MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 126
Sacramento, California
March 25, 2004

Present: Chairperson James Tilton
Representative of the Director of the Department of Finance
Member William Sherwood
Representative of the State Treasurer
Member Walter Barnes
Representative of the State Controller
Member Jan Boel
Acting Director of the Office of Planning and Research
Member John Lazar
City Council Member

Vacant: Local Elected Official
Public Member

CALL TO ORDER AND ROLL CALL

Chairperson Tilton called the meeting to order at 9:36 a.m.

APPROVAL OF MINUTES

Item 1 January 29, 2004

Upon motion by Member Barnes and second by Member Lazar, the minutes were unanimously adopted.

PROPOSED CONSENT CALENDAR

HEARING TO SET ASIDE PRIOR STATEMENTS OF DECISION, PARAMETERS AND GUIDELINES, AND STATEWIDE COST ESTIMATE PURSUANT TO COURT ORDERS (Gov. Code, § 17559, subd. (b).) (action)

Item 13 *Order to Set Aside Statement of Decision and Adopt New Decision: Medically Indigent Adults,* No. CSM R-S046843 (On Remand from the California Supreme Court, *County of San Diego v. State of California* (1997) 15 Cal.4th 68); (Peremptory Writ of Mandamus from the Superior Court, *County of San Diego v. Commission on State Mandates* (GIC 762953))

Item 14 *Order to Set Aside Statement of Decision Adopted on July 29, 1999 and Vacate Applicable Parameters and Guidelines and Statewide Cost Estimate: School Bus Safety II,* 97-TC-22 (Peremptory Writ of Mandamus from the Superior Court, *Department of Finance v. Commission on State Mandates* (02CS00994))
Education Code Sections 38048, 39831.3, and 39831.5,
Vehicle Code Section 22112
Statutes 1994, Chapter 831 (SB 2019)
Statutes 1996, Chapter 277 (SB 1562)
Statutes 1997, Chapter 739 (AB 1297)

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

ADOPTION OF AMENDMENTS TO PARAMETERS AND GUIDELINES

Item 15 Amendment to Vacate *School Bus Safety II* Parameters and Guidelines, 03-PGA-04, as described in Item 14 above, as adopted on November 30, 1999 and amended on January 23, 2003, from *School Bus Safety I* Parameters and Guidelines, CSM-4433
Education Code Sections 38048, 39831.3, and 39831.5
Vehicle Code Section 22112
Statutes 1992, Chapter 624 (AB 3144)
Statutes 1994, Chapter 831 (SB 2019)
Statutes 1996, Chapter 277 (SB 1562))
Statutes 1997, Chapter 739 (AB 1297)
Statutes 2002, Chapter 1167 (AB 2781)

ADOPTION OF PROPOSED STATEWIDE COST ESTIMATE

Item 16 *Presidential Primaries,* 99-TC-04
County of Tuolumne, Claimant
Elections Code Sections 15151 and 15375
Statutes 1999, Chapter 18 (SB 100)

Member Barnes moved for adoption of the consent calendar, which consisted of items 13, 14, 15, and 16. With a second by Member Sherwood, the consent calendar was unanimously adopted.

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)

Paula Higashi, Executive Director, swore the parties and witnesses participating in the hearing of the agenda items.

APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c)

Item 2 Return of "Test Claim" on *Transit Trash Receptacles,* 03-TC-04
California Water Quality Control Board Executive Order Number 01-182, December 13, 2001 [Permit Number CAS004001, Part 4, Section F.5.c.]. Filed on September 5, 2003 by County of Los Angeles, Claimant and Appellant.

Item 3 Return of "Test Claim" on *Inspection of Industrial/Commercial Facilities,* 03-TC-19; California Water Quality Control Board Executive Order Number 01-182, December 13, 2001 [Permit Number CAS004001, Part 4, Section C.2.a. & b.]. Filed on September 29, 2003, by County of Los Angeles, Claimant and Appellant.

Camille Shelton, Senior Commission Counsel, presented items 2 and 3. She noted that in September 2003, the County of Los Angeles filed two test claims on orders issued by the California Regional Water Quality Control Board, Los Angeles Region. However, in October 2003, the Executive Director returned the filings because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to article XIII B, section 6 of the California Constitution.

Ms. Shelton stated the county's argument that the Commission cannot rely on the plain language of Government Code section 17516 since it limits the right to reimbursement under article XIII B, section 6. Staff concludes that the Executive Director correctly returned these filings because article III, section 3.5 of the Constitution prohibits the Commission from declaring Government Code section 17516 unenforceable or unconstitutional.

Staff recommended that the Commission deny the county's appeals.

