested issue at the hearing was whether the accident, having occurred on private property, fell within the scope of the financial responsibility laws.

Following the hearing, the DMV issued a decision suspending appellant's license for a one-year period effective June 13, 1993. [FN4] The decision was based on the hearing officer's findings that (1) appellant was the driver or owner of a vehicle involved in an accident on December 29, 1992; [FN5] (2) the accident resulted in property damage over $500; and (3) appellant had not established that financial responsibility covered the driver of the vehicle involved in the accident. On July 30, 1993, the decision was sustained upon departmental review. (§ 14105.5.)

FN4 The suspension order permits appellant restricted driving privileges for work purposes upon payment of a penalty fee and proof of financial responsibility.

FN5 The notice states that the accident occurred on December 29, 1993. Based on the record on appeal, however, it is clear that the accident actually occurred the previous year, on December 29, 1992. Appellant does not argue otherwise.

Thereafter appellant filed a petition seeking a peremptory writ of mandate directing the DMV to set aside its order of suspension. On December 17, 1993, the superior court heard the matter and issued an order sustaining the suspension. Appellant appealed from the order on January 18, 1994. A formal judgment denying the writ of mandate was entered on February 14, 1994. ***493**

Discussion

I. *Premature Filing of the Notice of Appeal* [FN*]

FN* See footnote, *ante*, page 489.

. . . . . .

II. *Standard of Review*

(1) ñWhen an administrative agency initiates an action to suspend or revoke a [driver's] license, the burden of proving the facts necessary to support the action rests with the agency making the allegation. Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond. [Citations.]ò (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536 [189 Cal.Rptr. 512, 658 P.2d 1313].)

Since the retention of a driver's license constitutes a fundamental vested right, the trial court must exercise its independent judgment to determine whether the weight of the evidence supported the administrative decision reached by the DMV. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 394-397 [188 Cal.Rptr. 891, 657 P.2d 383].)

(2) ñ 'In reviewing the trial court's ruling on a writ of mandate, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible and competent evidence.' ò (*McNabb v. Department of Motor Vehicles* (1993) 20 Cal.App.4th 832, 837 [24 Cal.Rptr.2d 641], quoting *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 502 [2 Cal.Rptr.2d 50].) This limitation, however, is inapplicable to the construction of a statute, an issue which constitutes a question of law. (20 Cal.App.4th at p. 837.) ñIn such cases ... the appellate court is not bound by the trial court's decision, but may make its own determination.ò (*Ibid.*)

III. *Was Appellant Involved in a Reportable Traffic Accident Within the Meaning of Sections 16000 and 16000.1?*

In one form or another, California has required its drivers to be financially responsible for driving-related injuries since 1929. (*King v. Meese* (1987) 43 Cal.3d 1217, 1220 [240 Cal.Rptr. 829, 743 P.2d 889].) Generally, this obligation is satisfied by means of insurance. (*Ibid.*) Until 1990, only those accidents which occurred on a public street or highway qualified as a ñreportable accidentò triggering a driver's duty to establish compliance with ***494** the state's financial responsibility laws. (See former § 16000; Stats. 1984, ch. 1324, § 2, p. 4556.) Effective in 1989, however, the Legislature amended section 16000 and added section 16000.1 to the Vehicle Code for the express purpose of expanding the financial responsibility laws to include specified ñoff-highway accidents.ò

Findings and declarations accompanying the legislation explain the public policy considerations supporting these measures: ñThe Legislature finds and declares as follows: [¶] (a) The current provisions of

the Financial Responsibility Laws inadvertently do not permit the Department of Motor Vehicles to exercise its authority to suspend the driving privilege of an uninsured motorist who inflicts bodily injury or death upon individuals or who damages vehicles, buildings, or other property located on public and private property off the streets and highways. The Legislature further finds and declares that untold numbers of Californians are victims involved in these accidents. [¶] (b) It is the intent of the Legislature in amending the Financial Responsibility Laws to strengthen enforcement actions against uninsured motorists and to provide additional remedies for the victims of uninsured motorist accidents occurring off the streets and highways as soon as the department can reasonably implement the changes in Section 16000 of the Vehicle Code made by this act.ò (Stats. 1989, ch. 808, § 1, p. 2674.)

Section 16000, subdivision (a) [FN6] now defines a motorist's reporting duty as follows: ñThe driver of every motor vehicle who is in any manner involved in an accident originating from the operation of a motor vehicle on any street or highway or any reportable off-highway accident defined in Section 16000.1 ... shall, within 10 days after the accident, report the accidentò on a form approved by the DMV.

FN6 The word ñsubdivisionò shall be deleted from all further statutory references.

Section 16000.1(a) defines a ñreportable off-highway accidentò as one which: (1) occurs off the street or highway; (2) involves a vehicle subject to registration under the Vehicle Code; and (3) results in damage to the property of any one person in excess of $500 or in bodily injury or death.

Section 16000.1(b) excludes from the financial responsibility laws any accident which ñoccurs off-highway in which damage occurs only to the property of the driver or owner of the motor vehicle and no bodily injury or death of a person occurs.ò

In the instant case, appellant contends that the accident which is the subject of this action does not qualify as a ñreportable off-highway accident,ò as that term is defined in section 16000.1(b), because the accident did ***495** not involve physical injury or death. Stated another way, he contends that off-highway accidents which involve only property damage are not reportable.

In contrast, the trial court found, and the DMV agrees, that the accident was reportable because the exclusion contained in section 16000.1 applies only where the accident does not involve personal injury or death and where all of the property damage is sustained by the driver or owner whose compliance with the financial responsibility laws is in question.

Though we concur with the trial court's ultimate conclusion that appellant's accident qualified as a reportable off-highway accident under section 16000.1, the exclusionary provision is not reasonably susceptible to either of the foregoing interpretations.

ñ[O]ur first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]ò (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387 [241 Cal.Rptr. 67, 743 P.2d 1323].) A statute must be construed so as to avoid an unjust and absurd result. (*McNabb v. Department of Motor, supra*, 20 Cal.App.4th 832, 837.)

(3a) Appellant's construction of section 16000.1(b) would exclude from coverage all off-highway accidents involving only property damage. This construction is unsupportable. First, such an interpretation would render as mere surplusage that portion of section 16000.1(a)(3) defining a reportable off-highway accident as one which results in property damage exceeding $500. Had the Legislature intended to exclude from the reporting requirements *all* off-highway accidents involving only property damage, it would not have included property damage as a component of the general definition of a reportable off-highway accident.

Second, the legislative declaration of findings and purpose demonstrates an explicit intent to broaden the scope of the financial responsibility laws to ***496** include off-highway accidents resulting in damage to ñ*vehicles*, buildings, *or other property* located on public and private property off the streets and highways.ò (Stats. 1989, ch. 808, § 1, p. 2675, italics added.) Appellant's construction would completely frustrate this objective.

Read in context with section 16000.1(a)(3), and in light of the purpose of section 16000.1, the exclusionary provision must be construed as providing a narrow exception which may be invoked only when an otherwise reportable off-highway accident results in property damage of a limited and specific nature. [FN7] Though the parameters of this exception are difficult to ascertain due to the ambiguous language of section 16000.1(b), we believe that the exception was intended to apply only where there is a single-car accident in which all of the damage occurs to the property of the driver or owner of the single vehicle involved. We find support for our construction in the language of the relevant statutes, public policy considerations, and the consequences which would flow from an interpretation permitting the exclusion of off-highway accidents involving multiple vehicles.

> FN7 The parties effectively concede that an accident resulting in bodily injury or death will not fall within the exception. Our discussion thus focuses only on the construction of the property damage exception specified in section 16000.1(b).

First, were we to adopt a construction permitting application of the exception to multiple-car accidents, it is conceivable that the reportability of an accident might vary depending upon the perspective of each driver involved. In such cases, it is possible that the exception could act as a shield insulating the conduct of the uninsured motorist by permitting him to escape the reporting requirements and avoid suspension. [FN8] Such a scenario would contravene both the language of the pertinent statutes and the legislative intent to deter uninsured motorists and protect the state's drivers from suffering uncompensated damages. Our limited construction of section 16000.1(b), on the other hand, is entirely consistent with the statutory language and the legislative purpose in that it ensures application of the exclusion only where there can be no question that the uninsured motorist has not harmed anyone else as a result of his unlawful conduct.

> FN8 Consider the following scenario: Driver A is uninsured and sustains property damage to his vehicle exceeding $500; Driver B is insured and sustains no property damage. Since Driver A's vehicle sustained all of the damage, it is conceivable that he could avoid the reporting requirements specified in section 16000 and escape suspension since the ñdamage occur [red] only to the property of the driver or owner of the motor vehicle.ò (§ 16000.1(b).) At the same time, Driver B would conceivably be required to file a report and show proof of insurance.

Examining section 16000(a), we see that the reporting duty is framed in language which indicates that the duty to report is not dependent upon a ***497** particular driver's perspective but is conditioned upon the occurrence of a triggering event, i.e., a reportable accident, as that term is defined in sections 16000(a) and 16000.1(a). When such an accident occurs, the statute imposes a duty to report upon ñ[t]he driver of *every* motor vehicle who is *in any manner involved*ò in such an accident.

A comparison of the general definitions of reportable accidents found in sections 16000(a) and 16000.1(a)(3) with the language describing the exclusionary provision of section 16000.1(b) lends further support to our interpretation.

The Legislature painted with a broad brush when it set forth the ele ments of a reportable accident. The language of sections 16000(a) and 16000.1(a)(3) encompasses the possibility of multiple vehicles, and multiple instances of injury, death or significant property damage. Thus, any accident-whether it occurs on public or private property-is reportable whenever it results in significant ñdamage to the property of *any one person* ... or in bodily injury or in the death of *any* person ....ò (§§ 16000(a); 16000.1(a)(3).) In contrast, the exception delineated in section 16000.1(b) speaks narrowly of ñ*the* property of *the* driver or owner of *the* motor vehicle,ò language which conveys the involvement of a single vehicle, a single driver, and a single instance of property damage to the owner or driver of that vehicle.

(4) Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 507 [247 Cal.Rptr. 362, 754 P.2d 708].) (3b) In the instant case, the restrictive terminology of section 16000.1(b) compared with the expansive language used in the related provisions of sections 16000(a) and 16000.1(a)(3) supports our conclusion that the Legislature intended the exception to apply only in limited circumstances we have described.

For the foregoing reasons, we hold that the exception in section 16000.1(b) may be invoked only when a single car is involved in an accident and that accident results in property damage to no one but the driver or owner of that vehicle. [FN9] ***498**

FN9 We are aware that the government vehicle exception in section 16000(b) contains language similar to that found in section 16000.1(b). That provision exempts from the reporting requirements vehicles owned, leased, or under the direction of federal, state or local governments and provides: ñA report is not required pursuant to subdivision (a) if the motor vehicle involved in the accident was owned or leased by, or under the direction of, the United States, this state, another state, or a local agency.ò This provision could result in a situation where one driver is statutorily obligated to comply with the reporting requirements while a government driver involved in the accident is exempted. However, section 16000(b) is sui generis. Obviously, the statutory purpose of ensuring financial responsibility for driving-related injuries or property damage is not at issue where the full force and power of a government agency stands behind the vehicle in question. Accordingly, the government exclusion outlined in section 16000(b) does not undermine our construction of section 16000.1(b).

IV. , V. [FN*]

FN* See footnote, *ante*, page 489.

. . . . . .

Disposition

The judgment is affirmed.

Cottle, P. J., and Wunderlich, J., concurred.

A petition for a rehearing was denied April 19, 1995, and appellant's petition for review by the Supreme Court was denied June 1, 1995. ***499**

Cal.App.6.Dist.
Campbell v. Zolin
33 Cal.App.4th 489, 39 Cal.Rptr.2d 348

END OF DOCUMENT

94 Cal.App.4th 130, 94 Cal.App.4th 708C, 114 Cal.Rptr.2d 93, 01 Cal. Daily Op. Serv. 10,146, 2001 Daily Journal D.A.R. 12,605
(Cite as: 94 Cal.App.4th 130)

EVAN ENGLISH, Plaintiff and Appellant,
v.
IKON BUSINESS SOLUTIONS, INC., Defendant and Respondent.

No. C037611.

Court of Appeal, Third District, California.
Dec. 4, 2001.

SUMMARY

An employee brought an employment discrimination action against her former employer. Defendant moved for summary judgment, and plaintiff based her opposition to defendant's motion entirely on Code Civ. Proc., § 437c, subd. (h) (facts essential to oppose motion may exist but cannot yet be presented). The trial court granted the summary judgment motion and entered judgment for defendant. Two and a half months later, plaintiff filed a motion to vacate the summary judgment against her pursuant to the provision of Code Civ. Proc., § 473, subd. (b), which provides for mandatory relief from default, default judgment, or dismissal, based on attorney mistake, neglect, inadvertence, or surprise. The trial court denied plaintiff's motion to vacate the summary judgment. (Superior Court of Sacramento County, No. 99AS03962, Morrison C. England, Jr., Judge.)

The Court of Appeal affirmed. The court dismissed plaintiff's appeal from the summary judgment as untimely filed and further held that her motion to vacate the judgment did not provide her with an extension of time for filing her notice of appeal, since she filed her motion after the 60-day deadline for filing her notice of appeal had expired (Cal. Rules of Court, rules 2(a), (3(a)). The court held that the trial court properly denied plaintiff's motion to vacate the judgment under the mandatory provision of Code Civ. Proc., § 473, subd. (b), since that provision applies only to relief from a default, a default judgment, or a dismissal, and not to relief from a summary judgment. (Opinion by Nicholson, J., with Blease, Acting P. J., and Sims, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Appellate Review § 61--Notice of Appeal--Time for Filing--Matters Extending Time--Motion to Vacate Judgment--Limitation.

In a former employee's employment discrimination action, plaintiff's appeal from the summary judgment entered in favor of defendant employer was untimely filed, as it was filed more than 60 days after the notice of entry of judgment was served (Cal. Rules of Court, rule 2(a)), notwithstanding that plaintiff filed a motion to vacate the judgment under Code Civ. Proc., § 473, after the 60-day period. Cal. Rules of Court, rule 3(b), provides that the time for filing a notice of appeal may be extended by the filing of a motion to vacate a judgment, however, in order to extend the jurisdictional time for filing a notice of appeal, the motion to vacate must have been served and filed within the time allotted for filing a notice of appeal. Since plaintiff did not file her motion to vacate the summary judgment until after the 60-day deadline for filing her notice of appeal from the summary judgment had expired, there was no further extension of time.

(2a, 2b, 2c, 2d, 2e, 2f) Judgments § 45--Vacating Defaults and Dismissals--Mandatory Relief--Negligence, Inadvertence, or Mistake of Counsel--Whether Available to Vacate Summary Judgment.

In a former employee's employment discrimination action, in which the trial court had granted summary judgment to defendant employer and plaintiff had based her opposition to defendant's summary judgment motion entirely on Code Civ. Proc., § 437c, subd. (h) (facts essential to oppose the motion may exist but cannot yet be presented), the trial court properly denied plaintiff's motion to vacate the summary judgment. Plaintiff based her motion to vacate on the provision of Code Civ. Proc., § 473, subd. (b), which provides for mandatory relief based on attorney mistake, neglect, inadvertence, or surprise, and this mandatory provision applies only to relief from a default, a default judgment, or a dismissal, and not to relief from a summary judgment. Therefore, regardless of whether summary judgment was entered against plaintiff because of her counsel's mistake or neglect, relief from the judgment was not available to her under the mandatory provision of Code Civ. Proc.,

94 Cal.App.4th 130, 94 Cal.App.4th 708C, 114 Cal.Rptr.2d 93, 01 Cal. Daily Op. Serv. 10,146, 2001 Daily Journal D.A.R. 12,605
(Cite as: 94 Cal.App.4th 130)

§ 473, subd. (b). The policy goal of this provision is to relieve innocent clients from losing their day in court because the attorneys they hired to defend them inexcusably failed to file responsive papers; it is not intended to be a catch-all remedy for every case of poor judgment on the part of counsel.

[See 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 196; West's Key Digest System, Judgment k. 363.]

(3a, 3b) Statutes § 29--Construction--Language--Legislative Intent.

When statutory language is clear and unambiguous, there is no need for construction. If the language is ambiguous, the construing court next examines the context of the statute, striving to harmonize the provision internally and with related statutes, and may also consult extrinsic indicia of intent as contained in the legislative history of the statute.

(4a, 4b) Judgments § 45--Vacating Defaults and Dismissals--Mandatory Relief--Negligence, Inadvertence, or Mistake of Counsel.

While a 1992 amendment expanded the scope of Code Civ. Proc., § 473, subd. (b), to include mandatory relief based on attorney mistake, neglect, inadvertence, or surprise, from a dismissal as well as a default or a default judgment, this provision still has limits. When an aggrieved party is not challenging a default, default judgment, or dismissal, § 473, subd. (b), still requires that an attorney's neglect be excusable before relief can be granted. Further, when the Legislature incorporated dismissals into § 473, subd. (b), it intended to reach only those dismissals that occur through failure to oppose a dismissal motion-the only dismissals that are procedurally equivalent to a default. The Legislature did not intend that the mandatory provision of § 473, subd. (b), apply to a voluntary dismissal entered pursuant to a settlement agreement. Mandatory relief is also not available after a summary judgment or judgment after trial, which involve actual litigation and adjudication on the merits. The word default has both a broad and a narrow meaning. Broadly, a default is the omission or failure to perform a legal or contractual duty; narrowly, it refers to a defendant's failure to answer a complaint. The narrower meaning, that is, a default entered by the clerk or the court when a defendant fails to answer a complaint, applies in § 473, subd. (b).

(5) Statutes § 33--Construction--Language--Words and Phrases--Meaning Derived from Context.

In accordance with the principle of statutory construction *noscitur a sociis* (it is known from its associates), a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list.

COUNSEL

Biegler, Ortiz & Chan, Robert P. Biegler, Jesse S. Ortiz III and Paul Chan for Plaintiff and Appellant. ***133**

Carlton, DiSante & Freudenberger, Mark S. Spring and Jeremy T. Naftel for Defendant and Respondent.

NICHOLSON, J.

Plaintiff Evan English moved to vacate a summary judgment in favor of defendant IKON Business Solutions, Inc., on the ground her attorney had neglected to file a substantive opposition to the summary judgment motion. She relied exclusively on the part of Code of Civil Procedure section 473, subdivision (b) (hereafter section 473(b)) that requires the court to vacate a ñdefault,ò ñdefault judgment,ò or ñdismissalò resulting from attorney mistake, inadvertence, surprise, or neglect. The trial court concluded English was not entitled to relief under section 473(b) because her attorney's action did not constitute mistake, inadvertence, surprise, or neglect within the meaning of the statute.

On review, we conclude the mandatory provision of section 473(b) does not apply to summary judgments because a summary judgment is neither a ñdefault,ò nor a ñdefault judgment,ò nor a ñdismissalò within the meaning of section 473(b). Accordingly, the trial court properly denied English's motion to vacate the summary judgment.

Procedural History

The underlying facts are irrelevant to the issues on appeal. In July 1999, English filed a complaint against her former employer, IKON, asserting causes of action for employment discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) and wrongful termination in violation of public policy. [FN1] English later dismissed her wrongful termination cause of

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action, leaving only her statutory claims under the FEHA.

> FN1 English also named her former supervisor and a former coworker as defendants but eventually dismissed her claims against them.

In June 2000, IKON moved for summary judgment, offering evidence to negate various elements of English's claims. In opposing the motion, English did not submit any evidence to show that triable issues of fact existed and did not argue that IKON had failed to negate necessary elements of her claims. Instead, English based her opposition to the motion entirely on subdivision (h) of Code of Civil Procedure section 437c (hereafter section 437c(h)), which requires the court to deny a motion for summary judgment ***134** or grant a continuance ñ[i]f it appears ... that facts essential to justify opposition may exist but cannot ... then be presented ....ò [FN2] English contended she needed to obtain documents from IKON and complete the depositions of several individuals ñto obtain the proper evidence to oppose Defendant's Motion for Summary Judgment.ò

> FN2 ñIf it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just.ò (§ 437c(h).)

The trial court refused to grant a continuance under section 437c(h), concluding English had ñnot sufficiently explained what essential facts will be discovered which will raise a triable issue of material fact on any of her claims (of which she presumably has personal knowledge), and why the evidence could not have been presented in opposition to this motion.ò The court then concluded that IKON was entitled to summary judgment based on the evidence IKON had submitted in support of its motion. The court entered judgment against English on August 3, 2000, and notice of entry of the judgment was served on English's attorney by mail on August 23.

Two and a half months later, on November 7, 2000, English filed a motion under section 473(b) to vacate the summary judgment against her. In support of her motion, English's attorney submitted a declaration in which he claimed he had ñneglected to submit a substantive oppositionò to the motion for summary judgment ñbased on [his] mistaken belief that [he] only had to explain why [his] firm had not been dilatory in pursuing the case.ò Along with the motion to vacate the judgment, English submitted a new opposition to IKON's motion for summary judgment in which she presented evidence she contended was sufficient to raise triable issues of fact on almost all of her claims.

IKON opposed the motion to vacate on the ground it was untimely because English had delayed three months before seeking relief and on the ground section 473(b) ñaffords no remedy to a strategic gambit that fails.ò The trial court agreed with the latter argument, holding that the decision by English's attorney to rely on section 437c(h) as the sole basis for opposing the motion for summary judgment ñis not mistake, neglect, inadvertence, or surprise within the meaning of [section] 473(b).ò Accordingly, on January 12, 2001, the court denied English's motion to vacate the summary judgment. This appeal followed. ***135**

Discussion

(1) We begin with a jurisdictional issue. In her notice of appeal, which she filed on February 9, 2001, English purports to appeal from ñthe judgment ... granting Defendant Ikon's Motion for Summary Judgment dated August 3, 2000 ... and [the] rejection of Plaintiff's Motion for Relief under [section] 473(b), rejected January 12, 2001.ò IKON contends the appeal from the summary judgment is untimely. We agree.

ñ[A] notice of appeal from a judgment shall be filed on or before the earliest of the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled 'notice of entry' of judgment; (2) 60 days after the date of service of a document entitled 'notice of entry' of judgment by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) 180 days after the date of entry of the judgment.ò (Cal. Rules of Court, rule 2(a).) Here, IKON served English with a document entitled ñNotice of Entry of Judgmentò on August 23, 2000. Accordingly, absent an extension of the time for filing a notice of appeal, English had until

October 22, 2000, to file her notice of appeal from the summary judgment.

Under rule 3(b) of the California Rules of Court, the time for filing a notice of appeal may be extended by the filing of a motion to vacate a judgment. [FN3] ñA motion to set aside a judgment under section 473 qualifies as such a motion for purposes of extending the time to file a notice of appeal under rule 3(b).ò (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 108 [95 Cal.Rptr.2d 113].) However, ñin order to extend the jurisdictional time for filing a notice of appeal, the motion to vacate or set aside itself must have been timely; that is, such a motion must have been served and filed within either the normal time period for filing a notice of appeal under rule 2, or any shorter time period prescribed by applicable statute.ò (*Id.* at pp. 108-109, italics omitted.)

> FN3 ñWhen a valid notice of intention to move to vacate a judgment or to vacate a judgment and enter another and different judgment is served and filed by any party on any ground within the time in which, under rule 2, a notice of appeal may be filed, or such shorter time as may be prescribed by statute, the time for filing the notice of appeal from the judgment is extended for all parties until the earliest of 30 days after entry of the order denying the motion to vacate; or 90 days after filing the first notice of intention to move to vacate the judgment; or 180 days after entry of the judgment.ò (Cal. Rules of Court, rule 3(b).)

English did not file her motion to vacate the summary judgment under section 473(b) until November 7, 2000, more than two weeks after the 60-day deadline for filing her notice of appeal from the summary judgment. ***136** Accordingly, English's filing of a motion to vacate the summary judgment did not extend the time for her to file a notice of appeal from that judgment. With respect to the summary judgment, English's notice of appeal was more than three and a half months late. For this reason, we have no jurisdiction to review the trial court's grant of summary judgment in favor of IKON and must dismiss the appeal insofar as it purports to seek review of the summary judgment entered August 3, 2000, and the underlying order granting summary judgment entered August 23, 2000. (See *In re Marriage of Eben-King & King*, *supra*, 80 Cal.App.4th at pp. 109-110.)

(2a) We turn to the only part of English's appeal that is timely-her appeal from the trial court's denial of her motion to vacate the judgment under section 473(b). As relevant here, section 473(b) provides: ñThe court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.... Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.ò [FN4]

> FN4 Code of Civil Procedure section 473 was not subdivided until 1996. (Stats. 1996, ch. 60, § 1.) Accordingly, cases before 1996 do not refer to subdivision (b) of the statute. Nevertheless, for consistency, we will refer to the statute as section 473(b) throughout this opinion.

In challenging the trial court's denial of her motion to vacate the summary judgment under section 473(b), English does not rely on the discretionary provision of the statute, which allows, but does not require, the court to relieve a party or his or her legal representative ñfrom a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.ò Instead, as she did below, English relies exclusively on the mandatory provision of the statute, which requires the court to vacate a ñdefaultò or a ñdefault judgment or dismissalò entered against a party when that party's attorney swears in an affidavit the default or dismissal was ñcaused by the attorney's mistake, inadvertence, surprise, or neglect.ò Accordingly, the only question before us is whether the trial court erred in refusing to vacate the summary judg-

ment under the mandatory provision of section 473(b). ***137**

In support of her argument that the trial court erred in refusing to vacate the summary judgment, English relies primarily on *Avila v. Chua* (1997) 57 Cal.App.4th 860 [67 Cal.Rptr.2d 373]. In *Avila*, the plaintiff's attorney failed to timely file oppositions to two motions for summary judgment. The trial court struck the late-filed oppositions and granted summary judgment in favor of the defendants. The trial court later denied a motion to vacate the summary judgment under section 473(b). On appeal, Division Five of the Second Appellate District held the trial court erred in denying the motion to vacate because the mandatory provision of section 473(b) applied. Relying in part on this court's decision in *Huens v. Tatum* (1997) 52 Cal.App.4th 259 [60 Cal.Rptr.2d 438], the court in *Avila* concluded the plaintiff was entitled to relief under the mandatory provision of section 473(b) because the case was ñdirectly analogous to a default judgment.ò (*Avila v. Chua, supra,* 57 Cal.App.4th at p. 868.) According to the *Avila* court, the case was ñof the kind which *Huens* found that the mandatory provisions were designed for: Appellant lost his day in court due solely to his lawyer's failure to timely act.ò (*Ibid.*)

English contends the decision in *Avila* controls here because her failure to file a ñsubstantiveò opposition to IKON's motion for summary judgment is analogous to the failure of the plaintiff in *Avila* to file timely oppositions to motions for summary judgment. In both cases, English contends, the attorney made a ñmistakeò that resulted in the entry of summary judgment against the client, and the mandatory provision of section 473(b) requires the court to vacate the judgment.

IKON contends *Avila* does not control here because although the failure to timely file an opposition to a motion for summary judgment is ñequivalent to a default,ò the ñstrategic decisionò to oppose a summary judgment based solely on section 437c(h) is not. IKON relies primarily on the decision of Division Two of the First Appellate District in *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674 [68 Cal.Rptr.2d 228]. In *Garcia*, the plaintiff moved to vacate a summary judgment on the ground ñthat his original opposition papers, through inadvertence and time pressure, had not correctly identified all evidence creating triable issues ....ò (*Id.* at p. 679.) The trial court denied the motion, and the appellate court affirmed, holding section 473 was not meant to apply ñwhere there was no complete failure to oppose, but rather an opposition which was, though apparently timely and procedurally adequate, inadequate in substance.ò (*Garcia*, at p. 683.)

IKON contends the decision by English's counsel to oppose the summary judgment motion based solely on section 437c(h) is more akin to the ***138** inadequate opposition in *Garcia* than to the untimely opposition in *Avila*, and therefore *Garcia*, rather than *Avila*, controls here. We conclude, however, that *Avila* does not control here for a more fundamental reason. Contrary to the court in *Avila*, we conclude the mandatory provision of section 473(b) simply does not apply to summary judgments because a summary judgment is neither a ñdefault,ò nor a ñdefault judgment,ò nor a ñdismissalò within the meaning of section 473(b). Therefore, regardless of whether summary judgment was entered against English because of her counsel's mistake or neglect, relief from the judgment was not available to her under the mandatory provision of section 473(b), and the trial court properly denied her motion to vacate the judgment under that provision.

To explain our conclusion, and our understanding of how the *Avila* court and others have come to extend the reach of the mandatory provision of section 473(b) beyond what the Legislature intended, we begin by tracing the history and development of that provision. The discretionary provision of section 473(b) has been part of California law since 1851. (Stats. 1851, ch. 5, § 68, p. 60 [enacting § 68 of Practice Act, predecessor of § 473]; see also *Ayala v. Southwest Leasing & Rental, Inc.* (1992) 7 Cal.App.4th 40, 43, fn. 1 [8 Cal.Rptr.2d 637]; *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 788 [59 Cal.Rptr.2d 332].) The mandatory provision, however, is of much more recent vintage, having its origin in a 1988 amendment to the statute. (Stats. 1988, ch. 1131, § 1, p. 3631.) In its original form, the mandatory provision provided in relevant part: ñNotwithstanding any other requirements of this section, the court shall, whenever an application for relief is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake, in-

advertence, surprise, or neglect....ò (*Ibid.*)

As originally enacted, the mandatory provision of section 473(b) was much more limited in scope than the discretionary provision of the statute. While the discretionary provision at that time allowed the court to grant relief from ña judgment, order, or other proceeding ...,ò the mandatory provision required the court to grant relief only from a ñdefault judgment.ò In *Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250 [275 Cal.Rptr. 80], Division One of the Second Appellate District recognized that, given its expressly limited scope, the mandatory provision did not require a court to grant relief from an order of dismissal entered against a plaintiff. The *Billings* court first noted that the 1988 amendment ñexplicitly applies only to default judgments. (3a) And where the statutory language is clear and unambiguous, there is no need for construction.ò (*Id.* at p. 256.) The ***139** *Billings* court then explained that the legislative history of the 1988 amendment also supported the limited application of the mandatory provision to default judgments only. The court pointed out that in its initial form the mandatory provision, like the discretionary provision, would have applied to any ñjudgment, order, or other proceedingò; however, before its enactment, the bill containing the amendment was revised to limit the application of the mandatory provision to default judgments. (*Id.* at pp. 256-257.)

(2b) The Legislature's focus on providing mandatory relief from default judgments, but not from other types of judgments, apparently stemmed from reluctance by the trial courts to grant discretionary relief from default judgments because of increased caseloads. (See *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1819 [41 Cal.Rptr.2d 182].) ñ[T]he policy goal sought to be effectuated [was] to relieve innocent clients from losing their day in court because the attorneys they hired to defend them inexcusably fail[ed] to file responsive papers.ò (*Cisneros v. Vueve* (1995) 37 Cal.App.4th 906, 911-912 [44 Cal.Rptr.2d 682], italics omitted.) To achieve this goal, the Legislature expressly limited the scope of the mandatory provision of section 473(b) to require relief from default judgments only.

In passing, the *Billings* court noted ñthe amendment's reference to 'default judgments' could be construed to preclude mandatory relief when only the default, as opposed to the default judgment, has been entered.ò (*Billings v. Health Plan of America, supra*, 225 Cal.App.3d at p. 256, fn. 2.) The Legislature remedied this problem in 1991 by amending the mandatory provision to require the court to grant relief from a ñresulting default ... which will result in entry of a default judgment,ò as well as from the ñresulting default judgmentò itself. (Stats. 1991, ch. 1003, § 1, p. 4662; see *Lorenz v. Commercial Acceptance Ins. Co.* (1995) 40 Cal.App.4th 981, 992-994 [47 Cal.Rptr.2d 362] [discussing legislative history of 1991 amendment].) Still, as Division Four of the Second Appellate District recognized in *Ayala v. Southwest Leasing & Rental, Inc., supra*, 7 Cal.App.4th 40, even after the 1991 amendment, the mandatory provision of section 473(b) did not apply outside the realm of defaults and default judgments.

In *Ayala*, arbitration awards in favor of two plaintiffs were entered as a judgment when the defendants' attorney failed to timely request a trial de novo. The trial court refused to vacate the judgment under section 473(b), and the appellate court affirmed that decision, holding: ñThe mandatory portion of Code of Civil Procedure section 473 is not applicable because there was neither a default judgment nor a default which would result in the entry of a default judgment in this case.ò (*Ayala v. Southwest Leasing & Rental, Inc., supra*, 7 Cal.App.4th at p. 43.) Citing *Billings*, the *Ayala* court ***140** wrote: ñAlthough the case before us concerns a money judgment rather than an order of dismissal, we agree with Division One that the Legislature meant what it said when it added the mandatory language relating to relief from default judgments. [¶] This case does not involve a default judgment.... Therefore, respondents' motion to vacate the judgment fell within the discretionary, rather, than the mandatory, provisions of Code of Civil Procedure section 473.ò (*Id.* at p. 44.)

