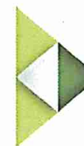

September 26, 2017

Mr. Arthur Palkowitz
Artiano Shinoff
2488 Historic Decatur Road, Suite 200
San Diego, CA 92106

Mr. Justyn Howard
Department of Finance
915 L Street
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Decision**
Certificated School Employees: Parental Leave, 16-TC-01
Education Code Section 44977.5;
Statutes 2015, Chapter 400 (AB 375)
Fresno Unified School District, Claimant

Dear Mr. Palkowitz and Mr. Howard:

On September 22, 2017, the Commission on State Mandates adopted the Decision denying the Test Claim on the above-entitled matter.

Sincerely,

Heather Halsey
Executive Director

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	Case No.: 16-TC-01
Education Code section 44977.5 Statutes 2015, Chapter 400 (AB 375) Filed on December 21, 2016 By Fresno Unified School District, Claimant	*Certificated School Employees: Parental Leave* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 22, 2017*) (*Served September 26, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2017. Art Palkowitz appeared on behalf of the claimant. Kimberly Leahy appeared on behalf of the Department of Finance (Finance).

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 the Proposed Decision to deny the Test Claim by a vote of 7-0, as follows:

Member	Vote
Lee Adams, County Supervisor	Yes
Richard Chivaro, Representative of the State Controller, Vice Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Scott Morgan, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	Yes
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	Yes

Summary of the Findings

The test claim statute, Statutes 2015, chapter 400, added section 44977.5 to the Education Code, effective January 1, 2016, to require school districts to provide differential pay, after the exhaustion of sick leave and accumulated sick leave, to certificated K-12 school district

employees who qualify under the California Family Rights Act (CFRA) for parental leave, which may be taken for up to 12 school weeks, due to the birth of the employee's child or the placement of a child with the employee as a result of adoption or foster care. Differential pay is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted. The Test Claim alleges reimbursable costs for the differential pay provided to certificated employees, and one-time costs for administrative activities, such as developing and implementing internal policies, training, procedures, and forms.

Although the test claim statute applies uniquely to local school districts and provides a new benefit to certificated employees, a reimbursable state mandate exists only when the state imposes a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. A new program or higher level of service exists only when the test claim statute requires an increase in the *actual level of service provided to the public*.[1] The courts have consistently held that increases in the cost of providing employee benefits do not increase the actual level of providing a service to the public.[2]

In this case, the requirement to provide differential pay does not increase the level of governmental service provided to the public. The governmental service provided by school districts is public education.[3] Based on the plain language of the test claim statute and the Legislature's placement of section 44977.5, which requires differential pay for parental leave, in the chapter relating to "Employees,"[4] and not in the chapters addressing "Instruction and Services,"[5] the Commission finds that differential pay is a benefit provided solely to certificated employees on parental leave who are *not* engaged in providing educational services to the public.

In addition, the requirement to provide differential pay does not impose increased costs mandated by the state because differential pay is the difference between the certificated employee's salary and the amount paid to a substitute employee (or the equivalent amount if no substitute is employed) after exhaustion of the certificated employee's sick leave and accumulated sick leave. Thus, if a certificated employee earns $200 per day, and a substitute is paid $75 per day, the differential pay to the absent employee is $125 per day during the 12-week authorized absence, after exhausting applicable sick leave. The amount the district spent on the differential pay and the amount paid to the substitute equals the amount the school district budgeted and would have paid the certificated employee if no parental leave were taken. The

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[1] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[2] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 875-878, where the court discusses the two lines of cases as "those measures designed to increase the level of governmental services to the public," which results in a new program or higher level of service, and those measures "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased," which does not.

[3] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

[4] Chapter 3 "Certificated Employees," of Part 25 "Employees," of Division 3 "Local Administration."

[5] Division 4 "Instruction and Services," beginning at Education Code section 46000.

district is not incurring *increased* costs for the differential pay. A school district may lose cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute teacher would be paid during the certificated employee's parental leave. The courts, however, have held that article XIII B, section 6 of the California Constitution is not designed to provide reimbursement for a loss of cost savings, but requires "*increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit."[6]

Moreover, the administrative activities to develop and implement internal policies, procedures, training, and forms, are not mandated by the plain language of the test claim statute. Although a school district may find that administrative activities are necessary to comply with the differential pay requirement, a state-mandated activity must be "ordered" or "commanded" by the state.[7] In addition, calculating and paying differential pay to the employee under the test claim statute is incidental to, and part and parcel of, providing the employee benefit. These activities do not provide an increased level of educational service to the public and therefore, do not constitute a new program or higher level of service.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

12/21/2016	The Fresno Unified School District (claimant) filed the Test Claim with Commission.[8]
02/14/2017	The Department of Finance filed comments on the Test Claim.[9]
03/15/2017	The claimant filed rebuttal comments.[10]
07/14/2017	Commission staff issued the Draft Proposed Decision.[11]
08/04/2017	The claimant filed comments on the Draft Proposed Decision.[12]
09/06/2017	Commission staff issued the Proposed Decision.
09/15/2017	The claimant filed comments on the Proposed Decision.[13]

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[6] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

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

[8] Exhibit A, Test Claim.

[9] Exhibit B, Finance's Comments on the Test Claim.

[10] Exhibit C, Claimant's Rebuttal Comments.

[11] Exhibit D, Draft Proposed Decision.

[12] Exhibit E, Claimant's Comments on the Draft Proposed Decision.

[13] Claimant's Comments on the Proposed Decision: https://csm.ca.gov/matters/16-TC-01/doc10.pdf. These comments were not included in the decision since they were submitted

II. Background

This Test Claim addresses Statutes 2015, chapter 400, which requires school districts to provide differential pay to K-12 certificated employees for purposes of maternity and paternity (parental) leave during the 12-week protected leave period under the California Family Rights Act (CFRA) after the employee's sick leave and accumulated sick leave has been exhausted. Differential pay is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted.

Preexisting law provides certificated employees with various types of paid and unpaid leave that may be used for a disability related to pregnancy and childbirth, and unpaid parental leave to care for a newly born or adopted child or foster child.