Parties were represented as follows: Leonard Kaye, on behalf of the County of Los Angeles; and Michael Lauffer, with the State Water Resources Control Board.

Mr. Kaye indicated that item 2 involved the activities of developing, installing, maintaining, and servicing transit trash receptacles. He argued that there was no other entity in the county that was required to perform these activities and it was not required under prior law. He also argued that the county did not receive funding, that this was not a law of general application, and that nothing in federal law states that trash receptacles needed to be provided at all transit stops in Los Angeles County. Mr. Kaye urged the Commission to at least consider the merits of the test claims before making a determination.

Mr. Lauffer agreed that the Commission was obliged to follow the Government Code and noted that there was ongoing litigation involving the issue of the Regional Board's authority to issue the permit.

Mr. Lauffer explained that the Regional Water Quality Control Board was compelled to issue the municipal stormwater permit pursuant to federal law, and that permits could only be issued to municipalities. To the extent that stormwater quality continues to be a problem, each permit under federal law is required to get more stringent.

Moreover, regarding the issue of inspections and the concern that the state is shifting its responsibility, Mr. Lauffer contended that the state continues to carry out its own inspection obligations. Under federal law, cities and counties are required to have an inspection program for their facilities and they are required to develop ordinances to regulate municipal stormwater runoff.

Mr. Lauffer encouraged the Commission to uphold the staff recommendation.

Chairperson Tilton stated that the issue before the Commission was whether Government Code section 17516 was applicable.

Mr. Kaye noted that the Commission's practice when a funding disclaimer is identified is to consider the merits of the matter. Regarding the issue of the federal mandate, he asserted that the state and regional boards had a great amount of discretion. He added that under the *Hayes* case, a state-mandated program becomes reimbursable if the state voluntarily assigns duties to the cities and counties.

Ms. Shelton agreed that when there were disclaimers in the legislation, the Commission would go through an analysis of the merits of the claim. However, in this case the test claim was filed on a permit issued by a water quality control board, and thus, Government Code section 17516 was being applied for the first time. Therefore, staff's position was that the Commission did not have jurisdiction over this claim and cannot analyze its merits.

Member Sherwood stated his belief that staff's recommendation was correct in this case.

Member Barnes made a motion to adopt the staff recommendations for items 2 and 3 to deny the county's appeals. With a second by Member Sherwood, the motion carried unanimously.

Item 4 Return of "Test Claim" on *Waste Discharge Requirements*, 03-TC-20 California Regional Water Quality Control Board, Los Angeles Region Executive Order Number 01-182, NPDES Permit (CAS004001), Dated December 13, 2001, Parts 4.B.4, 4.C.2.a, 4.C.2.b, 4.C.2.c, D, E, F, and G. Filed on September 30, 2003, by Cities of Artesia, Beverly Hills, Carson, La Mirada, Monrovia, Norwalk, Rancho Palos Verdes, San Marino, and Westlake Village, Claimants and Appellants.

Camille Shelton, Senior Commission Counsel, presented this item. She noted that as in the previous items, the Executive Director returned this filing because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to article XIII B, section 6 of the California Constitution.

Ms. Shelton stated the cities' contention that the Commission cannot rely on the plain language of Government Code section 17516 because it was unconstitutional as applied to this claim. The cities also argue that the California Regional Water Quality Control Board implemented the new requirements through underground rulemaking in violation of the Administrative Procedures Act.

Staff concludes that the Executive Director correctly returned this filing for the following reasons:

1) The Commission does not have authority to determine if the requirements issued by the California Regional Water Quality Control Board are underground regulations, and

2) Article III, section 3.5 of the Constitution prohibits the Commission from declaring Government Code section 17516 unenforceable or unconstitutional. Therefore, the Commission is required by law to enforce Government Code section 17516, and find that the document issued by the California Regional Water Quality Control Board is not an executive order subject to article XIII B, section 6 of the California Constitution.

Staff recommended that the Commission deny the cities' appeal.

Parties were represented as follows: Evan McGinley, on behalf of the test claimants; and Michael Lauffer, with the State Water Resources Control Board.

Mr. McGinley incorporated into his testimony the comments made by Mr. Kaye in the previous items. He added that the plain language of article XIII B, section 6 did not reference any kind of exemption for orders issued by the California Regional Water Quality Control Board.

Further, Mr. McGinley argued that even if the Commission accepted that it was constrained by the Government Code, it was still possible to find that this was an unfunded mandate being imposed upon local governments. He outlined three points for the Commission's consideration:

1) Regional boards have choices as to how they will meet their obligations under the Clean Water Act. They have chosen to meet their obligations in a way that shifts the burden of certain programmatic responsibilities onto local governments.