In 1992, at the urging of the State Bar, the Legislature once again amended section 473(b), this time to give plaintiffs some of the mandatory relief that had been available to defendants since the 1988 amendment. (Stats. 1992, ch. 876, § 4, pp. 4071-4072; see *Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th at p. 1820 [discussing legislative history of 1992 amendment].) The impetus behind this change was the State Bar's conclusion ñ 'that it is illogical and arbitrary to allow mandatory relief for defendants when a default judgment has been entered against them due to defense counsel's mistakes and to not

provide comparable relief to plaintiffs whose cases are dismissed for the same reason.' ò (*Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th at p. 1820, quoting Assem. Com. on Judiciary, Analysis of Assem. Bill No. 3296 (1991-1992 Reg. Sess.) as amended May 4, 1992.) By inserting the word ñdismissalò into the mandatory provision of the statute, the Legislature now required the courts to vacate any ñresulting defaultò or ñresulting default judgment or dismissalò when the other requirements of the mandatory provision were met. [FN5]

> FN5 The Legislature also inserted the word ñdismissalò into the discretionary provision of section 473(b), bringing that provision into its current form. That addition was superfluous, however, because the statute already provided discretionary relief from any ñjudgment, order, or other proceeding ....ò As existing case law recognized, ñ '[a]nything done from the commencement to the termination is a proceeding....' ò (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105 [1 Cal.Rptr.2d 222], quoting *Stonesifer v. Kilburn* (1892) 94 Cal. 33, 43 [29 P. 332].)

(4a) In *Tackett v. City of Huntington Beach* (1994) 22 Cal.App.4th 60 [27 Cal.Rptr.2d 133], Division Three of the Fourth Appellate District explained that while the 1992 amendment had expanded the scope of the mandatory provision of section 473(b), the provision still had limits. In *Tackett*, the plaintiff attempted to rely on the mandatory provision of section 473(b) to obtain relief from the claim-filing requirement of the Government Tort Claims Act. The appellate court held the mandatory provision was not so broad in scope, concluding: ñ[W]hen an aggrieved party is not challenging a default, default judgment, or dismissal, Code of Civil Procedure section 473 still requires that an attorney's neglect be excusable before relief can be granted under that [statute].ò (*Tackett*, at p. 65.) Similarly, in ***141***Douglas v. Willis* (1994) 27 Cal.App.4th 287 [32 Cal.Rptr.2d 408], Division One of the Second Appellate District concluded an attorney's failure to timely file a motion to tax costs could not be corrected under the mandatory provision of section 473(b). The *Douglas* court specifically found ñthe costs order did not constitute either a 'default' or a 'judgment' for purposes of the mandatory provisions of section 473.ò (*Douglas*, at p. 291.)

Judicial interpretation of section 473(b) continued through 1994 as several decisions addressed whether the 1992 amendment to the mandatory provision of the statute required a court to grant relief from a discretionary dismissal for failure to prosecute where the attorney claimed fault for the dismissal. In *Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th 1809, we followed decisions by Division Three of the Fourth Appellate District (*Tustin Plaza Partnership v. Wehage* (1994) 27 Cal.App.4th 1557 [33 Cal.Rptr.2d 366]) and Division Six of the Second Appellate District (*Graham v. Beers* (1994) 30 Cal.App.4th 1656 [36 Cal.Rptr.2d 765]) in concluding ñwhen the Legislature incorporated dismissals into section 473 it intended to reach only those dismissals which occur through failure to oppose a dismissal motion-the only dismissals which are procedurally equivalent to a default.ò (*Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th at p. 1817.) As we explained: ñ[A] default judgment is entered when a defendant fails to appear, and, under section 473, relief is afforded where the failure to appear is the fault of counsel. Similarly, under our view of the statute, a dismissal may be entered where a plaintiff fails to appear in opposition to a dismissal motion, and relief is afforded where that failure to appear is the fault of counsel. The relief afforded to a dismissed plaintiff by our reading of the statute is therefore comparable to the relief afforded a defaulting defendant.ò (*Id.* at pp. 1820-1821.)

In *Huens v. Tatum, supra*, 52 Cal.App.4th 259, we confronted whether the Legislature intended the mandatory provision of section 473(b) to apply to a voluntary dismissal entered pursuant to a settlement agreement. In setting out the ñbackground and historyò of the mandatory provision, we explained ñ[a]lthough the statute on its face affords relief from unspecified 'dismissal' caused by attorney neglect, our courts have, through judicial construction, prevented it from being used indiscriminately by plaintiffs' attorneys as a 'perfect escape hatch' [citation] to undo dismissals of civil cases.ò (*Id.* at pp. 263-264.) As an example, we cited *Lorenz v. Commercial Acceptance Ins. Co., supra*, 40 Cal.App.4th at page 990 for the proposition that ñ[m]andatory relief is not available after a summary judgment or judgment after trial, which involve actual litigation and adjudication on the merits.ò (*Huens v. Tatum, supra*, 52 Cal.App.4th at p. 263.) That statement was dictum, however, because *Huens* did not involve either a summary judgment or a ***142** judgment after trial. Moreover, the statement

from *Lorenz* upon which we relied was likewise dictum, because *Lorenz* also did not involve a summary judgment or judgment after trial. [FN6] (2c) Returning to the case before us, we went on in *Huens* to reject the plaintiff's contention the mandatory provision of section 473(b) applied to voluntary dismissals, stating: ñThe purpose of the statute was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys. There is no evidence the amendment was intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal.ò (*Huens*, at p. 264, italics in original.)

> FN6 The question presented in *Lorenz* was whether the mandatory provision of section 473(b) applied to a default entered by the *court*, as opposed to one entered by the *clerk*, given the statute's express reference to the former but not the latter. (See *Lorenz v. Commercial Acceptance Ins. Co., supra*, 40 Cal.App.4th at pp. 988-989.) The *Lorenz* court concluded the statute's reference to a default entered by the clerk was ñmerely descriptive,ò not restrictive. (*Id.* at pp. 991-992.)

Eight months after we decided *Huens*, Division Five of the Second Appellate District decided *Avila v. Chua, supra*, 57 Cal.App.4th 860. As noted above, the issue before the court in *Avila* was whether the trial court had erred in refusing to vacate a summary judgment entered when the plaintiff's attorney belatedly opposed two motions for summary judgment. After discussing *Ayala*, *Lorenz*, and *Huens*, but without reviewing in detail the history and development of the mandatory provision of section 473(b), the *Avila* court concluded the mandatory provision entitled the plaintiff to relief from the summary judgment entered against him. The court explained: ñThis case is unlike *Ayala*, where, as the court noted, the litigants participated in an arbitration hearing which resulted in an award which had the same force and effect as a civil judgment.... There has been no 'litigation and adjudication on the merits,' the rationale *Huens* suggested for excluding certain kinds of dismissals from the mandatory provisions. Instead, this case is of the kind which *Huens* found that the mandatory provisions were designed for: Appellant lost his day in court due solely to his lawyer's failure to timely act. [¶] ... [¶] This case is directly analogous to a default judgment: Due to counsel's late filing of crucial documents, the court decided the matter on the other parties' pleadings. There was no litigation on the merits.ò (*Avila*, at pp. 867-868, citation omitted.) Thus, the *Avila* court concluded that in some circumstances the mandatory provision of section 473(b) may require a court to vacate a summary judgment entered as a result of an attorney's mistake, inadvertence, surprise or neglect. For the following reasons, we disagree with that conclusion.

The determination of whether the mandatory provision of section 473(b) applies to summary judgments is a task of statutory construction. ***143** (3b) ñThe axioms of statutory construction require us first to look at the words used by the Legislature. If the language is unambiguous, our task is finished. [Citations.] If the language is ambiguous, we then examine the context of the statute, striving to harmonize the provision internally and with related statutes, and we may also consult extrinsic indicia of intent as contained in the legislative history of the statute.ò (*Construction Industry Force Account Council v. Amador Water Agency* (1999) 71 Cal.App.4th 810, 815 [84 Cal.Rptr.2d 139].)

(2d) Turning to the language of section 473(b), we find nothing in the statute to suggest the Legislature intended the mandatory provision of the statute to apply to summary judgments. On its face, the mandatory provision requires the court, if certain prerequisites are met, to vacate a ñdefault,ò a ñdefault judgment,ò or a ñdismissal.ò As we shall explain, a summary judgment is neither a ñdefault,ò nor a ñdefault judgment,ò nor a ñdismissal.ò

(4b) The word ñdefaultò has both a broad meaning and a narrow meaning. Broadly, a ñdefaultò is ñ[t]he omission or failure to perform a legal or contractual duty ....ò (Black's Law Dict. (7th ed. 1999) p. 428.) Narrowly, the word ñdefaultò refers to a defendant's failure to answer a complaint. (See Code Civ. Proc., § 585 [setting forth procedures for entry of default]; *Lorenz v. Commercial Acceptance Ins. Co., supra*, 40 Cal.App.4th at pp. 990-991 [discussing § 585].) As used in the mandatory provision of section 473(b), ñdefaultò carries its narrower meaning. The mandatory provision of the statute requires the court to vacate not any ñdefault,ò but only a ñdefault entered by the clerk ... which will result in entry of a default judgment ....ò By qualifying the word ñdefaultò in this

manner, the Legislature plainly conveyed its intent to use the word in its narrower sense. Thus, the mandatory provision of section 473(b) applies to a ñdefaultò entered by the clerk (or the court) [FN7] when a defendant fails to answer a complaint, not to every ñomissionò or ñfailureò in the course of an action that might be characterized as a ñdefaultò under the more general meaning of the word.

FN7 See *Lorenz v. Commercial Acceptance Ins. Co., supra*, 40 Cal.App.4th at pages 991-992.

With the word ñdefaultò thus properly understood, the meaning of the term ñdefault judgmentò follows inexorably. A ñdefault judgmentò within the meaning of section 473(b) is a judgment entered after the defendant has failed to answer the complaint and the defendant's default has been entered. (See Code Civ. Proc., § 585 [setting forth procedures for entry of default judgment]; *Peltier v. McCloud River R.R. Co., supra*, 34 Cal.App.4th at p. 1820 [ña default judgment is entered when a defendant fails to appearò].) ***144**

(2e) Once the terms ñdefaultò and ñdefault judgmentò are correctly understood, it takes no great leap of logic to conclude that a summary judgment is neither a ñdefaultò nor a ñdefault judgmentò within the meaning of the mandatory provision of section 473(b). A summary judgment does not result from a defendant's failure to answer the complaint. Instead, a summary judgment is a judgment entered following a motion based on ñaffidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken,ò when ñall the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.ò (Code Civ. Proc., § 437c, subds. (b) & (c).) By its very nature, a summary judgment is distinct from both a ñdefaultò and a ñdefault judgmentò as those terms are used in section 473(b).

Based on our construction of the statute, the *Avila* court's conclusion that a summary judgment is ñdirectly analogous to a default judgmentò when the opposing party fails to file a timely opposition to the motion misses the point. (*Avila v. Chua, supra*, 57 Cal.App.4th at p. 868.) It is not an appellate court's task, nor, indeed, its prerogative, when interpreting a statute, to extend the scope of the statute to encompass situations ñanalogousò to those the statute explicitly addresses. Rather, an appellate court's task is simply to determine what the Legislature meant by the words it used, relying first and foremost on the words themselves. For the reasons already given, the terms ñdefaultò and ñdefault judgment,ò as used in the mandatory provision of section 473(b), cannot reasonably be construed to encompass a summary judgment, regardless of whatever omissions or failures by counsel may have preceded the entry of that judgment.

A similar conclusion follows with regard to the word ñdismissal.ò Two justices of Division Four of the Second Appellate District have observed that ñ 'dismissal' is a much broader concept than 'default' ....ò (*Yeap v. Leake* (1997) 60 Cal.App.4th 591, 600 [70 Cal.Rptr.2d 680].) Even if that is generally true, it does not follow that by using the word ñdismissalò in the mandatory provision of section 473(b), the Legislature intended to encompass every resolution of a case against a plaintiff, including a summary judgment in favor of a defendant. As Justice Epstein's dissent in *Yeap* explained: ñWithout belaboring the obvious, it should suffice to say that, in the context of pleadings and motions, a dismissal is the withdrawal of an application for judicial relief by the party seeking such relief, or the removal of the application by a court.ò (*Yeap*, at p. 603 (dis. opn. of Epstein, J.).) Although Code of Civil Procedure section 581 describes various circumstances in which an action may be dismissed, either by the court or by a ***145** party, noticeably lacking is any provision describing a summary judgment in favor of a defendant as a ñdismissal.ò

(5) In determining the Legislature's intent in adding the word ñdismissalò to the mandatory provision of section 473(b), we must construe the word in the context of the provision in which it appears, ñstriving to harmonize the provision internally ....ò (*Construction Industry Force Account Council v. Amador Water Agency, supra*, 71 Cal.App.4th at p. 815.) In doing so, we are guided by the principle of statutory construction known as *noscitur a sociis*, i.e., it is known from its associates. (See *Coors Brewing Co. v. Stroh* (2001) 86 Cal.App.4th 768, 778 [103 Cal.Rptr.2d 570].) ñ 'In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list.' ò (

People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 307 [58 Cal.Rptr.2d 855, 926 P.2d 1042], quoting *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1012 [9 Cal.Rptr.2d 358, 831 P.2d 798].)

(2f)Applying this principle of construction to the mandatory provision of section 473(b), we construe the word ñdismissalò as having a limited meaning similar to the term ñdefault judgment.ò This approach is supported by the history of the mandatory provision, set out above. As Justice Epstein explained in his dissenting opinion in *Yeap*: ñThe purpose of the [1992] amendment was to give plaintiffs the functional equivalent of the 'default' provision for defendants ....ò (*Yeap v. Leake*, *supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).) Thus, where a defendant was entitled to mandatory relief from a ñdefaultò or ñdefault judgmentò resulting from attorney mistake, inadvertence, surprise, or neglect, a plaintiff would be entitled to mandatory relief from a ñdismissalò resulting from similar circumstances.

This court has previously recognized the legislative intent to achieve parity between defendants and plaintiffs in their entitlement to relief under the mandatory provision of section 473(b). We gave effect to that intent in *Peltier* when we concluded the Legislature ñintended to reach only those dismissals which occur through failure to oppose a dismissal motion-the only dismissals which are procedurally equivalent to a default.ò (*Peltier v. McCloud River R.R. Co.*, *supra*, 34 Cal.App.4th at p. 1817.) Other decisions from this court have also construed the word ñdismissalò in the mandatory provision of section 473(b) as having a limited meaning, to prevent that ***146** provision ñfrom being used indiscriminately by plaintiffs' attorneys as a 'perfect escape hatch' [citation] to undo dismissals of civil cases.ò (*Huens v. Tatum*, *supra*, 52 Cal.App.4th at pp. 263.) Thus, we have held that the mandatory provision does not apply to: (1) a dismissal following the sustaining of a demurrer without leave to amend on the ground the statute of limitations had run (*Castro v. Sacramento County Fire Protection Dist.* (1996) 47 Cal.App.4th 927 [55 Cal.Rptr.2d 193]); (2) a voluntary dismissal pursuant to a settlement agreement (*Huens v. Tatum*, *supra*, 52 Cal.App.4th 259); and (3) a mandatory dismissal for failure to serve a complaint within three years (*Bernasconi Commercial Real Estate v. St. Joseph's Regional Healthcare System* (1997) 57 Cal.App.4th 1078 [67 Cal.Rptr.2d 475]).

Unfortunately, language from our opinions in *Peltier* and *Huens*, which we used to explain our view of the Legislature's limited intent in adding the word ñdismissalò to section 473(b), has been taken out of context and used by other courts to support an expansive interpretation of the mandatory provision of the statute-an interpretation the words of the statute do not support. In holding the provision was not intended to apply to voluntary dismissals, we observed in *Huens* ñ[t]he purpose of the statute was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys.ò (*Huens v. Tatum*, *supra*, 52 Cal.App.4th at p. 264, italics in original.) The *Avila* majority seized on this language to support its conclusion the mandatory provision of section 473(b) was intended to apply to a summary judgment entered against a plaintiff where the plaintiff's attorney failed to oppose the summary judgment motion in a timely manner. (*Avila v. Chua*, *supra*, 57 Cal.App.4th at p. 868.) Regrettably, the *Avila* court focused on our statement of the mandatory provision's purpose without giving sufficient attention to the language and history of the provision itself and to the context in which we described the purpose of the provision. We offered our statement of the provision's purpose in *Huens* to explain why the mandatory provision must be construed in a limited, rather than an expansive, manner and why it could not be construed to require relief from a voluntary dismissal. In relevant part, we stated: ñThe statute's use of the word 'against' limits the class of targeted dismissals and makes clear that only *involuntary* dismissals are affected. [¶] This conclusion is consistent with the narrow view of the Legislature's intent which appellate courts have taken, i.e., that the section's purpose was simply 'to put plaintiffs whose cases are dismissed for failing to respond to a dismissal motion on the same footing with defendants who are defaulted for failing to respond to an action.' [Citations.] The purpose of the statute was to alleviate the hardship on parties who *lose their day in court* due solely to an inexcusable failure to act on the part of their attorneys. ***147** There is no evidence the amendment was intended to be a catch-all remedy for every case of poor judgment on the part of counsel which results in dismissal.ò (*Huens v. Tatum*, *supra*, 52 Cal.App.4th at p. 264, quoting, in part, *Peltier v. McCloud River R.R. Co.*, *supra*, 34 Cal.App.4th at p. 1824, italics in original.)

94 Cal.App.4th 130, 94 Cal.App.4th 708C, 114 Cal.Rptr.2d 93, 01 Cal. Daily Op. Serv. 10,146, 2001 Daily Journal D.A.R. 12,605
(Cite as: 94 Cal.App.4th 130)

By taking our statement about the purpose of the mandatory provision out of context, the *Avila* court was able to use that statement to justify extending the reach of the provision beyond the language of the statute itself and beyond what the Legislature intended when it added the word ñdismissalò to the statute. At the same time, the *Avila* court avoided directly addressing the issue we address here-whether the Legislature intended the word ñdismissalò to encompass a summary judgment entered against a plaintiff.

Other courts have perpetuated the *Avila* court's unwarranted, expansive interpretation of the mandatory provision of section 473(b) based on statements taken out of context from our decisions in *Huens* and *Peltier*. In *Yeap v. Leake*, the majority held the mandatory provision of the statute entitled a plaintiff to relief from a judgment of ñ$0ò entered after the plaintiff's attorney failed to attend judicial arbitration and then failed to timely request a trial de novo. Citing *Avila* and *Peltier*, the majority concluded the effect of an award of ñ$0ò ñwas the same as a dismissal for failure to appear on the first day of trialò and that ñthe judgment entered in this matter was analogous to a default because it came about as a result of appellant's failure to appear and litigate at the arbitration hearing.ò (*Yeap v. Leake, supra*, 60 Cal.App.4th at p. 601.)

More recently, in *In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438 [96 Cal.Rptr.2d 546], Division Five of the Second Appellate District held a party in a dissolution proceeding was entitled to have a judgment on reserved issues vacated under the mandatory provision of section 473(b) because the party's attorney failed to appear on the date set for trial of the reserved issues. Citing *Yeap* and *Avila*, among other decisions, the court concluded ñsection 473 may be used for relief under circumstances ... which have been determined to be the procedural equivalent of a default.ò (80 Cal.App.4th at p. 1443.)

We perceive it paradoxical that language from our opinions in *Peltier* and *Huens*-opinions that construed the word ñdismissalò as having a limited meaning in the context of the mandatory provision of section 473(b)-have now led to an expansive interpretation of the statute under which the ***148** dispositive test, largely detached from the language of the statute itself, is whether the ruling from which relief is sought was ñin the nature of a defaultò and whether the party seeking relief ñhad her day in court.ò (See *In re Marriage of Hock & Gordon-Hock, supra*, 80 Cal.App.4th at pp. 1444-1445; *Brown v. Williams* (2000) 78 Cal.App.4th 182, 189 [92 Cal.Rptr.2d 634] [concluding, for purposes of the mandatory provision of § 473(b), that participation in a judicial arbitration proceeding ñdoes constitute a 'day in court' ò].) We agree with Justice Epstein, who wrote in his dissent in *Yeap*: ñ[T]o read the mandatory provision of Code of Civil Procedure section 473 to apply whenever a party loses his or her day in court due to attorney error goes far beyond anything the Legislature has done.ò (*Yeap v. Leake, supra*, 60 Cal.App.4th at p. 605 (dis. opn. of Epstein, J.).)

In keeping with our opinions in *Peltier* and *Huens*, and upon careful reassessment of the language and history of the statute, we adhere to the conclusion that the Legislature intended the word ñdismissalò to have a limited meaning in the context of the mandatory provision of section 473(b). In doing so, we disagree with the growing number of decisions, including *Avila*, *Yeap*, and *In re Marriage of Hock & Gordon-Hock*, which, in understandable, yet ultimately misguided quests to salvage cases lost by inept attorneys, have applied the mandatory provision far beyond the limited confines the Legislature intended. ñIf the Legislature had intended to require relief whenever a client loses his or her day in court due to attorney error, it could easily have said so.ò (*Yeap v. Leake, supra*, 60 Cal.App.4th at p. 604 (dis. opn. of Epstein, J.).) By carefully differentiating between the scope of the discretionary provision of section 473(b) (which applies to ña judgment, dismissal, order, or other proceedingò) and the scope of the mandatory provision (which applies to a ñdefaultò or a ñdefault judgment or dismissalò), the Legislature chose to limit the circumstances in which a court must grant relief based on an attorney's mistake, inadvertence, surprise, or neglect. Neither this court nor any other court is at liberty to substitute its judgment for that of the Legislature in determining how far the statute should reach, no matter what good intentions may urge such an action.

Given the limited meaning of the word ñdismissalò as used in the mandatory provision of section 473(b), a summary judgment in favor of a defendant is not a ñdismissal.ò A summary judgment is not ñthe

removal ... by a courtò ñof an application for judicial relief.ò (*Yeap v. Leake, supra,* 60 Cal.App.4th at p. 603 (dis. opn. of Epstein, J.).) Rather, it is a judicial determination that under the undisputed facts before the court, the moving party is entitled to prevail in the action as a matter of law. (***149**Code Civ. Proc., § 437c, subd. (c).) It is true the summary judgment statute allows a court to grant summary judgment if the opposing party fails to file a separate statement of disputed and undisputed material facts. (Code Civ. Proc., § 437c, subd. (b).) Even in that situation, however, the court cannot grant the motion ñuntil it has considered all of the papers and determined no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.ò (*Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 113 [54 Cal.Rptr.2d 669].) Thus, a summary judgment in favor of a defendant does not constitute a removal of the plaintiff's application for judicial relief, but rather an adjudication of that application based on the undisputed facts before the court.

As used in the mandatory provision of section 473(b), the word ñdismissalò cannot reasonably be construed to encompass a judgment to which a court has determined the defendant is entitled as a matter of law based on undisputed facts before the court. Consequently, we conclude a summary judgment is not a ñdismissalò within the meaning of section 473(b).

Our construction of section 473(b) furthers the legislative goal behind the 1992 amendment of putting defendants and plaintiffs on equal footing in their entitlement to mandatory relief under the statute. Under no circumstance can the term ñdefault judgment,ò as we have interpreted that term, be deemed to encompass a summary judgment entered in favor of a plaintiff. By rigorously adhering to the statutory language, to the principles of statutory construction, and to the (by now) well-known legislative purpose behind the 1992 amendment, we carry out the Legislature's intent by ensuring neither party is entitled to a greater measure of relief than the other under the mandatory provision of section 473(b) in the summary judgment context.

In the appropriate circumstances, of course, relief from a summary judgment may be available to either a plaintiff or a defendant under the discretionary provision of section 473(b). (See, e.g., *Uriarte v. United States Pipe & Foundry Co., supra,* 51 Cal.App.4th at p. 791.) This is so because discretionary relief under the statute is not limited to defaults, default judgments, and dismissals, but is available from any judgment. In this case, however, English did not seek relief, here or in the trial court, under the discretionary provision of section 473(b). Accordingly, our construction of the mandatory provision of section 473(b) is dispositive of the remainder of this appeal. Because a summary judgment is neither a ñdefault,ò nor a ñdefault judgment,ò nor a ñdismissalò within the meaning of section 473(b), the trial court properly denied English's motion to vacate the summary judgment in favor of IKON. ***150**

Disposition

The judgment is affirmed.

Blease, Acting P. J., and Sims, J., concurred.

On December 27, 2001, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied February 13, 2002. Kennard, J., was of the opinion that the petition should be granted. ***151**

Cal.App.3.Dist.
English v. IKON Business Solutions, Inc.
94 Cal.App.4th 130, 94 Cal.App.4th 708C, 114 Cal.Rptr.2d 93, 01 Cal. Daily Op. Serv. 10,146, 2001 Daily Journal D.A.R. 12,605

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Estate of DENIS H. GRISWOLD, Deceased.
NORMA B. DONER-GRISWOLD, Petitioner and Respondent,
v.
FRANCIS V. SEE, Objector and Appellant.

No. S087881.

Supreme Court of California
June 21, 2001.

SUMMARY

After an individual died intestate, his wife, as administrator of the estate, filed a petition for final distribution. Based on a 1941 judgment in a bastardy proceeding in Ohio, in which the decedent's biological father had confessed paternity, an heir finder who had obtained an assignment of partial interest in the estate from the decedent's half siblings filed objections. The biological father had died before the decedent, leaving two children from his subsequent marriage. The father had never told his subsequent children about the decedent, but he had paid court-ordered child support for the decedent until he was 18 years old. The probate court denied the heir finder's petition to determine entitlement, finding that he had not demonstrated that the father was the decedent's natural parent pursuant to Prob. Code, § 6453, or that the father had acknowledged the decedent as his child pursuant to Prob. Code, § 6452, which bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent/child relationship unless the parent or relative acknowledged the child and contributed to the support or care of the child. (Superior Court of Santa Barbara County, No. B216236, Thomas Pearce Anderle, Judge.) The Court of Appeal, Second Dist., Div. Six, No. B128933, reversed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that, since the father had acknowledged the decedent as his child and contributed to his support, the decedent's half siblings were not subject to the restrictions of Prob. Code, § 6452. Although no statutory definition of òacknowledgeñ appears in Prob. Code, § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had confessed paternity in the 1941 bastardy proceeding, he had acknowledged the decedent under the plain terms of the statute. The court also held that the 1941 Ohio judgment established the decedent's biological father as his natural parent for purposes of intestate succession under Prob. Code, § 6453, subd. (b). Since the identical issue was presented both in the Ohio proceeding and in this California proceeding, the Ohio proceeding bound the parties in this proceeding. (Opinion by Baxter, J., with George, C. J., Kennard, Werdegar, and Chin, JJ., concurring. Concurring opinion by Brown, J. (see p. 925).)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d) Parent and Child § 18--Parentage of Children-- Inheritance Rights--Parent's Acknowledgement of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.

In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent were precluded by Prob. Code, § 6452, from sharing in the intestate estate. Section 6452 bars a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative acknowledged the child and contributed to that child's support or care. The decedent's biological father had paid court-ordered child support for the decedent until he was 18 years old. Although no statutory definition of òacknowledgeñ appears in § 6452, the word's common meaning is: to admit to be true or as stated; to confess. Since the decedent's father had appeared in a 1941 bastardy proceeding in another state, where he confessed paternity, he had acknowledged the decedent under the plain terms of § 6452. Further, even though the father had not had contact with the decedent and had not told his other children about him, the record disclosed no evidence that he disavowed paternity to anyone with knowledge of the circumstances. Neither the language nor the history of § 6452 evinces a clear intent to make inheritance contingent upon the decedent's awareness of the relatives who claim an inheritance right.

[See 12 Witkin, Summary of Cal. Law (9th ed. 1990)

Wills and Probate, §§ 153, 153A, 153B.]

(2) Statutes § 29--Construction--Language--Legislative Intent.

In statutory construction cases, a court's fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. A court begins by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, the court presumes the lawmakers meant what they said, and the plain meaning of the language governs. If there is ambiguity, however, the court may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. In such cases, the court selects the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoids an interpretation that would lead to absurd consequences.

(3) Statutes § 46--Construction--Presumptions--Legislative Intent--Judicial Construction of Certain Language.

When legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, a court may presume that the Legislature intended the same construction, unless a contrary intent clearly appears.

(4) Statutes § 20--Construction--Judicial Function.

A court may not, under the guise of interpretation, insert qualifying provisions not included in a statute.

(5a, 5b) Parent and Child § 18--Parentage of Children--Inheritance Rights--Determination of Natural Parent of Child Born Out of Wedlock:Descent and Distribution § 3--Persons Who Take--Half Siblings of Decedent.

In a proceeding to determine entitlement to an intestate estate, the trial court erred in finding that the half siblings of the decedent, who had been born out of wedlock, were precluded by Prob. Code, § 6453 (only ònatural parentñ or relative can inherit through intestate child), from sharing in the intestate estate. Prob. Code, § 6453, subd. (b), provides that a natural parent and child relationship may be established through Fam. Code, § 7630, subd. (c), if a court order declaring paternity was entered during the father's lifetime. The decedent's father had appeared in a 1941 bastardy proceeding in Ohio, where he confessed paternity. If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. Since the Ohio bastardy proceeding decided the identical issue presented in this California proceeding, the Ohio proceeding bound the parties in this proceeding. Further, even though the decedent's mother initiated the bastardy proceeding prior to adoption of the Uniform Parentage Act, and all procedural requirements of Fam. Code, § 7630, may not have been followed, that judgment was still binding in this proceeding, since the issue adjudicated was identical to the issue that would have been presented in an action brought pursuant to the Uniform Parentage Act.

(6) Judgments § 86--Res Judicata--Collateral Estoppel--Nature of Prior Proceeding--Criminal Conviction on Guilty Plea.

A trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. The issue of the defendant's guilt was not fully litigated in the prior criminal proceeding; rather, the plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his or her guilt. The defendant's due process right to a civil hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.

(7) Descent and Distribution § 1--Judicial Function.

Succession of estates is purely a matter of statutory regulation, which cannot be changed by the courts.

COUNSEL

Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.

Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

BAXTER, J.

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a ònatural parentñ or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative òacknowledged the childñ and

òcontributed to the support or the care of the child.ñ In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory ***908** construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife, Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described òforensic genealogistñ (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from Margaret Loera and Daniel Draves, [FN1] objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

> FN1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a òbastardy complaintñ [FN2] in the juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and òconfessed in Court that the charge of the plaintiff herein is true.ñ The court adjudged Draves to be the òreputed fatherñ of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

> FN2 A òbastardy proceedingñ is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as òDenis Howard Griswold,ñ a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold ***909** divorced in 1978 or after his mother died in 1983, Griswold learned that Draves was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children-Margaret and Daniel-as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's ònatural parentñ or that Draves òacknowledgedñ Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

Discussion

(1a) Denis H. Griswold died without a will, and his estate consists solely of separate property. Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half ò[w]here the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them.ñ (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: òIf there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ....ñ

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions-section 6450, section 6452, and section 6453-must be considered. ***910**

As relevant here, section 6450 provides that òa relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a personñ where ò[t]he relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents.ñ (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: òIf a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [¶] (a) The parent or a relative of the parent *acknowledged the child.* [¶] (b) The parent or a relative of the parent contributed to the support or the care of the child.ñ (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a ònatural parentñ within the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. *Acknowledgement*

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative òacknowledged the child.ñ (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record reflects no other acts of acknowledgement, but no disavowals either.

(2) In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [***911**105 Cal.Rptr.2d 457, 19 P.3d 1196].) òWe begin by examining the statutory language, giving the words their usual and ordinary meaning.ñ (*Ibid.*; *People v. Lawrence* (2000) 24 Cal.4th 219, 230 [99 Cal.Rptr.2d 570, 6 P.3d 228].) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal.4th at pp.

230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 272.) In such cases, we ò ' ñselect the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.ò ' ñ (*Ibid.*)

(1b) Section 6452 does not define the word òacknowledged.ñ Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of òacknowledge ñ is òto admit to be true or as stated; confess.ñ (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 [òto show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admitñ].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly ò confessedñ that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. [FN3] Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

FN3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, ***912** test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal.4th at p. 274; *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 93 [40 Cal.Rptr.2d 839, 893 P.2d 1160].)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would òprovide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had.ñ (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to òmake probate more efficient and expeditious.ñ (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to òmake

probate more efficient and expeditious.ñ (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation ***913** of that parent or his relative in the estate of the deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) òso absurd as to make it manifest that it could not have been intendedñ by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688 [89 P. 833] [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal.App.4th 843 [59 Cal.Rptr.2d 346] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons òwho would be entitled to the property of the decedent by intestate succession.ñ (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both òacknowledged the child ñ and òcontributed to the support or the care of the childñ as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of evidence in the record that the plaintiff had signed as òFatherñ on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. (*Lozano*, *supra*, 51 Cal.App.4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal.App.4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id*. at p. 849, citing ***914**Code Civ. Proc., § 376, subd. (c), Health & Saf. Code, § 102750, & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal.App.4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes òby publicly acknowledging it as his own.ñ (See Civ. Code, former § 230.) [FN4] Since that statute dealt with an analogous subject and employed a substantially similar phrase, we address the case law construing that legislation below.

> FN4 Former section 230 of the Civil Code provided: òThe father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not

> apply to such an adoption.ñ (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)
>
> In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 828-829 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

In *Blythe v. Ayres* (1892) 96 Cal. 532 [31 P. 915], decided over a century ago, this court determined that the word òacknowledge,ñ as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayers*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was ò 'to own or admit the knowledge of.' ñ (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542 [108 P. 499].) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal.App.2d 385, 388-389 [330 P.2d 452]; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543), but, as discussed, the word retains virtually the same meaning in general usage today-òto admit to be true or as stated; confess.ñ (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82 [183 P. 552, 7 A.L.R. 313], for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his ***915** one act of signing the birth certificate and proclaimed: òA more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine.ñ (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that òa public avowal, made in the courtsñ would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal.App.2d 391 [181 P.2d 741], a man's admission of paternity in a verified pleading, made in an action seeking to have the man declared the father of the child and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. [FN5] (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168 [75 P. 790] [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), had not been established. (*Wong v. Young*, *supra*, 80 Cal.App.2d at p. 394.)