A. Disability and Parental Leave for Female Certificated Employees Under Preexisting Law

1. Pregnancy Disability Leave

Education Code section 44965 requires school districts and county offices of education to give leave to certificated employees (i.e., teachers) who are absent due to pregnancy, miscarriage, childbirth, and childbirth recovery. This leave is considered temporary disability leave and employees are entitled to all the same rights as other persons with temporary disabilities. The length of the leave of absence is to be determined by the employee and the employee's physician, and school district employment policies apply to disability due to pregnancy and childbirth on the same terms and conditions applied to other temporary disability.

Under Government Code section 12945, employees are entitled to four months of unpaid pregnancy disability leave if they are disabled due to pregnancy, childbirth, or related medical conditions, to include lactation. The employee is guaranteed the right to return to her job at the end of the leave. Employers must continue the employee's health and welfare benefits for up to four months of pregnancy disability leave on the same terms as if the employee were working.

Unless the school district participates in the State Disability Insurance Program (SDI),[14] the employee must use available sick leave to be paid during disability due to pregnancy. Sick leave accrues at 10 days per year for full-time employees, and proportionately less for part-time employees.[15] Unused sick leave accumulates from year to year with no cap and can be transferred (provided the employee worked for a district for at least a year), if the employee

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after the close of the comment period, however the issues raised were addressed at the September 22, 2017 Commission hearing on this matter.

[14] Exhibit F, California Teachers Association Website. The California Teachers Association notes that most school districts do not participate in the SDI program. See: http://ctainvest.org/home/insurance-estate-planning/disability-long-term/pregnancy-and-parental-leave-rights.aspx (accessed on May 23, 2017).

[15] Education Code section 44978.

subsequently accepts a certified position with another school district.[16] School districts are authorized to adopt rules and regulations regarding proof of illness or injury.[17]

2. Differential Pay Leave for Extended Illness or Injury (Including Pregnancy, Childbirth, Miscarriage, or Childbirth Recovery)

If the certificated employee has exhausted her available sick leave and remains on temporary leave due to pregnancy, miscarriage, childbirth, and childbirth recovery, there were two ways, under preexisting law that school districts could pay her for up to five months of the absence.[18]

Under the first method, the employee is paid the difference between her salary and the sum that is actually paid a substitute employee employed to fill the position during her absence. If no substitute is employed, the certificated employee receives this "differential pay" as though the substitute had been employed. The district must make every reasonable effort to secure the services of a substitute employee.[19] An employee may not be provided more than one five-month period per illness or accident.[20] If a school year ends before the five-month period is exhausted, the employee may take the balance of the leave in a subsequent school year.[21] The differential pay statute was amended in 1998 so that the employee's sick leave, including accumulated sick leave, and the five-month leave period run consecutively, not concurrently.[22] The 1998 amendment was the subject of the Commission's *Differential Pay and Reemployment*, 99-TC-02, Statement of Decision, discussed below.

Under the second method, any school district may adopt and maintain in effect a rule that provides 50 percent or more of the employee's regular salary during the absence for up to five months.[23]

3. Unpaid Parental Leave

Both federal (Federal Family and Medical Leave Act, or FMLA)[24] and state law (CFRA)[25] authorize up to 12 weeks of unpaid leave to employees who have worked for an employer for at least 12 months prior to starting the leave, and have actually worked (not counting paid or unpaid

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[16] Education Code section 44979.

[17] Education Code section 44978.

[18] Education Code section 44978 states in pertinent part: "Any employee shall have the right to utilize sick leave provided for in this section [sick leave] and the benefit provided by Section 44977 [differential pay] for absences necessitated by pregnancy, miscarriage, childbirth, and recovery therefrom."

[19] Education Code section 44977(a).

[20] Education Code section 44977(b)(2).

[21] Education Code section 44977(b)(2).

[22] Education Code section 44977(b)(1).

[23] Education Code section 44983.

[24] 29 United States Code section 2611, et seq.

[25] Government Code sections 12945.2 and 19702.3.

time off) 1,250 hours in the past 12 months. Employees may take up to 12 workweeks of unpaid leave in a 12-month period for various family and medical reasons, including for "the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee."[26] CFRA only applies to school districts or private employers who employ 50 employees within 75 miles of the worksite where that employee is employed.[27] Upon granting the leave request, employers must provide the employee a guarantee of employment in the same or a comparable position when the leave period ends.[28]

If the employee is on pregnancy disability leave, she may take her 12 weeks of unpaid parental leave under CFRA after her physician clears her to return to work. If she is not on pregnancy disability leave, she may take her 12 weeks of unpaid parental leave upon the birth or placement of her child or at any time during the subsequent year.[29]

To receive pay during CFRA leave, the employee must use accrued vacation or other accrued leave. For leave in connection with a birth, adoption, or foster care of a child, sick leave may only be used if mutually agreed to by the employer and the employee.[30]

Although most school districts do not participate in the SDI program, employees of those that do may receive paid pregnancy disability benefits of roughly half of their current salary. For a pregnancy without complications, the benefit period is generally from four weeks before the due date to six weeks after the delivery. If the pregnancy prevents the employee from working before or after that period, she may receive benefits for a longer period of time if her doctor verifies the need for additional leave.[31]

B. Parental Leave for Male Certificated Employees Under Preexisting Law

The FMLA and CFRA also provide male certificated employees with 12 weeks of *unpaid* parental leave under the same terms as female employees as described above, which can be taken upon the birth or placement of the child, or at any time during the subsequent year.

Male certificated employees may also be able use their paid sick leave for a leave of absence due to "personal necessity." This leave may last up to seven days unless more time is specified in the

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[26] Government Code section 12945.2(c)(3)(A).

[27] Government Code section 12945.2(b).

[28] Government Code section 12945.2(a).

[29] Exhibit F, California Teachers Association Website: http://ctainvest.org/home/insurance-estate-planning/disability-long-term/pregnancy-and-parental-leave-rights.aspx (accessed on May 23, 2017).

[30] Government Code section 12945.2(e).