2) The permit adopted by regional boards have been issued across the state, and thus, resemble a rule of general application. Under the state's Administrative Procedures Act, a rule of general applicability should be formally adopted through the rulemaking provisions. This was not the case here, and hence, the provision under Government Code section 17516 is not applicable.

3) The definition of "executive order" references an exemption for actions that have been taken by the Regional Water Quality Control Board because it exempts publicly-owned treatment works.

Mr. Lauffer incorporated into his testimony the comments he made in the previous items. In response to Mr. McGinley's three arguments, Mr. Lauffer maintained that none altered the analysis conducted by staff under Government Code section 17516. Regarding the reference to publicly-owned treatment works, he asserted that it was precatory language. He added that California courts have consistently held that such language was not directory to an agency, and therefore, it was not binding on the Commission.

Ms. Shelton agreed with Mr. Lauffer's comments. She added that the definition of an executive order goes beyond a regulation. Thus, whether or not the permit goes through the regulatory process has no bearing on whether or not it is an executive order. She maintained that the plain language of Government Code section 17516 clearly applies to permits issued by the Regional Water Quality Control Board.

Member Sherwood made a motion to adopt the staff recommendation to deny the cities' appeal. With a second by Member Barnes, the motion carried unanimously.

Member Lazar indicated that he sympathized with the local governments. However, he stated that he had to follow the recommendations he felt were appropriate.

Item 5 Return of "Test Claim" on *Stormwater Pollution Control Requirements*, 03-TC-21
California Regional Water Quality Control Board, Los Angeles Region Executive Order Number 01-182, NPDES Permit (CAS004001), Dated December 13, 2001, Parts 1 and 2, pages 16-18; Part 4 C and E, pages 27-34, and pages 42-45; and Part 4 F, sections 5 and 6, pages 48-5. Filed on September 30, 2003, by Cities of Arcadia, Baldwin Park, Bellflower, Cerritos, Covina, Downey, Monterey Park, Pico Rivera, Signal Hill, South Pasadena, and West Covina, Claimants and Appellants[1]

Item 6 Return of "Test Claim" on *Stormwater Pollution Control Requirements*, 03-TC-22
California Regional Water Quality Control Board, Los Angeles Region Executive Order Number 01-182, NPDES Permit (CAS004001), Dated December 13, 2001, Parts 1 & 2, Pages 16-18; Part 4C & E, Pages 27-34, and Pages 42-45; and Part 4F (5) & (6), Pages 48-51. Filed on September 30, 2003, by the City of San Dimas, Claimant and Appellant

Camille Shelton, Senior Commission Counsel, presented these items. She noted that as in the previous items, the test claimants here alleged a reimbursable state-mandated program for requirements issued by the California Regional Water Quality Control Board. The Executive Director returned these filings because the plain language of Government Code section 17516 provides that requirements or rules issued by the California Regional Water Quality Control Board are not executive orders subject to article XIII B, section 6 of the California Constitution.

Ms. Shelton stated the cities' argument that the Commission cannot rely on the plain language of Government Code section 17516. Staff concludes that the Executive Director correctly returned these filings based on the plain language of Government Code section 17516, and because

[1] The City of Arcadia is not an appellant.

article III, section 3.5 of the Constitution prohibits the Commission from declaring Government Code section 17516 unconstitutional.

Staff recommended that the Commission deny the cities' appeals.

Parties were represented as follows: Ken Farfsing, on behalf of the test claimants; and Michael Lauffer, with the State Water Resources Control Board.

Mr. Farfsing incorporated into his testimony the comments made in the previous items. He also stated his belief that there were three unfunded mandates in this case that are subject to reimbursement under state law and the California Constitution: placing trash receptacles at all transit stops in the cities, inspecting state-permitted industrial facilities in construction sites, and doing what was necessary to prevent accedence of water quality standards. He contended that prior to the adoption of the stormwater permit in December 2001, none of the three activities were required.

Mr. Farfsing argued that these requirements were not appropriately a part of the stormwater permit. He indicated that this mandate literally required cities to collectively expend billions of dollars to comply with its terms. He added that this was not required by federal law, was not permitted by state law, and was the most expensive mandate that cities had to comply with.

Mr. Lauffer incorporated into his testimony the comments he made in the previous items. He disagreed with Mr. Farfsing as to his characterizations and fiscal analysis of the stormwater permit. He maintained that none of the arguments raised altered the analysis conducted by the Commission staff under Government Code section 17516.

Member Barnes made a motion to adopt the staff recommendations for items 5 and 6 to deny the cities' appeals. With a second by Member Boel, the motion carried unanimously.