> FN5 Section 255 of the former Probate Code provided in pertinent part: ò 'Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' ñ (*Estate of Ginochio* (1974) 43 Cal.App.3d 412, 416 [117 Cal.Rptr. 565], italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. 892, § 42, p.

3001.) (3) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that the Legislature intended the ***916** same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437 [35 Cal.Rptr.2d 155]; see also *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007 [55 Cal.Rptr.2d 760, 920 P.2d 705]; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557 [147 Cal.Rptr. 165, 580 P.2d 665].) (1c) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former § 255, as well) suffice for purposes of intestate succession under section 6452. FN6

FN6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to òpubliclyñ acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayers*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey* (1967) 257 Cal.App.2d 391 [64 Cal.Rptr. 837].

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he òwas garrulous upon the subjectñ of his paternity and òit was his common topic of conversation.ñ (*Id.* at p. 577.) Not only did the father declare the child to be his child, òto all persons, upon all occasions,ñ but at his request the child was named and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that òit could almost be held that he shouted it from the house-tops.ñ (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former section 230 of the Civil Code could òhardly be considered debatable.ñ (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute. ***917**

In *Estate of Maxey*, *supra*, 257 Cal.App.2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277 [223 P. 974].) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal.App.4th 843 [examining father's acts both before and after child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the validity of different forms of acknowledgement should not de-

tract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal.App.2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal.App.2d at p. 397) or òshouted ... from the house-tops ñ (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 does not support such requirements. (See *Lozano*, *supra*, 51 Cal.App.4th at p. 848.) (4) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349 [45 Cal.Rptr.2d 279, 902 P.2d 297].)

(1d) Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal.App.2d 385, and *Estate of Maxey*, *supra*, ***918**257 Cal.App.2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child òpublicly acknowledg[e] it as his ownñ; (2) that he òreceiv[e] it as such, with the consent of his wife, if he is married, into his familyñ; and (3) that he òotherwise treat[] it as if it were a legitimate child.ñ (*Ante*, fn. 4; see *Estate of De Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal.App.4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is òpresumedñ to be the natural father of a child if ò[h]e receives the child into his home and openly holds out the child as his natural childñ].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his two other children of Griswold's existence. The record here, however, stands in sharp contrast to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: òA distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity. ñ (*Id.* at p. 276.) ***919**

Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light

of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal.App.3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal.App.3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided that their terms did not apply to òa natural brother or a sister of the childñ born out of wedlock. [FN7] In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal.App.4th 1099 [9 Cal.Rptr.2d 475] held that a half sibling was a ònatural brother or sisterñ within the meaning of such ***920** exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it òcreates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware.ñ (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

> FN7 Former section 6408, subdivision (d) provided: òIf a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the following requirements are satisfied: [¶] (1) The parent or a relative of the parent acknowledged the child. [¶] (2) The parent or a relative of the parent contributed to the support or the care of the child. ñ (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the òundesirable riskñ that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of cir-

cumstances presented in *Estate of Corcoran*, *supra*, 7 Cal.App.4th 1099, and to substantially reduce the risk noted by the Commission. [FN8] ***921**

FN8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court òacknowledgementñ that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (2001) 90 Ohio St.3d 544 [740 N.E.2d 259, 262-263].) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, §§ 755, 946; see *Estate of Lund* (1945) 26 Cal.2d 472, 493-496 [159 P.2d 643, 162 A.L.R. 606] [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former § 230 of the Civ. Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

B. *Requirement of a Natural Parent and Child Relationship*

(5a) Section 6452 limits the ability of a ònatural parentñ or òa relative of that parentñ to inherit from or through the child òon the basis of the parent and child relationship between that parent and the child.ñ

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. [FN9] (See *Estate of Sanders* (1992) 2 Cal.App.4th 462, 474-475 [3 Cal.Rptr.2d 536].) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

FN9 Section 6453 provides in full: òFor the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [¶] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [¶] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [¶] (1) A court order was entered during the father's lifetime declaring paternity. [¶] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [¶] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.ñ

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, [FN10] if a court order was entered during the father's lifetime declaring paternity. [FN11] (§ 6453, subd. (b)(1).)

FN10 Family Code section 7630, subdivision (c) provides in pertinent part: òAn action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664.ñ

FN11 See makes no attempt to establish

> Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he ***922** argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal.App.3d 271, 276 [154 Cal.Rptr. 87].) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal.App.4th 1509, 1520 [70 Cal.Rptr.2d 33] (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal.App.3d 81, 85 [195 Cal.Rptr. 646]; cf. *Estate of Camp* (1901) 131 Cal. 469, 471 [63 P. 736] [same for adoption determinations].)

Doner-Griswold does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal.App.4th at pp. 1516-1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (1988) 47 Ohio App.3d 65 [546 N.E.2d 1354, 1357] [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the òreputed fatherñ of a child, [FN12] satisfied an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (1984) 22 Ohio App.3d 84 [489 N.E.2d 825, 829]; see also *Estate of Hicks* (1993) 90 Ohio App.3d 483 [629 N.E.2d 1086, 1088-1089] [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

> FN12 The term òreputed fatherñ appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (1937) 56 Ohio App. 82 [8 Ohio Op. 393, 10 N.E.2d 14, 16].)

Next, Doner-Griswold argues the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. ***923** It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal.App.3d 29 [246 Cal.Rptr. 762] (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. (6) The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. òThe issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources.ñ (*Id.* at p. 34, fn. omitted.)

(5b) Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (1936) 53 Ohio App. 19 [6 Ohio Op. 501, 4 N.E.2d 151, 152] [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal.App.3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record. ***924**

Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal.App.4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14 [97 S.Ct. 1459, 1466, 52 L.Ed.2d 31] [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths].)

In sum, we find that the 1941 Ohio judgment was a court order òentered during the father's lifetime declaring paternityñ (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

Disposition

(7) ò 'Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts.' ñ (*Estate of De Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

George, C. J., Kennard, J., Werdegar, J., and Chin, J., concurred. ***925**

BROWN, J.

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers òacknowledge[s] the childñ within the meaning of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contra-

venes the overarching purpose behind our laws of intestate succession-to carry out òthe intent a decedent without a will is most likely to have had.ñ (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a òfatherñ who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a òforensic genealogist.ñ

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So.2d 574, 577 [a father must òopenly treatñ a child born out of wedlock òas his own ñ in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here. ***926**

Cal. 2001.
Estate of Griswold
25 Cal.4th 904, 24 P.3d 1191, 108 Cal.Rptr.2d 165, 01 Cal. Daily Op. Serv. 5116, 2001 Daily Journal D.A.R. 6305

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208 Cal.App.2d 667, 25 Cal.Rptr. 314
(Cite as: 208 Cal.App.2d 667)

JOHN H. FAHEY et al., Plaintiffs and Respondents,
v.
CITY COUNCIL OF THE CITY OF SUNNYVALE et al., Defendants and Appellants.
JOE V. VIVO et al., Plaintiffs and Respondents,
v.
CITY COUNCIL OF THE CITY OF SUNNYVALE et al., Defendants and Appellants.
(Consolidated Cases.)

Civ. No. 19890.

District Court of Appeal, First District, Division 1, California.
Oct. 19, 1962.

HEADNOTES

(1a, 1b) Improvements-Public § 10--Statutes--Interpretation.

Sts. & Hy. Code, § 10103 (part of the Municipal Improvement Act of 1913), providing for incorporation by reference of provisions of the Improvement Act of 1911 (Sts. & Hy. Code, § 5000 et seq.), relating to the construction of work and the levy of an assessment by a city within a county or by a county within a city, must, in order to be effective, be interpreted as incorporating only those sections of the Improvement Act of 1911 which deal with extraterritoriality. That this is the interpretation intended by the Legislature is shown by the 1961 amendment of § 10103 clarifying the meaning.

(2) Statutes § 160--Construction--Giving Effect to Statute.

In constructing statutes, that interpretation should be given which will sustain rather than defeat them and which will make them operative, if the language permits, rather than render them without effect.
See **Cal.Jur.2d,** Statutes, § 113 et seq.; **Am.Jur.,** Statutes (1st ed § 357).
(3) Statutes § 73--Amendment.

An amended statute may be looked to in construing the prior one.
See **Cal.Jur.2d,** Statutes, § 59 et seq.; **Am.Jur.,** Statutes (1st ed §§ 3, 468).
(4) Statutes § 73--Amendment.

Where a statutory amendment is only for the purpose of clarification, it is merely a restatement of the prior law in a clearer form, the law before the amendment being the same as after it.

(5a, 5b) Improvements-Public § 54--Assessments--Contest of Validity-- Time to Sue.

Where actions by owners of land within a city and of land within an assessment district in an unincorporated area seeking to terminate proceedings by the city council for the levying of assessments under the Municipal Improvement Act of 1913 were not brought within the 30- day period prescribed by Sts. & Hy. Code, § 10400, providing that the validity of an assessment levied under the statute shall not be contested in any action unless the action is commenced within 30 days after the assessment is levied, the trial court had no jurisdiction to proceed other than to dismiss the actions.

(6) Improvements-Public § 26--Assessment--Levy.

Sts. & Hy. Code, § 10312 (part of the Municipal Improvement Act of 1913), providing that the legislative body, on confirmation of an assessment for a proposed improvement, shall ñdeclare its action upon the report and assessmentò and the ñassessment thereby leviedò on land in the assessment district, shows that the action on the report and assessment which the city council is to ñdeclareò is the levying of the assessment. Such levy is a quasi-judicial act to be done by the city council; it cannot be done by ministerial officers, such as the clerk, tax collector, etc.

(7) Improvements-Public § 26--Assessment--Levy.

As used in such statutes as Sts. & Hy. Code, § 10312 (part of the Municipal Improvement Act of 1913), ñassessmentò refers to the act of the assessor and ñleviedò refers to the act of the board of supervisors or city council.

(8) Improvements-Public § 26--Assessment--Levy.

Although the assessment referred to in Sts. & Highway Code, § 10312 (part of the Municipal Improvement Act of 1913), is not a tax, it, like a tax, can only be levied by a legislative body.

(9) Improvements-Public § 26--Assessment--Levy.

The fact that an assessment for an improvement under the Municipal Improvement Act of 1913 does not become a lien until the date of recordation (Sts. & Hy. Code, § 10402) does not affect the necessary conclusion from the provisions of Sts. & Hy. Code, § 10312, that when the city council ñdeclaresò its action on the report and assessment the assessment is ñthereby levied.ò

(10) Words and Phrases--ñLevied.ò

ñLeviedò may mean the apportionment of the amount to be raised, the fixing of the rate, the ordering of the tax or assessment, the extending in the tax rolls of the sums to be charged, the determination of the total amount thereof, or a provision for the collection of the cost of public improvements by a public officer in advance of the doing of the work by a summary sale rather than by foreclosure proceedings. Its meaning must be determined by the context in which it is used.

(11) Taxation § 228--Lien.

The levy of a tax and the imposition of a lien are two separate matters. They may be provided to take effect at the same time, but not necessarily so; there must be an express provision of law to make them effective at the same time.

(12) Improvements-Public § 26--Assessment--Levy.

With reference to assessments for local improvements, ñlevyò means to charge on the property which must respond to the assessment a sum of money already ascertained.

(13) Improvements-Public § 26--Assessment--Levy.

Where the report on which a resolution of a city council ordering a proposed improvement to be made or acquired pursuant to Sts. & Hy. Code, § 10312 (part of the Municipal Improvement Act of 1913), fully complied with Sts. & Hy. Code, § 10204, requiring that the report contain, among other matters, a diagram showing the assessment district and the boundaries and the dimensions of the subdivisions of land within the district, and a proposed assessment of the total amount of the cost and expenses of the proposed improvement on the several subdivisions of land in the district, the property and the subdivisions in the district were charged with the assessments thereby levied.

(14) Improvements-Public § 26--Assessment--Levy.

Whatever the word ñleviedò may mean in other statutes, the Legislature has stated in Sts. & Hy. Code, § 10312 (part of the Municipal Improvement Act of 1913), that the assessment to be stated in the resolution of the legislative body ordering a proposed improvement to be made or acquired is ñleviedò by the adoption of the resolution.

SUMMARY

APPEALS from a judgment of the Superior Court of Santa Clara County. Edwin J. Owens, Judge. Reversed with directions.

Proceedings in mandamus and certiorari to compel a city council to terminate proceedings for the levying of certain assessments and the ordering of certain work in connection with the establishment of an industrial subdivision. Judgment granting writs, reversed with directions.

COUNSEL

Frank Gillio, City Attorney, Wilson, Harzfeld, Jones & Morton, John E. Lynch and Kirkbride, Wilson, Harzfeld & Wallace for Defendants and Appellants.

Burnett, Burnett, Keough & Cali, Burnett, Burnett & Somers, John M. Burnett and John H. Machado for Plaintiffs and Respondents.

BRAY, P. J.

In two proceedings consolidated for trial, defendants appeal from a judgment granting writs of mandate and certiorari, requiring the termination by the City Council of the City of Sunnyvale of proceedings for the levying of certain assessments and the ordering of certain work. ***670**

Question Presented

Are petitioners' actions barred by the statute of limitations? This question requires a determination: (a) Does section 10103, Streets and Highways Code, incorporate all sections of the Improvement Act of 1911, and (b) when is the assessment referred to in section 10400 ñleviedò?

Record

The Nogales Industrial Assessment District embraces within its boundaries land situated within the limits of the City of Sunnyvale and lands lying outside said city limits and within unincorporated area of the

County of Santa Clara. Petitioners all own land in the city with the exception of petitioners Joe V. Vivo and Adelaide Vivo, who own land within the district in the unincorporated area.

The proceedings in question were undertaken by the city for the purpose of acquiring easements for street purposes and improving these areas by clearing, grading and paving the same, the installation therein of sewers, water mains and appurtenances, storm drain facilities, curbs, gutters and sidewalks. These improvements were to establish an industrial subdivision in an area which theretofore was raw, undeveloped acreage. The cost of the acquisition and the improvements, with the exception of a contribution by the city of $27,794, was assessed against the land in the district.

Preliminary to forming the district, the city, by resolution, requested the Santa Clara County Board of Supervisors to grant its consent to the formation of the proposed district and to the proposed acquisition of land and construction of improvements. The board gave this consent by resolution. Thereafter the city council by resolution preliminary determined to proceed with the formation of the district and the acquisition and improvements and fixed a time for hearing protests. Written protests against the entire project were filed by owners (including petitioners) of more than one-half of the property in said proposed district, by area, by assessed valuation and by front footage.

The city council, by vote of more than four-fifths of its members, adopted resolutions overruling all protests. determining that the public interest, convenience and necessity required the formation of the district and the proposed acquisition and improvements, and that division 4 of the Streets and Highways Code should not apply. The resolution further confirmed the proposed assessments and the engineers' report and ordered the proposed improvements. ***671**

Thereafter petitioners by two separate actions sought writs of mandamus and certiorari to prevent any further proceedings by the city council. These actions were consolidated for trial. The court found that the assessments were void for certain reasons which need not be discussed, because, as we herein determine, petitioners' actions are barred by the statute of limitations, in spite of the court's determination that they were not so barred.

Judgment ensued ordering the issuance of writs of mandamus and certiorari to terminate said proceedings.

The first question to be determined is what statute of limitations applies. It is petitioners' contention that the limitation to be applied is that contained in the 1911 Improvement Act, while defendants contend, and we think correctly, that it is the limitation contained in the Municipal Improvement Act of 1913.

To solve this question it is necessary to determine whether section 10103, Streets and Highways Code (part of the Municipal Improvement Act of 1913) [FN1] incorporates only those sections of the Improvement Act of 1911 [FN2] which deal with extraterritoriality or incorporates all of the sections of the 1911 act including the provision therein concerning limitations of actions.

FN1 Hereinafter referred to as the 1913 act. It is set forth in section 10000 et seq., Streets and Highways Code.

FN2 This act will be referred to as the 1911 act. It is set forth in section 5000 et seq., Streets and Highways Code.

(a) Does Section 10103 Incorporate All Sections of the Improvement Act of 1911?

(1a) The proceeding to establish the district, construct the work and levy the assessments was undertaken pursuant to the provisions of the Municipal Improvement Act of 1913. The only sections of the Improvement Act of 1911 followed by the council were 5115, 5116, 5117, and 5118, the council believing, and now contending, that section 10103 incorporated only those sections of the 1911 act which deal with extraterritoriality, that is, area of a district outside the city limits. Section 5115-5118 are such sections. Section 10103 (of the 1913 act) [FN3] provided: ñ*Improvement Act of 1911 relating to construction and assessments incorporated by reference*: *Matters authorized thereby.* The provisions of the Improvement Act of 1911 providing for the construction of work and the ***672** levy of an assessment by a city within a county or by a county within a city, are incorporated in this division as if fully set out herein. Upon taking the proceedings provided in that act, a city may construct improvements and levy an as-

sessment in a county or in another city, a county may construct improvements and levy an assessment within a city, and a public corporation may construct improvements outside of its boundaries either within a city or within a county. The consent required by that act shall be obtained before the recordation of the assessment.ò

> FN3 All reference to code sections herein, except where otherwise noted, are to such sections as they existed in 1960, the time of the trial herein. Some of them have been amended since.

The 1913 act and the 1911 act are generally coextensive, providing alternate methods of constructing improvements of a local nature and financing them by levying assessments. There are no restrictive provisions in the 1913 act which would preclude the establishment of a district to construct the improvements contemplated by the Nogales District and to levy assessments therefor. (§ 10102.) That district, however, included land in Santa Clara County. There are no independent provisions in the 1913 act which authorize this. Therefore, section 10103 was placed in that act providing that the provisions of the 1911 act ñproviding for the construction of work and the levy of an assessment *by a city within a county* or by a county within a cityò (emphasis added) are incorporated in the 1913 act.

Sections 5115 through 5118 are the only sections in the 1911 act which deal with such situation. Section 5115 provides in effect that when in the opinion of the city ñthe proposed work is of such a character that it directly and peculiarly affects property in two or more cities, or in one or more cities and counties,ò and that the purposes sought to be accomplished by the work can best be accomplished by a single, comprehensive scheme of work, there is conferred on the city council ñfull power and authority to extend the work or the boundaries of the district to be assessed therefor beyond the territorial limits of the city.ò

Section 5116 provides the nature of work which the city council may authorize, in the adjacent county area. Section 5117 provides in effect that if the consent of the governing body of the county is obtained the city may include within the boundaries of an assessment district lands lying within the county. Section 5118 provides in pertinent part that the consent, if obtained, ñshall, of itself, constitute assent to the assumption of jurisdiction thereover for all purposes of the proceeding and authorize the legislative body initiating the ***673** proceeding to take each and every step required for or suitable for the consummation of the work extending outside the limits of the city, and the levying, collecting and enforcement of the assessments to cover the expenses thereof and the issuance and enforcement of bonds to represent unpaid assessments.ò It is conceded that the court found that the council followed sections 5115-5118.

The court's interpretation of section 10103 precludes the use of the 1913 act to construct improvements and to levy assessments where extraterritoriality is involved, and the use of its provisions where work is being done ñby a city within a county or by a county within a city. ...ò As a city may not act beyond its territorial limits without specific legislative authority [FN4] such would be the result if section 10103 were not enacted. So if such is its meaning, why was it enacted? Such an interpretation leaves the section meaningless.

> FN4 Except in certain instances not applicable here.

(2) ñIt is a cardinal rule in the construction of statutes that they should be given one which will sustain rather than defeat them,-which will make them operative, if the language will permit, rather than render them without effect. ...ò (*Glassell Dev. Co. v. Citizens' Nat. Bank* (1923) 191 Cal. 375, 384 [216 P. 1012, 28 A.L.R. 1427].)

(1b) To give section 10103 meaning requires that it be construed to provide that only those provisions of the 1911 act incorporated in the 1913 act are those which deal with extraterritoriality. A study of the language of section 10103 supports this conclusion. The first sentence states: ñ*The provisions* of the Improvement Act of 1911 *providing for the construction of work and the levy of an assessment by a city within a county* or by a county within a city, are incorporated. ...ò (Emphasis added.) Thus, only the provisions of the 1911 act dealing with construction and assessment by a city within a county or by a county within a city are referred to. No reference is made to other provisions of the 1911 act. The second sentence again makes it clear that the section has a limited application: ñUpon taking the proceedings provided in that act, a city may

construct improvements and levy an assessment in a county or in another city. ...ò What proceedings are referred to? Obviously, those proceedings which the 1911 act requires to be taken to give the city jurisdiction over the outside territory. In doing special assessment work *within* the city and levying assessments therefor a city has the ***674** choice of proceeding under either the 1911 or 1913 act. No good reason appears why the Legislature would intend to prevent the use of the 1913 act for extraterritorial work, which would be the situation under the court's interpretation of section 10103. The second sentence in that section gives the city jurisdiction to ñconstruct improvements and levy an assessment in a county ...ò ñ[u]pon taking the proceedings provided in that act. ...ò The latter phrase refers to the provisions of the act of 1911 which provide for the construction and assessment by a city within a county, not the general provisions of that act. Otherwise the Legislature would be considered to require that while a city has the option of using one of two acts for the creation and operation of assessment districts within the city it is limited to one act where the district includes land without the city. Had the Legislature so intended there would have been no reason for adopting section 10103.

The last sentence of that section reads: ñThe consent required [that is, of the county] by that act [the 1911 act] shall be obtained *before the recordation of the assessment."* (Emphasis added.) The 1913 act contemplates the recordation of the assessment prior to the commencement of construction (Sts. & Hy. Code, §§ 10312-10401). The 1911 act provides for the recordation *after the completion of the work.* The sentence above quoted would be meaningless in a proceeding under the 1911 act, since the consent need not be secured until after the work was completed. This would lead to a possible situation in which the work would be done, and the city would then apply to the county for consent to the formation of the district which had already been formed and to the work which had already been done. If the county failed to consent there would be no way of paying for the work done in the county area. The possibility of such a ridiculous situation resulting clearly shows that it was the intent of the Legislature that only those sections of the 1911 act applicable to a district including outside territory were intended to be incorporated in the 1913 act.

The proper interpretation of section 10103 is that it incorporates in the 1913 act only those provisions of the 1911 act which deal with extraterritoriality. That this is the interpretation of the section intended by the Legislature is shown by the recent amendment of the section. It was amended (Stats. 1961, ch. 1432, p. 3238) effective July 12, 1961, to read as follows (the deletions are in strike-out type and the new language ***675** is italicized): ñThe provisions of *Chapter 2 (commencing with Section 5115) of Part 3 of Division 7 of this code* providing for the construction of work and the levy of an assessment by a city within a county or by a county within a city, are incorporated in this division as if fully set out herein. Upon *obtaining the consent required* in that *chapter,* a city may construct improvements and levy an assessment in a county or in another city, a county may construct improvements and levy an assessment within a city, and a public corporation may construct improvements *and levy an assessment* outside of its boundaries either within a city or within a county. *If no assessment is to be levied outside the boundaries of the city, county, or public corporation conducting the assessment proceedings, the proposed resolution of intention need not be submitted or approved and the consent required shall be obtained prior to the ordering of the improvement.*

"Sec. 2. This act is an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

"It is necessary that the provision for exercise of extraterritorial jurisdiction be more clearly stated in the Municipal Improvement Act of 1913. Clarity of the law is essential to the conduct of bonding proceedings in order to obtain merchantable legal opinions supporting the legality of bonds and to avoid wasteful interpretative litigation. Many areas are in urgent need of improvements which can be most economically constructed and financed under said act as single projects, regardless of territorial boundaries, during the spring and summer of 1961, before the advent of winter rains. It is, therefore, imperative that this act take effect immediately."

It is to be noted that chapter 2 of part 3 of division 7 of the Streets and Highways Code is composed of sections 5115-5119, exactly what we have determined is all that is incorporated in the section before amendment. Section 2 of the amended section clearly shows that the amendment was intended only to clar-

ify the prior law.

(3) An amended statute may be looked to in construing the prior one. (*Koening v. Johnson* (1945) 71 Cal.App.2d 739, 753-755 [163 P.2d 746]; see also ***676***People v. Puritan Ice Co.* (1944) 24 Cal.2d 645, 653 [151 P.2d 1]; 2 Sutherland, Statutory Construction (3d ed.), § 5015.) (4) And where an amendment is only for the purpose of clarificaiton it is merely a restatement of the prior law in a clearer form, the law before the amendment being the same as after it. (*W .R. Grace & Co. v. California Emp. Com.* (1944) 24 Cal.2d 720, 729-730 [151 P.2d 215]; *Koenig v. Johnson, supra,* 71 Cal.App.2d at p. 755.)

As the portions of the act of 1911 incorporated by section 10103 in the 1913 act do not include the limitation portions of the 1911 act, we must look to the 1913 act to determine what limitations of action appear therein, and then determine whether the actions are barred by such limitations.

(b) When the Assessment Is Levied

(5a) Section 10400, Streets and Highways Code, the section of the 1913 act pertinent here, provided: ñThe validity of an assessment or supplementary assessment levied under this division shall not be contested in any action or proceeding unless the action or proceeding is commenced within 30 days after the assessment is *levied."* (Emphasis added.)

The ñResolution Determining Convenience and Necessity, Adopting Engineer's Report, Confirming Assessment and Ordering Work and Acquisitionsò was adopted November 24, 1959. In that resolution the council found that the assessment of the costs and expenses of the proposed acquisition and improvements upon the several subdivisions of land in the district in proportion to the estimated benefits to be received by said subdivision, respectively, ñbe and the same is hereby, finally approved and confirmed as the assessment to pay the costs and expenses of said acquisitions and improvements.ò

The first action was filed December 30, 1959, 36 days after the assessment was levied by said resolution. The second action was filed January 11, 1960, 48 days thereafter. Petitioners contend that the assessment is not levied by the above mentioned resolution but only after the city clerk, following the adoption of the resolution, transmits to the city tax collector the diagram and assessment (§ 10401), and the tax collector records the assessment (§ 10402) in the office of the superintendent of streets and in the office of the county surveyor. This recording occurred December 1, 1959. Thus, say they, the first action was filed within 30 days thereafter. However, they do not discuss the situation as to the second action, which was not filed until 40 days after such recording. That action, ***677** even under petitioners' interpretation of when the assessment is ñleviedò (§ 10401), was too late and should have been dismissed.

When was the assessment levied? (6) Section 10312 provided: ñWhen upon the hearing the proposed assessment is confirmed as filed, as modified, or corrected, by resolution the legislative body shall order the proposed improvement to be made or acquired, and *declare its action upon the report and assessment.* The resolution shall be final as to all persons, and the *assessment thereby levied* upon the respective subdivisions of land in the assessment district.ò (Emphasis added.) Thus section 10312 shows that the action upon the report and assessment which the council is to ñdeclareò is the levying of the assessment. The levying of an assessment is a quasi-judicial act. It cannot be done by the ministerial officers such as the clerk, tax collector, etc. It is done by the city council. (7) As said in *Smith v. Byer* (1960) 179 Cal.App.2d 118, 121 [3 Cal.Rptr. 645], with respect to real property taxes, ñThe word 'assessment' in the section refers to the act of the assessor. The word 'levied' refers to the act of the board of supervisors or city council. (*Allen v. McKay & Co.,* 120 Cal. 332 [52 P. 828].)ò (8) Although the assessment is not a tax (see *Creighton v. Manson* (1865) 27 Cal. 613, 620), it, like a tax, can only be levied by a legislative body. Cases dealing with ñlevyò of writs of attachment cited by petitioners are not in point. (9) The fact that the assessment does not become a lien until the date of recordation (§ 10402) does not affect the necessary conclusion from the provisions of section 10312 that when the council ñdeclaresò its action upon the report and assessment the assessment is ñthereby levied.ò The resolution of November 24 was the type of resolution referred to in section 10312.

(10) The word ñleviedò has a variety of meanings. For example, it may mean the apportionment of the amount to be raised, the fixing of the rate, the ordering of the tax or assessment, the extending in the tax roll of the sums to be charged, or the determination of the

total amount thereof. It may mean a provision for the collection of the cost of public improvements by a public officer in advance of the doing of the work by a summary sale rather than by foreclosure proceedings. (See *Hayne v. City & County of San Francisco* (1917) 174 Cal. 185, 196 [162 P. 625].) Its meaning must be determined by the context in which it is used.

Thus section 2151, Revenue and Taxation Code, provides, ***678** concerning property taxation, ñThe board of supervisors shall fix the rates of county and district taxes and *shall levy* the State, county, and district taxes as provided by law.ò (Emphasis added.) Section 2152 provides, ñThe auditor shall *then*ò (emphasis added) compute the sums to be paid upon the property listed. Thus, the tax is *levied* before the amount assessed against the particular piece of property is determined. Section 2153 provides ñA tax of one-tenth of one per cent is *hereby levied* on the actual value of solvent credits and any interest therein.ò (Emphasis added.) In this instance the tax is *levied* before value and ownership of the property levied upon are determined. (11) The *levy* of a tax and the imposition of a lien are two separate matters. They may be provided to take effect at the same time, but not necessarily so. There must be an express provision of law to make them effective at the same time. As pointed out in *County of San Diego v. County of Riverside* (1899) 125 Cal. 495, 500 [58 P. 81], concerning taxes, ñthe assessment does not create the lien. It is merely one of the steps for its enforcement.ò

Here the Legislature has stated that the assessment ñthereby leviedò by the resolution provided for in section 10312 shall be final. This is the context in which we must construe the meaning of ñlevied.ò If, as contended by petitioners, the assessment is not thereby levied, when and how could it become final?

(12) In 14 McQuillin, Municipal Corporations (3d ed.), p. 260, ñlevyò is defined: ñWith reference to assessments for local improvements, it means to charge upon the property which must respond to the assessment a sum of money already ascertained.ò (See also *People v. Mahoney* (1939) 13 Cal.2d 729, 735-736 [91 P.2d 1029].)

(13) Section 10204 requires that the report on which the resolution provided for in section 10312 is based shall contain among other matters ñ(d) A diagram showing the assessment district and the boundaries and dimensions of the subdivisions of land within the district as they existed at the time of the passage of the resolution of intention. Each subdivision shall be given a separate number upon the diagram. (e) A proposed assessment of the total amount of the cost and expenses of the proposed improvement upon the several subdivisions of land in the district. ... The assessment shall refer to the subdivisions by their respective numbers as assigned pursuant to subdivision (d) of this section.ò

The report on which the resolution of November 24 was ***679** based fully complied with section 10204. Thus, the property and the subdivisions thereof in the district were charged with the assessments thereby levied, meeting the definition of ñlevyò in *McQuillin, supra.*

There is nothing in the language of section 10312 which is uncertain or ambiguous. To adopt petitioners' interpretation of the section would require the complete disregard of the words ñand the assessment thereby levied upon the respective subdivisions of land in the assessment district.ò (14) Whatever the word ñleviedò may mean in other statutes, the Legislature has stated in this section that the assessment to be stated in the resolution is *levied* by the adoption of the resolution. (5b) Section 10400 requires any court contest of the validity of the proceeding to be commenced within 30 days thereafter. Neither proceeding was brought in time. Therefore, the trial court had no jurisdiction to proceed other than to dismiss the proceedings.

In view of our determination, it is unnecessary to consider any other of the contentions made on appeal.

The judgment is reversed and the trial court directed to dismiss the petitions and complaints.

Sullivan, J., and Molinari, J., concurred.

A petition for a rehearing was denied November 15, 1962, and respondents' petition for a hearing by the Supreme Court was denied December 12, 1962. ***680**

Cal.App.1.Dist.
Fahey v. City Council of City of Sunnyvale
208 Cal.App.2d 667, 25 Cal.Rptr. 314

END OF DOCUMENT

208 Cal.App.2d 667, 25 Cal.Rptr. 314
(Cite as: 208 Cal.App.2d 667)

87 Cal.App.4th 1161, 105 Cal.Rptr.2d 254, 01 Cal. Daily Op. Serv. 2281, 2001 Daily Journal D.A.R. 2869
(Cite as: 87 Cal.App.4th 1161)

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; VALERIE A. et al., Real Parties in Interest.

No. B140917.

Court of Appeal, Second District, Division 3, California.
Mar. 20, 2001.

SUMMARY

In a dependency proceeding, the juvenile court placed two minor children with their maternal great-uncle and his wife and further ordered that the wife be granted legal guardianship over the children. The great-uncle had an extensive history of narcotics-related criminal convictions. Citing Welf. & Inst. Code, § 361.4, subd. (d)(2), which states that a dependent child shall not be placed in the home where the child would have contact with an adult who has been convicted of a crime other than a minor traffic violation, the county department of child and family services opposed the placement. The juvenile court sustained the dependency petition, ordered that the children remain released to the great-uncle's wife, then ordered the great-uncle to move out of his wife's home. (Superior Court of Los Angeles County, No. CK10530, Marilyn H. Mackel, Juvenile Court Referee.)