[31] Exhibit F, California Teachers Association Website: http://ctainvest.org/home/insurance-estate-planning/disability-long-term/pregnancy-and-parental-leave-rights.aspx (accessed on May 23, 2017).

district's bargaining agreement. School districts adopt rules and regulations regarding the manner and proof of personal necessity.[32]

C. The Test Claim Statute – Differential Pay for Certificated Employees on Parental Leave

The test claim statute, Statutes 2015, chapter 400, added section 44977.5 to the Education Code, effective January 1, 2016, to provide differential pay to certificated K-12 school district employees who qualify for CFRA and who take maternity or paternity leave for up to 12 school weeks due to the birth of their child or placement of a child with them through adoption or foster care, as follows:[33]

> (a) During each school year, when a person employed in a position requiring certification qualifications has exhausted all available sick leave, including all accumulated sick leave, and continues to be absent from his or her duties on account of maternity or paternity leave pursuant to Section 12945.2 of the Government Code [the CFRA] for a period of up to 12 school weeks, whether or not the absence arises out of or in the course of the employment of the employee, the amount deducted from the salary due him or her for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed. The school district shall make every reasonable effort to secure the services of a substitute employee.
>
> (b) For purposes of subdivision (a):
>
> (1) The 12-week period shall be reduced by any period of sick leave, including accumulated sick leave, taken during a period of maternity or paternity leave pursuant Section 12945.2 of the Government Code.
>
> (2) An employee shall not be provided more than one 12-week period per maternity or paternity leave. However, if a school year terminates before

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[32] Education Code section 44981. Female employees may also use paid sick leave for absences due to personal necessity.

[33] Education Code section 44977.5 was amended by Statutes 2016, chapter 883, effective January 1, 2017, to expand the population of employees entitled to this benefit, amending subdivision (d) to state: "Notwithstanding subdivision (a) of Section 12945.2 of the Government Code [the CFRA], a person employed in a position requiring certification qualifications is *not* required to have 1,250 hours of service with the employer during the previous 12-month period in order to take parental leave pursuant to this section." (Emphasis added.) Before this amendment, differential pay was provided only to those certificated employees who, under the CFRA, worked 1,250 hours in the past 12 months. The 2016 statute also expanded differential pay for K-14 classified school employees and community college faculty on parental leave for the 12 weeks of unpaid leave. The Commission has not received a test claim filing on Statutes 2016, chapter 883 and thus, makes no determination on that statute.

the 12-week period is exhausted, the employee may take the balance of the 12-week period in the subsequent school year.

(3) An employee on maternity or paternity leave pursuant to Section 12945.2 of the Government Code shall not be denied access to differential pay while on that leave.

(c) This section shall be applicable whether or not the absence from duty is by reason of a leave of absence granted by the governing board of the employing school district.

(d) To the extent that this section conflicts with a provision of a collective bargaining agreement entered into by a public school employer and an exclusive bargaining representative before January 1, 2016, pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, this section shall not apply until expiration or renewal of that collective bargaining agreement.

(e) For purposes of this section, "maternity or paternity leave" means leave for reason of the birth of a child of the employee, or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee.

Under the test claim statute, the certificated employee is required to exhaust existing and accumulated sick leave benefits before he or she is eligible for differential pay during the 12-weeks of parental leave. Differential pay is the remainder of the certificated employee's salary after the substitute employee's pay is deducted. As the statute states, differential pay is "the amount deducted from the salary due [the certificated employee] for any of the additional 12 weeks in which the absence occurs [and] shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed." For example, if a certificated employee earns $200 per day, and a substitute is paid $75 per day, the differential pay to the absent certificated employee is $125 per day during the 12-week authorized absence, after exhausting existing and accumulated sick leave.[34] Therefore, after the sick leave is exhausted, the differential pay to the certificated employee on leave and the substitute's pay equals the amount the school district budgeted for and would have paid the certificated employee if no parental leave were taken. As recognized in the May 26, 2015 analysis of the bill by the Assembly Appropriations Committee, the statute may result in a loss of cost savings to the district as a result of not paying the employee on leave:

> Employer costs based on the differential pay program should not exceed what is normally paid to a school employee who would otherwise be working; however,

[34] See Exhibit F, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 3, which uses the following example: if the certificated employee is normally paid $50,000 and the substitute pay is $35,000, then the certificated employee would be paid the difference of $15,000 during maternity or paternity leave, after exhausting all accrued sick leave. Substitute teachers are generally paid by the day and do not receive an annual salary. (Ed. Code, § 45030.)

> this bill may place additional cost pressures on school district budgets to the extent they no longer experience cost savings as a result of not paying employees during a leave of absence due to maternity or paternity leave.[35]

Similarly, the Senate Appropriations Committee states that school districts "will not realize the savings attributed to unpaid maternity and paternity protected leave that they currently experience. . . . [E]mployer costs based on the differential pay program should not exceed what is normally paid to a school employee who would otherwise be working."[36]

The initial reason for enacting the bill, according to the author, is stated in the legislative history:

> According to the author, currently, certificated school employees can only take up to six or eight weeks of paid leave when they have a baby. Six or eight weeks is insufficient time for a new parent to care for and bon [sic] with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave.
>
> [¶] . . . [¶]
>
> The U.S. is the only industrialized nation that doesn't mandate that parents of newborns get paid leave.[37]

The later-drafted Senate Floor Analysis states additional reasons for the bill:

> According to the author's office, "Forcing teachers and other certificated employees to take entirely unpaid leave after only six or eight weeks of maternity leave, or none in the case of a new father, can lead to several issues for the employee, the school district, and society. Less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems. A lack of proper postpartum support in the form of reasonable parental leave tends to lead to a delay in childhood immunizations, a decrease in the duration and likelihood of breastfeeding, increased financial hardship, and a higher chance of postpartum depression." The author's office indicates that six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave.[38]

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[35] Exhibit F, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 2.

[36] Exhibit F, Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

[37] Exhibit F, Assembly Committee on Education, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 5.

[38] Exhibit F, Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

D. Commission Statement of Decision on *Differential Pay and Reemployment,* 99-TC-02

On July 31, 2003, the Commission adopted a decision partially approving *Differential Pay and Reemployment*, 99-TC-02, a test claim on Statutes 1998, Chapter 30, which amended Education Code section 44977 and added Education Code 44978.1.