TEST CLAIMS AND PROPOSED STATEMENTS OF DECISION

Item 7 *Integrated Waste Management,* 00-TC-07
Santa Monica and South Lake Tahoe Community College Districts, Co-Claimants
Public Resources Code Sections 40148, 40196.3, and 42920-42928
Public Contract Code Sections 12167 and 12167.1
Statutes 1992, Chapter 1116 (AB 3521)
Statutes 1999, Chapter 764 (AB 75)
Manuals of the California Integrated Waste Management Board

Eric Feller, Commission Counsel, presented this item. He noted that among other related activities, the claimants sought reimbursement for the costs of community colleges to divert at least 25 percent of all solid waste generated on campus from landfill or transformation facility disposal by January 2002, and at least 50 percent by January 2004. Staff found a partially reimbursable state mandate for the following activities:

- complying with the board's model integrated waste management plan;
- designating a solid waste reduction and recycling coordinator;
- diverting 25 percent of waste from landfills by January 2002, and 50 percent by January 2004;
- requesting a time extension or alternative requirement, if necessary, with all the accompanying requirements; and

- submitting annual reports to the board on the progress in reducing solid waste and submitting recycled material reports to the board.

Staff further found that the remaining activities alleged by the claimant did not constitute reimbursable activities. Mr. Feller stated that also at issue was whether the community colleges had fee authority to fund the waste reduction program. Staff found that they did not.

Staff recommended that the Commission partially approve the test claim for the identified activities.

Parties were represented as follows: Keith Petersen, on behalf of the test claimants; Deborah Borzelleri and Trevor O'Shaughnessey, with the Integrated Waste Management Board; and Michael Wilkening, with the Department of Finance.

Mr. Petersen stood with his written submissions but had two points of clarification. First, he stated his understanding of staff's conclusion that "a community college must comply with the board's model integrated waste management plan," to mean that regardless of whether a college adopts its own plan, it had to follow the state plan. However, quoting Public Resources Code section 42920, subdivisions (b)(1) and (b)(2), he argued that the plain meaning of the sentence is that community colleges shall adopt an integrated waste management plan.

Mr. Feller explained that subdivision (b)(3) states that if a college fails to adopt a plan, then the state's model plan governs. Therefore, staff took the position that community colleges were not actually required to develop their own plan.

Mr. Petersen argued that the staff conclusion was pertinent only to those colleges that did not adopt their own plan, and that there was no authorization for such a conclusion.

Chairperson Tilton clarified Mr. Petersen's issue. Mr. Petersen added that there was no penalty if colleges do not adopt their own plan.

Paul Starkey, Chief Legal Counsel, stated that in reading the provisions together, staff concluded that at a minimum, the state's model plan must be adopted. Mr. Petersen asserted it was a misstatement of law because each sentence should be read separately. He maintained that the law did not give colleges discretion, either they adopted their own plan or the state forced its plan upon them.

Member Boel requested Ms. Higashi's comments. Ms. Higashi indicated that there was a difference between what the law mandated and what was reimbursable. She stated that Mr. Petersen was arguing that all should be reimbursable, whereas staff's conclusion limits reimbursement to what the state adopted for the community college districts.

Mr. Petersen reiterated that staff had no legal basis for its conclusion and maintained that reimbursement for the plan should either be the community colleges' plan or the state plan.

Mr. Starkey disagreed with Mr. Petersen, explaining that staff interpreted the statutory scheme to mean that there was no mandate with respect to the district voluntarily opting to adopt its own plan as opposed to adopting the state's plan.

Ms. Borzelleri agreed with Mr. Starkey and the staff analysis.

Member Barnes commented that the imposition of the state's model plan appeared to be more a consequence rather than a requirement. He requested clarification as to the requirements of the plan. Mr. O'Shaughnessy explained that the state's model plan outlined what needed to be submitted – what the district planned to do in its location for recycling and diversion of materials from California landfills. He clarified that the minimum level of compliance was either to adopt

the model plan or submit information covering the requirements. Anything above the requested information was discretionary.

Mr. Petersen asserted that there was nothing in the law saying it was discretionary. He added that this law went into effect four years ago and the maintenance and operations directors were not aware that they could wait and do nothing until the state plan was forced upon them.

Member Boel asked if as a jurisdiction, a community college district could file the state plan as its own plan. Mr. Petersen responded that legally, there was nothing that prevented a district from doing so. But he argued that there was also no requirement that districts adopt the state plan.

As to his second issue, Mr. Petersen asked for clarification regarding the staff recommendation to divert solid waste. Mr. Feller clarified that staff's intent was to allow reimbursement for actually diverting solid waste rather than just planning the diversion.