The Court of Appeal ordered issuance of a writ of mandate directing the trial court to vacate its orders and to enter a new order removing the children from the home of the great-uncle's wife and placing them in a suitable home. The court held that the juvenile court acted in excess of its authority in ordering the placement challenged by the department, since the prohibition of Welf. & Inst. Code, § 361.4, subd. (d)(2), is mandatory and the statute does not provide the juvenile court with authority to avoid a disqualifying criminal conviction. The general ñbest interest of the childò standard cannot supplant the specific prohibition of § 361.4, subd. (d)(2). The court further held that, even though the juvenile court had directed the great-uncle to move out of his wife's home, the statutory prohibition applies to any person who has a familial or intimate relationship with any person living in the home. (Opinion by Aldrich, J., with Klein, P. J., and Perluss, J., [FN*] concurring.)

FN* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 30--Construction--Language--Plain Meaning Rule.

In construing statutes, courts must determine and effectuate legislative intent, looking first to the words of the statutes, giving them their usual and ordinary meaning. If there is no ambiguity in the language of the statute, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs. When the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.

(2) Delinquent, Dependent, and Neglected Children § 52--Dependency Proceedings--Disposition--Statutory Prohibition Against Placement with Adult Who Has Criminal Conviction--Trial Court Discretion.

In a dependency proceeding, the juvenile court acted in excess of its authority in ordering two minor children placed with their maternal great-uncle, who had an extensive history of narcotics-related criminal convictions, and his wife. Welf. & Inst. Code, § 361.4, subd. (d)(2), provides that a dependent child shall not be placed in the home where the child would have contact with an adult who has been convicted of a crime other than a minor traffic violation. That prohibition is mandatory and the statute does not provide the juvenile court with authority to avoid a disqualifying criminal conviction. The general ñbest interest of the childò standard cannot supplant the specific prohibition of § 361.4, subd. (d)(2). Further, even though the juvenile court had directed the great-uncle to move out of the house, the statutory prohibition applies to any person who has a familial or intimate relationship with any person living in the home.

87 Cal.App.4th 1161, 105 Cal.Rptr.2d 254, 01 Cal. Daily Op. Serv. 2281, 2001 Daily Journal D.A.R. 2869
(Cite as: 87 Cal.App.4th 1161)

[See 10 Witkin, Summary of Cal. Law (9th ed. 1989) Parent and Child, § 702.]
COUNSEL

Lloyd W. Pellman, County Counsel, and Jill Regal, Deputy County Counsel, for Petitioner.

No appearance for Respondent.

Peter Ferrera For Real Parties in Interest. ***1163**

Law Offices of Lisa E. Mandel, David Estep and Nancy Aspaturian for Minors.

ALDRICH, J.

Introduction

Welfare and Institutions Code [FN1] section 361.4, subdivision (d)(2) states that a ñ[dependent] child shall not be placed in the homeò where the child would have contact with an adult who has been convicted of a crime, other than a minor traffic violation. The Los Angeles County Department of Children and Family Services (the department) has filed a petition for writ of mandate asking this court to vacate the order of the juvenile court placing nine-month-old Serena A. and four-year-old Richard A. with their maternal great-uncle and his wife because of the great-uncle's extensive disqualifying history of narcotics-related criminal convictions. We hold that the prohibition in section 361.4, subdivision (d)(2) is mandatory. We further hold that the statute does not otherwise provide the juvenile court with discretion to avoid a disqualifying criminal conviction. Thus, the juvenile court acted in excess of its authority in ordering the challenged placement. Accordingly, we grant the department's writ and direct the juvenile court to vacate its order.

FN1 Hereinafter, all statutory references shall be to the Welfare and Institutions Code, unless otherwise noted.

Factual and Procedural Background

The department filed a petition alleging the children are described by subdivisions (b), (g), and (j) of section 300 because their mother, Valerie A., has a long history of drug abuse, arrests, and convictions, and used rock cocaine during her pregnancy with Serena, all of which endangers the children's health, safety, and well-being.

The children were detained and the court ordered the department to conduct a pre-release investigation of the maternal great-uncle, Robert M., and his wife, Delores M., for possible placement of the children with them. (§ 319.) The investigation revealed, among other things, that Delores and Robert have been married for one year and are active in their church. Because Delores works outside the home, she made day-care arrangements for the children. Delores has no criminal record. ***1164**

Robert, however, disclosed that he has a criminal record: it is believed he has 16 adult convictions for drug-related offenses, over the past 15 years, resulting in incarceration in both county jail and state prison. He stated he had a history of drug abuse until 1993. He had had a relapse in 1998, when he was arrested for driving under the influence of alcohol, although he has since recovered his driver's license. He also admitted to gang-related activities, ñyears ago.ò Robert is not in good health. He undergoes kidney dialysis three times a week for four hours a day and consequently does not work. He is also on numerous medications for high blood pressure, liver disorder, and renal failure. Because of concerns about Robert's criminal record, history of drug use, and health, the department recommended against the children's release to Robert and Delores.

Over the department's objections, the court ordered the children released to Delores and directed that Robert could only have monitored contact with the children and could not babysit them. In making its order, the court found that Robert and Delores were taking good care of the children and had been forthcoming about their situation.

The department filed an application for rehearing on the ground that the placement of the children in Robert's home violated the prohibition in section 361.4, subdivision (d)(2) [FN2] against placing children in a home in which is present an adult with a criminal record other than a minor traffic violation.

FN2 Although section 361.4 was amended effective September 13, 2000, immediately after the selection and implementation hearing was held in this case, the changes do not affect the substantive result here. Section 361.4 provides in relevant part, ñ(b) When-

87 Cal.App.4th 1161, 105 Cal.Rptr.2d 254, 01 Cal. Daily Op. Serv. 2281, 2001 Daily Journal D.A.R. 2869
(Cite as: 87 Cal.App.4th 1161)

> ever a child may be placed in the home of a relative, or the home of any prospective guardian or other person who is not a licensed or certified foster parent, the court or county social worker placing the child shall cause a criminal records check to be conducted.... [¶] ... [¶] (d)(1) If the fingerprint clearance check indicates that the person has no criminal record, the county social worker and court may consider the home of the relative, prospective guardian, or other child who is not a licensed or certified foster parent for placement of a child. [¶] (2) If the fingerprint clearance check indicates that the person has been convicted of a crime that would preclude licensure under Section 1522 of the Health and Safety Code, *the child shall not be placed in the home*.ò (Italics added.)

Instead, the court sustained the petition and ordered that the children remain released to Delores. The department filed the instant petition for writ of mandate.

This court issued a notice directing the juvenile court to change its placement order. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 [203 Cal.Rptr. 626, 681 P.2d 893].) Noting the children were ***1165** receiving appropriate care with Delores, the juvenile court ordered Robert to move out of Delores's home and directed the department to verify that Robert had moved out.

After the department confirmed that Robert had moved, a social worker discovered Robert in Delores's house during a surprise 8:00 a.m. visit. Robert admitted spending all his waking hours at Delores's house, only going to his mother's late in the evening to sleep. Robert had moved his clothes back into Delores's house, took showers, ate all his meals there, and maintained unmonitored contact with the children, even driving them to day care. Robert and Delores stated that their marriage is intact and they planned for Robert to move back into the house when the juvenile proceedings terminate. Delores also stated, with respect to divorce, that she would do what was needed to protect the children's placement. Recently, counsel for the children reported that Robert had ñvoluntarily stopped transporting the children to and from day-care....ò

We issued an alternative writ of mandate directing the trial court to remove the children from Delores's home and/or to bar contact between the children and Robert. After the selection and implementation hearing, the department informed this court that the juvenile court had granted Delores legal guardianship over the children, again over the department's objection, but refrained from terminating its jurisdiction because of the pendency of the instant writ petition.

Discussion

The juvenile court acted in excess of its authority.

(1) ñThe applicable principles of statutory construction are well settled. 'In construing statutes, we must determine and effectuate legislative intent.' [Citation.] 'To ascertain intent, we look first to the words of the statutes' [citation], 'giving them their usual and ordinary meaning' [citation]. If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not òinterpret away clear language in favor of an ambiguity that does not exist.ñ [Citation.]' [Citation.]ò (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563, 885 P.2d 976].)

(2) Turning to the statute, section 361.4 directs, before placing dependent children in a house that is not a licensed or certified foster home, that the department conduct a criminal records check on all adults living in the ***1166** potential home, and on any other known adult who may have significant contact with the children, or who has a familial or intimate relationship with anyone living in the potential home. (§ 361.4, subd. (b).) The department must follow this records check with a fingerprint clearance check to ensure accuracy. (§ 361.4, subd. (d).) If the fingerprint clearance check indicates that a person described in section 361.4 has been convicted of a crime that would preclude licensure under Health and Safety Code section 1522, [FN3] -any crime other than a minor traffic violation-the statute states: ñ*the child shall not be placed in the home*.ò (§ 361.4, subd. (d)(2), italics added.)

> FN3 Health and Safety Code section 1522, subdivision (a)(1), provides in pertinent part that if an applicant for foster family home or foster family agency ñhas been convicted of a

> crime other than a minor traffic violation, the application shall be denied, unless the director grants an exemption pursuant to subdivision (g).ò

The italicized language of section 361.4 subdivision (d)(2) is plain: the statute is mandatory. It is a well-settled principle that the word ñshallò in statutes is usually construed as a mandatory term. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 [261 Cal.Rptr. 574, 777 P.2d 610].)

Section 361.4, subdivision (d)(2) does not confer on the juvenile court any discretion to avoid its prohibition. The section applies broadly to anyone involved in placement because the clause is stated in the passive form. That is, the phrase ñthe child shall not be placed in the home,ò lacks a subject with the result that it clearly forbids the juvenile court, as well as social workers and the department, to place a child with someone who has a disqualifying criminal conviction. ñ ' ò[W]here ... the language is clear, there can be no room for interpretation.ñ ' ò (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121 [253 Cal.Rptr. 1, 763 P.2d 852].) The plain language of section 361.4, subdivision (d)(2) simply precludes the juvenile court from ignoring a disabling criminal conviction.

Although there is a provision in the statute allowing for a *waiver* of the disqualification, the power to grant a waiver *was not conferred on the juvenile court*. (§ 361.4, subd. (d)(3). [FN4]) According to the statute, ñthe countyò may request a waiver from the *Director of the Department of Social Services* (DSS). The director has 14 days to grant or deny a waiver application based on the standards set out in Health and Safety Code section 1522, subdivision ***1167** (g)(1). [FN5] It has already been established that ñ[t]he plain language of both section 361.4, subdivision (d)(2), and Health and Safety Code section 1522, subdivision (g)(1), places responsibility for granting or denying the exemption *squarely* on the Director of DSS. The Legislature has made *no provision for delegation of this duty outside the DSS*.ò (*In re Jullian B.* (2000) 82 Cal.App.4th 1337, 1350 [99 Cal.Rptr.2d 241], italics added, fn. omitted.) [FN6] ñ[T]he statement of limited exceptions excludes others, and therefore the judiciary has no power to add additional exceptions; the enumeration of specific exceptions precludes implying others. [Citation.]ò (*Parmett v. Superior Court* (1989) 212 Cal.App.3d 1261, 1266 [262 Cal.Rptr. 387].) Having given the authority to request a waiver only to the department and the power to waive the disqualification only to the director of DSS, it is apparent that the Legislature did not intend to confer such authority on the juvenile court.

> FN4 Subdivision (d)(3) of section 361.4 states, ñUpon request from a *county*, the *Director of Social Services may waive application of this section* pursuant to standards established in paragraph (1) of subdivision (g) of Section 1522 of the Health and Safety Code. The director shall grant or deny the waiver within 14 days of receipt of the county's request.ò (§ 361.4, subd. (d)(3), italics added.)

> FN5 Health and Safety Code section 1522, subdivision (g)(1) states, ñ[a]fter review of the record, the director may grant an exemption from disqualification ... if the director has substantial and convincing evidence to support a reasonable belief that the applicant and the person convicted of the crime, if other than the applicant, are of such good character as to justify issuance of the license or special permit ....ò

> FN6 The *Jullian B*. court elucidated at least one reason for restricting to the director of DSS the power to grant exemptions: ñAs DSS is the ultimate overseeing authority for approval of community care licenses and adoptive placements, the director is uniquely positioned to ensure uniform statewide application of the grant or denial of exemptions. Such uniformity prevents 'forum shopping' by prospective adoptive parents and licensees.ò (*In re Jullian B., supra*, 82 Cal.App.4th at pp. 1350-1351.)

Here, the department did not request a waiver from the Director of DSS. (§ 361.4, subd. (d)(3).) The reasons for that decision are clearly amplified in the record. (*Ibid.*; *In re Jullian B., supra*, 82 Cal.App.4th at p. 1347.) Robert has numerous disqualifying narcotics-related convictions and a very recent arrest for driving under the influence. Additionally, as the department observes, a waiver would be inappropriate under section 300.2, which declares that a placement be free from the negative effects of substance abuse.

[FN7] The department's decision is reviewed for abuse of discretion. (*In re Jullian B., supra*, at p. 1350.) In our view, the department's recommendation against ***1168** seeking a waiver and against placing the children with Robert and Delores represents a solid exercise of discretion. Pursuant to section 361.4, Robert's criminal record automatically disqualified his house from serving as placement for the children and, in the face of departmental opposition and no application for a waiver, the juvenile court had no statutory authority to circumvent sua sponte the requirement in section 361.4, subdivision (d)(3) of an application to the DSS for a waiver.

> FN7 Section 300.2 states, in relevant part, ñNotwithstanding any other provision of law, the purpose of the provisions of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and so ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.... The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child. Successful participation in a treatment program for substance abuse may be considered in evaluating the home environment.ò
>
> Although the successful participation in a treatment program for substance abuse may be considered in evaluating the home environment under section 300.2, Robert's recent arrest for driving under the influence reasonably suggests to the department that Robert remains a risk under section 300.2.

Focussing on the goal of the dependency law to preserve families whenever possible and to promote the safety and well-being of dependent children, counsel for Richard and Serena contend that section 361.4 should not be interpreted in a manner that removes all discretion from the juvenile court. Counsel argue that a construction of section 361.4 that absolutely prohibits placing the child in the home of a person with a disabling criminal conviction would conflict with the broad discretion vested in the juvenile court generally to make decisions that promote the ñbest interests of the child.ò

We disagree. The general ñbest interest of the childò standard cannot supplant the specific prohibition in section 361.4. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 464 [65 Cal.Rptr.2d 860, 940 P.2d 311] [reciting rule of statutory interpretation that specific provision controls over more general provision].) Furthermore, section 361.4 represents the Legislature's determination that it would *not* be in the best interest of the dependent child to be placed with a relative with a disqualifying criminal conviction. The author of the Lance Helms Child Safety Act, of which section 361.4 is a part, sought to address the dangers faced by children in the dependency system and anticipated that enacting this statute would help to protect children and provide them with a safe environment while in the system. (Sen. Rules Com., Analysis of Sen. Bill No. 645 (1997-1998 Reg. Sess.) as amended July 27, 1998.)

Next, counsel for the children argue that the department's interpretation of section 361.4 subdivision (d)(2) directly conflicts with the court's role as laid out in section 319. [FN8] ***1169**

> FN8 In pertinent part, section 319 reads, ñIf the child cannot be returned to the custody of his or her parent or guardian, the court shall determine if there is a relative who is able and willing to care for the child.... [¶] When the child is not released from custody, the court *may order that the child shall be placed in the suitable home of a relative* .... [¶] As used in this section, 'relative' means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand' .... *However, only the following relatives shall be given preferential consideration for the placement of the child: an adult who is a grandparent, aunt, uncle, or sibling of the child*. [¶] The court *shall* consider the recommendations of the social worker based on the emergency assessment of the relative's suitability, *including the results of a criminal* records check ... prior to ordering that the child be placed with a relative....ò (Italics

added.)

There is no conflict. Paragraphs 3 and 5 of subdivision (d) of section 319 give the juvenile court the discretion to place a detained child in a ñ*suitable* home of a relative.ò (§ 319, italics added.) Section 361.4 constitutes a declaration that a home in which a person with a criminal record is living is *not suitable*. (§ 361.4, subd. (d)(2).) Indeed subdivision (d) of section 319 directs that the court ñshallò consider the department's recommendation based on the assessment of suitability, *including a criminal records check*. Here, the court ignored the department's advice. In any event, Robert is not entitled to preferential consideration for placement under section 319, because he is neither ña grandparent, aunt, uncle [n]or sibling of the child.ò (§ 319, subd. (d), ¶ 4.)

In re Jullian B., supra, 82 Cal.App.4th 1337, cited by the children's attorneys, does not change the result here. Jullian was a member of an Indian tribe and subject to the placement preferences of the Indian Child Welfare Act. (ICWA, 25 U.S.C. § 190 et seq.) The *Jullian B.* court wrestled with the relationship between, on the one hand, the ICWA, which mandates that preference in adoptive placement of Indian children be given to Indian families in the absence of good cause to do otherwise (25 U.S.C. § 1915(c)), and on the other hand, the section 361.4, subdivision (d)(2) placement prohibition. In selecting a non-Indian family, the county had rejected the ICWA's preference for placing Jullian B. with his maternal great-uncle, nominated by the tribe, because the uncle had a history of two criminal convictions 20 to 30 years earlier. The appellate court reversed the juvenile court's finding that the county had met its burden of establishing good cause under the ICWA to avoid its preference. The reviewing court held, to circumvent the ICWA's placement preference where the applicant has a disqualifying criminal conviction, the department must request a waiver from the director of DSS, or explain why, based on the merits of the individual case and subject to review for abuse of discretion, no waiver had been sought. (*In re Jullian B., supra*, at p. 1350.) The county had not considered whether the statutory disability for the criminal conviction should be waived for Jullian. ***1170**

Analogizing to the section 361.3 preference for placements with relatives, [FN9] counsel for the children argue *Jullian B.* lends support for the notion that the juvenile court retains some discretion to avoid the disqualifying criminal conviction in favor of the preference for relative placement.

FN9 In relevant part, section 361.3 provides that whenever a child is removed from the custody of his or her parents under section 361, ñpreferential consideration shall be given to a request by a relative of the child for placement of the child with the relative. In determining whether placement with a relative is *appropriate*, the county social worker and court shall consider, but shall not be limited to, consideration of all the following factors: [¶] .... [¶] ... The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts ....ò (Italics added.)

Obviously, we are not concerned here with the ICWA, or what constitutes good cause *under the ICWA* for avoiding its strong preferences. More important, *Jullian B.* does not stand for the proposition that the *juvenile court* has discretion to choose to disregard the disabling criminal conviction under section 361.4, subdivision (d)(2). *In re Jullian B.* states that the juvenile court's discretion under section 361.4 is to review the department's decision not to seek a waiver under that statute. The juvenile court also has discretion once the Director of DSS waives the disability, to ñdetermine[s] whether there is good cause [under the ICWA] to *avoid the preferences of the ICWA* and to determine a placement that is in the best interest of the minor.ò (*In re Jullian B., supra*, 82 Cal.App.4th at p. 1350, italics added.) Neither *Jullian B.* nor the Welfare and Institutions Code's preference can be read to confer on the juvenile court any discretion to actively disregard the disabling conditions of subdivision (d)(2) of section 361.4, especially in view of the department's recommendation to the contrary here and without a waiver. [FN10]

FN10 Pointing to the testimony, counsel for the children argue that the court exercised its discretion when it ordered the children placed with Robert and Delores because the evidence shows that the great uncle and aunt are caring for the children. While there is evidence supporting the court's *finding* that Robert and Delores are responsible, caring,

> and forthcoming, these facts are irrelevant to the court's task because, as explained above, the statute does not authorize the court to exercise its discretion to place the children with in a home with someone who has a disqualifying criminal conviction, absent a waiver from the DSS. (§ 361.4, subd. (d)(2).) Therefore, under the circumstances here, the factual findings do not affect the placement order.

Finally, counsel for the children argue that this writ should be dismissed as moot because, in response to our notice to vacate its placement order (*Palma v. U.S. Industrial Fasteners, Inc., supra,* 36 Cal.3d at p. 180), the court directed Robert to move out of the house. Counsel is wrong. As the department notes, this issue is being raised with increasing frequency and so ***1171** it is not moot. [FN11] Additionally, the section 361.4, subdivision (b) disqualification applies not only to those living in the home, but also to ñany ... person over the age of 18 years ... known to the placing entity who may have significant contact with the child, *including any person who has a familial or intimate relationship with any person living in the home*.ò (§ 361.4, subd. (b), italics added.) Robert has a ñfamilial or intimate relationshipò with Delores. He certainly has a familial relationship with the children and has been shown to have ñsignificant contactò with them. The children reside in Robert's home, Robert is the blood relative, and Robert is the one with the criminal record. Regardless of whether Robert is living in the house, his disqualifying convictions disqualify the house and the trial court cannot conveniently circumvent the statute's placement prohibition by ordering Robert out of the house and placing the children with Delores. In short, the juvenile court acted in excess of its authority when it ordered the children placed with Robert and Delores.

> FN11 Not only has this issue already been brought to the attention of this district Court of Appeal in at least two other cases, but with respect to this case in particular the issue has and will recur: Robert moved out of and then returned to, his and Delores's house; there is no indication that his marriage to Delores is dissolved; Delores and Robert both stated to the department social worker that Robert will return as soon as dependency jurisdiction is terminated.

Disposition

The petition for writ of mandate is granted. The alternative writ issued on September 29, 2000, is hereby discharged. Let a writ of mandate issue directing the superior court to vacate the orders entered which place the children in a home in which Robert M. resides or which affords him significant contact with the children, and to enter a new order removing the children from the home of Delores M. and placing them in a suitable home. The superior court is further directed to vacate the order granting Delores M. guardianship over the children.

Klein, P. J., and Perluss, J., [FN*] concurred.

> FN* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The petition of minors for review by the Supreme Court was denied June 27, 2001. ***1172**

Cal.App.2.Dist.
Los Angeles County Dept. of Children and Family Services v. Superior Court (Valerie A.)
87 Cal.App.4th 1161, 105 Cal.Rptr.2d 254, 01 Cal. Daily Op. Serv. 2281, 2001 Daily Journal D.A.R. 2869

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294 F.3d 797, 166 Ed. Law Rep. 464, 30 Media L. Rep. 2057, 2002 Fed.App. 0213P
(Cite as: 294 F.3d 797)

United States Court of Appeals,
Sixth Circuit.
UNITED STATES of America, Plaintiffï Appellee,
v.
MIAMI UNIVERSITY; Ohio State University, Defendantsï Appellees,
The Chronicle of Higher Education, Intervening Defendantï Appellant.

No. 00ï 3518.
Argued Aug. 10, 2001.
Decided and Filed June 27, 2002.

United States commenced action, on its own behalf and on behalf of the Department of Education (DOE), alleging that universities violated the Family Educational Rights and Privacy Act (FERPA) by releasing student disciplinary records. Upon intervening newspaper's motion to dismiss and government's motion for summary judgment, the United States District Court for the Southern District of Ohio, 91 F.Supp.2d 1132,George C. Smith, J., permanently enjoined the universities from releasing student disciplinary records or any personally identifiable information contained therein, except as otherwise expressly permitted under the FERPA, and newspaper appealed. The Court of Appeals, Karl S. Forester, Chief District Judge, held that: (1) the United States and DOE had standing to sue for injunctive relief; (2) student disciplinary records are ñeducation recordsò within the contemplation of FERPA; (3) the district court did not abuse its discretion in denying discovery to newspaper before granting summary judgment and permanent injunction; (4) irreparable harm was shown in absence of injunction; (5) there were no adequate alternative remedies precluding grant of injunctive relief; (6) injunction was not too broad; and (7) there is no First Amendment right of access to student disciplinary records detailing criminal activities and punishment.

Affirmed.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Court of Appeals reviews de novo the district court's determination of whether the plaintiff had standing to bring the present case, while affording due deference to the district court's factual determinations on the issue.

[2] Federal Courts 170B 814.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk814 Injunction
170Bk814.1 k. In general. Most Cited Cases

Injunction 212 1009

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1008 Discretionary Nature of Remedy
212k1009 k. In general. Most Cited Cases
(Formerly 212k1)

The decision to grant a permanent injunction is within the sound discretion of the district court, and thus grant of a permanent injunction is reviewed for abuse of that discretion.

[3] United States 393 82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General

393k82(2) k. Aid to state and local agencies in general. Most Cited Cases

Constitutional spending power permits Congress to fix the terms on which it disburses federal money to the states, and to receive those funds, the states must agree to comply with clearly stated, federally imposed conditions. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[4] Colleges and Universities 81 9.40

81 Colleges and Universities
81k9 Students
81k9.40 k. Records, transcripts and recommendations. Most Cited Cases

Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

United States and the Secretary of Education had standing to sue to enforce the ñcontractualò conditions of the Family Education Rights and Privacy Act (FERPA), in lieu of its administrative remedies, and if remedies at law were inadequate, then the government could seek contractual relief through a court of equity, including seeking prior restraints such as a permanent injunction against release of student records in violation of FERPA. U.S.C.A. Const. Art. 1, § 8, cl. 1; General Education Provisions Act, §§ 444(b)(2), (f), 454(a), as amended, 20 U.S.C.A. §§ 1232g(b)(2), (f), 1234c(a).

[5] Administrative Law and Procedure 15A 305

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak305 k. Statutory basis and limitation. Most Cited Cases

Administrative Law and Procedure 15A 665.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak665 Right of Review
15Ak665.1 k. In general. Most Cited Cases

Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes; rather, an agency garners its authority to act from a congressional grant of such authority in the agency's enabling statute.

[6] Administrative Law and Procedure 15A 305

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak303 Powers in General
15Ak305 k. Statutory basis and limitation. Most Cited Cases

Administrative Law and Procedure 15A 325

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak325 k. Implied powers. Most Cited Cases

If Congress does not expressly grant or necessarily imply a particular power for an agency, then that power does not exist.

[7] Federal Courts 170B 791

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk791 k. Presumptions in general. Most Cited Cases

Court of Appeals will not lightly assume that Congress has stripped it of its equitable jurisdiction;

such departure from equity requires a clear and valid legislative command.

[8] United States 393 82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to state and local agencies in general. Most Cited Cases

Even in the absence of statutory authority, the United States has the inherent power to sue to enforce conditions imposed on the recipients of federal grants.

[9] United States 393 82(2)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(2) k. Aid to state and local agencies in general. Most Cited Cases

Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states. U.S.C.A. Const. Art. 1, § 8, cl. 1.

[10] Records 326 55

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k55 k. Exemptions or prohibitions under other laws. Most Cited Cases

States 360 18.15

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular cases, preemption or supersession. Most Cited Cases

Ohio Public Records Act does not require disclosure of records the release of which is prohibited by federal law, and thus does not conflict with the Family Education Rights and Privacy Act (FERPA), and preemption is not implicated. General Education Provisions Act, § 444, as amended, 20 U.S.C.A. § 1232g. Ohio R.C. § 149.43(A)(1)(v).

[11] Federal Courts 170B 433

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk433 k. Other particular matters. Most Cited Cases

The federal district court was not bound by the Ohio Supreme Court's interpretation of ñeducation recordsò under the Family Education Rights and Privacy Act (FERPA). General Education Provisions Act, § 444, as amended, 20 U.S.C.A. § 1232g.

[12] Federal Courts 170B 386

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State constitutions and statutes, validity and construction. Most Cited Cases

Federal Courts 170B 387

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk387 k. Federal constitution and laws. Most Cited Cases

While federal courts must defer to a state court's interpretation of its own law, federal courts owe no deference to a state court's interpretation of a federal statute.

[13] Records 326 31

326 Records
326II Public Access
326II(A) In General
326k31 k. Regulations limiting access; offenses. Most Cited Cases

Student disciplinary records are ñeducation recordsò within the contemplation of the Family Education Rights and Privacy Act (FERPA), even though some of the disciplinary proceedings may have addressed criminal offenses that also constitute violations of the educational institutions' rules or policies. General Education Provisions Act, § 444(a)(4)(A), (4)(B)(ii), (b)(6)(Aï C), (h)(2), (i)(1), as amended, 20 U.S.C.A. § 1232g(a)(4)(A), (4)(B)(ii), (b)(6)(Aï C), (h)(2), (i)(1).

[14] Administrative Law and Procedure 15A 412.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak412 Construction
15Ak412.1 k. In general. Most Cited Cases

Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited Cases

Court reads statutes and regulations with an eye to their straightforward and commonsense meanings.

[15] Statutes 361 190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity. Most Cited Cases

When court can discern an unambiguous and plain meaning from the language of a statute, its task is at an end.

[16] Statutes 361 206

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k206 k. Giving effect to entire statute. Most Cited Cases

A court must avoid an interpretation of a statutory provision that renders other provisions superfluous.

[17] Administrative Law and Procedure 15A 330

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(A) In General
15Ak330 k. Statutes, construction and application of. Most Cited Cases

Where a statutory provision was somewhat ambiguous, the district court properly turned to the regulations of the administering agency for interpretive assistance.

[18] Records 326 31

326 Records
326II Public Access
326II(A) In General
326k31 k. Regulations limiting access; offenses. Most Cited Cases

Definitions in Department of Education (DOE) regulations of ñlaw enforcement unit,ò and of when records are ñlaw enforcement recordsò or ñeducation records,ò and interpretation that ñall disciplinary records, including those related to non-academic or criminal misconduct by students, are óeducation records' subject to FERPA,ò are reasonable and permissible constructions of the Family Education Rights and Privacy Act (FERPA). General Education Provisions Act, § 444, as amended, 20 U.S.C.A. § 1232g; 34 C.F.R. §§ 99.3, 99.8(a)(1)(i),(ii), (2), (b)(2)(ii), (c)(2).

[19] Federal Courts 170B 820

170B Federal Courts

294 F.3d 797, 166 Ed. Law Rep. 464, 30 Media L. Rep. 2057, 2002 Fed.App. 0213P
(Cite as: 294 F.3d 797)

170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and discovery. Most Cited Cases

The district court's decision not to permit intervening defendant discovery before ruling on plaintiff's motion for summary judgment and permanent injunction was reviewable for abuse of discretion. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[20] Injunction 212 1582

212 Injunction
212V Actions and Proceedings
212V(F) Trial or Hearing
212k1582 k. Right or necessity. Most Cited Cases
(Formerly 212k130)

An evidentiary hearing typically is required before an injunction may be granted, but a hearing is not necessary where no triable issues of fact are involved.

[21] Federal Civil Procedure 170A 2553

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2547 Hearing and Determination
170Ak2553 k. Time for consideration of motion. Most Cited Cases

In action by the United States to enjoin release by universities of student disciplinary records in violation of the Family Education Rights and Privacy Act (FERPA), the district court did not abuse its discretion in denying discovery to intervening newspaper before granting summary judgment and permanent injunction to the United States, where the district court was faced with questions of law and additional discovery would not have aided in the resolution of those questions. General Education Provisions Act, § 444, as amended, 20 U.S.C.A. § 1232g; Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

[22] Injunction 212 1046

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1041 Injury, Hardship, Harm, or Effect
212k1046 k. Irreparable injury. Most Cited Cases
(Formerly 212k14)

Injunction 212 1053

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1050 Availability and Adequacy of Other Remedies
212k1053 k. Adequacy of remedy at law. Most Cited Cases
(Formerly 212k16)

Injunction 212 1106

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1101 Injury, Hardship, Harm, or Effect
212k1106 k. Irreparable injury. Most Cited Cases
(Formerly 212k138.6)

Injunction 212 1113

212 Injunction
212II Preliminary, Temporary, and Interlocutory Injunctions in General
212II(B) Factors Considered in General
212k1110 Availability and Adequacy of Other Remedies
212k1113 k. Adequacy of remedy at law. Most Cited Cases
(Formerly 212k138.6, 212k138.9)

In order to obtain either a preliminary or permanent injunction, a party must demonstrate that failure to issue the injunction is likely to result in irreparable harm and, in addition, the party seeking injunctive relief generally must show that there is no other adequate remedy at law.

294 F.3d 797, 166 Ed. Law Rep. 464, 30 Media L. Rep. 2057, 2002 Fed.App. 0213P
(Cite as: 294 F.3d 797)

[23] Injunction 212 1016

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1013 Scope of Relief in General
212k1016 k. Specificity, vagueness, overbreadth, and narrowly-tailored relief. Most Cited Cases
(Formerly 212k189)

If injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue.

[24] Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

Given that the Family Education Rights and Privacy Act (FERPA) permits the Department of Education (DOE) to bring a cause of action, including an action for injunctive relief, but does not expressly authorize the granting of injunctive relief to halt or prevent a violation of the FERPA, court's traditional role in equity applies, requiring a determination of whether failure to issue an injunction is likely to result in irreparable harm. General Education Provisions Act, § 454(a)(4), as amended, 20 U.S.C.A. § 1234c(a)(4).

[25] Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

The Department of Education (DOE) would suffer irreparable harm if universities were not enjoined from releasing student disciplinary records in violation of the Family Education Rights and Privacy Act (FERPA), thus supporting issuance of a permanent injunction, as continued release of the records clearly will injure the reputations of the students involved, including the perpetrator, the victim and any witnesses, the inherent privacy interest that Congress sought to protect will be greatly diminished, and Congress granted the DOE authority to sue to enforce those privacy interests, so that FERPA must also contemplate that the DOE experiences the irreparable harm suffered by those students whose privacy interests are violated. General Education Provisions Act, § 444(b)(2), as amended, 20 U.S.C.A. § 1232g(b)(2).

[26] United States 393 126

393 United States
393IX Actions
393k126 k. Rights of action by United States or United States officers. Most Cited Cases

When a specific interest and right has been conferred upon the United States by statute, the remedies and procedures for enforcing that right are not to be narrowly construed so as to prevent the effectuation of the policy declared by Congress.