As originally enacted before 1975, Education Code section 44977 required that certificated employees who are absent from work on account of illness or accident (including pregnancy, miscarriage, childbirth, and childbirth recovery) to receive differential pay (i.e., the difference between the employee's salary and the sum paid to the substitute employee who filled in during the absence) for a period of up to five school months. This requirement was subject to alternative interpretations. Education Code section 44978, in addition to providing a minimum of ten days of annual sick leave for full-time certificated employees, states that "Section 44977 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident." Thus, differential pay in section 44977 was calculated by many school districts to run after the exhaustion of annual sick leave, and *concurrently* with any accumulated sick leave the teacher may have carried over from previous years. This interpretation was supported by case law in the First and Second District Courts of Appeal and several opinions of the Attorney General.[39]

The 1998 test claim statute, however, required the differential pay to start after the exhaustion of sick leave and accumulated sick leave, stating: "[t]he sick leave, including accumulated sick leave, and the five-month [differential pay] period shall run consecutively." The claimant alleged that this change resulted in increased costs mandated by the state.

The Commission concluded that the change in calculating differential pay from concurrent to consecutive with accrued sick leave may result in an increased cost to school districts in some instances, but does not provide an increased level of service to the public. Therefore, the Commission found that the 1998 amendment to Education Code section 44977 did not impose a new program or higher level of service within the meaning of article XIII B, section 6 for the amount of differential pay to the employee.[40] However, the Commission approved reimbursement for the one-time administrative activity for changing the calculation of differential pay from running concurrently to consecutively with accumulated sick leave.[41]

The 1998 test claim statute also added Education Code section 44978.1, which states that certificated employees who remain unable to return to their original duties due to illness or injury after all sick leave and differential pay is exhausted shall, if not placed in another position, be

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[39] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 6 and 7 (citing *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243; *Lute v. Covina Valley Unified School Dist.* (1988) 202 Cal.App.3d 1181; 29 Ops.Atty.Gen. 62, 63 (1957); 30 Ops.Atty.Gen. 307, 309 (1957); 53 Ops.Atty.Gen. 111, 113 (1970).)

[40] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 8-9.

[41] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 7, 12.

placed on a reemployment list. The Commission concluded that Education Code section 44978.1 imposed a reimbursable state-mandated program for school districts to:

- When a certificated employee is not medically able to resume the duties of his or her position following the exhaustion of all sick leave and the five-month differential pay period described in Education Code section 44977 has been exhausted, place the employee, if not placed in another position, on a reemployment list for 24 months for probationary employees, or 39 months for permanent employees. (This activity includes the one-time activity of establishing a reemployment list for this purpose, and ongoing activities of maintaining the list.)
- When the employee is medically able, return the employee to a position for which he or she is credentialed and qualified. (This activity includes the administrative duties required to process the re-employment paperwork, but not reimbursement of salary and benefits for the employee once they return to work.)[42]

Costs for the *Differential Pay and Reemployment* program are currently reimbursed under the education mandates block grant.[43]

III. Positions of the Parties

A. Fresno Unified School District

The claimant maintains that the test claim statute imposes a reimbursable state-mandated program on school districts under article XIII B, section 6 of the California Constitution and Government Code section 17514. The claimant alleges reimbursable costs for differential pay for up to 12 school weeks to certificated school district employees who exhaust their sick leave. The claimant also alleges one-time administrative costs for developing and implementing internal policies, training, and procedures and forms. The claimant's declaration, filed under penalty of perjury, states that the test claim statute resulted in total actual costs to the claimant of $17,972.86 during 2016.[44]

In rebuttal comments, the claimant distinguishes the *Differential Pay and Reemployment*, 99-TC-02, Test Claim Statement of Decision, citing the legislative history of the test claim statute in the present case to show that differential pay for certificated employees provides an enhanced service to the public. According to the claimant:

> The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's future mental, physical, social and emotional health in life impacted by the strength of the relationship with both of the child's parents. The test claim does not involve concurrent and consecutive sick leave that is limited to a change in calculating differential pay.[45]

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[42] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment,* 99-TC-02, July 31, 2003, pages 11-12.

[43] Government Code section 17581.6(e)(19).

[44] Exhibit A, Test Claim, pages 11-12.

[45] Exhibit C, Claimant's Rebuttal Comments, page 4.

The claimant further argues that the statute enhances the level of service provided to the public because, according to the legislative history:

1. Maternity leave is essential, not only for a mother's full recovery from childbirth, but also to facilitate a stronger mother-child bond.
2. A child's ability to succeed in school and in life is impacted by the strength of the relationship with the primary caretaker. This relationship affects a child's future mental, physical, social, and emotional health. Additionally, this relationship is founded on the nonverbal emotional communication between child and parent, known as the attachment bond, which occurs naturally as a baby's needs are cared for. A secure attachment bond ensures that a child will feel secure, understood, and safe; this results in eagerness to learn, healthy self-awareness, trust, and empathy.
3. Overall, paid family leave helps keep people in the workforce after they have children. When more workers are able to take leave, they are more likely to choose to remain in the labor market; and paid parental leave is associated with higher employment in economies around the world. (AB 375; Assembly Third Reading – May 4, 2015)
4. Forcing teachers and other certificated employees to take entirely unpaid leave after only six to eight weeks of maternity leave, or none in the case of a new father, can lead to several issues for the employee, the school district, and society. Less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems. A lack of proper postpartum support in the form of reasonable parental leave tends to lead to a delay in childhood immunizations, a decrease in the duration and likelihood of breastfeeding, increased financial hardship, and a higher chance of postpartum depression.
5. The author's office indicates that six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave. (Senate Rules Committee, July 8, 2015).[46]

The claimant's rebuttal comments and comments on the Draft Proposed Decision distinguish *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that were cited by Finance to argue that the test claim statute does not impose a new program or higher level of service. The claimant argues that unlike the statutes in those cases, this test claim statute imposes unique requirements on school districts that constitute a state-mandated new program or higher level of service.[47]

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[46] Exhibit C, Claimant's Rebuttal Comments, page 2.