Member Barnes raised a concern about the designation of a solid waste reduction and recycling coordinator. He noted that the bill referenced the use of existing resources to cover the duties assigned to the designated solid waste reduction and recycling coordinator. He stated his understanding that the intent of the legislation was that there would be no additional staffing. Further, since this was applied across the board to all state agencies, it should also be applied with regard to community colleges. Therefore, Member Barnes believed that this designation should not be a reimbursable activity.

Mr. Feller explained that community colleges are treated differently as far as mandate reimbursement is concerned because they are subject to article XIII B, section 6 of the California Constitution. Additionally, he noted that in past cases, the courts have rejected language saying that local agencies have to absorb costs within their existing resources. Mr. Petersen agreed, adding that legislative disclaimers were ineffectual.

In terms of mandate determination, Mr. Starkey stated that the Commission could not rely upon legislative intent as limiting language.

Member Barnes raised another concern. He stated that the annual report should contain information about savings that could be used to offset the costs of the mandate. Acknowledging that this may be a parameters and guidelines issue, he wanted some agreement from the members that offsetting savings language should in fact be included in the parameters and guidelines. Member Sherwood agreed.

Mr. Petersen added that revenues received by the districts, including recycling income, would be offset against the costs of the mandate.

Member Barnes stated that all offsetting savings factors need to be included so that only net costs are reimbursed.

Ms. Borzelleri made three points. First, she saw a problem with community colleges being allowed to claim for reimbursement as a local entity since they were not subject to this law under the originating statute, Assembly Bill 939. Second, she disagreed with the staff analysis regarding the applicability of Government Code section 17556, subdivision (d), and the fee authority of community colleges. She believed that community colleges did have optional fee authority to recover the costs of implementing the program. Finally, she indicated that the Integrated Waste Management Board would like to participate in the parameters and guidelines process because they believed that many diversion programs were already in place prior to the enactment of Assembly Bill 75. Pursuant to Government Code section 17565, reimbursement is

allowed only for costs incurred after the operative date of the mandate.

Chairperson Tilton noted that it was not clear to him why this type of service was not included as part of maintaining the basic program of providing education. He inquired whether this program was already covered by the state and local funding that community colleges received as a normal cost of doing business to provide educational activities. He also asked about their ability to raise fees in the case that they were not receiving funding.

Mr. Feller indicated that there was no evidence in the record about funding already being received by community college districts, and staff found it to be a new requirement. As to the issue of the fee authority, he stated that the community college Chancellor's Office stated that "…districts may not charge students a fee for use of a service which the district is required to provide by state law…."

Also, in response to Ms. Borzelleri, Mr. Feller stated that if a community college was already implementing a program prior to the effective date of the legislation, Government Code section 17565 does not preclude the existence of a reimbursable state-mandated program.

Mr. Petersen added that the entire body of fee law in public education pertained to providing services directly to students, and recycling was not such a service. He also argued that a community college could not charge on its own authority a fee for something the state mandated. Moreover, he agreed with Mr. Feller regarding Government Code section 17565.

Mr. Wilkening stated that he had no expertise in the community college budget but offered to have someone from the Department of Finance address the issue.

Ms. Higashi recommended that the Commission take a short break.

[At this time, a short break was taken.]

Chairperson Tilton indicated that he was not able to demonstrate for the record that this mandate was in fact being funded.

Member Boel made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried unanimously.

Item 8 Proposed Statement of Decision: *Integrated Waste Management,* 00-TC-07, as described in Item 7.

Eric Feller, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the decision just made in item 7. He requested that the Commission allow minor changes to be made, including those to reflect the hearing testimony and vote count.

Chairperson Tilton asked if a stronger reference for identifying savings would be included. Mr. Feller responded that offsetting savings would be identified in the parameters and guidelines.

Mr. Petersen requested clarification as to the Commission's decision regarding reimbursement for the colleges' plans versus the state plan. Chairperson Tilton clarified that whether or not a college adopts its own plan, the state plan describes reimbursement.

Member Lazar made a motion to adopt the proposed Statement of Decision. With a second by Member Boel, the motion carried unanimously.

Item 9 *School Accountability Report Cards II and III,* 00-TC-09, 00-TC-13, and 02-TC-32
Empire Union School District, Sweetwater Union High School District, and Bakersfield City School District, Claimants
Education Code Sections 33126, 33126.1, 41409
Statutes 1997, Chapter 912 (AB 572); Statutes 2000, Chapter 996 (SB 1632)
Statutes 2001, Chapters 159 (SB 662) and 734 (AB 804)
Statutes 2002, Chapter 1168 (AB 1818)

Katherine Tokarski, Commission Counsel, presented this item. She noted that California voters approved Proposition 98 in 1988, amending the California Constitution and adding the Education Code sections on the school accountability report cards. Before the Commission were consolidated test claims that alleged new reimbursable activities required for including new components in the school accountability report card, as well as for training school personnel to either use the optional state template or the template regarding standard definitions to be used when preparing the school accountability report card.