[27] Action 13 3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory rights of action. Most Cited Cases

Colleges and Universities 81 9.40

81 Colleges and Universities
81k9 Students
81k9.40 k. Records, transcripts and recommendations. Most Cited Cases

Congress did not establish individually enforceable rights through the Family Education Rights and Privacy Act (FERPA) but, instead, acknowledged students' and parents' privacy interests as a whole and empowered the Department of Education (DOE) to protect those interests when a university systemically ignores its obligations under FERPA. General Education Provisions Act, §§ 444(b)(1,2), 454(a), as amended, 20 U.S.C.A. § 1232g(b)(1,2), 1234c(a).

[28] Injunction 212 1039

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(B) Factors Considered in General
212k1039 k. Public interest considerations. Most Cited Cases
(Formerly 212k24)

In cases involving the public interest as defined or protected by an Act of Congress, the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief.

[29] Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

Statute stating that no provision ñshall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any educational school systemò did not preclude issuance of a permanent injunction to prevent universities from releasing student disciplinary records in violation of the Family Education Rights and Privacy Act (FERPA). General Education Provisions Act, §§ 437, 444, as amended, 20 U.S.C.A. §§ 1232, 1232g.

[30] Schools 345 20

345 Schools
345II Public Schools
345II(A) Establishment, School Lands and Funds, and Regulation in General
345k20 k. Regulation and supervision of schools and educational institutions in general. Most Cited Cases

Statute stating that no provision ñshall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over any educational school systemò was directed primarily at the possibility of the Department of Education (DOE) assuming the role of a national school board, but it may also apply if a federal court plays an overly active role in supervising a state's expenditures of federal funding. General Education Provisions Act, § 438, as amended, 20 U.S.C.A. § 1232a.

[31] Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

Money damages were insufficient relief for violation of the Family Education Rights and Privacy Act (FERPA) by universities' release of student disciplinary records, and thus did not preclude issuance of a permanent injunction, since, in general, a loss of privacy and injury to reputation are difficult to calculate, parties had no way of knowing how many people would require compensation and how much money would compensate each injury, and the harm suffered by the myriad number of students affected by the continued release of student disciplinary records was irreparable, and by definition, not compensable. General Education Provisions Act, § 444, as amended, 20 U.S.C.A. § 1232g.

[32] Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

None of the administrative remedies authorized by the Family Education Rights and Privacy Act (FERPA) would be adequate to stop the violations of FERPA by universities' release of student disciplinary records, and thus did not preclude issuance of a permanent injunction, as Ohio Supreme Court's decision served as precedent to compel state universities to release student disciplinary records in the absence of a federal court injunction, so that it would be nearly

impossible to obtain voluntary compliance, and cutting off federal funding would be detrimental to the universities' educational purpose, would injure more students than it would protect, and would not guarantee compliance because universities would still feel constrained to follow the Ohio Supreme Court's interpretation. General Education Provisions Act, § 454(a)(1, 3), as amended, 20 U.S.C.A. § 1234c(a)(1, 3).

[33] Injunction 212 1329

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1322 Post-Secondary Education
212k1329 k. Students. Most Cited Cases
(Formerly 212k78)

A cease and desist order under the enforcement provisions of the Family Education Rights and Privacy Act (FERPA) would be an inadequate remedy, and thus did not preclude issuance of a permanent injunction against universities's release of student disciplinary records in violation of FERPA, as such an order requires new enforcement measures each time a violation occurs, and is not self-executing and would lead to intermittent violative releases that would otherwise be protected by permanent injunctive relief. General Education Provisions Act, § 454(a)(2), as amended, 20 U.S.C.A. § 1234c(a)(2).

[34] Injunction 212 1319

212 Injunction
212IV Particular Subjects of Relief
212IV(I) Education
212k1312 Public Elementary and Secondary Education
212k1319 k. Students. Most Cited Cases
(Formerly 212k189)

Permanent injunction which was crafted to protect the privacy interests embodied in the Family Education Rights and Privacy Act (FERPA), and narrowly tailored to enjoin only the release of student disciplinary records or any personally identifiable information contained therein, except as otherwise expressly permitted under the FERPA, was not too broad, and the district court did not abuse its discretion in granting such relief. General Education Provisions Act, § 444, as amended, 20 U.S.C.A. § 1232g.

[35] Colleges and Universities 81 9.40

81 Colleges and Universities
81k9 Students
81k9.40 k. Records, transcripts and recommendations. Most Cited Cases

Constitutional Law 92 2005

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2005 k. In general. Most Cited Cases
(Formerly 92k90.1(1.4))

There is no First Amendment right of access to student disciplinary records detailing criminal activities and punishment, as university disciplinary proceedings are not criminal proceedings despite the fact that some behavior that violates a university's rules and regulations may also constitute a crime, student disciplinary proceedings and records historically have not been open to the press and general public, public access does not play a significant positive role in the functioning of the particular process in question, and denial of access to student disciplinary records would not prevent newspaper from obtaining information about crime on university campuses. U.S.C.A. Const.Amend. 1; Higher Education Act of 1965, § 485(f)(1)(F), as amended, 20 U.S.C.A. § 1092(f)(1)(F).

[36] Constitutional Law 92 1569

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)3 Particular Issues and Applications in General
92k1569 k. Government information. Most Cited Cases
(Formerly 92k90.1(1))

Constitutional Law 92 4067

294 F.3d 797, 166 Ed. Law Rep. 464, 30 Media L. Rep. 2057, 2002 Fed.App. 0213P
(Cite as: 294 F.3d 797)

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)2 Governments and Political Subdivisions in General
92k4067 k. Public records or information. Most Cited Cases
(Formerly 92k320.5)

Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. U.S.C.A. Const.Amends. 1, 14.

[37] Constitutional Law 92 ⇦2106

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(V) Judicial Proceedings
92XVIII(V)2 Criminal Proceedings
92k2105 Access to Proceedings; Closure
92k2106 k. In general. Most Cited Cases
(Formerly 92k90.1(3))

There is a First Amendment right of access to criminal trials, proceedings, and records: a qualified right of access attaches where the information sought has historically been open to the press and general public and public access plays a significant positive role in the functioning of the particular process in question, and once the qualified First Amendment right of access attaches, it can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. U.S.C.A. Const.Amend. 1.

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Before SILER and MOORE, Circuit Judges; FORESTER, Chief District Judge.[FN*]

FN* The Honorable Karl S. Forester, United States Chief District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

KARL S. FORESTER, Chief District Judge.

Intervening Defendantï Appellant *The Chronicle of Higher Education* (ñ*The Chronicle* ò) contests the district court's grant of summary judgment and subsequent permanent injunction in favor of Plaintiffï Appellee the United States. Specifically, the district court concluded that university disciplinary records were ñeducational recordsò as that term is defined***803** in the Family Education Rights and Privacy Act (ñFERPAò), 20 U.S.C. § 1232g, and that releasing such records and the personally identifiable information contained therein constitutes a violation of the FERPA. The district court permanently enjoined the Defendantsï Appellees Miami University and The Ohio State University (ñMiami,ò ñOhio State,ò or collectively ñUniversitiesò) from releasing student disciplinary records or any ñpersonally identifiable informationò contained therein, except as otherwise expressly permitted under the FERPA. For the reasons that follow, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case was born of a dispute between a university newspaper and the university's administration. In the spring of 1995, the editor-in-chief of Miami's student newspaper, *The Miami Student* (ñthe paperò), sought student disciplinary records from the University Disciplinary Board (ñUDBò) to track crime trends on campus.[FN1] *State ex rel. Miami Student v. Miami University,* 79 Ohio St.3d 168, 680 N.E.2d 956, 957 (Ohio 1997). Miami initially refused to release the

requested records, but after the editors made a written request pursuant to the Ohio Public Records Act, Ohio Rev.Code § 149.43, for all UDB records from 1993ï 1996, Miami released the records. *Id.* Pursuant to the FERPA privacy provisions, however, Miami redacted ñfrom these records the identity, sex, and age of the accuseds [sic], as well as the date, time and location of the incidents giving rise to the disciplinary charges.ò *Id.* The editors were dissatisfied with Miami's redacted disclosure and subsequently filed an original mandamus action in the Ohio Supreme Court seeking full disclosure of the UDB records, redacting only the ñname, social security number, or student I.D. number of any accused or convicted party.ò *Id.*

FN1. Later that year, the editor-in-chief's successor joined in her pursuit to obtain the student disciplinary records, hereinafter collectively referred to as the ñeditors.ò

A divided Ohio Supreme Court granted the editors a writ of mandamus. *Id.* at 958. According to the Court, the Ohio Public Records Act ñprovides for full access to all public records upon request unless the requested records fall within one of the specific exceptions listed in the Act.ò *Id.* The relevant exception in the *Miami* case ñexcludes from the definition of public records those records ótthe release of which is prohibited by state or federal law.ôò *Id.* (quoting Ohio Rev.Code § 149.43(A)(1)(*o*)).[FN2] Relying on a Georgia Supreme Court case,[FN3] the Ohio Supreme Court concluded that university disciplinary records were not ñeducation recordsò as defined in the FERPA. *Id.* at 958ï 59. The Ohio Court reasoned that, because disciplinary records were not protected by the FERPA, they did not fall within the prohibited-by-federal-law exception to the Ohio Public Records Act. *Id.* Accordingly, the Court granted a writ of mandamus compelling Miami to provide the records requested by the editors. *Id.* at 959ï 60. Miami sought United States Supreme Court review of the Ohio decision, but the Supreme Court denied certiorari. *Miami University v. The Miami Student,* 522 U.S. 1022, 118 S.Ct. 616, 139 L.Ed.2d 502 (1997).

FN2. The Ohio Legislature subsequently amended the Ohio Public Records Act and the pertinent provision is now found at Ohio Rev.Code § 149.43(A)(1)(v). The Court will use the updated citation for the remainder of the opinion.

FN3. *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia,* 262 Ga. 848, 427 S.E.2d 257 (Georgia 1993).

***804** On the heels of the Ohio Supreme Court decision, *The Chronicle,* [FN4] pursuant to the Ohio Public Records Act, made written requests of Miami and Ohio State for disciplinary records amassed during the calendar years 1995 and 1996. Because the Ohio Supreme Court concluded that student disciplinary records were not educational records covered by the FERPA, *The Chronicle* requested the records with names intact and minimal redaction as required by the Ohio Public Records Act. Upon receipt of the request, and in light of the Ohio Supreme Court decision, Miami contacted the United States Department of Education (ñDOEò) and explained that it might not be able to comply with the FERPA.[FN5] The DOE told Miami that it believed the Ohio Supreme Court was incorrect in holding that student disciplinary records are not ñeducation recordsò under the FERPA. *Declaration of LeRoy S. Rooker,* J.A. at 91. The DOE assured Miami ñthat the FERPA prohibits the University from releasing personally identifiable information contained in student disciplinary records.ò *Id.*

FN4. *The Chronicle* states that it is ñengaged in the business of publishing and distributing a national weekly newspaper, ... that is the preeminent source of information about higher education in the United States.ò *The Chronicle's Motion to Intervene* in the underlying district court case, J.A. at 102.

FN5. When an educational agency or institution believes that it cannot comply with the FERPA due to a potential conflict with state laws, it must notify the DOE, citing the potentially conflicting law. *See* 34 C.F.R. § 99.61.

In December of 1997, Miami complied in part with *The Chronicle's* request by providing the newspaper virtually unredacted disciplinary records from November, 1995, and November, 1996. *Id.* at 92. Miami informed the DOE that it intended to comply with the remainder of *The Chronicle's* request. *Id.* In addition, Miami advised the DOE that it ñhad adopted a policy of releasing disciplinary records to any third-party requestor.ò *Id.*

In January of 1998, Ohio State confirmed with the DOE that it too had received *The Chronicle's* request for all disciplinary records from 1995 and 1996. *Id.* Ohio State informed the DOE that it already had released unredacted disciplinary records from November, 1995, and November, 1996. *Id.* Thereafter, Ohio State told the DOE that it intended to comply with the remainder of *The Chronicle's* request. *Id.*

Shortly after the DOE learned that Miami and Ohio State intended to release student disciplinary records containing personally identifiable information without the consent of the student, the United States filed the underlying complaint against the Universities.[FN6] In the complaint, the DOE sought declaratory and preliminary and permanent injunctive relief prohibiting the Universities from releasing student disciplinary records that contain personally identifiable information, except as permitted under the FERPA. The DOE immediately filed a motion to preliminarily enjoin the Universities' release of student disciplinary records. The district court granted the motion and noted that the parties did not dispute the material facts; therefore, the court was left with a pure question of law.

> FN6. The United States brought the underlying action on its own behalf and on behalf of the United States Department of Education, hereinafter referred to collectively as the ñDOE.ò

On February 13, 1998, *The Chronicle* filed an unopposed motion to intervene and the district court granted the motion. *The Chronicle* subsequently filed a motion to dismiss the action and a motion to establish an order of procedure. The motion to ***805** dismiss contended that the DOE lacked standing to bring this action and that the DOE's enforcement power was limited to the administrative remedies outlined in the FERPA. The second motion alleged that *The Chronicle* may dispute certain material facts. *The Chronicle* requested a reasonable period of time for discovery and the filing of additional affidavits to develop those facts.

The DOE responded to *The Chronicle's* motions and filed its own motion for summary judgment. The district court denied *The Chronicle's* motion to dismiss and motion for an order of procedure. Determining that the student disciplinary records were ñeducation recordsò under the FERPA, the court granted the DOE's motion for summary judgment and permanently enjoined the Universities from releasing student disciplinary records in violation of the FERPA.[FN7] This timely appeal followed.

> FN7. Given this author's intimate familiarity with the caseload and backlog facing district court judges across the country, Judge George Smith should be commended for his remarkably detailed and insightful opinion and order in this case. *See United States v. Miami University,* 91 F.Supp.2d 1132 (S.D.Ohio 2000).

II. *THE CHRONICLE'S* APPEAL

The Chronicle asserts that the district court should be reversed for several reasons. First, *The Chronicle* contends that the DOE lacks standing to bring an action seeking injunctive relief and compliance with the FERPA. Second, *The Chronicle* argues that the district court erred in holding that the FERPA ñprohibitsò education records disclosure, thereby concluding that education records were not subject to disclosure under the Ohio Public Records Act. Instead, *The Chronicle* contends that the district court implicitly held that the Ohio public records law was preempted by the FERPA. Third, *The Chronicle* alleges that the district court erred in holding that student disciplinary records are education records within the meaning of the FERPA. Next, *The Chronicle* contends that the district court erred by granting summary judgment without first permitting discovery to develop a sufficient factual record. Fifth, *The Chronicle* alleges that the United States had an entirely adequate remedy at law and failed to show irreparable harm; therefore, the district court erred in granting broad permanent injunctive relief. Finally, *The Chronicle* argues that, to the extent it prohibits disclosure of student disciplinary records, the FERPA violates the First Amendment and the district court failed to recognize that violation. After a recitation of the applicable standards of review and a brief FERPA synopsis, we will address these arguments in turn.

A. Standards of Review

We review a district court's grant of summary judgment *de novo,* using the same standard employed by the district court. *Herman Miller, Inc. v. Palazzetti Imports and Exports,* 270 F.3d 298, 308 (6th

Cir.2001) (citing *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Center,* 109 F.3d 275, 280 (6th Cir.1997)). Summary judgment is appropriate where ñthe pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.ò Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, this Court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party. *Herman Miller, Inc.,* 270 F.3d at 308 (citing *National Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997)). Nonetheless, ñ[t]he mere existence of a scintilla ***806** of evidence in support of the [nonmoving party's] position will be insufficient;ò as noted above, the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original).

[1] This Court reviews *de novo* the district court's determination of whether the plaintiff had standing to bring the present case while affording due deference to the court's factual determinations on the issue. *See Coyne v. Am. Tobacco Co.,* 183 F.3d 488, 492 (6th Cir.1999). In addition, we review issues of statutory interpretation *de novo. Walton v. Hammons,* 192 F.3d 590, 592 (6th Cir.1999).

[2] The decision to grant a permanent injunction is within the sound discretion of the district court. *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir.1998) (citing *Wayne v. Village of Sebring,* 36 F.3d 517, 531 (6th Cir.1994)). Accordingly, we review a district court's grant of permanent injunction for abuse of that discretion. *See CSX Transp., Inc. v. Tennessee State Bd. of Equalization,* 964 F.2d 548, 553 (6th Cir.1992). ñA district court abuses its discretion when it relies on clearly erroneous findings of fact or when it improperly applies the law.ò *Herman Miller, Inc.,* 270 F.3d at 317 (citing *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.,* 753 F.2d 1354, 1356 (6th Cir.1985)). ñAn abuse of discretion is defined as a definite and firm conviction that the district court committed a clear error of judgment.ò *Id.* (citing *Pouillon v. City of Owosso,* 206 F.3d 711, 714 (6th Cir.2000)).

B. Family Education Rights and Privacy Act

[3] For the last quarter of a century, the FERPA has helped protect the privacy interests of students and their parents. In fact, Congress enacted the FERPA ñto protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent.ò Joint Statement, 120 Cong. Rec. 39858, 39862 (1974). Pursuant to its constitutional spending power,[FN8] Congress provides funds to educational institutions via the FERPA on the condition that, *inter alia,* such agencies or institutions do not have a ñpolicy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of [the students or] their parents[.]ò 20 U.S.C. § 1232g(b)(1). The Act also provides that ñ[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records,ò except as permitted by the Act. 20 U.S.C. § 1232g(b)(2).[FN9] Congress also recognizes that, based upon the privacy interests protected by the FERPA, educational institutions may withhold from *the federal government* certain personal data on students ***807** and families. *See* 20 U.S.C. § 1232i. Because Congress holds student privacy interests in such high regard:

> the refusal of a[n] ... educational agency or institution ... to provide personally identifiable data on

FN8. ñThe Congress shall have the Power to ... provide for the ... general Welfare of the United States[.]ò U.S. Const. art. I, § 8, cl. 1. The Constitutional spending power permits Congress to fix the terms on which it disburses federal money to the states, and to receive those funds, the states must agree to comply with clearly stated, federally imposed conditions. *See Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

FN9. The DOE's definition of ñpersonally identifiable informationò includes the student's name, a family member's name, the address of the student or family member, personal identifiers such as the student's social security number or student number, and personal characteristics or other information that would make the student's identity easily traceable. *See* 34 C.F.R. § 99.3

> students or their families, as a part of any applicable program, to any Federal office, agency, department, or other third party, on the grounds that it constitutes a violation of the right to privacy and confidentiality of students or their parents, shall not constitute sufficient grounds for the suspension or termination of Federal assistance.
>
> *Id.* In other words, Congress places the privacy interests of students and parents above the federal government's interest in obtaining necessary data and records. The Act broadly defines ñeducation recordsò as ñthose records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.ò 20 U.S.C. § 1232g(a)(4)(A).

C. Standing

[4][5][6] On appeal, *The Chronicle* contends that the DOE and the United States [FN10] do not have standing to bring this suit for injunctive relief because Congress has not conferred such authority upon them, and because they are bound by the administrative remedies enumerated in the Act and its corresponding regulations. Indeed, ñ[a]gencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes.ò *Dir. Office of Workers' Compensation Programs, DOL v. Newport News Shipbuilding and Dry Dock Co.,* 514 U.S. 122, 132, 115 S.Ct. 1278, 131 L.Ed.2d 160 (1995). An agency garners its authority to act from a congressional grant of such authority in the agency's enabling statute. *See Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986). If Congress does not expressly grant or necessarily imply a particular power for an agency, then that power does not exist. *See Walker v. Luther,* 830 F.2d 1208, 1211 (2d Cir.1987). Accordingly, we must look to the language of the Act and its enforcement provisions to determine whether Congress intended to provide the DOE with standing to sue for injunctive relief.

> FN10. As noted earlier, the United States sued on its own behalf and on behalf of the DOE. When faced with this situation, other courts have held that the United States may sue in its own name even though a statute bestows enforcement rights and obligations on a federal agency. *See, e.g., United States v. Stuart,* 392 F.2d 60, 64 (3d Cir.1968) (ñ[T]he SBA is a nonincorporated federal agency and an integral part of the United States Government; [ ]while the Administrator may sue, the United States may also sue on this type of claim as the real party in interest.ò)

The express language of the FERPA provides:

> The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

20 U.S.C. § 1232g(f). Standing alone, this singular provision, allowing the Secretary to take ñappropriate actionsò to enforce this section, arguably may not sufficiently empower the DOE to enforce the FERPA through the courts. *Cf. Dir. Office of Workers' Compensation Programs, DOL,* 514 U.S. at 132, 115 S.Ct. 1278. Congress did not resign the Secretary's enforcement power to this sole, imprecise provision. Instead, 20 U.S.C. § 1234c(a) provides that ***808** the Secretary may take the following actions when a recipient of funds fails to comply with the FERPA:

> (1) withhold further payments under that program, as authorized by section 1234d of this title;
>
> (2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;
>
> (3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title; or
>
> (4) *take any other action authorized by law with respect to the recipient.*

Id. (emphasis added). We believe that the fourth alternative expressly permits the Secretary to bring suit to enforce the FERPA conditions in lieu of its administrative remedies. The Fifth Circuit held as much when reviewing a similar catch-all enforcement provision in the Rehabilitation Act, 29 U.S.C. § 794. *See United States v. Baylor Univ. Med. Ctr.,* 736 F.2d 1039, 1050 (5th Cir.1984) (ñWe do not mean to imply

that a federal agency seeking to enforce ... Section 504 must resort to administrative remedies. The statute expressly states otherwise: an agency may resort to ó any other means authorized by lawôõ including the federal courts.ò). The District of Columbia Circuit recognized similar alternatives under Title VI of the Civil Rights Act. *See* *National Black Police Ass'n v. Velde,* 712 F.2d 569, 575 (D.C.Cir.1983), *cert. denied,* 466 U.S. 963, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984) (Title VI ñallows the funding agency to effect compliance through funding termination or ó any other means authorized by law.ô Although fund termination was envisioned as the primary means of enforcement under Title VI, ... Title VI clearly tolerates other enforcement schemes. Prominent among these other means of enforcement is referral of cases to the Attorney General, who may bring an action against the recipient. The choice of enforcement methods was intended to allow funding agencies flexibility in responding to instances of discrimination.ò)(footnotes omitted).

[7] Having reached that conclusion, it follows that the DOE can proceed in equity: a common and ñauthorizedò means to enforce legal obligations. After all, this Court will not lightly assume that Congress has stripped it of its equitable jurisdiction; such departure from equity requires a clear and valid legislative command. *See* *Hecht Co. v. Bowles,* 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944); *Porter v. Warner Holding Co.,* 328 U.S. 395, 398, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946).

[8] Even in the absence of statutory authority, the United States has the inherent power to sue to enforce conditions imposed on the recipients of federal grants. ñ[L]egislation enacted pursuant to the spending power [, like the FERPA,] is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.ò *Pennhurst State School and Hospital,* 451 U.S. at 17, 101 S.Ct. 1531; *King v. Smith,* 392 U.S. 309, 333 n. 34, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968)(ñThere is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed.ò). If Congress imposes a ñcondition on the grant of federal moneys, it must do so unambiguously;ò otherwise, the State cannot ñvoluntarily and knowingly accept [ ] the terms of the ó contract.ôò *Id.*

[9] Spending clause legislation, when knowingly accepted by a fund recipient, imposes enforceable, affirmative obligations upon the states. *See* ***809** *Wheeler v. Barrera,* 417 U.S. 402, 427, 94 S.Ct. 2274, 41 L.Ed.2d 159 (1974), *modified on another ground,* 422 U.S. 1004, 95 S.Ct. 2625, 45 L.Ed.2d 667 (1975) (recognizing that states and local agencies must fulfill their part of a spending clause contract if they choose to accept the funds); *King,* 392 U.S. at 333, 88 S.Ct. 2128; *see also* *South Dakota v. Dole,* 483 U.S. 203, 206ï 08, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (noting that clearly stated conditions permit a State to be ñcognizant of the consequences of their participationò). Finally, the Supreme Court repeatedly has recognized a court's equitable powers to enforce spending clause obligations and conditions under various statutes. *See* *Rosado v. Wyman,* 397 U.S. 397, 420ï 22, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) (enjoining the implementation of a state welfare program because the state scheme conflicted with the spending clause conditions in federal legislation); *Pennhurst State School and Hospital,* 451 U.S. at 29, 101 S.Ct. 1531 (listing various equitable remedies for state violations of spending legislation conditions).

ñUnder FERPA, schools and educational agencies receiving federal financial assistance *must* comply with certain conditions. One condition specified in the Act is that sensitive information about students *may not be released* without [the student's] consent.ò *Owasso Independent School District v. Falvo,* 534 U.S. 426, 122 S.Ct. 934, 937, 151 L.Ed.2d 896 (2002) (emphasis added). The FERPA unambiguously conditions the grant of federal education funds on the educational institutions' obligation to respect the privacy of students and their parents. *See* 20 U.S.C. § 1232g(b)(2) (precluding schools from receiving federal funds if they maintain a policy or practice of disclosing education records without the student's consent). Based upon these clear and unambiguous terms, a participant *who accepts federal education funds* is well aware of the conditions imposed by the FERPA and is clearly able to ascertain what is expected of it. *See Davis v.* *Monroe County Bd. of Educ.,* 526 U.S. 629, 640, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (quoting *Pennhurst State School and Hospital,* 451 U.S. at 17, 101 S.Ct. 1531). Once the conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent.[FN11] Based upon the case law

discussed above, we believe that, in the alternative to its statutory authority to sue, the United States may enforce the Universities' ñcontractualò obligations through the traditional means available at law. If those remedies are inadequate, then the government may seek contractual relief through a court of equity.

> FN11. We limit this conclusion, that the FERPA imposes a binding obligation on schools that accept federal funds, to federal government action to enforce the FERPA. In *Gonzaga University v. Doe,* the Supreme Court held that the FERPA does not create personal rights that an individual may enforce through 42 U.S.C. § 1983. 536 U.S. 273, at ïïïï, 122 S.Ct. 2268, 153 L.Ed.2d 309, 2002 WL 1338070, at * 3 (June 20, 2002).

Finally, *The Chronicle* argues that the DOE has no power to prevent future violations of the FERPA because the statute only provides a remedy when the recipient *"is failing* to comply substantially with any requirement of law applicable to such funds.ò 20 U.S.C. § 1234c(a) (emphasis added). *The Chronicle* contends that because Congress couched violations in the present tense, it did not intend to provide prior restraints such as the permanent injunction granted in this case. We find these grammatical semantics unpersuasive. The administrative remedies outlined in the Act encompass various forms of forward-looking relief, designed to bring straying fund recipients into compliance. According to the enforcement provisions, the Secretary may withhold further payments under the program, compel compliance***810** through a cease and desist order, and enter into a compliance agreement. None of these provisions imply a congressional intent to limit prospective relief; to the contrary, it appears that Congress envisioned a broad range of ñprior restraintò remedies in the event that fund recipients failed to comport with their spending clause restraints. Accordingly, we hold that the DOE had standing to bring the case at bar.

D. The FERPA, *Miami* and the Ohio Public Records Act

The Chronicle finds error in the district court's alleged refusal to respect the Ohio Supreme Court's interpretation of the Ohio Public Records Act, Ohio Rev.Code § 149.43. *The Chronicle* contends that, because the Ohio Supreme Court held that disciplinary records are not ñeducation recordsò as defined by the FERPA, it was unnecessary for the Court to decide whether the FERPA prohibits the disclosure of the requested records within the meaning of Ohio Rev.Code § 149.43. *State ex rel. Miami Student,* 680 N.E.2d at 958 n. 1. The Ohio Supreme Court noted that ñthe Ohio Public Records Act is intended to be liberally construed ótо ensure that governmental records be open and made available to the public ... subject to only a few very limited and narrow exceptions.ô ò *Id.* at 958. Among those exceptions is a provision that ñexcludes from the definition of public records those records óthe release of which is prohibited by state or federal law.ô ò *Id.* (citing Ohio Rev.Code § 149.43(A)(1)(v)). It follows, according to *The Chronicle,* that the district court invaded the province of the state court when it implicitly concluded that the FERPA ñprohibitedò the release of student disciplinary records. In reaching that conclusion, *The Chronicle* contends that the district court impermissibly broadened the state's otherwise narrow definition of the term ñprohibit.ò We find several flaws in *The Chronicle's* reasoning.

As an initial matter, *The Chronicle* concedes that the Ohio Supreme Court never reached the issue of whether the FERPA ñprohibitedò the release of education records, much less student disciplinary records as a subpart thereof. Instead, the Ohio Supreme Court misinterpreted a *federal* statuteð erroneously concluding that student disciplinary records were not ñeducation recordsò as defined by the FERPAð and prematurely halted its inquiry based upon that erroneous conclusion. We decline to speculate how the Ohio Supreme Court might otherwise have resolved this issue. Furthermore, whether the release of a particular record is prohibited by federal law necessarily implicates the interpretation of that federal law. The State of Ohio clearly recognized that necessity when it exempted from its definition of public records those records the release of which is prohibited *by federal law.* Ohio Rev.Code § 149.43(A)(1)(v). The prohibition finds its root in the federal law, not the Ohio Public Records Act. Accordingly, to the extent that the district court concluded that the FERPA prohibited the release of education records, it did so on federal grounds.[FN12]

> FN12. This conclusion is distinguishable from the Supreme Court's holding on the application of federal versus state law in

> *Wheeler v. Barrera,* 417 U.S. at 416ï 19, 94 S.Ct. 2274. In that case, the Court held that state law controlled the decision of ñwhether federal aid is money ódonated to any state fund for public school purposes,ô within the meaning of the Missouri Constitution, Art. 9, § 5.ò *Id.* The Missouri Constitution broadly described its fund pool for public schools and did not provide an explicit exception for funds received from the federal government. *Id.* In the case at bar, the Ohio legislators explicitly exempted from the definition of public records any records the release of which is prohibited by federal law.

***811** In this case, the United States sought declaratory and injunctive relief against the Universities under the FERPA. Specifically, the United States asked the district court to determine whether student disciplinary records were ñeducation recordsò as defined by FERPA. If the district court concluded, as it did, that student disciplinary records were ñeducation records,ò then the United States also sought an injunction prohibiting the Universities from releasing student disciplinary records. The issues before the district court were of federal genesis and required no application of state law.

[10] The Ohio Public Records Act and the *Miami* case were neither explicitly nor implicitly affected by the district court decision. As noted above, the Ohio Public Records Act does not require disclosure of records the release of which is prohibited by federal law. Ohio Rev.Code § 149.43(A)(1)(v). Based on that exception, the Ohio Public Records Act does not conflict with the FERPA and the state and federal statutes can coexist. Furthermore, the *Miami* case expressly adjudicated the relationship between two parties: Miami University and the editors of *The Miami Student. See State ex rel. Miami Student,* 680 N.E.2d at 957. We assume that the rights and responsibilities established in that case were satisfied long ago. Unlike the case at bar, the editors in the *Miami* case permitted Miami to redact significantly the student disciplinary records prior to disclosure and, in its mandamus, the Ohio Supreme Court expanded the list of items that Miami could redact. *Id.* at 959. After concluding that student disciplinary records were not ñeducation records,ò the Court still permitted Miami to redact the following ñpersonally identifiable informationò in accord with the FERPA: the student's name; Social Security Number; student identification number; and the exact date and time of the alleged incident. *Id.* With these court-imposed redactions, the mandamus appears to comport with the FERPA's requirements. *See id.* at 960 (COOK, J. dissenting).

In the case *sub judice, The Chronicle* seeks records fraught with personally identifiable information and virtually untainted by redaction. Given the vast difference in the records sought by *The Chronicle,* it is by no means clear that the *Miami* case would support, without exception, the release of those records.

[11][12] Finally, the district court was not bound by the Ohio Supreme Court's interpretation of ñeducation recordsò under the FERPA. While federal courts must defer to a State court's interpretation of its own law, *Terminiello v. City of Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), federal courts owe no deference to a state court's interpretation of a federal statute, *Kuhnle Brothers, Inc. v. County of Geauga,* 103 F.3d 516, 520 (6th Cir.1997) (ñNotions of federalism do not require this court to follow a State court's holdings with respect to federal questions.ò).

Because the district court's conclusions were based entirely on federal law, and the federal law does not conflict with state law, we agree with the district court's conclusion that preemption is not implicated in this case.

E. Student Disciplinary Records, Education Records and the FERPA

[13] *The Chronicle* argues that the district court erred in concluding that student disciplinary records are ñeducation recordsò within the contemplation of FERPA. *The Chronicle* states that there is no evidence that Congress ever intended the FERPA to protect records other than those records relating to individual student academic performance, financial aid or scholastic probation. In addition, *The Chronicle* contends that student disciplinary records involving criminal offenses ***812** should be construed as unprotected law enforcement records. Otherwise, the FERPA affords ñspecialò privacy rights to students that the general public does not enjoy.

[14][15] As noted above, we review *de novo* issues of statutory interpretation. *Walton,* 192 F.3d at 592. ñWe read statutes and regulations with an eye to their straightforward and commonsense meanings.ò

Henry Ford Health Sys. v. Shalala, 233 F.3d 907, 910 (6th Cir.2000). ñWhen we can discern an unambiguous and plain meaning from the language of a statute, our task is at an end.ò *Bartlik v. U.S. Dept. of Labor,* 62 F.3d 163, 166 (6th Cir.1995). With these principles in hand, we turn to the words of Congress for guidance on this issue.

