ITEM 9

REQUEST FOR RECONSIDERATION
STAFF ANALYSIS

Government Code Section 16262.5
Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 14132.95, 17600

Statutes 1999, Chapters 90 and 91
Statutes 2000, Chapter 445

In-Home Supportive Services II
07-R-01 (00-TC-23)

County of San Bernardino, Claimant

Department of Social Services, Requestor

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Statutes 1999, Chapters 90 and 91
Statutes 2000, Chapter 445

In-Home Supportive Services II
07-R-01 (00-TC-23)

County of San Bernardino, Claimant

Department of Social Services, Requestor

EXECUTIVE SUMMARY

Background

The Statement of Decision at issue is for the test claim *In-Home Supportive Services II* (IHSS). IHSS is a social services program developed to provide necessary care, such as housekeeping, grooming and medical transportation, to aged, blind or permanently disabled, low-income persons, with the goal of allowing the individual to remain in their home and out of nursing home care. Since its inception in 1973, IHSS has been jointly funded by federal, state, and county government.

The test claim statutes, in part, address the form in which the IHSS care providers are employed, referred to as the "mode of service." Prior law did not require the designation of an employer of record for individual providers. The Commission heard this test claim on April 16, 2007, during a regularly scheduled hearing. The Commission, by a vote of 4-3, partially approved the test claim. The adopted Statement of Decision was mailed on June 6, 2007.[1] On July 5, 2007, the Department of Social Services (DSS) timely filed a request for reconsideration.

Staff Analysis

Government Code section 17559, subdivision (a), and section 1188.4 of the Commission's regulations, grant the Commission, within statutory timeframes, discretion to reconsider a prior final decision. Any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.

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[1] The issuance of the Statement of Decision was held until after the receipt of the transcript of the April 16, 2007 Commission hearing, in order to incorporate witness testimony.

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted. A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law. A supermajority of five affirmative votes is required to change a prior final decision.

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration.

DSS requests that the Commission reconsider and amend a portion of its decision to "1) clarify what costs are reimbursable and 2) establish an equitable level of reimbursement." DSS proposes that two of the approved activities be amended, as indicated by underline, as follows:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service using whichever mode is the least costly for the county. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request from July 12, 1999 until December 31, 2002. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)

Regarding the request that the Commission amend its decision to add cost-limiting language to one approved activity, as the courts have made clear, the Commission is required to construe article XIII B, section 6 strictly and not extend its provisions to include matters not covered by the language used or "as an equitable remedy to cure the perceived unfairness resulting from political decision on funding priorities."[2] The legislation that required the counties to establish an employer of record did not require that the counties make their choice based on the least-costly method, nor does any other statute require that the choice be made on the basis of cost alone. Therefore the request does not address an error of law subject to reconsideration.

Regarding the request to add time-limiting language to another activity, staff finds that the law requiring the activity has no statutory end date and remains valid law, and thus the lack of time limitation in the Statement of Decision was not an error of law subject to reconsideration.

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[2] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

The Commission has the following options:

- the Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present; or
- the Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration; or
- the Commission can take no action, which has the legal effect of denying the request.

Conclusion and Recommendation

Staff recommends that the Commission deny the request for reconsideration, finding that the requestor has raised no issues that merit reconsideration.

STAFF ANALYSIS

Requestor

Department of Social Services

Chronology

04/16/07	Commission hearing on the test claim
04/16/07	Commission adopts the Statement of Decision
06/06/07	Statement of Decision is mailed to the claimant and mailing list
07/05/07	Department of Social Services files a request for reconsideration

Legal Process for Reconsideration

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. That section states the following:

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.[3]

Before the Commission considers a request for reconsideration, Commission staff is required to prepare a written analysis and recommend whether the request for reconsideration should be granted.[4] A supermajority of five affirmative votes is required to grant the request for reconsideration and schedule the matter for a hearing on the merits.[5]

If the Commission grants the request for reconsideration, a subsequent hearing is conducted to determine if the prior final decision is contrary to law and to correct an error of law.[6] A supermajority of five affirmative votes is required to change a prior final decision.[7]

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[3] California Code of Regulations, title 2, section 1188.4, subdivision (b).