[47] Exhibit C, Claimant's Rebuttal Comments, pages 3-4. Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 6. The Claimant's Rebuttal Comments (Exhibit C, p. 3, fn. 1) also state: "Finance's comments failed to comply with Cal. Code Regs., tit. 2, §§1183.2 and 1187.5 and shall be excluded from the Commission's ultimate findings and the record." These regulations require all representations of fact, including written comments and supporting documentation to be signed at the end of the document by an authorized representative, with a declaration that they are true and complete to the best of the representative's personal knowledge

In comments on the Draft Proposed Decision, the claimant maintains that the test claim statute applies uniquely to school districts and increases the level of service to the public "in providing higher student test scores, reduces gap in education, avoids costly turnover, and retains the valued expertise, skills, and perspective of teachers who are mothers."[48] Citing a Senate analysis of the test claim statute, the claimant states that less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems, and other benefits to the children of mothers who used maternity leave. The claimant also cites: (1) the part of the legislative history expressing support from the California Teachers Association, which touted the benefits of maternity leave and paid family leave, and (2) legislative history from the bill's author that six or eight weeks of leave is insufficient time for a parent to care for and bond with a child. The claimant also alleges that school teachers who take parental leave are more likely to return to the classroom and provide an "experienced level of service" to the public in reducing the time that substitute teachers, who are often less experienced or un-credentialed, are in the classroom.[49] "Previous mandates that denied reimbursement did not exclusively apply to public education or provide a higher level of service. (unemployment insurance, worker's compensation, pensions, and death benefits.)"[50]

The claimant distinguishes the activities required by this test claim statute from those in the *Differential Pay and Reemployment*, 99-TC-02, test claim, which the Commission found did not provide an increased level of service to the public, though they may have resulted in increased costs to school districts in some instances. According to the claimant:

> The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's educational performance, future mental, physical, social, and emotional health in life, impacted by the strength of the relationship with both of the child's parents. The test claim does not involve concurrent and consecutive sick leave that is limited to a change in calculating differential pay.[51]

The claimant also alleges that the test claim statute results in increased costs mandated by the state because school districts were not required to pay differential leave before the test claim statute, but now must do so for three months during the employee's leave.[52] The claimant contends that the school district budget is not the decisive factor, but actual costs, and the shift in

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or information or belief. Although the Finance's comments are not signed under penalty of perjury with the declaration, the issues presented in this Test Claim are pure questions of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.) Finance's comments relevant to test claim findings contain arguments interpreting the law and do not include representations of fact.

[48] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 3.

[49] Exhibit E, Claimant's Comments on the Draft Proposed Decision, pages 3-4.

[50] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

[51] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 6.

[52] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

program funding from the state to a local entity violates the intent of article XIII B, section 6 of the California Constitution.[53]

The claimant submitted comments in response to the Proposed Decision, objecting to the citation to an unpublished decision, *CSAC-Excess Insurance Authority v. Commission on State Mandates,* on the ground that the citation violates California Rule of Court 8.1115. The claimant included a declaration regarding the increased costs for differential pay, arguing that it is inaccurate to say that the claimant does not incur increased costs for differential pay, and that due to the test claim statute, the claimant "has been required to develop and implement internal policies, training, procedures, and forms relating to the administration of the Parental Leave Program. (One-time)"[54]

B. Department of Finance

Finance states that recognizing one-time administrative activities (such as for developing and implementing internal policies, training, procedures and forms to comply with the statute) as reimbursable activities would be consistent with the Commission's 2003 Statement of Decision in *Differential Pay and Reemployment,* 99-TC-02. Finance anticipates that ongoing costs associated with the administrative activities would "likely be less than the low tens of thousands of dollars annually."[55]

Finance also argues that the cost of differential pay to certificated employees on maternity or paternity leave is not a state-reimbursable cost for the same reasons stated in the Statement of Decision for the Test Claim, *Differential Pay and Reemployment,* 99-TC-02. Courts have found that a higher cost of employee compensation is not the same as a higher cost of providing a service to the public.[56]

Finance did not file comments on the Draft Proposed Decision.

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'

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[53] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

[54] Claimant's Comments on the Proposed Decision, Declaration of Kim Kelstrom, September 15, 2017, page 2: https://csm.ca.gov/matters/16-TC-01/doc10.pdf. These comments were not included in the decision since they were submitted after the close of the comment period, however the issue regarding increased costs was addressed at the September 22, 2017 Commission hearing on this matter.

[55] Exhibit B, Finance's Comments on the Test Claim, page 1.

[56] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[57] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[58]

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.[59]
2. The mandated activity constitutes a "program" that 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.[60]
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.[61]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[62]

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 of the California Constitution.[63] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[64] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

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

[58] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[59] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 874.

[60] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[61] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[62] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[63] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[64] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[65]

A. Although the Test Claim Statute Applies Uniquely to Local School Districts and Provides a New Benefit to Certificated Employees, the Requirement to Provide Differential Pay Does Not Constitute a New Program or Higher Level of Service, and Does Not Impose Increased Costs Mandated by the State.

As stated in the background, Education Code section 44977.5, as amended by Statutes 2015, chapter 400, provides for differential pay for up to 12 weeks to a certificated school employee who is absent due to parental leave, after the exhaustion of sick leave. "Differential pay" is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted.

The Commission finds that the differential pay required by the test claim statute increases an employee benefit, but does not increase the level of governmental service provided to the public, nor does it result in increased costs mandated by the state. Thus, the differential pay required by the test claim statute does not constitute a reimbursable state-mandated program.

1. Differential Pay for Parental Leave Does Not Impose a New Program or Higher Level of Service Because Differential Pay Is an Employee Benefit, and Does Not Increase the Level of Governmental Service Provided to the Public.

The courts have consistently held that increases in the cost of providing employee compensation or benefits are not subject to reimbursement as state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6. Rather, a new program or higher level of service exists only when the test claim statute requires an increase in the *actual level of governmental service provided to the public*.[66]

In 1987, the California Supreme Court decided *County of Los Angeles v. State of California,*[67] and for the first time, defined a " new program or higher level of service" within the meaning of article XIII B, section 6. Counties were seeking reimbursement for legislation that required local agencies to provide the same level of workers' compensation benefits to their employees as employees of private individuals or organizations receive. The Supreme Court recognized that workers' compensation is not a new program and was left to decide whether the legislation imposed a higher level of service on local agencies.[68] Although the court defined a "program" to

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

[66] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877. See also pages 875-878, where the court discusses the two lines of cases as "those measures designed to increase the level of governmental services to the public," which results in a new program or higher level of service, and those measures "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased," which does not.