The FERPA broadly defines ñeducation recordsò as ñthose records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.ò 20 U.S.C. § 1232g(a)(4)(A). Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university. Notably, Congress made no content-based judgments with regard to its ñeducation recordsò definition. We find nothing in the statute or its legislative history to the contrary, and the various state court and federal district court cases cited by *The Chronicle* do not sway our conclusion.[FN13] In fact, a detailed study of the statute and its evolution by amendment reveals that Congress intends to include student disciplinary records within the meaning of ñeducation recordsò as defined by the FERPA. This intention is evinced by a review of the express statutory exemptions from privacy and exceptions to the definition of ñeducation records.ò

> FN13. Some exemptions and exceptions, both in the statute and the DOE's regulations, have been added in response to those cases cited by *The Chronicle.*

The FERPA sanctions the release of certain student disciplinary records in several discrete situations through exemption. The Act does not prohibit disclosure ñ*to an alleged victim* of any crime of violence ... or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by the institution against the alleged perpetrator....ò 20 U.S.C. § 1232g(b)(6)(A) (emphasis added). The *public generally* may be informed of ñthe final results of any disciplinary proceeding conducted by [an] institution against a student who is an alleged perpetrator of any crime of violence ... or a nonforcible sex offense, if the institution determines ... that the student committed a violation of the institution's rules or policies with respect to such crime or offense.ò *Id.* at § 1232g(b)(6)(B). ñ[T]he final results of any disciplinary proceeding (i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.ò *Id.* at § 1232g(b)(6)(C).

These two exemptions clearly evolve from a base Congressional assumption that student disciplinary records are ñeducation recordsò and thereby protected from disclosure. Working from that base, Congress selected two particular situations in which otherwise protected student disciplinary records may be released. And even then, Congress significantly limits the amount of information that an institution may release and the people to whom the institution may release such information. In the first provision, Congress balanced the privacy interests of an alleged perpetrator***813** of any crime of violence or nonforcible sex offense with the rights of the alleged victim of such a crime and concluded that the right of an alleged victim to know the outcome of a student disciplinary proceeding, regardless of the result, outweighed the alleged perpetrator's privacy interest in that proceeding. Congress also determined that, if the institution determines that an alleged perpetrator violated the institution's rules with respect to any crime of violence or nonforcible sex offense, then the alleged perpetrator's privacy interests are trumped by the public's right to know about such violations. In so doing, Congress acknowledged that student disciplinary records are protected from disclosure but, based on competing public interests, carefully permitted schools to release bits of that information while retaining a protected status for the remainder.

Next, the disciplinary records of a student posing a significant risk to the safety or well-being of that student, other students, or other members of the school community may be disclosed to individuals having a ñlegitimate educational interest[ ] in the behavior of the student.ò *Id.* at § 1232g(h)(2). This provision recognizes that a student has a privacy interest in his or her disciplinary records, even if those records reflect that the student poses a significant safety risk. Congress concluded that, although such information may be included in the student's education record, schools may disclose those disciplinary records to teachers and school officials. Obviously this narrow exemption does not contemplate release of the student

disciplinary records to the general public.

Finally, if an institution of higher education determines that a student, under the age of twenty-one, ñhas committed a disciplinary violation with respect toò the use or possession of alcohol or a controlled substance, then the institution may disclose information regarding such violation to a parent or legal guardian of the student. *Id.* at § 1232g(i)(1). Once again, this provision explicitly recognizes that student disciplinary records are education records and therefore are protected from disclosure. In spite of that protection, Congress concluded that a parent, not the general public, had a right to know about such violations.

[16] If Congress believed that student disciplinary records were not education records under the FERPA, then these sections would be superfluous. It is well established that a court must avoid an interpretation of a statutory provision that renders other provisions superfluous. *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 877, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991). Congress is the appropriate body to address whether student disciplinary records should be open to the public and under what circumstances. Congress has proven through the exemptions discussed above that, when faced with a situation justifying limited student disciplinary record disclosure, it is willing and able to carefully draft a provision permitting such disclosure. Until Congress broadens these exemptions or otherwise alters the clear statutory language, we must conclude that student disciplinary records remain protected under the term ñeducation records.ò [FN14]

FN14. If we were unable to determine whether student disciplinary records were education records from the plain language in the statute, we would of course defer to a reasonable agency interpretation of the issue. In 1995, the DOE made the following conclusion:

> Based on the broad definition of œeducation records,ô which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are œeducation records' subject to FERPA.

60 F.R. 3464, 3465 (1995). Given the fact that the DOE reached the same conclusion that we did, we find it to be a well reasoned and permissible construction of the statutory language and we would adopt the DOE's construction.

***814** In addition to the exemptions discussed above, Congress also provided some exceptions to the ñeducation recordsò definition. Relevant among those exceptions, the term ñeducation recordsò does not include ñrecords maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.ò 20 U.S.C. § 1232g(a)(4)(B)(ii). Because law enforcement records are by definition not education records, the FERPA does not protect law enforcement records or place restriction on their disclosure.

[17] *The Chronicle* notes, without objection, that student disciplinary proceedings can and sometimes do involve serious criminal conduct. Based upon that fact, it argues that student disciplinary records addressing such conduct are law enforcement records and should be disclosed to the public. Faced with this argument and the fact that this provision is somewhat ambiguous, the district court turned to the DOE's regulations for interpretive assistance. We agree with this approach.

In *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court outlined a two-step procedure to determine Congressional intent in a statute. First, *Chevron* requires courts to determine whether Congress has directly spoken to the precise question at issue. *Id.* at 842ï 43, 104 S.Ct. 2778. If so, then this panel must give effect to the unambiguously expressed intent of Congress. *Id.* If the statute is silent or ambiguous with respect to the specific issue, this Court must defer to the agency's interpretation as long as it is based on a permissible construction of the statute. *Id.*

[18] We find the following definitions and interpretations to be reasonable and permissible constructions of the relevant statute. ñA [l]aw enforcement unit

means any ... component of an educational agency or institution ... that is officially authorized or designated by that agency or institution to [e]nforce any local, State, or Federal law ... or [m]aintain the physical security and safety of the agency or institution.ò 34 C.F.R. § 99.8(a)(1)(i),(ii). ñA component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student.ò *Id.* at § 99.8(a)(2). In fact, ñ[r]ecords created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institutionò are not records of a law enforcement unit. *Id.* at § 99.8(b)(2)(ii). In addition, ñ[i]f a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a ... school official for use in a disciplinary proceeding, that copy is an óeducation recordô subject to FERPA if it is maintained by the ... school official....ò 60 F.R. 3464, 3466. Finally, ñ[e]ducation records ... do not lose their status as education records and remain subject to the Act, including the disclosure provisions ..., while in the possession of the law enforcement unit.ò 34 C.F.R. at § 99.8(c)(2).

The DOE also defines disciplinary action or proceeding as ñthe investigation, adjudication,***815** or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.ò *Id.* at § 99.3. With these definitions in mind, the DOE states that, ñ[i]n contrast to law enforcement unit records, the Department has been legally constrained to treat the records of a disciplinary action or proceeding as óeducation records' under FERPA (20 U.S.C. 1232g), that is, protected against non-consensual disclosure except in statutorily specified circumstances.ò 60 F.R. 3464, 3464. Finally, the DOE concludes that ñall disciplinary records, including those related to non-academic or criminal misconduct by students, are óeducation records' subject to FERPA.ò 60 F.R. 3464, 3465.

The agency draws a clear distinction between student disciplinary records and law enforcement unit records. The former are protected as ñeducation recordsò under the FERPA without regard to their content while the latter are excluded from the definition of ñeducation recordsò and receive no protection by the FERPA. In the records request that gave rise to the underlying suit and this appeal, *The Chronicle* asked Miami and Ohio State to please send ñcopies of records of all disciplinary proceedings handled by the university's internal judicial system for the calendar years 1995 and 1996.ò *The Chronicle Requests,* J.A. at 425ï 26. Even though some of the disciplinary proceedings may have addressed criminal offenses that also constitute violations of the Universities' rules or policies, the records from those proceedings are still protected ñeducation recordsò within the meaning of the FERPA.[FN15]

> FN15. The holding in *Bauer v. Kincaid,* 759 F.Supp. 575 (W.D.Mo.1991), does not affect this conclusion. Having closely reviewed *Bauer,* we believe that the records sought in that case, criminal investigation and incident records compiled and maintained by the Southwest Missouri State University Safety and Security Department, would likely fall within the *current* law enforcement unit records exception. In fact, the subsequent amendments to the FERPA and its regulations were likely designed to bring the *Bauer* documents clearly within the law enforcement unit records exception. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. § 99.8(a)(1)(i),(ii). It goes without saying, however, that the records sought in *Bauer,* incident and criminal investigation reports gathered and maintained by a campus safety and security department, are entirely different than the records sought by *The Chronicle* in this case, *to wit,* copies of records of all disciplinary proceedings handled by the university's internal judicial system.

F. The Right to Discovery

The Chronicle contends that the district court committed reversible error when it declined to allow discovery in this matter. In its motion to establish an order of procedure, *The Chronicle* asked the district court, pursuant to Fed.R.Civ.P. 56(f), for an order establishing a cut-off date for discovery, a deadline for motions, and a date for an evidentiary hearing. The district court denied this motion, concluding that there were no genuine issues of material fact. We agree.

[19][20] The district court's decision not to permit *The Chronicle* discovery before ruling on the motion for summary judgment and permanent injunction is reviewed by this Court for abuse of discretion. *See Good v. Ohio Edison Co.,* 149 F.3d 413, 422 (6th Cir.1998). An evidentiary hearing typically is required before an injunction may be granted, but a hearing is not necessary where no triable issues of fact are involved. *See United States v. McGee,* 714 F.2d 607, 613 (6th Cir.1983). ñThis court requires ó[a] party invoking [Rule 56(f)] protections [to] do so in good faith by affirmatively demonstrating ... how postponement of a ruling on the motion will enable him, by discovery or ***816** other means, to rebut the movant's showing of the absence of a genuine issue of fact.ô ò *Good,* 149 F.3d at 422 (citing *Emmons v. McLaughlin,* 874 F.2d 351, 356 (6th Cir.1989) (additional citations omitted)).

[21] *The Chronicle* lists three areas in which permitting discovery could have led to questions of material fact. *The Chronicle* contends that a close review of the UDB proceedings would have shed light on whether any or all of the disciplinary records generated are ñeducation recordsò or ñlaw enforcement recordsò within the meaning of FERPA. This question is answered by law not by fact. The Universities and the DOE conceded that some disciplinary proceedings address criminal conduct; through deference to the DOE's rules and regulations, we conclude as a matter of law that such records are education records nonetheless. Next, *The Chronicle* contends that additional discovery would have allowed it to test the DOE's claim of irreparable harm. As we discuss below, based upon the facts in the record, the harm in releasing student disciplinary records was indeed irreparable and no amount of discovery could possibly change that. The district court did not abuse its discretion in denying discovery. Finally, *The Chronicle* argues that it might have uncovered facts refuting the DOE's claim that criminal statistic availability satisfied *The Chronicle's* First Amendment rights. This information is irrelevant because student disciplinary proceedings are not criminal proceedings. The Constitution does not guarantee any rights to the records relating to student disciplinary proceedings.

The district court was faced with questions of law and additional discovery would not aid in the resolution of those questions. Accordingly, the district court did not abuse its discretion when it denied *The Chronicle's* motion for discovery and a hearing.

G. Injunctive Relief

The district court permanently enjoined the Universities ñfrom releasing student disciplinary records or any ópersonally identifiable informationô contained therein, as defined in [the] FERPA and its corresponding regulations, except as otherwise expressly permitted under [the] FERPA.ò *The Chronicle* contends that the DOE failed to establish the necessary prerequisites to secure a permanent injunction. It follows, according to *The Chronicle,* that the district court abused its discretion in granting such extraordinary relief without sufficient support.

[22][23] ñIn order to obtain either a preliminary or permanent injunction, [a party] must demonstrate that failure to issue the injunction is likely to result in irreparable harm.ò *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1068 (6th Cir.1998). In addition, the party seeking injunctive relief generally must show that there is no other adequate remedy at law. *See id.* at 1067; *see also Weinberger v. Romero–Barcelo,* 456 U.S. 305, 311ï 320, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982) (ñThe Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.ò) (citations omitted). If injunctive relief is proper, it should be no broader than necessary to remedy the harm at issue. *Kallstrom,* 136 F.3d at 1069.

[24] As an initial matter, the DOE contends that irreparable harm is presumed because the FERPA statutory scheme authorizes the government to obtain injunctive relief to prevent violations. In support of this proposition, the DOE cites ***817***CSX Transp., Inc. v. Tennessee State Bd. of Equalization,* 964 F.2d 548, 551 (6th Cir.1992), and other cases from the Eighth and Ninth Circuits. *See, e.g., United States v. Odessa Union,* 833 F.2d 172, 175 (9th Cir.1987); *Burlington Northern R.R. v. Bair,* 957 F.2d 599, 601 (8th Cir.1992). *CSX* held that when:

> Congress has expressly authorized the granting of injunctive relief to halt or prevent a violation of [a statute], traditional equitable criteria do not govern the issuance of preliminary injunctions under [that statute]. In order to issue a preliminary injunction under [the statute], a court must determine only whether there is ñreasonable causeò to believe that a violation of [the statute] has occurred or is about to

occur.

964 F.2d at 551 (citations omitted). However, the statute in *CSX* ñexpressly conferred jurisdiction on United States district courts ótо grant such mandatory and prohibitive injunctive relief ... as may be necessary to prevent, restrain, or terminateô any violations of the section.ò *Id.* at 550.[FN16] The Eighth and Ninth Circuits interpreted identical or similar language.

> FN16. The original section of the statute involved in *CSX* expressly provided for injunctive relief. *See* § 306(2) of the Railroad Revitalization and Regulatory Reform Act of 1976, originally codified at 49 U.S.C. § 26c (1976). When the Act was recodified at 49 U.S.C. § 11503(c), the express authority to enjoin was omitted from the statute, but Congress stated that language changes that occurred during recodification were not intended to be substantive. Therefore, the court held that § 11503(c) still expressly granted ñthe authority to district courts to issue injunctive relief to prevent or terminate violations.ò *CSX,* 964 F.2d at 550.

When a recipient of funds fails to comply with the FERPA, Congress permits the Secretary of Education to ñtake any ... action authorized by law with respect to the recipient.ò 20 U.S.C. § 1234c(a)(4). While this provision certainly permits the DOE to bring a cause of action, including, *inter alia,* an action for injunctive relief, it does not expressly authorize the granting of injunctive relief to halt or prevent a violation of the FERPA. *Cf. CSX Transportation, Inc.,* 964 F.2d at 551. Given the assortment of remedies available in the FERPA, Congress by no means foreclosed the exercise of equitable discretion. *Compare Weinberger,* 456 U.S. at 311ï320, 102 S.Ct. 1798 (providing a thorough discussion of instances when courts should and should not balance equitable considerations) *with United States v. Szoka,* 260 F.3d 516, 523ï24 (6th Cir.2001)(discussing a statute in which Congress foreclosed the exercise of equitable discretion). Accordingly, the ñreasonable causeò standard enunciated in *CSX* does not apply to the instant case and we must embrace our traditional role in equity.[FN17]

> FN17. Because the statute in this case clearly is distinguishable from the statute in *CSX,* we express no opinion as to the validity of the ñreasonable cause standardò in general.

Our first step is to determine whether ñfailure to issue the injunction is likely to result in irreparable harm.ò *Kallstrom,* 136 F.3d at 1068. With that in mind, we consider the express purposes of the FERPA as well as the parties and interests involved in this litigation.

[25] One explicit purpose of the FERPA is ñto protect [students'] rights to privacy by limiting the transferability of their records without their consent.ò Joint Statement, 120 Cong. Rec. 39858, 39862 (1974).[FN18] Congress effectuated this purpose by providing that: ñNo funds shall ***818** be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records.ò 20 U.S.C. § 1232g(b)(2).[FN19] Therefore, the Universities' continued release of student disciplinary records clearly will injure the reputations of the students involved, including the perpetrator, the victim and any witnesses. In addition, the inherent privacy interest that Congress sought to protect will be greatly diminished. Once personally identifiable information has been made public, the harm cannot be undone.

> FN18. Ten years before Congress enacted the FERPA, the Supreme Court surmised that ñthe First Amendment has a penumbra where privacy is protected from governmental intrusion.ò *Griswold v. Connecticut,* 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). Accordingly, certain student privacy interests are recognized in the FERPA and may find protection in the Constitution.

> FN19. As we noted above, this provision creates a binding obligation on schools that accept federal funds not to release education records without consent. The FERPA provisions permit the DOE to enforce this obligation.

[26][27] ñWhen a specific interest and right has been conferred upon the United States by statute, the remedies and procedures for enforcing that right are not to be narrowly construed so as to prevent the effectuation of the policy declared by Congress.ò *United States v. York,* 398 F.2d 582, 586 (6th Cir.1968). The

United States (and the DOE) brought this action to enforce the Universities' guarantees and to protect the privacy interests of the students at those Universities.[FN20] To be sure, ours is a ñgovernment of the people, by the people, for the people.ò A. Lincoln, *Gettysburg Address* (1863) (quoted in *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 821, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995)). It logically follows that if Congress values the privacy interests acknowledged in the Congressional record, and authorizes the DOE to enforce those privacy interests, it must also contemplate that the DOE experiences the irreparable harm suffered by those students whose privacy interests are violated. *See generally United States v. City and County of San Francisco,* 310 U.S. 16, 29ï 31, 60 S.Ct. 749, 84 L.Ed. 1050 (1940) (interpreting a statute that allowed the United States to enjoin San Francisco, presumably for the benefit of the City's citizens, without requiring the United States to show irreparable harm); *see also Board of Comm'rs of Jackson County v. United States,* 308 U.S. 343, 349, 60 S.Ct. 285, 84 L.Ed. 313 (1939) (recognizing the United States's authority to enforce a treaty and in so doing, sue on behalf of a Native American who had been improperly taxed by Jackson County, Kansas). Viewing this conclusion in conjunction with the fact that Congress granted the DOE authority to sue, presumably for injunctive relief, to enforce the Universities' obligations under the FERPA, we find that the DOE will suffer irreparable harm if the Universities are not enjoined from releasing the subject student disciplinary records.

> FN20. Congress did not establish individually enforceable rights through the FERPA. *Gonzaga University,* ïïï U.S. ïïïï, slip op. at 12ï1 3, 122 S.Ct. 2268, 536 U.S. 273, at ïïïï, 122 S.Ct. 2268, 153 L.Ed.2d 309, at ïïïï, 2002 WL 1338070, at *9. Instead, Congress acknowledged students' and parents' privacy interests as a whole and empowered the DOE to protect those interests when a University systemically ignores its obligations under the FERPA. *See id. See also* 20 U.S.C. § 1232g (b)(1)-(2), § 1234c (a).

[28] Moreover, millions of people in our society have been or will become students at an educational agency or institution, and those people are the object of FERPA's privacy guarantees. Accordingly, systematic violations of the FERPA provision result in appreciable consequences to the public and no doubt are a matter of public interest. *See Virginian Railway v. System Federation No. 40,* 300 U.S. 515, 552, 57 S.Ct. 592, 81 L.Ed. 789 (1937). In cases involving the public interest as defined or protected by an Act of ***819** Congress, courts have long held that equitable discretion ñmust be exercised in light of the large objectives of the Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases.ò *Hecht,* 321 U.S. at 331, 64 S.Ct. 587. ñCourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.ò *Virginian Railway,* 300 U.S. at 552, 57 S.Ct. at 601 (citations omitted). Based on this broad grant of equitable discretion, we conclude that the United States must represent the public interests at stake. In light of the noble and broad objectives of the FERPA and the irreparable harm to the public interest, injunctive relief was appropriate in this case.

[29][30] *The Chronicle* also argues that 20 U.S.C. § 1232a prevents the district court's injunction. In sum, the statute states that no provision ñshall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over ... any educational school system.ò *Id.* ñ[T]his concern was directed primarily at the possibility of [DOE's] assuming the role of a national school board,ò but it may also apply if a federal court plays ñan overly active role in supervisingò a state's expenditures of federal funding. *Wheeler v. Barrera,* 417 U.S. at 416ï 19, 94 S.Ct. 2274; *see also Crawford v. Pittman,* 708 F.2d 1028, 1036 (5th Cir.1983). The district court does not take an overly active role in the Universities' function and the injunction does not involve supervision of a state's expenditures. ñOur decision requires only that [the Universities] fulfill the contract[s] [they] made when [they] chose to receive federal moneys under the Act.ò *Crawford,* 708 F.2d at 1036. We reject *The Chronicle's* argument under § 1232a.

Based upon the foregoing analysis, we hold that continued release of student disciplinary records will irreparably harm the United States and the DOE. Before a permanent injunction issues, however, we must determine whether there is any other adequate remedy

at law. *Kallstrom,* 136 F.3d at 1067. *The Chronicle* contends that money damages or administrative remedies will satisfy the injuries suffered by the DOE. Even if equitable relief is appropriate, *The Chronicle* believes that the district court's blanket injunction is too broad.

[31] ñ[A]n injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate.ò *Basicomputer Corp.,* 973 F.2d at 511. In general, a loss of privacy and injury to reputation are difficult to calculate. These difficulties are compounded by the fact that the DOE or *The Chronicle* have no way of knowing how many people would require compensation and how much money would compensate each injury. Moreover, we have already concluded that the harm suffered by the myriad number of students affected by the continued release of student disciplinary records is irreparable, and by definition, not compensable. Accordingly, money damages are insufficient relief.

[32] Second, none of the administrative remedies authorized by the FERPA would stop the violations. The Ohio Supreme Court's decision in *Miami* serves as precedent to compel Miami and Ohio State to release student disciplinary records in the absence of a federal court injunction. Thus, it would be nearly impossible to obtain voluntary compliance under 20 U.S.C. § 1234c(a)(3). Cutting off federal funding under 20 U.S.C. § 1234c(a)(1) would be detrimental to the Universities' educational purpose and would injure more students than it would protect. Furthermore,***820** it would not guarantee compliance with the purpose of the FERPA because the defendants would still feel constrained to follow the Ohio Supreme Court's interpretation of the Act.

[33] Next, a cease and desist order under 20 U.S.C. § 1234c(a)(2) is inadequate for two reasons. First, it requires new enforcement measures each time a violation occurs. Second, as the district court noted, a cease and desist order is not self-executingð it can only be enforced by withholding funds or by referring the matter to the Attorney General for enforcement. We have already noted that withholding funds is inadequate and piecemeal enforcement leads to intermittent violative releases that would otherwise be protected by permanent injunctive relief. Having balanced the alternatives, the district court's permanent injunction was not an abuse of discretion.

[34] Finally, *The Chronicle* contends that the district court's injunction was too broad. Courts regularly have afforded much more invasive relief, with less consideration, as a result of state violations of spending conditions. *See, e.g., King,* 392 U.S. at 332ï 33, 88 S.Ct. 2128 (striking a state regulation as invalid because it defined a term in a manner that was inconsistent with the spending clause condition); *Townsend v. Swank,* 404 U.S. 282, 285ï 86, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971) (striking a state statute without even addressing the form of relief); *Rosado v. Wyman,* 397 U.S. 397, 420ï 22, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) (enjoining the release of federal welfare funds). Over the years, courts have expressed a reluctance to require states to expend a great deal of their own revenue to comply with federal spending conditions, *see Rosado,* 397 U.S. at 421, 90 S.Ct. 1207, and have declined to enforce open-ended and potentially burdensome obligations, *see Pennhurst State School and Hospital,* 451 U.S. at 29, 101 S.Ct. 1531. Instead, courts generally seem to prefer prospective relief like the permanent injunction issued in this case. *See id.* Because this injunction is crafted to protect the privacy interests embodied in the FERPA, and is narrowly tailored to enjoin only the release of student disciplinary records or any personally identifiable information contained therein, except as otherwise expressly permitted under the FERPA, we conclude that the district court did not abuse its discretion in granting such relief.[FN21]

> FN21. We note that if Congress changes the definition of ñeducation recordsò or otherwise alters the balance struck in the FERPA such that a different interpretation of student disciplinary records must be reached, or the DOE changes its interpretation of law enforcement unit records, *The Chronicle* or the Universities may move the district court to lift the injunction. Moreover, if the Universities choose to discontinue their receipt of federal education funds, then they may also move the court to lift the injunction and release student disciplinary records to the extent authorized by law.

H. The First Amendment

[35] *The Chronicle* contends that there is a First Amendment right of access to student disciplinary

records detailing criminal activities and punishment. To the extent that the permanent injunction limits access to those documents, *The Chronicle* argues that it constitutes a violation of *The Chronicle's* First Amendment rights.

[36] ñIt has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.ò *Branzburg v. Hayes,* 408 U.S. 665, 684ï 85, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Moreover, ñ[t]he Constitution itself is [not] a Freedom of Information Act,ò permitting the release of government records at the will of the public. ***821***Houchins v. KQED, Inc.,* 438 U.S. 1, 14, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978). ñNeither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.ò *Id.* at 15, 98 S.Ct. 2588.

[37] That being said, the Supreme Court repeatedly has recognized a First Amendment right of access to criminal trials, proceedings, and records. *Richmond Newspapers v. Virginia,* 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (ñthe right to attend criminal trials is implicit in the guarantees of the First Amendmentò).[FN22] As the Supreme Court explained, a qualified right of access attaches where (1) the information sought has ñhistorically been open to the press and general publicò; and (2) ñpublic access plays a significant positive role in the functioning of the particular process in question[.]ò *Press–Enterprise Co. v. Superior Court (Press–Enterprise II),* 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (applying this test and recognizing a qualified right of access to a preliminary hearing transcript in a criminal matter). Once the qualified First Amendment right of access attaches, it can ñbe overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.ò *Press–Enterprise Co. v. Superior Court (Press–Enterprise I),* 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). ñThe right of access is not absolute, however, despite these justifications for the open courtroom.ò *Brown & Williamson Tobacco Corp.,* 710 F.2d at 1179.

FN22. In the heat of these landmark Supreme Court decisions, this Court concluded that ñ[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.ò *Brown & Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d 1165, 1178 (6th Cir.1983) (vacating the lower court's order to seal certain F.T.C. documents filed in the court's record during a preenforcement challenge to proposed changes in cigarette testing) (citing *Richmond Newspapers,* 448 U.S. at 580 n. 17, 100 S.Ct. 2814 (noting that historically civil trials have been presumptively open, but declining to decide whether they enjoy a First Amendment right of access because the issue was not before the Court)), *cert. denied,* 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984). *See, e.g., Smith v. United States Dist. Court,* 956 F.2d 647, 650 (7th Cir.1992) (recognizing a right of access to civil proceedings).

From the outset, *The Chronicle* colors certain student disciplinary proceedings as criminal proceedings. First, *The Chronicle* notes that university disciplinary boards adjudicate various infractions of student rules and regulations which may include: underage drinking; physical and sexual assault; and theft and destruction of property. It then contends that, by hearing these cases, the university disciplinary boards interfere with the traditional criminal prosecutions that would otherwise remedy this criminal behavior. If these cases were instead handled through traditional criminal prosecutions, *The Chronicle* argues, then the First Amendment would undeniably require access to the underlying criminal trials, proceedings and records. That these ostensibly criminal activities are dressed up as student rule infractions does not change the fact that student disciplinary boards are adjudicating criminal matters, and those criminal matters have historically enjoyed open access to the press and general public.

In drawing these conclusions, *The Chronicle* omits a few important facts. University disciplinary proceedings are not criminal proceedings despite the fact that some behavior that violates a university's rules and regulations may also constitute a crime. For many reasons, student disciplinary proceedings do not ñafford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting***822** the charge, or to call his own witnesses to verify his version of the incident.ò *Goss v. Lopez,* 419

U.S. 565, 583, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Not only are students often denied the procedural due process protections cherished by our judicial system, they are also denied procedural finality. The protections against ñdouble jeopardyò do not attach to university disciplinary proceedings; therefore, as the Ohio State and Miami student handbooks explain, a student may be disciplined or sanctioned by the Universities and still be subject to local, state or federal criminal prosecution for the same offense. [FN23] This is true because student disciplinary proceedings govern the relationship between a student and his or her university, not the relationship between a citizen and ñThe People.ò Only the latter presumptively implicates a qualified First Amendment right of access to the proceedings and the records. *See Richmond Newspapers,* 448 U.S. at 580, 100 S.Ct. 2814; *Press Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735.

> FN23. *Code of Student Conduct,* Miami University, 3, J.A. 524; *Code of Student Conduct,* The Ohio State University, 85, J.A. 546. ñStudents are also advised that a disciplinary action by the University does not preclude the possibility that a separate criminal or civil prosecution may also follow, and that, conversely, questionable conduct in the non-University community may be grounds for the University's taking action as well.ò *Miami University Disciplinary Procedures,* originally submitted by *The Chronicle's* counsel in the *Miami* Ohio Supreme Court mandamus action, Tab 2, Exhibit 13, J.A. 175. The Miami University Disciplinary Board Summary occasionally reflects this mutuality. *See, e.g.,* Tab 2, Exhibit 14, J.A. 177, 178, 179, 184.

In *Cincinnati Gas and Elec. Co. v. General Elec. Co.,* the district court ordered the parties to participate in a summary jury trial which was to be closed to the press and the public. 854 F.2d 900, 901ï 02 (6th Cir.1988), *cert. denied,* 489 U.S. 1033, 109 S.Ct. 1171, 103 L.Ed.2d 229 (1989). Various newspapers moved to intervene for the limited purpose of challenging closure of the summary jury trial proceeding. *Id.* at 902. The district court denied the newspapers' motion and the newspapers appealed. On appeal, the newspapers argued, *inter alia,* that ñthe summary jury proceeding is analogous in form and function to a civil or criminal trial on the merits, and therefore, the First Amendment right of access which encompasses civil and criminal trial ... proceedings also encompasses the summary jury proceedings.ò *Id.* at 902. Rejecting the analogy, this Court pointed to the ñmanifold differencesò between summary jury proceedings and a ñreal trial.ò *Id.* at 904. In addition to several procedural differences similar to those in the case *sub judice,* the Court found it ñimportant to note that the summary jury trial does not present any matter for adjudication *by the court,*ò despite the fact that the district court judge ordered the proceeding which takes place in a federal courthouse and is overseen by a federal judge. *Id.; see also In re Cincinnati Enquirer,* 94 F.3d 198 (6th Cir.1996), *cert. denied,* 520 U.S. 1104, 117 S.Ct. 1107, 137 L.Ed.2d 309 (1997).

Similarly, while student disciplinary proceedings may resemble a criminal trial in some limited respects and while certain university rule and regulation violations may also constitute criminal behavior, student disciplinary proceedings do not present matters for adjudication by a court of law. *See First Amendment Coalition v. Judicial Inquiry and Review Board,* 784 F.2d 467, 471ï 77 (3d Cir.1986) (*en banc*) (denying right of access to judicial disciplinary proceedings and records unless the records subsequently are filed in a court of law); *Jessup v. Luther,* 277 F.3d 926, 928ï 29 (7th Cir.2002) (noting that settlement agreements and arbitrations are private ***823** documents subject to a right of access only when filed in the court record); *United States v. El–Sayegh,* 131 F.3d 158, 162ï 63 (D.C.Cir.1997) (holding that there is no First Amendment or common law right of access to documents which played no role in a judicial decision). Therefore, we decline to evaluate student disciplinary proceedings with the same deferential eye toward First Amendment access as we would government criminal proceedings.

With that in mind, we turn to the two-part test applied by courts when determining whether a qualified First Amendment right of access attaches in a particular situation. First, we must consider whether student disciplinary proceedings and records ñhistorically [have] been open to the press and general public.ò *Press–Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. The question is as easily answered as it is raised. Student disciplinary proceedings have never been open to the public and until the Ohio Supreme Court decision in *Miami,* they were presumed to be protected by the FERPA. This conclusion is supported by the

fact that *The Chronicle* filed its record request with the Universities a mere five days after the Ohio Supreme Court concluded that student disciplinary records were not ñeducation recordsò within the meaning of the FERPA. Moreover, if student disciplinary proceedings were historically open to the public, then a request ñfor records of all disciplinary proceedings handled by the university's internal judicial system for calendar years 1995 and 1996ò would not have sparked so much controversy. Clearly student disciplinary proceedings do not satisfy the first prong of the test. *See* *First Amendment Coalition,* 784 F.2d at 471ï 77.

In addition, ñpublic access [does not] play[ ] a significant positive role in the functioning of the particular process in question[.]ò *Press–Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. A university is an ñacademic institution, not a courtroom or administrative hearing room.ò *Board of Curators v. Horowitz,* 435 U.S. 78, 88, 98 S.Ct. 948, 55 L.Ed.2d 124 (1977). As we noted earlier, student disciplinary proceedings exclusively affect the relationship between a particular student and the university. Not only do the rules, regulations and proceedings define the terms of that relationship, they also serve as an effective part of the teaching process. *See* *Goss,* 419 U.S. at 583, 95 S.Ct. 729. Public access will not enhance this relational determination, nor will it aid in the student's education. In fact, due to inevitably heightened public scrutiny, public access to disciplinary proceedings may force universities to afford students more procedural due process protections than are required by the Constitution. As the Supreme Court noted, enhanced procedural requirements ñmay not only make [student disciplinary proceedings] too costly as a regular disciplinary tool but [it may] also destroy [the proceedings'] effectiveness as part of the teaching process.ò *Id.* We find that public access will not aid in the functioning of traditionally closed student disciplinary proceedings; accordingly, *The Chronicle* does not enjoy a qualified First Amendment right of access to such proceedings.[FN24]

FN24. Even if a qualified First Amendment right of access attached to these proceedings, which it clearly does not, the common law recognizes various exceptions to the right of access including certain privacy rights of participants or third parties. *Brown & Williamson Tobacco Corp.,* 710 F.2d at 1179 (citing *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978)). These privacy rights are of particular import when recognized and protected by federal statutory provisions like the FERPA. *See In re The Knoxville News–Sentinel Co., Inc.,* 723 F.2d 470, 476 (6th Cir.1983) (holding that it was appropriate to seal banking records when Congress clearly mandated the privacy of those records).