[4] California Code of Regulations, title 2, section 1188.4, subdivision (f).

[5] *Ibid.*

[6] California Code of Regulations, title 2, section 1188.4, subdivision (g).

[7] California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

Thus, at this stage, the sole issue before the Commission is whether it should exercise its discretion to grant the request for reconsideration. In this regard, the Commission has the following options:

- The Commission can approve the request, in all or in part, finding that reconsideration is appropriate to determine if any error of law is present; or
- the Commission can deny the request, finding that the requestor has not raised issues that merit reconsideration; or
- the Commission can take no action, which has the legal effect of denying the request.

The Commission's Decision

The Statement of Decision at issue is for the test claim *In-Home Supportive Services II* (IHSS). IHSS is a social services program developed to provide necessary care, such as housekeeping, grooming and medical transportation, to aged, blind or permanently disabled, low-income persons, with the goal of allowing the individual to remain in their home and out of nursing home care. Since its inception in 1973, IHSS has been jointly funded by federal, state, and county government.

The test claim statutes, in part, address the form in which the IHSS care providers are employed, referred to as the "mode of service." Prior law did not require the designation of an employer of record for individual providers. The Commission heard this test claim on April 16, 2007, during a regularly scheduled hearing. The Commission, by a vote of 4-3, partially approved the test claim. The request for reconsideration is limited to the following approved activities:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[8]
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[9]

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[8] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[9] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

Request for Reconsideration

On July 5, 2007, the Department of Social Services (DSS) timely filed this request for reconsideration. DSS requests that the Commission reconsider and amend a portion of its decision to "1) clarify what costs are reimbursable and 2) establish an equitable level of reimbursement." DSS proposes to accomplish this with two amendments to the text of the approved activities, which will be discussed below.

Discussion

As indicated above, the Department of Social Services requests that the Commission reconsider and amend its decision on the *In-Home Supportive Services II* test claim to add language requiring that the counties' reimbursement by the state "be limited to the least expensive method of administering the program." The request for reconsideration includes a second issue: "[w]ith regard to Advisory Committee, CDSS' understanding of the ruling is that it is limited to the period from July 12, 1999 until December 31, 2002. However, the order did not clearly state this time limit and we are asking that the clarification be added."

For the reasons described below, staff recommends that the Commission deny DSS's request for reconsideration and find that the requestor has not raised issues that merit reconsideration on either point.

The first issue raised by DSS requests that the Commission's Statement of Decision be amended to add cost-limiting language to the activity for establishing an employer of record, as indicated in underline below:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service <u>using whichever mode is the least costly for the county.</u> It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[10]

At the April 16, 2007 Commission hearing, DSS testified that, regarding the choice of employer-of-record, "[w]e think there is a least-cost method in terms of administrative costs that a county could use; and that it is only these costs that are arguably required by the test claim statutes. And, therefore only those costs should be reimbursable."[11] Thus, the same allegations were raised at the hearing on the test claim and, after full consideration, a motion was made to adopt the staff analysis, the motion was seconded, and the Commission voted to approve the staff recommendation without adopting the argument from DSS.

The Commission has the exclusive jurisdiction to determine whether there are reimbursable state-mandated costs.[12] Within the limited time period allowed by statute, the Commission

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[10] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[11] April 16, 2007 Transcript, page 24.

[12] Government Code sections 17500, 17551, 17552. See also *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.

retains jurisdiction after a final decision to reconsider that decision to ensure it has carried out its duty to correctly decide the mandate question.[13] However, finality of decisions is favored, and reconsideration should not be viewed as a means to decide again what has already been decided.[14] In this regard, the California Supreme Court has stated the following:

> [. . .] that the decisions of the various agencies of this state are reached, in the overwhelming majority of the proceedings undertaken, only after due consideration of the issues raised and the evidence presented. While occasional mistakes are an unfortunate by-product of all tribunals, judicial and administrative, the fact remains that a petition for reconsideration, raising the same arguments and evidence a second time, will not likely often sway an administrative body to abandon the conclusions it has reached after full prior consideration of those same points.[15]

Moreover, staff finds that the Commission's decision to approve the activity without such limiting language is correct under article XIII B, section 6, and is supported by case law; thus, there is no error of law. The test claim statute, Welfare and Institutions Code section 12302.25, subdivision (a), requires counties to establish "an employer for in-home supportive service providers," and each county "shall ... solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services."[16] At no point does the Legislature require that the counties select the mode of service that imposes the least-cost option, as proposed by DSS.