Further, Ms. Tokarski noted that Empire Union School District also alleged new activities from the amendment of Education Code section 33126 by Statutes 1997, chapter 912. Staff asserts that the statutory amendment was part of the original *School Accountability Report Cards (SARC)* Statement of Decision, and therefore, no further issues on the merits may be raised before the Commission at this time.

Staff found that to the extent the claimed amendments to the Education Code were a restatement of what was required by the voters in enacting Proposition 98, no new program or higher level of service could be found. Staff recommended that the Commission adopt the final staff analysis, which denies the consolidated test claims.

Parties were represented as follows: David Scribner, on behalf of the Empire Union School District; and Michael Wilkening and Lenin Del Castillo, with the Department of Finance.

Mr. Scribner noted that what was added to Education Code section 33126 by the electorate was the language "but is not limited to" and that under Proposition 98, 13 specific activities were required. He stated that the "but is not limited to" language, in staff's opinion, gave the Legislature the authority to change the original 13 activities without imposing new costs or activities upon districts. Mr. Scribner questioned the legal support for staff's opinion and offered his opinion of what the "but is not limited to" language meant. Rather than being able to change the original 13 activities, his interpretation of the language was that it allowed districts to provide additional information to parents or guardians.

While acknowledging that Commission decisions had no precedential value, Mr. Scribner pointed out that if staff's recommendation was adopted, there would be a huge inconsistency between the original *SARC* and *SARC II*. He argued that the original *SARC* test claim and the *SARC II* test claim had the same fact pattern; and that there was no change in the Education Code, Government Code, or case law. He indicated that the claimant provided a declaration signed under penalty of perjury that the new information was only added to the school accountability report card when the Legislature mandated it upon the districts.

Mr. Scribner's second issue related to the argument about costs mandated by the state. He disagreed with staff's reliance on the *Department of Finance* case to support its position that the *School Accountability Report Cards II* program was tied to Proposition 98. He argued that

Proposition 98 was a funding guarantee, not an appropriation. Also, he asserted that there were fundamental factual differences between the case here and the *Department of Finance* case because it dealt with a program that had a specific line item in the budget, where in this case, there was no line item in the budget. Therefore, the case was inapplicable. He requested that the Commission deny the staff analysis.

Ms. Tokarski explained that the staff analysis did not hinge on the "but is not limited to" language. Rather, it focused on the issues of whether it was a new program or higher level of service. She indicated that many of the so-called new items added by the Legislature dealt specifically with testing results of particular tests currently required. Staff's assertion was that activities were specifically related to providing information on student achievement and progress towards meeting reading, writing, arithmetic, and other academic goals.

As to the issue of costs mandated by the state, Ms. Tokarski maintained that staff relied on both old and new case law. She noted that the staff analysis also cited the *County of Sonoma* and *Redevelopment Agency* cases, which help analyze the issue of Proposition 98 funding versus a budget line item. She stated that providing a school accountability report card was part of the Proposition 98 funding guarantee. Staff's position was that the claimant had not shown that those state funds were not available to cover any incremental increased costs incurred in compliance with the new language added by the Legislature.

Mr. Del Castillo concurred with the staff analysis.

Mr. Scribner contended that the Legislature, by its actions, took away the discretion to determine whether or not districts wanted to include information in the school accountability report card. He argued that the original 13 activities were expanded to well over two dozen, and therefore, he disagreed that there was no higher level of service being imposed.

Member Barnes made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried 4-1, with Member Boel voting "No."

Item 10 Proposed Statement of Decision: *School Accountability Report Cards II and III*, 00-TC-09, 00-TC-13, and 02-TC-32, as described in Item 9.

Katherine Tokarski, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the decision just made in item 9. She noted that minor changes would be included in the final Statement of Decision to reflect the hearing testimony and vote count.

Member Sherwood made a motion to adopt the proposed Statement of Decision. With a second by Member Lazar, the motion carried unanimously.