***824** Finally, a denial of access to student disciplinary records does not prevent *The Chronicle* from obtaining information about crime on university campuses. Pursuant to the district court's injunction, *The Chronicle* may still request student disciplinary records that do not contain personally identifiable information. Nothing in the FERPA would prevent the Universities from releasing properly redacted records. In addition, the Student Rightï toï Know and Campus Security Act requires universities to publish statistics concerning the occurrence of various campus crimes including: murder; sex offenses (forcible or nonforcible); violent hate crimes; robbery; burglary; motor vehicle theft; aggravated assault; arson; weapons violations; liquor-law violations; and drug related violations. *See* 20 U.S.C. § 1092(f)(1)(F). *The Chronicle* indeed has access to student disciplinary records and crime related statistics, just not the unfettered access it hoped to secure.

III. CONCLUSION

Because the district court's grant of summary judgment was consistent with legal precedent and sound statutory interpretation, and because the district court did not abuse its discretion in denying discovery or granting a permanent injunction, we AFFIRM.

C.A.6 (Ohio),2002.
U.S. v. Miami University
294 F.3d 797, 166 Ed. Law Rep. 464, 30 Media L. Rep. 2057, 2002 Fed.App. 0213P

END OF DOCUMENT

CONCURRENCE IN SENATE AMENDMENTS
AB 2525 (Education Committee)
As Amended August 27, 2004
2/3 vote. Urgency

ASSEMBLY:	74-0	(May 17, 2004)	SENATE:	39-0	(August 27, 2004)

Original Committee Reference: ED.

SUMMARY : This bill is the State Department of Education's (SDE) annual omnibus clean-up bill to correct technical errors in statute, update cross references and delete obsolete references.

The Senate amendments are technical, clarifying and non-controversial.

AS PASSED BY THE ASSEMBLY , this bill was an omnibus education bill that made non-controversial and technical changes to the Education Code.

FISCAL EFFECT : According to the Senate Appropriations Committee, no new costs and minor savings related to the code clean-up provisions.

COMMENTS : Each year SDE sponsors a bill to make technical and conforming changes to the Education Code and Budget control language. This bill is widely reviewed and any item that raises concerns is removed from this bill in the interest of obtaining and maintaining consensus.

This bill makes a number of non-controversial, conforming, and technical changes to various education statutes and Budget items.

Analysis Prepared by : Dee Brennick / ED. / (916) 319-2087

FN: 0008935

acter in a play that other actors on stage are supposed by dramatic convention not to hear. 2. A parenthetical digression.

aside from *prep.* Except for : EXCLUDING.

as if *conj.* 1. In the same way that it would be if <looked *as if* it would rain> 2. That <seemed *as if* they'd never leave>

as·i·nine (ăs′ə-nīn′) *adj.* [Lat. *asininus,* of an ass < *asinus,* ass.] 1. Marked by failure to exercise prudent judgment or common sense : SILLY <*asinine* behavior> 2. Of, relating to, or like an ass. —**as′i·nine′ly** *adv.* —**as·i·nin′i·ty** (-nĭn′ə-tē) *n.*

ask (ăsk, äsk) *v.* **asked, ask·ing, asks.** [ME *asken* < OE *āscian.*] —*vt.* 1. To put a question to. 2. To seek information about : inquire about. 3. To request of or for : SOLICIT <*asking* your help> 4. a. To require or call for. b. To expect or demand <*ask* a lot of a friend> 5. To invite. 6. *Archaic.* To publish, as marriage banns. —*vi.* 1. To inquire <*asked* about my job> 2. To make a request <*asked* for more money>

a·skance (ə-skăns′) *adv.* [Orig. unknown.] 1. With a side or oblique glance : SIDEWAYS. 2. With disapproval, skepticism, or distrust.

a·skew (ə-skyōō′) *adj.* & *adv.* [Prob. A-[2] + SKEW.] To one side : AWRY.

a·slant (ə-slănt′) *adj.* & *adv.* At a slant : OBLIQUELY. —*prep.* Obliquely over or across.

a·sleep (ə-slēp′) *adj.* 1. In a condition of sleep. 2. Inactive : dormant. 3. Numb <My hand is *asleep.*> 4. Dead. —*adv.* Into a state of sleep.

as long as *conj.* 1. Since <*As long as* we're here, let's visit.> 2. On the condition that <I'll go *as long as* I can drive.>

a·slope (ə-slōp′) *adv.* & *adj.* At a slope or slant.

a·so·cial (ā-sō′shəl) *adj.* 1. Avoiding the company of others. 2. Unable to interact adequately with others.

as of *prep.* On : at <in residence *as of* Sept. 15>

asp (ăsp) *n.* [ME *aspide* < Lat. *aspis* < Gk.] Any of several poisonous Old World snakes, as the small cobra, *Naja haje,* or the horned viper, *Cerastes cornutus,* both of Africa and Asia Minor.

as·par·a·gus (ə-spăr′ə-gəs) *n.* [Lat. < Gk. *asparagos.*] 1. Any of several plants of the genus *Asparagus,* indigenous to Eurasia, with small scales or needlelike branchlets rather than true leaves, esp. the widely cultivated species *A. officinalis.* 2. The edible, succulent young shoots of the asparagus.

asparagus beetle *n.* A small, spotted beetle, *Crioceris asparagi,* that infests and damages asparagus plants.

asparagus fern *n.* A vine indigenous to southern Africa *Asparagus plumosus,* with fernlike stems.

as·par·tame (ăs′pər-tām′, ə-spär′-) *n.* [ASPART(IC ACID) + (PHENYL)A(LANINE) + M(ETHYL) + E(STER).] An artificial sweetener, $C_{14}H_{18}N_2O_5$, derived from aspartic acid.

as·par·tic acid (ə-spär′tĭk) *n.* [< ASPARAGUS (from its being obtained by hydrolysis from an amino acid found in asparagus).] A nonessential amino acid, $C_4H_7NO_4$, occurring esp. in young sugar cane and sugar-beet molasses.

as·par·to·kin·ase (ə-spär′tō-kī′nās′) *n.* [ASPART(IC ACID) + KINASE.] An enzyme that catalyzes aspartic acid phosphorylation by ATP.

as·pect (ăs′pĕkt′) *n.* [ME < Lat. *aspectus,* a view, p.part. of *aspicere,* to look at : *ad-,* toward + *specere,* to look.] 1. A particular facial expression : MIEN <a judge of stern *aspect*> 2. Appearance to the eye, esp. when seen from a specific view. 3. The way in which an idea, problem, or situation is considered mentally. 4. A position facing or commanding a given direction : EXPOSURE. 5. A side or surface facing in a particular direction <the dorsal *aspect* of the body> 6. The configuration of the stars or planets in relation to one another or to an observer, held by astrologers to influence human affairs. 7. A category of the verb denoting primarily the relation of the action to the passage of time, esp. in reference to completion, duration, or repetition. 8. *Archaic.* A gaze : look.

aspect ratio *n.* The width-to-height ratio of a television image.

as·pen (ăs′pən) *n.* [ME *aspe* < OE *æsp.*] A tree of the genus *Populus,* bearing leaves attached by flattened leafstalks so that they flutter readily in the wind. —*adj.* 1. Of or relating to an aspen. 2. Trembling like the leaves of an aspen.

as·per·ate (ăs′pə-rāt′) *vt.* **-at·ed, -at·ing, -ates.** [Lat. *asperare, asperat-* < *asper,* rough.] To make uneven : ROUGHEN.

as·per·ges (ə-spûr′jēz) *n.* [Lat., from the phrase *asperges me,* 'you will sprinkle me, the first words of the rite.] *Rom. Cath. Ch.* A short rite preceding the High Mass on Sundays that consists of sprinkling the altar, clergy, and congregation with holy water.

as·per·gill (ăs′pər-jĭl) *also* **as·per·gil·lum** (ăs′pər-jĭl′əm) *n., pl.* **-gills** *also* **-gil·la** (-jĭl′ə) [NLat. *aspergillum* < Lat. *aspergere,* to sprinkle. —see ASPERSE.] *Rom. Cath. Ch.* An instrument, as a brush or a perforated container, used for sprinkling holy water.

as·per·gil·li (ăs′pər-jĭl′ī′) *n. pl. of* ASPERGILLUS.

as·per·gil·lo·sis (ăs′pər-jə-lō′sĭs) *n.* [ASPERGILL(US) + -OSIS.] An infectious disease esp. of the skin or lungs, caused by certain fungi of the genus *Aspergillus.*

as·per·gil·lum (ăs′pər-jĭl′əm) *n. var. of* ASPERGILL.

as·per·gil·lus (ăs′pər-jĭl′əs) *n., pl.* **-gil·li** (-jĭl′ī′) [NLat. < *aspergillum,* aspergill, from its resemblance to an aspergill brush.] Any of various fungi of the genus *Aspergillus,* which includes many common molds.

as·per·i·ty (ă-spĕr′ĭ-tē) *n.* [Lat. *asperitas* < *asper,* rough.] 1. Roughness or harshness, as of surface, weather, or sound. 2. Ill temper : IRRITABILITY.

as·perse (ə-spûrs′) *vt.* **-persed, -pers·ing, -pers·es.** [Lat. *aspergere, aspers-,* to sprinkle : *ad-,* toward + *spergere,* to strew.] 1. To spread untrue charges or damaging insinuations against : DEFAME. 2. To sprinkle, as with holy water.

as·per·sion (ə-spûr′zhən, -shən) *n.* 1. A defamatory report or remark : CALUMNY. 2. The act of defaming. 3. A sprinkling, esp. with holy water.

as·phalt (ăs′fôlt′) *also* **as·phal·tum** (ăs-fôl′təm) *or* **as·phal·tus** (-təs) *n.* [ME *aspalt* < Med. Lat. *asphaltus* < Gk. *asphaltos.*] 1. A brownish-black solid or semisolid mixture of bitumens obtained from native deposits or as a petroleum by-product and used in roofing, paving, and waterproofing. 2. Mixed asphalt and crushed gravel or sand, used for roofing or paving. —*vt.* **-phalt·ed, -phalt·ing, -phalts.** To pave or cover with asphalt.

as·phal·tite (ăs′fôl-tīt′) *n.* A solid, dark-colored complex of hydrocarbons, found in natural veins and deposits.

as·phal·tum (ăs-fôl′təm) *or* **as·phal·tus** (-təs) *n. vars. of* ASPHALT.

a·spher·ic (ā-sfĭr′ĭk, ă-sfĕr′-) *also* **a·spher·i·cal** (-ĭ-kəl) *adj.* Varying only slightly from sphericity and having only slight aberration, as a lens.

as·pho·del (ăs′fĕ-dĕl′) *n.* [Lat. *asphodelus* < Gk. *asphodelos.*] Any of several plants of the genera *Asphodeline* and *Asphodelus* of the Mediterranean region, with white or yellow flower clusters.

as·phyx·i·a (ăs-fĭk′sē-ə) *n.* [Gk. *asphuxia,* stopping of the pulse : *a-,* without + *sphuxis,* heartbeat < *sphuzein,* to throb.] Unconsciousness or death resulting from lack of oxygen.

as·phyx·i·ant (ăs-fĭk′sē-ənt) *adj.* Causing or tending to cause asphyxia. —*n.* An asphyxiant substance or condition.

as·phyx·i·ate (ăs-fĭk′sē-āt′) *v.* **-at·ed, -at·ing, -ates.** —*vt.* To cause asphyxia in : SMOTHER. —*vi.* To undergo asphyxia : SUFFOCATE. —**as·phyx′i·a′tion** *n.* —**as·phyx′i·a′tor** *n.*

as·pic[1] (ăs′pĭk) *n.* [Fr., asp (from the resemblance of the jelly's coloration to an asp's). —see ASPIC[2].] 1. A molded dish of jellied meat, fish, vegetables, or fruit. 2. A jellied garnish of meat or fish stock.

as·pic[2] (ăs′pĭk) *n.* [Fr. < OFr., alteration of *aspe* < Lat. *aspis* <Gk.] *Archaic.* An asp.

as·pi·dis·tra (ăs′pĭ-dĭs′trə) *n.* [NLat. *Aspidistra,* genus name < Gk. *aspis,* shield.] An Asian plant of the genus *Aspidistra,* esp. *A. lurida,* with long, tough, evergreen leaves and small brownish flowers, widely grown as a house plant.

as·pi·rant (ăs′pər-ənt, ə-spīr′-) *n.* One who aspires, esp. for advancement, honors, or a high position. —*adj.* Aspiring for position, recognition, or distinction.

as·pi·rate (ăs′pə-rāt′) *vt.* **-rat·ed, -rat·ing, -rates.** [Lat. *aspirare, aspirat-,* to breathe on : *ad-* to + *spirare,* to breathe.] 1. a. To pronounce (a vowel or word) with the initial release of breath associated with English *h,* as in *Halloween.* b. To follow (a consonant, esp. a stop consonant) with a puff of breath that is clearly audible before the next sound begins, as in English *p, t,* and *k* before vowels. 2. *Med.* a. To remove (liquids or gases) with an aspirator. b. To draw (foreign matter, esp. food particles) into the lungs with the breath. —*n.* (-pər-ĭt). 1. The speech sound represented by English *h.* 2. The puff of air accompanying the release of a stop consonant. 3. A speech sound followed by a puff of breath.

as·pi·ra·tion (ăs′pə-rā′shən) *n.* 1. Expulsion of breath in speech. 2. a. The pronunciation of a consonant with an aspirate. b. An aspirate. 3. *Med.* a. Removal of liquids or gases with an aspirator. b. A drawing of foreign matter in the upper respiratory tract into the lungs with the breath. 4. a. A strong desire for high achievement : AMBITION. b. An object of such desire : GOAL.

as·pi·ra·tor (ăs′pə-rā′tər) *n.* 1. A device that removes liquids or gases from a space by suction, esp. one used medically to evacuate a bodily cavity. 2. A suction pump used to create a partial vacuum.

as·pir·a·to·ry (ə-spīr′ə-tôr′ē, -tōr′ē) *adj.* Of, relating to, or suited for breathing or suction.

as·pire (ə-spīr′) *vi.* **-pired, -pir·ing, -pires.** [ME *aspiren* < Lat. *aspirare,* to desire. —see ASPIRATE.] 1. To have a fervent hope or ambition <*aspired* to be a prima ballerina> 2. To strive toward an end <*aspiring* to great wealth> 3. *Archaic.* To rise upward : SOAR. —**as·pir′er** *n.* —**as·pir′ing·ly** *adv.*

as·pi·rin (ăs′pə-rĭn, -prĭn) *n.* [Orig. a trademark.] 1. A white crystalline compound of acetylsalicylic acid, $CH_3COOC_6H_4COOH$, used as an antipyretic and analgesic. 2. Aspirin in tablet or liquid form.

a·squint (ə-skwĭnt′) *adv.* & *adj.* [ME.] With a sidelong glance.

ass (ăs) *n., pl.* **ass·es** (ăs′ĭz) [ME *asse* < OE *assa.*] 1. Any of several hoofed mammals of the genus *Equus,* closely related to the horses and zebras and including the domesticated donkey. 2. A foolish or stupid person : DOLT.

as·sa·gai *or* **as·se·gai** (ăs′ə-gī′) *n.* [OFr. *azagaie;* prob. < OSp. *azagaya* < Ar. *az-zaghāyah* : *al,* the + Berber *zaghāyah,* spear.] 1. A light spear or javelin, often with an iron tip, used by southern African tribesmen. 2. A tree, *Curtisia faginea* of southern Africa, yielding wood used for making assagais.

a·sa·i[1] (ä-sī′) *n.* [Port. (Brazil) *assaí* < Tupi *assahi.*] 1. A tropical South American palm tree of the genus *Euterpe,* with edible, fleshy purple fruit. 2. A beverage made from the fruit of the assai.

a·sa·i[2] (ä-sē′) *adv.* [Ital. < VLat. **ad satis,* to sufficiency. —see ASSET.] *Mus.* Very. —Used in tempo directions.

as·sail (ə-sāl′) *vt.* **-sailed, -sail·ing, -sails.** [ME *assailen* < OFr. *assaillier* < VLat. **assalire,* var. of Lat. *assilire,* to jump on : *ad-,* onto + *salire,* to jump.] 1. To attack with or as if with violent blows : ASSAULT. 2. To attack verbally, as with ridicule. —**as·sail′a·ble** *adj.* —**as·sail′a·ble·ness** *n.* —**as·sail′er** *n.* —**as·sail′ment** *n.*

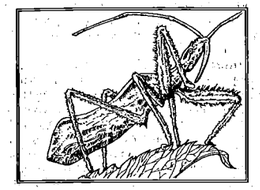
as·sail·ant (ə-sā′lənt) *n.* One who assails another.

As·sam·ese (ăs′ə-mēz′, -mēs′) *adj.* Of or relating to Assam, its people, or their language. —*n., pl.* **Assamese.** 1. A native or resident of Assam. 2. The Indic language of the Assamese.

as·sas·sin (ə-săs′ĭn) *n.* [Fr. < Med. Lat. *assassinus* < Ar. *ḥashshāshīn,* user of hashish < *ḥashīsh,* hashish.] 1. A murderer, esp. one who carries out a plot to kill a prominent person. 2. **Assassin.** A member of a secret Muslim order that killed Crusaders and others.

as·sas·si·nate (ə-săs′ə-nāt′) *vt.* **-nat·ed, -nat·ing, -nates.** 1. To murder (a prominent person). 2. To destroy or injure (e.g., an opponent's character) treacherously. —**as·sas′si·na′tion** *n.* —**as·sas′si·na′tive** *adj.* —**as·sas′si·na′tor** *n.*

assassin bug *n.* Any of various predatory insects of the large family Reduviidae, with short, curved, powerful beaks adapted for sucking blood and capable of inflicting a painful bite.



assassin bug
Up to one inch in length

as·sault (ə-sôlt′) *n.* [ME *assaut* < OFr. < VLat. **assaltus,* var. of Lat. *assultus,* p.part. of *assilire,* to jump on. —see ASSAIL.] 1. A violent physical or verbal attack. 2. a. A military attack on a fortified place. b. The final stage of an attack that includes close combat with the enemy. 3. *Law.* An unlawful threat or attempt to injure another physically. 4. RAPE[1] 1, 2. —*v.* **-sault·ed, -sault·ing, -saults.** —*vt.* To attack violently. —*vi.* To make an assault. —**as·sault′er** *n.*

assault and battery *n. Law.* The threat to use force upon another and the carrying out of the threat.

assault rifle *n.* An automatic or semiautomatic rifle designed for use in military attacks.

as·say (ăs′ā′, ă-sā′) *n.* [ME *assai* < OFr. —see ESSAY.] 1. a. The qualitative or quantitative analysis of a substance, esp. of an ore or drug. b. A substance to be so analyzed. c. The result of such an analysis. 2. An analysis or examination. 3. *Obs.* An attempt : essay. —*v.* (ă-sā′, ăs′-ā′) **-sayed, -say·ing, says.** —*vt.* 1. To subject to chemical analysis. 2. To examine by trial or experiment : TEST <*assay* one's skill> 3. To assess or evaluate. 4. To attempt <*assay* skiing> —*vi.* To be shown by analysis to have a certain proportion, usu. of a precious metal. —**as·say′a·ble** *adj.* —**as·say′er** *n.*

as·se·gai (ăs′ə-gī′) *n. var. of* ASSAGAI.

as·sem·blage (ə-sĕm′blĭj) *n.* 1. ASSEMBLY 1. 2. A group of people or things. 3. A fitting together of manufactured parts, as of a machine. 4. A sculpture consisting of an arrangement of miscellaneous objects, as scraps of metal, cloth, string, etc.

as·sem·ble (ə-sĕm′bəl) *v.* **-bled, -bling, -bles.** [ME *assemblen* < OFr. *assembler* < VLat. **assimulare* : Lat. *ad-,* to + Lat. *simul,* together.] —*vt.* 1. To bring or gather together into a group or whole. 2. To fit or join together the parts of. —*vi.* To come together : CONGREGATE.

as·sem·bler (ə-sĕm′blər) *n.* 1. One that assembles. 2. *Computer Sci.* A program operating on symbolic input data to produce the equivalent machine code.

as·sem·bly (ə-sĕm′blē) *n., pl.* **-blies.** 1. The act of assembling or state of being assembled. 2. A group of persons gathered together for a common purpose : MEETING. 3. **Assembly.** The lower house of the legislature in certain U.S. states. 4. a. The combining of manufactured parts to make a completed product, esp. a machine. b. A set of parts so combined. 5. The signal calling troops to form ranks.

assembly language *n. Computer Sci.* A programming language that is a close approximation of machine code.

assembly line *n.* A line of factory workers and equipment on which the product being assembled passes consecutively from operation to operation until completed.

as·sem·bly·man (ə-sĕm′blē-mən) *n.* A man who is a member of a legislative assembly.

Assembly of God *n.* A Pentecostal congregation founded in the United States in 1914.

assembly time *n. Computer Sci.* The time required for an assembler to translate symbolic language into machine instructions.

as·sem·bly·wom·an (ə-sĕm′blē-wo͝om′ən) *n.* A woman who is a member of a legislative assembly.

as·sent (ə-sĕnt′) *vi.* **-sent·ed, -sent·ing, -sents.** [ME *assenten* < OFr. *assentir* < Lat. *assentari* : *ad-,* toward + *sentire,* to feel.] To express agreement : CONCUR. —*n.* 1. Agreement, as to a plan or proposal. 2. Acquiescence : consent. —**as·sent′er, as·sen′tor** *n.* —**as·sent′ing·ly** *adv.* —**as·sen′tive** *adj.* —**as·sen′tive·ness** *n.*

as·sen·ta·tion (ăs′ĕn-tā′shən) *n.* Servile or ill-considered agreement with another's opinions.

as·sert (ə-sûrt′) *vt.* **-sert·ed, -sert·ing, -serts.** [Lat. *asserere, assert-* : *ad-,* to + *serere,* to join.] 1. To state or express positively : AFFIRM. 2. To defend or maintain (e.g., one's rights). —**assert oneself.** To express oneself boldly or forcefully. —**as·sert′a·ble, as·sert′i·ble** *adj.* —**as·sert′er, as·ser′tor** *n.*

★ ***syns:*** ASSERT, AFFIRM, AVER, AVOUCH, AVOW, DECLARE, HOLD, MAINTAIN, STATE *v. core meaning* : to put into words, positively and with conviction <*asserted* their innocence> ***ants:*** CONTROVERT, DENY

as·ser·tion (ə-sûr′shən) *n.* 1. The act of asserting. 2. Something asserted. —**as·ser′tion·al** *adj.*

as·ser·tive (ə-sûr′tĭv) *adj.* Inclined to or displaying bold assertion : SELF-CONFIDENT. —**as·ser′tive·ly** *adv.* —**as·ser′tive·ness** *n.*

assertiveness training *n.* A method of training individuals to behave in a boldly self-confident manner.

as·sess (ə-sĕs′) *vt.* **-sessed, -sess·ing, -sess·es.** [ME *assessen* < OFr. *assesser* < Lat. *assidēre,* to sit by (as an assistant judge) : *ad-,* near to + *sedēre,* to sit.] 1. To estimate the value of (property) for taxation. 2. To set or determine the amount of (e.g., a tax or fine). 3. To charge (a person or property) with a special payment, as a tax or fine. 4. To appraise or evaluate. —**as·sess′a·ble** *adj.*

as·sess·ment (ə-sĕs′mənt) *n.* 1. The act, process, or an instance of assessing. 2. An amount assessed.

as·ses·sor (ə-sĕs′ər) *n.* 1. An official who makes assessments, as for taxation. 2. An assistant to a judge, selected for his or her specialized knowledge. —**as′ses·so′ri·al** (ăs′ə-sôr′ē-əl, -sōr′-) *adj.*

as·set (ăs′ĕt′) *n.* [Back-formation < E. *assets* < AN *asetz,* sufficient goods to settle a testator's debts and legacies < OFr. *asez,* enough < VLat. **ad satis* : Lat. *ad-,* to + *satis,* enough.] 1. A useful or valuable quality or thing <Beauty can be a great *asset.*> 2. A valuable material possession. 3. **assets.** The entries on a balance sheet showing all properties and claims against others that may be directly or indirectly applied to cover liabilities.

▲ ***word history:*** *Asset* is an example of the process of back-formation. By this process a word is mistakenly analyzed as a base word augmented by an affix. *Asset* is a back-formation from the old legal term *assets,* which was not a plural noun (*asset* + *-s*); in fact, it was not a noun at all but an adjective. *Assets* was originally *asetz* or *asez,* an Old French word meaning simply "enough," as does *assez,* the modern French form. *Assets* was used as legal shorthand for "enough wealth to settle the claims made against a deceased person's estate." Because *assets* looked like a plural form and had a collective meaning, the word came to be treated grammatically as a plural. A singular form *asset* appeared in the 19th century to denote a single item in the "assets" column of a balance sheet, and from that usage the figurative meanings developed.

as·sev·er·ate (ə-sĕv′ə-rāt′) *vt.* **-at·ed, -at·ing, -ates.** [Lat. *asseverare, asseverat-* : *ad-,* to + *severus,* serious.] To declare positively or seriously : AFFIRM. —**as·sev′er·a′tion** *n.*

as·sib·i·late (ə-sĭb′ə-lāt′) *vt.* **-lat·ed, -lat·ing, -lates.** [AD- + SIBILATE.] To pronounce with a hissing sound. —**as·sib′i·la′tion** *n.*

as·si·du·i·ty (ăs′ĭ-do͞o′ĭ-tē, -dyo͞o′-) *n., pl.* **-ties.** 1. The quality or condition of being assiduous : DILIGENCE. 2. *often* **assiduities.** Continuous personal attention : SOLICITUDE.

as·sid·u·ous (ə-sĭj′o͞o-əs) *adj.* [Lat. *assiduus* < *assidēre,* to attend to : *ad-,* near to + *sedēre,* to sit.] 1. Constant in application or attention : DILIGENT <an *assiduous* employee> 2. Persistent : unceasing <*assiduous* efforts> —**as·sid′u·ous·ly** *adv.* —**as·sid′u·ous·ness** *n.*

as·sign (ə-sīn′) *vt.* **-signed, -sign·ing, -signs.** [ME *assignen* < OFr. *assignir* < Lat. *assignare* : *ad-,* to + *signare,* to mark < *signum,* sign.] 1. To set aside for a particular purpose : DESIGNATE. 2. To select for a duty or office : APPOINT. 3. To give out as a task : ALLOT. 4. To ascribe <*assigned* our failure to lack of planning> 5. *Law.* To transfer (property, rights, or interests). 6. To place (a unit or personnel) integrally into a military organization. —*n. Law.* An assignee. —**as·**

dicinally as a muscle relaxant and by some South American Indians as an arrow poison. **2.** Any of the trees from which curare is obtained.

cu·ra·rine (kōō-rä′rĭn, -rēn′, kyōō-) *n.* [CURAR(E) + -INE².] A poisonous alkaloid, $C_{39}H_{42}N_2O$, derived from curare.

cu·ra·rize (kōō-rä′rīz′, kyōō-) *vt.* **-rized, -riz·ing, -riz·es. 1.** To poison with curare. **2.** To treat with curare so as to paralyze the motor nerves. **—cu·ra′ri·za′tion** *n.*

cu·ras·sow (kŏŏr′ə-sō′, kyŏŏr′-) *n.* [Alteration of *Curaçao*, an island in the Caribbean.] Any of several long-tailed, crested tropical American birds of the family Cracidae, related to the pheasants and domestic fowl.

cu·rate (kyŏŏr′ĭt) *n.* [ME *curat* < Med. Lat. *curatus* < *cura*, spiritual charge < Lat., care.] **1.** A member of the clergy in charge of a parish. **2.** A member of the clergy who assists a rector or vicar.

cu·ra·tive (kyŏŏr′ə-tĭv) *adj.* **1.** Serving or tending to cure. **2.** Of or relating to the cure of disease. *—n.* A remedy. **—cu′ra·tive·ly** *adv.* **—cu′ra·tive·ness** *n.*

cu·ra·tor (kyŏŏ-rā′tər, kyŏŏr′ə-tər) *n.* [ME *curatour*, legal guardian < OFr. *curateur* < Lat. *curator*, overseer < *curare*, to take care of < *cura*, care.] The administrator of an institution, as a museum. **—cu′ra·to′ri·al** (kyŏŏr′ə-tôr′ē-əl, -tōr′-) *adj.* **—cu·ra′tor·ship′** *n.*

curb (kûrb) *n.* [OFr. *courbe*, horse bit < *courbe*, curved < Lat. *curvus*.] **1.** A restraint or check. **2.** A concrete border or row of joined stones forming part of a gutter along the edge of a street. **3.** An enclosing framework. **4.** A raised margin along an edge to confine or strengthen. **5.** A strap or chain serving in conjunction with the bit to restrain a horse. *—vt.* **curbed, curb·ing, curbs. 1.** To check, restrain, or control. **2.** To lead (a dog) off the sidewalk into the gutter so that it can excrete waste matter. **3.** To furnish with a curb. **—curb′er** *n.*

curb·ing (kûr′bĭng) *n.* **1.** The material for constructing a curb. **2.** CURB 2.

curb roof *n.* A roof with two slopes on each side.

curb·stone (kûrb′stōn′) *n.* A stone or row of stones forming a curb.

cur·cu·li·o (kər-kyōō′lē-ō′) *n., pl.* **-os.** [Lat., a kind of weevil.] Any of several weevils of the family Curculionidae, many of which are destructive to fruit and vegetables.

cur·cu·ma (kûr′kyə-mə) *n.* [NLat. *Curcuma*, genus name < Ar. *kurkum*, saffron.] Any of various Old World tropical plants of the genus *Curcuma*, with thick, aromatic rootstocks, including *C. longa*, the source of turmeric.

curd (kûrd) *n.* [ME *crud.*] **1.** The coagulated part of milk, used for making cheese. **2.** A coagulation resembling curd. *—vi. & vt.* **curd·ed, curd·ing, curds.** To curdle : coagulate. **—curd′y** *adj.*

curd cheese *n. Chiefly Brit.* Cottage cheese.

cur·dle (kûr′dl) *vi. & vt.* **-dled, -dling, -dles.** [Freq. of CURD.] To change into or cause to change into curd.

cure (kyŏŏr) *n.* [ME, duty, care < OFr. < Lat. *cura.*] **1.** Restoration of health. **2.** A method or course of medical treatment for restoring health. **3.** A restorative agent, as a drug : REMEDY. **4.** Something that relieves or corrects a harmful or disturbing situation. **5.** Spiritual charge or care of souls, as of a priest for a congregation. **6.** The office or duties of a curate. **7.** The act or process of preserving a product, as fish, meat, or tobacco. *—v.* **cured, cur·ing, cures.** *—vt.* **1.** To restore to health. **2.** To get rid of : REMEDY <*cure* an evil> **3.** To preserve (e.g., meat), as by salting, smoking, or aging. **4.** To prepare, preserve, or finish (a substance) by a chemical or physical process. **5.** To vulcanize. *—vi.* To effect a cure. **2.** To be prepared, preserved, or finished by a chemical or physical process. **—cure′less** *adj.* **—cur′er** *n.*

★ ***syns:*** CURE, ELIXIR, NOSTRUM, REMEDY *n. core meaning* : an agent used to restore health <found no *cure* for cancer>

cu·ré (kyōō-rā′, kyŏŏr′ā′) *n.* [Fr.] A parish priest.

cure-all (kyŏŏr′ôl′) *n.* A remedy for all diseases or evils : PANACEA.

cu·ret (kyōō-rĕt′) *n. var. of* CURETTE.

cu·ret·tage (kyŏŏr′ĭ-täzh′) *n.* Surgical cleaning or scraping of a bodily cavity with a curette.

cu·rette *also* **cu·ret** (kyōō-rĕt′) *n.* [Fr. < *curer*, to cure < OFr. < Lat. *curare*, to take care of < *cura*, care.] A scoop, spoon, or loop for performing curettage.

cu·rette·ment (kyōō-rĕt′mənt) *n.* Curettage.

cur·few (kûr′fyōō) *n.* [ME *curfeu* < OFr. *cuevrefeu*, cover the fire : *couvrir*, to cover + *feu*, fire < Lat. *focus*, hearth.] **1.** An order or regulation enjoining specified segments of the population to leave the streets at a prescribed hour. **2. a.** The period during which a curfew regulation is in effect. **b.** The signal announcing curfew.