[67] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[68] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

include "laws which, to implement a state policy, impose unique requirements on local governments," the court emphasized that a new program or higher level of service requires "state mandated increases in the services provided by local agencies in existing programs."[69]

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[70]

The court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[71]

Applying these principles, the court held that reimbursement for the increased costs of providing workers' compensation benefits to employees of local agencies was not required by the California Constitution. The court stated:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[72]

Seventeen years later, the California Supreme Court summarized its holding in *County of Los Angeles* by stating that although "[t]he law increased the cost of employing public servants, … it did not in any tangible manner increase the level of service provided by those employees to the public."[73]

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[69] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[70] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Emphasis added.

[71] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57. Emphasis added.

[72] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58, footnote omitted.

[73] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 875.

In 1998, the Third District Court of Appeal decided *City of Richmond v. Commission on State Mandates*,[74] involving legislation requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System (PERS) and the workers' compensation system. This resulted in survivors of local safety members of PERS who were killed in the line of duty receiving both a death benefit under worker's compensation and a special death benefit under PERS, instead of the greater of the two as under prior law. The court held that the legislation did not constitute a new program or higher level of service even though the benefits might generate a higher quality of local safety officers and thereby, in a general and indirect sense, provide the public with a higher level of service by its employees.[75] The court in *City of Richmond* stated:

> Increasing the costs of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 … A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.[76]

The court further clarified that "[a]lthough a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[77]

Two other published cases have reached the same conclusion regarding employee compensation or benefits. In *City of Anaheim*, the court found that a temporary increase in PERS benefits for retired employees, resulting in higher contribution rates for local government, did not constitute a new program or higher level of service to the public.[78] As the court said: "City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public."[79] And in *City of Sacramento*, the California Supreme Court determined that the requirement to provide unemployment insurance to the city's employees was not a service to the public.[80]

In 2004, the California Supreme Court summarized the above line of cases in *San Diego Unified School Dist.*, as those "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased."[81] The Supreme Court stated: "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order

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[74] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[75] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, where the Supreme Court reviewed the *City of Richmond* decision.

[76] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[77] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[78] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

[79] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

[80] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[81] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 878.

constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[82, 83]

Based on these cases, a new program or higher level of service requires more than increased costs experienced uniquely by local government. A new program or higher level of service exists only if the state has mandated an increase in the actual level of governmental service provided to the public.[84] For example, the courts have found a reimbursable new program or higher level of service when the state imposed a new requirement on local agencies to provide protective clothing and safety equipment to firefighters "because the increased safety equipment apparently was designed to result in more effective fire protection . . . ."[85] In addition, courts have found a reimbursable new program or higher level of service when the state mandated school districts to take specific steps to measure and address racial segregation in public schools. The court found this was a higher level of service to the extent the requirements exceeded federal law and case law requirements by mandating school districts to undertake defined actions that were merely advisory under prior law.[86] The California Supreme Court has held that requirements to immediately suspend and recommend expulsion for pupils who possess a firearm at school were intended to provide a new program or higher level of service to the public in the form of "safer schools for the vast majority of students."[87] The courts have also found a new program or higher level of service when the state shifted the cost of educating pupils at state schools for the severely handicapped to local school districts; a program that was previously administered and funded entirely by the state.[88]

In this case, the claimant argues that the test claim statute provides a service to the public, citing the legislative history of the test claim statute that extols the benefits of parental leave to families

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[82] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877. Emphasis in original.

[83] Similarly, in 2006, the Second District Court of Appeal issued an unpublished decision in *CSAC-Excess Insurance Authority v. Commission on State Mandates*, finding that legislation, which provided an evidentiary presumption of industrial causation in workers' compensation cases for cancer and lower back injury claims for local government employees (firefighters, peace officers, and publicly-employed lifeguards), did not provide a service to the public even though the legislation was addressed only to local government. (Exhibit F, *CSAC-Excess Insurance Authority v. Commission on State Mandates,* December 20, 2006, B188169; review denied by Supreme Court March 21, 2007, nonpublished opinion.)

[84] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.

[85] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877, citing *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537-538.

[86] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172, 173; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[87] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878.

[88] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836.

and society. According to the claimant: "The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's future mental, physical, social and emotional health in life impacted by the strength of the relationship with both of the child's parents."[89]

However, the governmental service provided by school districts is public education,[90] which has not been increased or enhanced by the test claim statute. In fact, the Legislature placed section 44977.5 in the part of the Education Code that relates to "Employees"[91] and *not* in the part that relates to "Instruction and Services" for pupils.[92] Based on the plain language of the test claim statute and its placement of section 44977.5, the differential pay is a benefit provided solely to certificated employees who are *not* engaged in providing educational services to the public. In this regard, the test claim statute resembles the statutes at issue in the cases that involved unemployment insurance,[93] workers compensation,[94] pensions,[95] and public safety death benefits,[96] in which reimbursement was denied. In those cases, employment benefits were also provided to employees not engaged in their official duties. As recognized by the California Supreme Court, employee benefits might generate a higher quality of local employees and, "in a general and indirect sense," provide the public with a higher level of service.[97] But the purpose of article XIII B, section 6 is to require reimbursement to local government for the costs of carrying out functions peculiar to government, not for compensating local government employees. "A higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public."[98]

The claimant now argues, however, that the statute provides a higher level of service to the public because teachers who take parental leave are more likely to return to the classroom and provide an "experienced level of service" to pupils, and reduce the time that substitute teachers,

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[89] Exhibit C, Claimant's Rebuttal Comments, pages 2, 4; Exhibit E, Claimant's Comments on the Draft Proposed Decision, pages 3-4.

[90] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

[91] Chapter 3 "Certificated Employees," of Part 25 "Employees," of Division 3 "Local Administration."

[92] Division 4 of the Education Code (Parts 26-38) "Instruction and Services," beginning with section 46000.