Article XI, section 7 of the California Constitution authorizes counties to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." This constitutional grant of power allows counties a certain amount of independence and discretion in matters of local concern. The Legislature required that counties choose an in-home supportive services provider option by taking the advice and recommendation of a committee made up of "no less than 50 percent" of persons who have used public or private in-home supportive services. The committee must also have a minimum of one to two providers of in-home supportive services, and no more than one county employee may serve. The Legislature was clearly requiring an advisory committee designed to provide informed public views to the counties to utilize when making this choice; but left the ultimate decisionmaking to the counties, without a mandate that the least-costly method be the final choice.

As the courts have made clear, the Commission is required to construe article XIII B, section 6 strictly and not extend its provisions to include matters not covered by the language used or "as an equitable remedy to cure the perceived unfairness resulting from political decision on funding

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[13] Government Code section 17559.

[14] "The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive arguments is small. Indeed no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (Code Civ. Proc., § 1008.)" *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501.

[15] *Id.* at page 502.

[16] Welfare and Institutions Code section 12302.25, subdivision (d).

priorities."[17] Therefore, staff finds that there is no error of law that can be addressed by approving this portion of the reconsideration request.

Finally, addressing the DSS request to amend the Statement of Decision to establish a time limitation for an additional activity, staff finds there is no error in the Statement of Decision. DSS proposes that one of the approved activities be amended, as indicated by underline, as follows:

- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request <u>from July 12, 1999 until December 31, 2002</u>. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).) [18]

A different approved activity, for establishing an employer of record for IHSS providers, does include such language, but the same cannot be applied to the activity as requested by DSS. Welfare and Institutions Code section 12302.25, subdivision (j), as amended by Statutes 2002, chapter 1135, operative January 1, 2003 created a "default" employer of record if a county had not completed the process of *establishing an employer of record* as set out in earlier statutes. The Commission found that only on or after January 1, 2003, was the "default" employer of record provision applicable, and any requirement to *establish* an employer of record was no longer mandatory. Therefore, the Commission correctly found that the administrative activity to establish an employer of record was limited from July 12, 1999, the operative date of Statutes 1999, chapter 90, until December 31, 2002. The same is not true for the activity DSS identified in its request for reconsideration.

The activity identified by DSS is to offer an employer of record in the individual provider mode, "*in addition to* a county's selected method of establishing an employer for in-home supportive service providers." The same January 1, 2003 date does not apply to the administrative activities of establishing an additional "individual provider employer option." Because this activity is required to be performed "[u]pon request of a recipient," and "in addition to a county's selected method of establishing an employer for in-home supportive service provided pursuant to this subdivision" staff finds that the required activity could occur at any time, before or after the date that counties are required to establish an employer of record for IHSS providers.[19]

Accordingly, staff recommends that the Commission deny the request for reconsideration and find that DSS has not raised issues that merit reconsideration.

Conclusion and Recommendation

Staff recommends that the Commission deny the request for reconsideration, finding that the requestor has raised no issues that merit reconsideration.

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[17] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[18] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[19] Welfare and Institutions Code section 12302.25, subdivision (a).

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BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code section 16262.5; Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 12306.1, 14132.95, and 17600 and 17600.110 as added, amended or repealed by: Statutes 1999 Chapters 90 and 91; and Statutes 2000 Chapter 445; Filed on June 29, 2001 By County of San Bernardino, Claimant.	Case No. 00-TC-23 PETITION FOR RECONSIDERATION (2 CCR § 1188.4)

I.

INTRODUCTION

The California Department of Social Services (herein after CDSS) hereby requests the Commission on State Mandates to reconsider its adopted Statement of Decision issued on June 6, 2007 pursuant to California Code of Regulations, Title 2 § 1188.4. The CDSS requests that the Statement of Decision be amended to clarify that State is only obligated to pay for the least expensive method of complying with the mandate and if a more expensive means of complying with the mandate is then chosen the State will only be required to pay the costs of the least expensive means.