▲ ***word history:*** A *curfew* was originally a medieval regulation requiring that fires be put out or covered at a certain hour at night. The rule was probably instituted as a public safety measure to minimize the risk of a general conflagration. A bell was rung at the prescribed hour, and the word *curfew* has been extended to denote both the signal and the hour in addition to the regulation.

cu·ri·a (kōōr′ē-ə, kyŏŏr′-) *n., pl.* **cu·ri·ae** (kōōr′ē-ē′, kyŏŏr′-) [Lat., council.] **1. a.** One of the ten primitive subdivisions of a tribe in early Rome, consisting of ten gentes. **b.** The curia's place of assembly. **2. a.** The Senate or any of the various buildings in which it met in republican Rome. **b.** The place of assembly of high councils in various Italian cities under Roman administration. **3.** The ensemble of central administrative and governmental services in imperial Rome. **4.** *often* **Curia.** The central administration governing the Roman Catholic Church. **5. a.** A medieval assembly or council. **b.** A royal court of justice. **—cu′ri·al** *adj.*

cu·rie (kyŏŏr′ē, kyōō-rē′) *n.* [After Marie *Curie* (1867–1934).] A unit of radioactivity, the amount of any nuclide that undergoes exactly 3.7 x 10^{10} radioactive disintegrations per second.

Curie law *n.* [After Pierre *Curie* (1859–1906).] The law that the magnetic susceptibility varies inversely with absolute temperature in a paramagnetic substance with negligible interactions among magnetic carriers.

Curie point *or* **Curie temperature** *n.* [After Pierre *Curie.*] A transition temperature marking a change in the magnetic properties of a substance, esp. the change from ferromagnetism to paramagnetism.

Cu·rie-Weiss law (kyŏŏr′ē-wīs′, -vīs′, kyōō-rē′-) *n.* [After Pierre *Curie* and Pierre-Ernest *Weiss* (1865–1940).] The law that the magnetic susceptibility of a paramagnetic substance above the Curie point varies inversely with the excess of temperature above that point.

cu·ri·o (kyŏŏr′ē-ō′) *n., pl.* **-os.** [Short for CURIOSITY.] An unusual object of art.

cu·ri·o·sa (kyŏŏr′ē-ō′sə, -zə) *pl.n.* [NLat., neut. pl. of Lat. *curiosus*, inquisitive. —see CURIOUS.] Books or other writings dealing with unusual, esp. pornographic topics.

cu·ri·os·i·ty (kyŏŏr′ē-ŏs′ĭ-tē) *n., pl.* **-ties. 1.** A desire to learn or know. **2.** A desire to know about matters of no concern to one : NOSINESS. **3.** Something novel or extraordinary that arouses interest. **4.** A strange aspect. **5.** *Obs.* Fastidiousness.

cu·ri·ous (kyŏŏr′ē-əs) *adj.* [ME < OFr. *curios* < Lat. *curiosus*, careful, inquisitive < *cura*, care.] **1.** Eager to acquire information or knowledge. **2.** Unduly inquisitive : NOSY. **3.** Interesting due to novelty or rarity : ODD <a *curious* fact> **4.** *Obs.* **a.** Accomplished with skill or ingenuity. **b.** Very careful or scrupulous. **—cu′ri·ous·ly** *adv.* **—cu′ri·ous·ness** *n.*

cu·ri·um (kyŏŏr′ē-əm) *n.* [After Marie *Curie* (1867–1934) and Pierre *Curie* (1859–1906).] *Symbol* **Cm** A silvery, metallic synthetic radioactive element; atomic number 96; longest-lived isotope Cm 247.

curl (kûrl) *v.* **curled, curl·ing, curls.** [ME *curlen* < *crulle*, curly, perh. of MLG orig.] *—vt.* **1.** To twist (e.g., the hair) into coils or rings with curls. *—vi.* **1.** To form coils or ringlets. **2.** To assume a spiral or curved shape. **3.** To move in a curve or spiral. **4.** To play the game of curling. **—curl up.** To assume a position with the legs drawn up. *—n.* **1.** Something shaped like a spiral or coil. **2.** A ringlet of hair. **3.** The act of curling or state of being curled. **4.** Any of various plant diseases in which the leaves roll up. **5.** *Math.* The vector product of the vector differential operator and a vector function.

curl·er (kûr′lər) *n.* **1.** One that curls. **2.** A device, as a pin or roller, on which hair is wound for curling. **3.** A player of curling.

cur·lew (kûrl′yōō, kûr′lōō) *n.* [ME *curleu* < OFr. *courlieu.*] A brownish, long-legged shore bird of the genus *Numenius*, with a long, slender, downward-curving bill.

curl·i·cue *also* **curl·y·cue** (kûr′lĭ-kyōō′) *n.* [CURLY + CUE¹.] A fancy twist or curl.

curl·ing (kûr′lĭng) *n.* A game played on ice, in which two four-man teams slide heavy, oblate stones toward a target.

curling iron *n.* A rod-shaped metal implement used when heated for curling the hair.

curl paper *n.* A piece of soft paper on which a lock of hair is rolled up for curling.

curl·y (kûr′lē) *adj.* **-i·er, -i·est. 1.** Having curls <*curly* hair> **2.** Tending to curl. **3.** Having a wavy grain <*curly* maple> **—curl′i·ly** *adv.* **—curl′i·ness** *n.*

curl·y·cue (kûr′lĭ-kyōō′) *n. var. of* CURLICUE.

curly top *n.* A plant disease caused by a virus, *Ruga verrucosans*, and resulting in severe stunting of growth.

cur·mudg·eon (kər-mŭj′ən) *n.* [Orig. unknown.] A cantankerous person. **—cur·mudg′eon·ly** *adj.*

cur·rach *also* **cur·ragh** (kûr′əkh, kûr′ə) *n.* [ME *currok* < Ir. Gael. *curach.*] *Scot. & Ir.* A coracle.

cur·rant (kûr′ənt, kŭr′-) *n.* [ME (*raysons of*) *coraunte*, (raisins of) Corinth.] **1.** Any of various usu. prickly shrubs of the genus *Ribes*, bearing clusters of red, black, or greenish fruit. **2.** The small sour fruit of any of the currant plants, used chiefly for making jelly. **3.** A small, dried seedless Mediterranean grape used in cooking.

cur·ren·cy (kûr′ən-sē, kŭr′-) *n., pl.* **-cies.** [Med. Lat. *currentia*, a flowing < Lat. *currens*, pr.part. of *currere*, to run.] **1.** Money in use as a medium of exchange. **2.** A passing from hand to hand : CIRCULATION. **3.** General acceptance : PREVALENCE. <See table on pages 278–279.>

cur·rent (kûr′ənt, kŭr′-) *adj.* [ME *curraunt* < OFr. *corant*, pr.part. of *courre*, to run < Lat. *currere.*] **1. a.** Belonging to the present time. **b.** Now in progress. **2.** Passing from one to another : CIRCULATING <*current* money> **3.** Being in general or widespread use. **4.** Flowing : running. *—n.* **1.** A smooth and steady onward movement, as of water. **2.** The part of any body of liquid or gas that has a continuous onward movement <river *currents*> **3.** A general tendency, movement, or course. **4.** *Elect.* **a.** A flow of electric charge. **b.** The amount of electric

charge flowing past a specified circuit point per unit time. **—cur′rent·ly** *adv.* **—cur′rent·ness** *n.*

current assets *pl.n.* Cash or assets readily convertible into cash.

current density *n.* **1.** *Elect.* The ratio of the magnitude of current flowing in a conductor to the cross-sectional area perpendicular to the current flow. **2.** *Physics.* The number of subatomic particles per unit time crossing a unit area in a designated plane perpendicular to the direction of motion of the particles.

current ratio *n.* The ratio of current assets to liabilities.

cur·ri·cle (kûr′ĭ-kəl) *n.* [Lat. *curriculum*, racing chariot, course < *currere*, to run.] A light, open two-wheeled carriage, drawn by two horses.

cur·ric·u·lum (kə-rĭk′yə-ləm) *n., pl.* **-la** (-lə) *or* **-lums.** [NLat. < Lat., course < *currere*, to run.] **1.** All the courses of study offered by an educational institution. **2.** A course of study, often in a specialized field. **—cur·ric′u·lar** (-lər) *adj.*

cur·ric·u·lum vi·tae (kə-rĭk′yə-ləm vī′tē, kə-rĭk′ə-ləm wē′tī′) *n.* [Lat., course of life.] A résumé of one's career, as for an employer.

cur·rie (kûr′ē, kŭr′ē) *n. var. of* CURRY².

cur·ri·er (kûr′ē-ər, kŭr′-) *n.* [ME *curreiour* < OFr. < Lat. *coriarius*, a tanner < *corium*, leather.] One who curries, esp. leather.

cur·ri·er·y (kûr′ē-ə-rē, kŭr′-) *n., pl.* **-ies.** The trade, work, or shop of a leather currier.

cur·rish (kûr′ĭsh) *adj.* **1.** Of or like a cur. **2. a.** Snarling : badtempered. **b.** Base : cowardly. **—cur′rish·ly** *adv.*

cur·ry¹ (kûr′ē, kŭr′ē) *vt.* **-ried, -ry·ing, -ries.** [ME *curreien* < AN *curreier*, to arrange, curry.] **1.** To groom (a horse) with a currycomb. **2.** To prepare (tanned hides) for use by soaking, coloring, or other processes. **—curry favor.** To seek or gain favor by flattery.

cur·ry² *also* **cur·rie** (kûr′ē, kŭr′ē) *n., pl.* **-ries.** [Tamil *kari*, relish.] **1.** Curry powder. **2.** A heavily spiced relish or sauce made with curry powder and eaten with rice, meat, fish, or other food. **3.** A dish seasoned with curry powder. **—cur′ry** *v.* **(-ried, -ry·ing, -ries).**

cur·ry·comb (kûr′ē-kōm′, kŭr′-) *n.* A comb with metal teeth, used for grooming horses. **—cur′ry·comb′** *v.* **(-combed, -comb·ing, -combs).**

curry powder *n.* A pungent blended condiment prepared from cumin, coriander, turmeric, and other spices.

curse (kûrs) *n.* [ME < OE *curs.*] **1.** An appeal for evil or injury to befall someone or something. **2.** Evil or injury resulting from or as if from an invocation. **3.** One that is accursed. **4.** Something bringing or causing evil : SCOURGE. **5.** A profane oath. **6.** An ecclesiastical censure, ban, or anathema. **7. the curse.** *Slang.* Menstruation. *—v.* **cursed** *or* **curst** (kûrst), **curs·ing, curs·es.** *—vt.* **1.** To invoke evil, calamity, or injury upon : DAMN. **2.** To swear at. **3.** To bring evil upon : AFFLICT. **4.** To put under an ecclesiastical ban or anathema : EXCOMMUNICATE. *—vi.* To utter curses : SWEAR. **—curs′er** *n.*

curs·ed (kûr′sĭd, kûrst) *also* **curst** (kûrst) *adj.* That deserves to be cursed : WICKED. **—curs′ed·ly** *adv.* **—curs′ed·ness** *n.*

cur·sive (kûr′sĭv) *adj.* [Med. Lat. (*scripta*) *cursiva*, flowing (script) < Lat. *cursus*, p.part. of *currere*, to run.] Designating writing or printing with letters joined together. *—n.* **1.** A cursive character or letter. **2.** A manuscript written in cursive characters. **3.** Printing type imitative of handwriting. **—cur′sive·ly** *adv.* **—cur′sive·ness** *n.*

cur·sor (kûr′sər) *n.* [Lat., runner < *cursus*, p.part. of *currere*, to run.] A visual indicator on a video terminal showing the position where a character can be entered, changed, or deleted.

cur·so·ri·al (kûr-sôr′ē-əl, -sōr′-) *adj.* [< LLat. *cursorius*, of running. —see CURSORY.] Adapted to or specialized for running <*cursorial* birds> <*cursorial* legs>

cur·so·ry (kûr′sə-rē) *adj.* [LLat. *cursorius*, of running < Lat. *cursor*, runner. —see CURSOR.] Hastily and superficially done. **—cur′so·ri·ly** *adv.* **—cur′so·ri·ness** *n.*

curst (kûrst) *adj. var. of* CURSED. *—v. var. p.t. & p.p. of* CURSE.

curt (kûrt) *adj.* **-er, -est.** [Lat. *curtus*, cut short.] **1.** Rudely abrupt or brief <a *curt* retort> **2.** Terse or concise. **3.** Shortened. **—curt′ly** *adv.* **—curt′ness** *n.*

cur·tail (kər-tāl′) *vt.* **-tailed, -tail·ing, -tails.** [Obs. *curtal*, to dock a horse's tail < CURTAL.] To cut short : ABBREVIATE. **—cur·tail′er** *n.* **—cur·tail′ment** *n.*

curtail step *n.* [Orig. unknown.] The widened step or steps at the bottom of a flight of stairs.

cur·tain (kûr′tn) *n.* [ME < OFr. *courtine* < LLat. *cortina.*] **1.** Material hanging esp. in a window as a decoration, shade, or screen. **2.** Something that screens, covers, or acts as a barrier. **3. a.** The movable drape or screen between the stage and auditorium in a theater or hall. **b.** The ascent or opening of a theater curtain at the beginning or its descent or closing at the end, as of a play or act. **c.** A line, speech, or situation in a play that occurs at the very end or just before the curtain closes. **d.** The time at which a theatrical performance begins or is scheduled to begin. **4.** The part of a rampart or parapet joining two bastions or gates. **5.** An enclosing wall joining two towers or similar structures. **6. curtains.** *Slang.* **a.** The end. **b.** Ruin. **c.** Death. **—cur′tain** *v.* **(-tained, -tain·ing, -tains).**

curtain call *n.* The appearance of a performer or performers at the end of a performance in acknowledgment of applause.

curtain raiser *n.* **1.** A short play presented before the principal dramatic production. **2.** A preliminary event.

curtain speech *n.* A talk delivered in front of the curtain at the end of a theatrical performance.

cur·tal (kûr′tl) [OFr. *courtault*, horse with a cropped tail < *court*, short < Lat. *curtus*, cut short.] *Obs. —n.* **1.** An animal with a docked tail. **2.** Something cut short or docked. *—adj.* **1.** Cut short or docked, as an animal's tail. **2.** Wearing a short frock.

curtal ax *n.* [By folk ety. < obs. *curtelace*, *coutelace*, cutlass < OFr. *coutelas.* —see CUTLASS.] *Archaic.* A cutlass.

cur·tate (kûr′tāt′) *adj.* [Lat. *curtatus*, p.part. of *curtare*, to shorten < *curtus*, cut short.] Abbreviated : shortened.

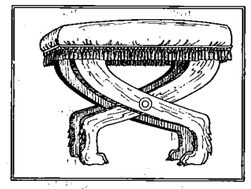
cur·te·sy (kûr′tĭ-sē) *n., pl.* **-sies.** [ME *curtesie.* —see COURTESY.] The life tenure that by common law is held by a man over the property of his deceased wife if children with rights of inheritance were born during the marriage.

cur·ti·lage (kûr′tl-ĭj) *n.* [ME < OFr. *courtillage* < *courtil*, dim. of *cort*, court. —see COURT.] *Law.* The enclosed land surrounding a house or dwelling.

curt·sy (kûrt′sē) *n., pl.* **-sies.** [Var. of COURTESY.] A gesture of respect made by bending the knees with one foot forward and lowering the body. *—vi.* **-sied, -sy·ing, -sies.** To make a curtsy.

cu·rule (kyŏŏr′ōōl′) *adj.* [Lat. *curulis*, of a curule chair < *currus*, chariot < *currere*, to run.] **1.** Of or pertaining to a seat like a campstool that only the highest officials in ancient Rome were permitted to use. **2.** Privileged to sit in a curule chair : of superior rank.

curule chair *n.* A backless seat with heavy curved legs, reserved for the use of the highest ancient Roman officials.



curule chair

cur·va·ceous (kûr-vā′shəs) *adj.* Voluptuous in figure. **—cur·va′ceous·ly** *adv.* **—cur·va′ceous·ness** *n.*

cur·va·ture (kûr′və-chŏŏr′, -chər) *n.* [Lat. *curvatura* < *curvatus*, p.part. of *curvare*, to bend < *curvus*, curved.] **1.** The act of curving or state of being curved. **2.** *Math.* **a.** The ratio of the change in tangent inclination over a given arc to the length of the arc. **b.** The limit of this ratio as the length of the arc approaches zero. **3.** *Med.* A curving or bending, esp. an abnormal one <*curvature* of the spine>

curve (kûrv) *n.* [ME, curved < Lat. *curvus.*] **1. a.** A line deviating from straightness in a smooth, continuous way. **b.** A surface deviating from planarity in a smooth, continuous way. **2. a.** A rounded part, object, or area. **b.** A rather smooth bend in a road. **3. curves.** *Slang.* A woman's well-proportioned figure. **4. a.** A line representing data on a graph. **b.** A trend derived from or as if from such a graph. **5.** *Math.* **a.** The graph of a function on a coordinate plane. **b.** Intersection of two surfaces in three dimensions. **6.** A graphic representation of the relative performance of individuals as measured against each other, used esp. as a method of grading students with the range of grades based on the proportion of students. **7.** *Baseball.* A curve ball. *—v.* **curved, curv·ing, curves.** *—vi.* To take the shape of or move in a curve. *—vt.* **1.** To cause to curve. **2.** *Baseball.* To pitch a curve ball to. **3.** To grade on a curve. **—curv′ed·ly** (kûr′vĭd-lē) *adv.* **—curv′ed·ness** *n.*

curve ball *n.* **1.** *Baseball.* A pitched ball that veers or breaks to the left when thrown with the right hand and to the right when thrown with the left hand. **2.** *Slang.* A trick : deception.

cur·vet (kûr-vĕt′) *n.* [Ital. *corvetta* < OItal., dim. of *corva*, curve < Lat. *curvus*, curved.] A light leap by a horse, in which both hind legs leave the ground just before the forelegs are set down. *—v.* **-vet·ted, -vet·ting, -vets** *or* **-vet·ed, -vet·ing, -vets.** *—vi.* **1.** To leap in a curvet. **2.** To prance : frolic. *—vt.* To cause to leap in a curvet.

cur·vi·lin·e·ar (kûr′və-lĭn′ē-ər) *also* **cur·vi·lin·e·al** (-əl) *adj.* [Lat. *curvus*, curved + LINEAR.] Formed, bounded, or characterized by curved lines. **—cur′vi·lin′e·ar′i·ty** (-ē-ăr′ĭ-tē) *n.* **—cur′vi·lin′e·ar·ly** *adv.*

cus·cus (kŭs′kəs) *n.* [NLat., prob. < a native New Guinean word.] A marsupial of the genus *Phalanger* of New Guinea and adjacent areas, with protruding eyes, a yellow nose, and a prehensile tail.

cu·sec (kyōō′sĕk′) *n.* [CU(BIC) + SEC(OND)¹.] A unit of volumetric flow of liquids, equal to one cubic foot per second.

cu·shaw (kə-shô′, kŏŏ′shô′) *n.* [Of Algonquian orig.] A squash, *Cucurbita moschata*, having variably shaped, often crook-necked fruit.

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SAN DIEGO UNIFIED SCHOOL DISTRICT et al.,

Plaintiffs and Appellants,

v.

COMMISSION ON STATE MANDATES,

Defendant and Respondent;

STATE DEPARTMENT OF FINANCE,

Real Party in Interest and Respondent.

C044162

(Super.Ct.No. 00CS00816)

FILED

JUL 27 2004

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY_____ Deputy

At issue in this appeal is whether school districts are entitled to be reimbursed by the State of California for the time spent by teachers during the regular school day in administering state-mandated assessment tests. We conclude that because test administration does not impose actual financial costs on the districts, no reimbursement is required under the California Constitution. We therefore affirm the judgment.

FACTS AND PROCEEDINGS

To put this appeal in the proper context, we briefly describe the system for reimbursing local entities for state-mandated costs.

Last year the California Supreme Court succinctly described two provisions of the state constitution that bear on this matter as follows: "Article XIII A (adopted by the voters in 1978 as Proposition 13), limits the *taxing* authority of state and local government. Article XIII B (adopted by the voters in 1979 as Proposition 4) limits the *spending* authority of state and local government." (*Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735 (*Department of Finance*).)

Section 6 of article XIII B (section 6) provides in relevant part that "[w]henever 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 such local government for the costs of such program or increased level of service . . . ." (Cal. Const., art. XIII B, § 6.) This provision "recognizes that articles XIII A and XIII B severely restrict the taxing and spending powers of local governments. [Citation.] 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. [Citations.] With certain exceptions, section 6 '[e]ssentially' requires the state 'to pay for any new governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies.'" (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 (*County of San Diego*).)

The Legislature devised procedures to determine whether a statute imposes state-mandated costs on a local agency within the meaning of section 6. "The local agency must file a test claim with the Commission [on State Mandates], which, after a public hearing, decides whether the statute mandates a new program or increased level of service. [Citations.] If the Commission finds a claim to be reimbursable, it must determine the amount of reimbursement. [Citation.] . . . If the Commission finds no reimbursable mandate, the local agency may challenge this finding by administrative mandate proceedings under section 1094.5 of the Code of Civil Procedure." (*County of San Diego, supra,* 15 Cal.4th at pp. 81-82.)

Two programs spawned the current controversy. In 1995, the California Legislature enacted a program requiring school districts to administer physical fitness tests to students in the fifth, seventh and ninth grades, and to report those results to the state Department of Education. (Ed. Code, § 60800.) This testing began in the spring of 1996.

Later the same year, plaintiff San Diego Unified School District (SDUSD) filed a test claim with the Commission on State Mandates (Commission) seeking reimbursement for various costs

associated with this program, including the purchase of materials and equipment, training of staff, and the costs of administering the tests to students.

The State Department of Finance opposed the claim, arguing that the physical fitness testing was not a new program but simply replaced a program that had "sunsetted" earlier. The Department of Finance further asserted that in any event, the costs of administering and scoring the tests should not be reimbursed because these activities could occur "during the normal school day with existing staff . . . ."

A draft analysis prepared by Commission staff also found that "the teacher's time to administer the test, including the time it takes teachers to score and re-record the score onto scantron sheets, is *not* a reimbursable activity. Testing is conducted during the normal classroom day. Neither the school day nor the school year is extended to accommodate the time required for teachers to administer the physical performance tests. Rather, the time to administer the tests is *absorbed* into the school day with no resultant increased costs to the school district."

SDUSD argued strenuously that by redirecting teacher time from academics to test administration, a reimbursable cost had in fact been created. It asserted that this cost could readily be determined through the application of standard cost accounting principles.

After a hearing, the Commission concluded that the physical fitness testing was indeed a new, state-mandated program within

the meaning of section 6, and it approved reimbursement for some of SDUSD's claimed costs. However, the Commission found that "classroom teacher time to administer the physical performance test, including scoring the tests in class and re-recording score data to computer scantron sheets, is *not* a reimbursable state mandated activity because no increased costs are incurred by school districts." The Commission noted that "the State Department of Education's advisory stated that physical performance testing takes between two and four regular class periods and, further, that the testing is conducted during the *normal* classroom day by regular school personnel. [¶] [B]ecause neither the school day nor the school year is extended to accommodate the time required to administer and score the physical performance tests, school districts incur no increased reimbursable costs when classroom teachers administer the physical fitness test."

The Commission noted that it had denied reimbursement in another test claim in which the time and costs associated with instructing students in emergency procedures "were absorbed within the school day with no increased costs to the school district." The Commission reasoned: "Similarly, while teachers spend time administering physical performance tests, scoring the tests and re-recording scores on scantron sheets, teacher time is absorbed within the school day and is *not* passed on to the school district as 'increased costs.'"

The Commission concluded: "In sum, . . . physical performance testing requires teachers to substitute the tests

for other activities. The time to administer and score the tests is therefore *absorbed* into the school day with no resultant increased costs to the school district. To be eligible for reimbursement a school district must incur increased costs as a result of administering physical performance tests. However, because testing takes place in an environment that has an identifiable limit on the number of hours in a normal workday, and the normal workday has not been extended, . . . teacher time to administer physical performance tests is not reimbursable."

While this matter was pending before the Commission, the Legislature adopted legislation requiring school districts to administer the standardized testing and reporting program (STAR), an academic assessment test, to all students in grades two to 11. (Ed. Code, §§ 60640, 60641.) SDUSD again filed a test claim to recoup costs associated with this program, including the costs of administering the STAR tests. The Department of Finance and SDUSD presented conflicting views as to whether the time spent during the regular school day on STAR administration constituted a reimbursable cost.

Again, the Commission concluded that this legislation constituted a new state-mandated program, but it denied reimbursement for the costs associated with test administration.

SDUSD, joined by the San Juan Unified School District (collectively the school districts), filed a petition for writ of administrative mandamus. (Code. Civ. Proc., § 1094.5.) The school districts argued again that they were entitled to be

reimbursed for teacher time spent on administering the STAR and physical fitness tests. The trial court concluded otherwise and denied their petition. This appeal followed.

DISCUSSION

The question of whether a statute establishes a reimbursable mandate within the meaning of section 6 is a question of law, which we review de novo. (*County of San Diego, supra*, 15 Cal.4th at p. 109; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195.)

This appeal is focused on only one aspect of section 6. There is no dispute that the STAR and physical fitness tests are state-mandated, nor is there any dispute that these are "new" programs within the meaning of section 6. The sole question before us is whether the costs of administering the STAR and physical fitness tests constitute reimbursable state mandates. We conclude that because the school districts did not incur any actual increased costs in administering these programs, no reimbursement is required under section 6. We explain.

Section 6 and related legislation focus on actual tangible costs and shifting financial responsibilities. They are not concerned with theoretical expenses. For example, Government Code section 17514 defines "costs mandated by the state" to mean "any increased costs which a local agency or school district *is required to incur* . . . as a result of any statute . . . , which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the

California Constitution." (Italics added.) Numerous cases have explained the intent behind section 6. This constitutional provision was designed "to protect residents from excessive taxation and *government spending.*" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 61, italics added.) It was also intended to preclude "a *shift of financial responsibility* for carrying out governmental functions from the state to local agencies which had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs." (*Ibid.*, italics added; accord, *County of San Diego, supra,* 15 Cal.4th at p. 81; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836; *City of Richmond v. Commission on State Mandates, supra,* 64 Cal.App.4th at p. 1197.) Section 6 "was designed to protect the tax revenues of local governments from state mandates that *would require expenditure of such revenues.*" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, italics added.) "No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes." (*Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987.)

As these cases make clear, section 6 focuses on state-mandated programs that require a local agency to spend money. If a program does not require the expenditure of funds, it is not eligible for subvention.

Two cases are particularly instructive on this point. In *County of Sonoma v. Commission on State Mandates* (2000) 84

Cal.App.4th 1264 (*County of Sonoma*), the court analyzed a legislative mandate that reallocated tax revenue, and concluded that reimbursement was not available to the county because it had not been required to expend any funds. "In this case, the County's tax revenues were not expended. No invoices were sent, no costs were collected and no charges were made against the counties in this case. Contrary to the conclusion of the trial court it is the expenditure of tax revenues of local governments that is the appropriate focus of section 6." (*County of Sonoma, supra*, at p. 1283.)

The court noted that the proposition enacting section 6 "was aimed at controlling and capping government spending, not curbing changes in revenue allocations. Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with 'costs' incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas." (*County of Sonoma, supra*, 84 Cal.App.4th at pp. 1283-1284.)

Furthermore, the court observed, the statutes enacted to implement section 6 reflected this understanding. (*County of*

Sonoma, supra, 84 Cal.App.4th at p. 1284.) For example, "Government Code section 17514 defines 'costs mandated by the state' for purposes of section 6 as 'any increased costs which a local agency or school district is *required to incur* . . . .' (Italics added.) Government Code section 17522 defines 'annual reimbursement claim' to mean 'a claim for *actual costs incurred* . . . .' (Italics added.) Similarly, Government Code section 17558.5 refers to a claim for '*actual costs* filed by a local agency

. . . .' (Italics added.) The obvious view of the Legislature is that reimbursement is intended to replace actual costs incurred . . . ." (*Ibid.*)

The court concluded that "when the Constitution uses 'costs' in the context of subvention of funds to reimburse for the 'costs of such program,' that some actual cost must be demonstrated . . . ." (*County of Sonoma, supra,* 84 Cal.App.4th at p. 1285.)

A second case, the recent decision of *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176 (*County of Los Angeles*), also relates to the matter before us. *County of Los Angeles* involved newly enacted legislation that required local law enforcement officers to participate in two hours of domestic violence training. (*Id.* at p. 1179.) Officers were already required to spend 24 hours in continuing education training, and the new two-hour component on domestic violence could be included in the 24-hour total. (See *id.* at p. 1178.) The County argued that substituting the work agenda of

the state for that of the local government imposed a state-mandated, reimbursable cost. (*Id.* at p. 1180.) The Commission on State Mandates disagreed and denied the County's claim, finding that the course could be "accommodated or absorbed by local law enforcement agencies within their existing resources available for training." (*Id.* at pp. 1184-1185.)

In its petition for mandate challenging that decision, the County argued that "the only way local agencies could avoid the costs of the new program would be to redirect their efforts from the training they were already providing . . . , thereby losing flexibility to design programs to suit their own needs." (*County of Los Angeles, supra,* 110 Cal.App.4th at p. 1185) The trial court agreed and granted the petition, noting in part that "[a]lthough it may be reasonable in some or even most cases for a deputy to eliminate an unrequired two-hour elective in favor of the required domestic violence instruction, what about cases where the County's needs and priorities would be affected detrimentally, if two hours of electives were taken away? At what point would additional mandated courses result in increased costs?" (*Id.* at pp. 1185-1186.)

The Court of Appeal reversed. After reviewing the principles outlined in *County of Sonoma* the court reaffirmed that reimbursement under section 6 is required only if the state is "attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding." (*County of Los Angeles, supra,* 110 Cal.App.4th at p. 1194.) The

court recognized that the county was required to add domestic violence training to its continuing education curriculum, but noted that "merely by adding a course requirement . . . the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training. [¶] Furthermore, the state has not shifted from itself the cost of a program previously administered and funded by the state. Instead, the state is requiring certain courses to be placed within an already existing framework of training. This loss of 'flexibility does not, in and of itself, require the County to expend funds that previously had been expended on the . . . program by the State." (*Ibid.*) The court concluded: "Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement. Thus, while there may be a mandate, there are no increased costs mandated . . . ." (*Id.* at p. 1195.)

The same is true here. The time required for administering the physical fitness and STAR testing is performed during the regular school day, and the school districts do not have to spend any additional funds to comply with this mandate. The fact that the school districts might prefer that their limited financial resources be spent on substantive academics rather than test administration does not mean that the cost of that

testing is reimbursable. (See *Department of Finance, supra*, 30 Cal.4th at p. 748.) Perceived inequities do not give rise to a right to reimbursement. (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802 at p. 1817.) Only if a cost falls within the parameters outlined in section 6 is reimbursement required. That is not the case here. Because the school districts do not have to expend revenue to comply with the mandated programs, no reimbursable mandate has been created.

The school districts reiterate the claim that because the cost of teacher time spent on these programs can be calculated by using standard accounting practices, a cost has in fact been incurred and therefore should be reimbursed. But again, that is not the test. The districts point to guides such as the State Administrative Manual, prepared by the Department of Finance, that define "costs" to include the redirection of existing staff and/or resources. However, this is only part of the definition. The relied-upon provision states in full that "'Costs' are *all additional expenses* for which either supplemental financing or the redirection of existing staff and/or resources (with or without the need for supplemental funding) is required." (Italics added.) The districts' reliance on this provision begs the question of whether there were in fact "additional expenses" in this case. To find a reimbursable cost any time reallocation of staff is required, whether or not an additional expense is imposed, would essentially make any mandate eligible for reimbursement. Much as local agencies might applaud such an approach, that is not the law. The Commission explained at oral

argument that applying the State Administrative Manual to principles involving the reimbursement of state-mandated costs essentially mixes apples and oranges. The manual was not intended to be utilized in defining reimbursable state-mandated costs but was instead meant to help agencies when writing regulations to ensure that all costs of proposed regulations were included in the budget.

In any event, these accounting guides were not adopted as regulations and therefore have limited authoritative value. This is especially true in this context, given the long line of case law interpreting the state Constitution's provisions relating to reimbursable state-mandated costs. Administrative manuals do not trump these decisions.

The fact that the dollar cost of a particular function can be determined does not mean that reimbursement is available. Reimbursement is required under section 6 only if an actual financial outlay is incurred to cover the mandated program. If there is no actual expenditure, the harm section 6 seeks to avoid, namely requiring a local agency or school district to spend its limited revenues on a state-mandated program, has not occurred. Here, because teachers perform the test administration duties within the parameters of the existing school day, the school districts have incurred no actual financial cost and no reimbursement is required.

The school districts warn that "the State could commandeer additional segments of teachers' workday[s] by imposing progressively more burdensome programs until there are no

instructional minutes left in the day -- until . . . teachers are spending their entire day performing State-mandated functions and local school districts are rendered impotent to direct their employees -- without ever reimbursing a dime." This dire hypothetical is beyond our task here because it does not reflect the state of the record before us. On this record, only limited time is required to administer the mandated tests at issue, and that testing can occur during the regular school day, without imposing any additional costs on the school districts.

Under these circumstances, the Commission properly concluded that requiring teachers to administer the physical fitness and STAR programs does not create a reimbursable mandate within the meaning of section 6.

DISPOSITION

The judgment is affirmed. The Commission on State Mandates and the State Department of Finance are awarded costs on appeal.

HULL, J.

We concur:

SIMS, Acting P.J.

NICHOLSON, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: San Diego Unified School District et al. v.
Commission on State Mandates et al.
C044162
Sacramento County No. 00CS00816

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