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

[94] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[95] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

[96] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[97] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, where the Supreme Court reviewed the *City of Richmond* decision.

[98] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

who are often less experienced or un-credentialed, are in the classroom.[99] The claimant's argument is not supported by the evidence in the record. The assertion that the test claim statute will result in teachers returning to the classroom, thereby reducing substitute teacher time, is not supported by the record. Although the legislative history of the test claim statute recognizes the possibility that differential pay may result in more employees staying in the labor market,[100] the bill analysis by the Senate Appropriations Committee states that the benefit will likely provide an incentive for the certificated employee to be absent longer than if the leave were unpaid:

> The expanded differential pay requirement will likely provide employees on maternity and paternity leave an incentive to be absent longer than they otherwise would have been if they were not paid during this time. However, the strength of this incentive will depend on the how long the employee can go without earning his or her full salary.[101]

In addition, the claimant provides no evidence for the assertion that a permanent certificated employee provides a higher and more "experienced" level of service than a substitute employee.[102] To the extent that this may be true in some cases, it only provides the public with a higher level of service "in a general and indirect sense," similar to how a pension,[103] or public safety death benefits[104] might help to "generate a higher quality" of public employees but the purpose of article XIII B, section 6 of the California Constitution is to require reimbursement to local government for the costs of carrying out functions peculiar to government, not to

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[99] Exhibit E, Claimant's Comments on the Draft Proposed Decision, pages 3-4.

[100] Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 3. Support for AB 375 from the California Teachers Association stated: "when more workers are able to take leave, they're more likely to choose to remain in the labor market, and paid parental leave is associated with higher employment in economies around the world."

[101] Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 3.

[102] According to Education Code section 41401(d): ""Teacher" means an employee of a school district, employed in a position requiring certification qualifications, whose duties require him or her to provide direct instruction to pupils in the schools of that district for the full time for which he or she is employed. "Teacher" includes, but is not limited to, teachers of special classes, teachers of exceptional children, teachers of pupils with physical disabilities, teachers of minors with intellectual disabilities, substitute teachers, ..." Emphasis added.

[103] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

[104] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195. One of the arguments the City of Richmond made and the court rejected was that the death benefit at issue was provided "to generate a higher quality of local safety officers and thus provide the public with a higher level of service." In discussing the *City of Richmond* case, the California Supreme Court said this employee benefit provided a service to the public in a "general and indirect" sense. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876.

compensate local government employees. "A higher cost to local government for compensating its employees is not the same as a higher cost of providing services to the public."[105]

Thus, the test claim statute does not directly enhance or increase the level of educational services provided by school districts to the public.[106] The statute simply provides an employee benefit. The claimant also suggests that the test claim statute shifted the financial responsibility for paying employee benefits from the state to local school districts, thereby requiring reimbursement under article XIII B, section 6.[107] The courts have determined that reimbursement under article XIII B, section 6 is required, not only when the state mandates local government to perform new activities or to increase the level of service provided to the public, but also when the state compels local government to accept financial responsibility in whole or in part for a governmental program which was funded and administered entirely by the state before the advent of article XIII B, section 6.[108] The test claim statute, however, has not shifted an educational program from itself to local school districts, and the State has never been responsible for paying the salary and benefits (including differential pay) of local employees. Paying salaries and benefits to certificated employees has always been the responsibility of the local school district.[109] Thus, the state has not shifted the financial responsibility of a governmental program to the local districts.

Therefore, the Commission finds that the differential pay required by the test claim statute does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

2. <u>The Differential Pay Required by the Test Claim Statute Does Not Impose Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution</u>.

The claimant alleges that the test claim statute results in increased costs mandated by the state, and filed a declaration by the Executive Officer of Fiscal Services from Fresno Unified School District, who declares under penalty of perjury that the district incurred actual costs of $17,972.86 during 2016 to comply with the test claim statute.[110] The claimant, however, does not identify which expenses were actually incurred, or provide any evidence of the cost of each alleged activity to implement the test claim statute.

The purpose of article XIII B, section 6 is to prevent the state from forcing new programs or higher levels of service on local governments that require "increased actual expenditures" of

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[105] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[106] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

[107] Exhibit E, Claimant's Comments on the Draft Proposed Decision, page 5.

[108] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[109] Education Code sections 45022, et seq.

[110] Exhibit A, Test Claim, pages 11-12.

their limited tax revenues that are counted against the local government's annual spending limit in accordance with articles XIII A and XIII B.[111] The Commission finds, as a matter of law, that the differential pay required by the test claim statute does not result in actual increased costs mandated by the state within the meaning of article XIII B, section 6.

As indicated in the Background, after a certificated employee's sick leave and accumulated sick leave have been exhausted, differential pay is the remainder of the certificated employee's salary after the substitute employee's pay (or the equivalent amount if no substitute is employed) is deducted. Substitute employees are generally paid by the day.[112] Thus, if a certificated employee earns $200 per day, and a substitute is paid $75 per day, the differential pay to the absent certificated employee is $125 per day during the 12-week authorized absence, after exhausting sick leave and accumulated sick leave. The amount spent by the district on the differential pay and the amount paid to the substitute equals the amount the school district budgeted and would have paid the certificated employee if the certificated employee had not taken parental leave.[113] Thus, the district is not incurring an *increased* cost for the differential pay. Rather, the district is simply paying part of the certificated employee's budgeted salary to the certificated employee, and part to the substitute. Thus, the test claim statute does not require "increased actual expenditures" of a school district's limited tax revenues that are counted against the district's annual spending limit for the differential pay.

As recognized in the legislative history of the test claim statute, a school district may lose cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute would be paid during the certificated employee's parental leave.[114] The courts, however, have held that article XIII B, section 6 is not designed to reimburse a loss of cost savings. In *County of Sonoma v. Commission on State Mandates*, the court concluded that reimbursement is not required for a loss of revenue; "it is the expenditure of tax revenues of local

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[111] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 736; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284; California Constitution, article XIII B, sections 1 and 8(a)-(c), (h).

[112] Education Code section 45030, which provides that "The governing board of any school district may employ such substitute employees of the district as it deems necessary and shall adopt and make public a salary schedule setting the daily or pay period rate or rates for substitute employees."