For example, while the State may require that a car be provided, that mandate does not require the State to pay for a Porsche or Hummer when a Saturn or Ford will fulfill the purpose.

II.

PROPOSED ADMENDMENT

CDSS requests that the statement of decision be amended to 1) clarify what costs are reimbursable and 2) establish an equitable level of reimbursement. The requested amendments are presented below in bold:

> "Staff concludes that Welfare and Institutions Code § 12301.3, §12301.4 and §12302.25, as added by Statutes 1999, chapter 90 or amended by Statutes 2000, chapter 445, impose new programs or higher levels of service for counties within the meaning of Article XIII B, Section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code §17514, for the following specific new activities:
>
> - From July 12, 1999 until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of services **using whichever mode is the least costly for the county.**
>
> - Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. The activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, **upon request from July 12, 1999 until December 31, 2002.** It does not mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code §12302.25, subd. (a).) . . .

III.

ARGUMENT AND ANALYSIS

CDSS is requesting clarification that the level of expenses considered a new program and reimbursable by the State be limited to the least expensive method of administering the program.

Government Code §17514 defines "costs mandated by the State" as any increased cost that a local agency is required to incur as a result of a statute or executive order that mandates a new program or higher level of service.

While Welfare and Institutions Code § 12302.25 may constitute a new program in that it requires the county or public authority establish an "employer of record," it also provides the agency with flexibility in the method to be used to achieve that end.

In the interest of fiscal responsibility, a county or public authority has a fiduciary duty to ensure the mandated outcome is achieved in the most cost-effective manner. Costs to be reimbursed for the mandate should be limited to those for the least expensive method that can achieve the desired outcome. Reimbursements without consideration of the relative costs between options provides little motivation or incentive to implement the program in a cost-effective manner and could be considered as giving the counties or public authorities a blank check. CDSS has suggested amendments to the decision on this item above to clarify that the mandate is to the least expensive way to achieve the requirement.

With regard to Advisory Committee, CDSS' understanding of the ruling is that it is limited to the period from July 12, 1999 until December 31, 2002. However, the order did not clearly state this time limit and we are asking that the clarification be added.

Other claims will most likely follow the test claim; CDSS is requesting these minor modifications to guide the other counties or public authorities that may make claims as a result of the ruling.

IV.

CONCLUSION

For the reasons outlined above, the CDSS asks the Commission on State Mandates to amend its decision to clarify the two points presented above.

Dated: July 3, 2007

Respectfully submitted,

JEANLAURIE AINSWORTH
Senior Staff Counsel
California Department of Social Services

Commission on State Mandates
Case No. 00-TC-23

DECLARATION OF SERVICE

I Sonya Kincaid, declare that I am employed in the County of Sacramento, State of California, that I am over the age of 18 years and am not a party to the within action, that my business address is 744 P Street, Sacramento, California 95814, that on July 5, 2007, I served the item(s) described in number 1, below, by the method described in number 2, below, to the person(s) and at the address(es) indicated in number 3, below.

1. ITEM(S) SERVED:

STATEMENT OF DECISION
PETITION FOR RECONSIDERATION

2. METHOD OF SERVICE:

__XX__ **First Class Mail.** I declare that I placed a true copy of the item(s) in a sealed envelope, that I am readily familiar with this agency's practice for the collection and processing of correspondence for mailing with the United States Postal Service, that, pursuant to this agency's ordinary course of business, correspondence will be deposited with the United States Postal Service the same day that mail is placed for collection and mailing, and that, following ordinary business practices, I deposited the envelope(s) in the place at 744 P Street, Sacramento, California for collection and mailing.

___ **Certified Mail, Return Receipt Requested.** I declare that I placed a true copy of the item(s) in a sealed envelope with the designation "Certified Mail, Return Receipt Requested," that I am readily familiar with this agency's practice for the collection and processing of correspondence for mailing with the United States Postal Service, that, pursuant to this agency's ordinary course of business, correspondence will be deposited with the United States Postal Service the same day that mail is placed for collection and mailing, and that, following ordinary business practices, I deposited the envelope(s) in the place at 744 P Street, Sacramento, California for collection and mailing.