Item 11 *High School Exit Examination*, 00-TC-06
Trinity Union High School District, Claimant
Education Code Sections 60850, 60851, 60853, 60855
Statutes 1999x, Chapter 1 (SBX1 2)
Statutes 1999, Chapter 135 (AB 584)
California Code of Regulations, Title 5, Sections 1200-1225, in effect as of March 2003

Eric Feller, Commission Counsel, presented this item. He noted that the claimant sought reimbursement for costs of school districts performing various activities in administering the high school exit examination. Staff found a partially reimbursable state mandate for the following activities:

- providing and documenting notice of the exam;
- determining whether English-learning pupils have sufficient skills to be assessed with the exam;
- administering the exam, including the activities as required by regulations;
- maintaining test security, including activities as required by regulations; and
- reporting data to either the Superintendent of Public Instruction or its designee.

Staff further found that the claimant's remaining alleged activities did not constitute reimbursable activities. Mr. Feller stated that also at issue was whether the $3 administration fee apportioned to districts was sufficient to meet the costs of the program. He noted that the state was afforded a presumption that this amount was sufficient; however, the claimant successfully rebutted the presumption by submitting sworn declarations. Therefore, staff found that the $3 apportionment per exam administration was insufficient to cover the costs of the program.

Staff recommended that the Commission partially approve the test claim for the identified activities.

Parties were represented as follows: David Scribner, on behalf of the claimant; Michael Wilkening and Lenin Del Castillo, with the Department of Finance; Juan Sanchez, with the California Department of Education; and Paul Warren, with the Legislative Analyst's Office.

Mr. Scribner concurred with the staff recommendation. He indicated that there was one issue outstanding about who was required to actually submit the results to the parents or guardians; however, he could not provide any legal support for the position that schools were submitting the information. He noted that if the claimant received some sort of management advisory within the time frame for reconsideration, he would be putting forth a request.

Mr. Wilkening outlined the following three issues:

1) He disagreed with staff's assertion that the No Child Left Behind program was not a federal mandate. He indicated that funds in excess of two billion dollars were being provided pursuant to that statute, and thus, there was no real choice. The state had to take that money and comply with the federally imposed mandate.
2) He disagreed with the assertion that the *High School Exit Exam* was not a federal mandate. He stated his belief that it was a federal mandate for tenth graders because No Child Left Behind requires the state to have a cumulative assessment in the tenth grade. He asserted that the high school exit exam was the state's test used to comply with the federal requirement.
3) He believed that the standard for determining whether or not a mandate will reach the $1000 threshold should be more stringent than an assertion. He argued that data should be submitted along with the assertion. Thus, he disagreed that $3 was inadequate to cover the costs of the program because there was no data to support the contention.

In response to Mr. Wilkening's third point, Mr. Scribner responded that declarations were submitted under penalty of perjury and were developed based on data the districts had. He asserted that Mr. Wilkening's recommendation would be a new mandated program.

As to the No Child Left Behind issues, Mr. Scribner agreed with staff that it was not a requirement, but a choice. It was an incentive program because districts that wanted to continue receiving Title 1 funding had to submit a state plan. He argued that No Child Left Behind was a

non-issue in this test claim.

Mr. Wilkening contended that No Child Left Behind was coercive. A state that does not participate forgoes a large amount of funding for schools. He explained that No Child Left Behind did not allow districts discretion in doing assessments. No Child Left Behind required that an assessment be chosen.

Mr. Scribner argued that there was no clear delineation in No Child Left Behind as far as *High School Exit Exam* was concerned. He stated that No Child Left Behind had very broad statements about assessments and accountability. In addition, he noted that *High School Exit Exam* was imposed by the state before No Child Left Behind was established.

Mr. Feller stated that No Child Left Behind and the predecessor statute, Improving America's Schools Act of 1994, were funding statutes that the state was not required to participate in. After quoting a portion of the statute, he maintained that they were also not federal mandates.

Member Barnes wanted technical clarification about the $3 per student funding source. There was some discussion among Member Barnes, Mr. Wilkening, and Mr. Sanchez. Member Barnes then asked what the relationship was between the federal funding and the $3. Clarification was provided by Mr. Warren and Mr. Scribner.

Member Barnes explained that he was trying to ascertain whether there was funding to cover the costs of the mandate. He added that the $3 per student was an amount that needed to be offset from the costs.

Mr. Wilkening reiterated that the $3 per pupil was adequate. To the extent that there were costs beyond the $3, he maintained that funding provided under No Child Left Behind was available to cover those costs.

Mr. Scribner argued that there was no evidence in the record from state agencies to support Mr. Wilkening's contention. He indicated that it may be worthwhile to request additional information from the claimants and state agencies to determine at what level No Child Left Behind provided funding that could be applied to the *High School Exit Exam.*

Member Barnes asked staff and those involved in developing the parameters and guidelines to specifically address the issue of the federal funding and whether any or all of it should be identified as offsetting savings. Chairperson Tilton added that specifics should be provided as to what is submitted to the federal government in order to obtain the funding.