[113] Under the Education Code, school districts must adopt their annual budgets by July 1. (Ed. Code, § 42127(a)(2)(A).) Between 50 to 60 percent of state-apportioned district funds are required to be spent on salaries of certificated classroom teachers, which is included in the district's annual budget. (Ed. Code, §§ 41370, 41372(b); and Exhibit F, California Department of Education, California School Accounting Manual (2016) pages 210-1 – 210-19. The manual requires budgeting for certificated employees separately: http://www.cde.ca.gov/fg/ac/sa/documents/csam2016complete.pdf (accessed on May 31, 2017).)

[114] Exhibit F, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 2; Exhibit F, Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

governments that is the appropriate focus of section 6."[115] In that case, several counties challenged a Commission decision denying reimbursement for a statute that reduced property taxes previously allocated to local governments and simultaneously placed, in an amount equal to the amount reduced, into the Educational Revenue Augmentation Fund for distribution to school districts.[116] The court found that the counties' tax revenues were not expended. "No invoices were sent, no costs were collected, and no charges were made against the counties . . ."[117] As the court explained, reimbursement is only required when a test claim statute results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit:

> An examination of the intent of the voters and the language of Proposition 4 [the source of article XIII B, section 6] itself supports our conclusion that Proposition 4 was aimed at controlling and capping government spending, not curbing changes in revenue allocations [between counties and school districts]. 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.[118]

Accordingly, the Commission finds that the differential pay required by the test claim statute does not impose increased costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution.

B. The Test Claim Statute Does Not Mandate a New Program or Higher Level of Service for Administrative Activities to Develop and Implement Internal Policies and Procedures, Training, and Forms, or to Calculate and Pay the Differential Salary.

The claimant alleges that the test claim statute mandates a new program or higher level of service for administrative activities, such as developing and implementing internal policies, training, and adopting forms to administer differential pay for certificated employees on maternity and paternity leave.[119] Finance states that one-time reimbursement for these types of administrative activities would be consistent with the Statement of Decision for the *Differential Pay and*

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[115] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[116] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1269.

[117] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[118] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284 (emphasis added).

[119] Exhibit A, Test Claim, pages 8-9.

Reemployment Program, 99-TC-02.[120] In that decision, the Commission approved reimbursement for the one-time administrative activity of changing the process for calculating the five-month differential pay period from running concurrently to consecutively with accumulated sick leave.[121]

The Commission finds that these activities are not mandated by the state, and do not impose a new program or higher level of service.

Developing and implementing internal policies, procedures, training, and forms, is not mandated by the plain language of the test claim statute. The test claim statute states in pertinent part: "…the amount deducted from the salary due … [the certificated employee] for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence."[122] Although a school district may find that administrative activities are necessary to comply with the requirement to provide differential pay, a state-mandated activity must be "ordered" or "commanded" by the state.[123]

Moreover, the administrative activities of calculating and paying the differential salary under the test claim statute are incidental to, and part and parcel of, providing the employee benefit. These activities do not result in an increased level of educational services provided to the public and thus, do not constitute a new program or higher level of service. "Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[124] As clarified by the Supreme Court in the 2004 *San Diego Unified School District* case, incidental aspects of law that are designed to implement a statute, like the administrative activities in this case, are not eligible for reimbursement under article XIII B, section 6.[125]

Although this finding may be viewed as a departure from the Commission's Test Claim Statement of Decision *Differential Pay and Reemployment,* 99-TC-02, Commission decisions are not precedential. Like other administrative agencies, the Commission is free to depart from its prior findings if its determination is supported by law and the evidence in the record, and is not

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[120] Exhibit B, Finance's Comments on the Test Claim, page 1.

[121] Statement of Decision, *Differential Pay and Reemployment,* 99-TC-02, July 31, 2003, pages 7, 12.

[122] Education Code, section 44977.5(a) (Stats. 2015, ch. 400). Note that this code section has since been amended by Statutes 2016, chapter 883, over which the Commission has no jurisdiction and makes no finding.

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

[124] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[125] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889, where the court concluded that incidental requirements designed to implement existing federal law are not eligible for reimbursement.

arbitrary in itself.[126] In addition, the Statement of Decision in *Differential Pay and Reemployment*, 99-TC-02, was adopted before the California Supreme Court clarified the law on this issue in the *San Diego Unified School District* case.[127]

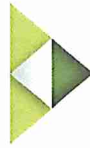
Accordingly, the Commission finds that the test claim statute does not mandate a new program or higher level of service for administrative activities to develop and implement internal policies, training, procedures, and forms, or to calculate and pay the differential salary.

V. Conclusion

For the reasons stated above, the Commission finds that Statutes 2015, chapter 400, does not impose a reimbursable state-mandated program on school districts. The Commission denies the Test Claim.

[126] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777; 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989) ["We do not question the power of an administrative agency to reconsider a prior decision for the purpose of determining whether that decision should be overruled in a subsequent case. It is long settled that due process permits substantial deviation by administrative agencies from the principle of stare decisis."]

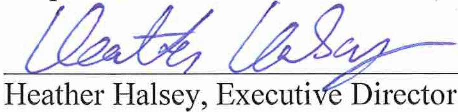
[127] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889.


STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

RE: **Decision**

Certificated School Employees: Parental Leave, 16-TC-01
Education Code Section 44977.5;
Statutes 2015, Chapter 400 (AB 375)
Fresno Unified School District, Claimant

On September 22, 2017, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.



Heather Halsey, Executive Director

Dated: September 26, 2017

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

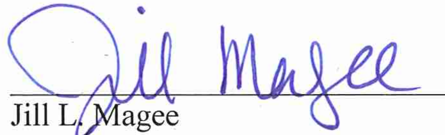
On September 26, 2017, I served the:

- **Decision adopted September 22, 2017**

  Certificated School Employees: Parental Leave, 16-TC-01
  Education Code Section 44977.5;
  Statutes 2015, Chapter 400 (AB 375)
  Fresno Unified School District, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

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 September 26, 2017 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/21/17

Claim Number: 16-TC-01

Matter: Certificated School Employees: Parental Leave

Claimant: Fresno Unified School District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

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