Member Barnes specifically requested the active participation of the California Department of Education. Mr. Sanchez responded positively.

Mr. Warren noted that there was a another mandate adopted prior to 1975, which required districts to test students for proficiency before graduation. He stated that this should also be considered as offsetting savings.

Mr. Feller indicated that he outlined in the staff analysis some of the offsetting savings.

Member Sherwood commented that he was happy to see the involvement from state agencies because he felt that such participation was important in order to get to the bottom line, to resolve the issues, and to make fair determinations.

Member Barnes made a motion to adopt the staff recommendation. With a second by Member Sherwood, the motion carried unanimously.

Item 12 Proposed Statement of Decision: *High School Exit Examination*, 00-TC-06, as described in Item 11.

Eric Feller, Commission Counsel, presented this item. Staff recommended that the Commission adopt the proposed Statement of Decision, which accurately reflected the decision just made in item 11. He noted that minor changes would be included in the final Statement of Decision to reflect the hearing testimony and vote count.

Member Lazar made a motion to adopt the proposed Statement of Decision. With a second by Member Barnes, the motion carried unanimously.

STAFF REPORTS

Item 17 Chief Legal Counsel's Report
Recent Decisions, Litigation Calendar

Mr. Starkey reported the following:

- *New Filings.* There was one new filing from the County of Los Angeles, a writ to the Commission's decision on *Animal Adoption.* A writ filed by the Department of Finance on the Commission's decision for *Animal Adoption* is also pending in the Sacramento Superior Court.

Item 18 Executive Director's Report
Budget, Workload, Legislation, Next Hearing

Ms. Higashi noted the following:

- *Budget.* Hearings are scheduled for the Commission's budget with the Senate Budget Sub-committee and the Assembly Budget Sub-committee.
- *Legislation.* There have been a number of updates on the legislative report. Also, there are an unprecedented number of bills addressing mandate issues. The Assembly Special Committee on State Mandates is in the midst of completing its review of the education mandates. Commission staff continues to attend the meetings and provides assistance to committee staff and the members during the hearings. Committee discussions focusing on the mandates process are expected to start sometime in April. There has also been interest from the Governor's Office, the Education Secretary's Office, on mandate issues. Chairperson Tilton mentioned that there was also some discussion in Finance's front office about mandates.
- *Next Agenda*. There are four test claims scheduled for the next hearing.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *San Diego County v. Commission on State Mandates, et al*., Case Number GIC 762953, on remand, in the Superior Court of the State of California, County of San Diego. CSM Case No. 01-L-12 [*San Diego MIA*]
2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 02CS00994, in the Superior Court of the State of California, County of Sacramento. CSM Case No. 02-L-01 [*School Bus Safety II*]

3. *San Diego Unified School District v. Commission on State Mandates, et al.*, Case Number S109125, in the Supreme Court of the State of California. CSM Case No. 02-L-02 [*Pupil Expulsions*]
4. *San Diego Unified School District and San Juan Unified School District v. Commission on State Mandates, et al.*, Case Number C044162, in the Appellate Court of the State of California, Third Appellate District. CSM Case No. 02-L-05 [*Physical Performance Tests*]
5. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Case Number 03CS01069 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-01 [*Animal Adoption*]
6. *State of California, Department of Finance v. Commission on State Mandates, et al*., Case Number 03CS01432in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]
7. *San Diego Unified School District v. Commission on State Mandates, et al*., Case Number 03CS01401 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-03 [*Graduation Requirements IRC*]
8. *Castro Valley Unified School District v. Commission on State Mandates, et al*., Case Number 03CS01568 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-04 [*Graduation Requirements IRC*]
9. *San Jose Unified School District v. Commission on State Mandates, et al*., Case Number 03CS01569 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-05 [*Graduation Requirements IRC*]
10. *Sweetwater Union High School District v. Commission on State Mandates, et al*., Case Number 03CS01570 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-06 [*Graduation Requirements IRC*]
11. *Clovis Unified School District v. Commission on State Mandates, et al*., Case Number 03CS01702 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-09 [*Graduation Requirements IRC*]
12. *Grossmont Union High School District v. Commission on State Mandates, et al*., Case Number 04CS00028 in the Superior Court of the State of California, County of Sacramento. CSM Case No. 03-L-10 [*Graduation Requirements IRC*]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a), and 17526.

Discussion and action, if appropriate, on report from the Personnel Sub-Committee.

Hearing no further comments, Chairperson Tilton adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Tilton reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

Hearing no further business, Chairperson Tilton adjourned the meeting at 12:51 p.m.

Paula Higashi

PAULA HIGASHI
Executive Director