___ **Facsimile Transmittal.** I declare that on the date shown above at _____am/pm, I sent by facsimile machine a true copy of the item(s) to the person(s) and at the facsimile machine number(s) indicated in number 3, below, that the telephone number of the sending machine is (916)_____, that the transmission was reported as complete and without error, and that the transmission report was properly issued by the sending machine. A true copy of the transmission report is attached to this declaration.

___ **Electronic Mail Transmittal.** I declare that on the date shown above, I sent, via electronic mail, a true copy of the item(s) to the person(s) below.

___ **Personal Service.** I declare that I handed a true copy of the item(s) to each person indicated in number 3, below.

___ **Golden State Overnight.** I declare that I caused a true copy of the items, enclosed in a sealed envelope, with delivery charges pre-paid, addressed as indicated in number 3, below, to be delivered to Golden State Overnight for delivery by next day air.

3. PERSON(S) SERVED:

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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 at Sacramento, California.

DATED: July 06, 2007

SIGNED: Sonya Kincaid
Sonya Kincaid

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:	Case No.: 00-TC-23
Government Code Section 16262.5; Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as Added, Amended, or Repealed by Statutes 1999, Chapters 90 and 91; and Statutes 2000, Chapter 445; Filed on June 29, 2001, By County of San Bernardino, Claimant.	*In-Home Supportive Services II* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 16, 2007)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi

PAULA HIGASHI, Executive Director

6-06-2007

Date

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Section 16262.5; Welfare and Institutions Code Sections 12301.3, 12301.4, 12301.6, 12301.8, 12302.25, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as Added, Amended, or Repealed by Statutes 1999, Chapters 90 and 91; and Statutes 2000, Chapter 445; Filed on June 29, 2001, By County of San Bernardino, Claimant.	Case No.: 00-TC-23 *In-Home Supportive Services II* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 16, 2007)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 16, 2007. Bonnie Ter Keurst, County of San Bernardino, appeared on behalf of the claimant. Allan Burdick of Maximus, and Steve Lakich, Director of Labor Relations, County of Sacramento, appeared as interested parties in support of the claimant's position. Susan Geanacou and Carla Castaneda appeared for the Department of Finance. James Norris, Senior Staff Counsel, appeared for the Department of Social Services.

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 section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve this test claim at the hearing by a vote of 4-3.

Summary of Findings

County of San Bernardino's test claim filing alleges that legislative amendments governing the operation of the In-Home Supportive Services (IHSS) program in California, added by Statutes 1999, chapters 90 and 91, and Statutes 2000, chapter 445, "imposed a new state mandated program and cost ... by substantially amending the administrative requirements of the IHSS program." The test claim statutes, in part, address the form in which in-home supportive services care providers are employed, referred to as the "mode of service," including requiring that all counties establish an employer of record for IHSS providers, other than the recipient of the

services. The test claim statutes also provide that "[e]ach county shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals."

At the outset, the advisory committee must make recommendations on the best method of employing IHSS providers, and for establishing an "employer of record." According to Welfare and Institutions Code section 12301.4, the advisory committee must also have an ongoing role providing "advice and recommendations regarding in-home supportive services." Claimant asserts that the state funding provided at the time of the test claim filing was inadequate to cover the actual costs of the advisory committee, and seeks to recover the remainder of their claimed costs of creating and operating the advisory committee through mandate reimbursement.

The Commission finds that while counties may incur increased costs for higher wages and benefits as an indirect result of the requirement to act as or establish an employer of record, a showing of increased costs is not determinative of whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone do not result in a reimbursable state-mandated program under article XIII B, section 6.[1] The test claim statutes create a situation where the employer may be faced with "a higher cost of compensation to its employees." As held by the court, "[t]his is not the same as a higher cost of providing services to the public." Therefore, the Commission finds that any increased wage and benefit costs that may be incurred indirectly following implementation of Welfare and Institutions Code section 12302.25, is not a new program or higher level of service.

In addition, the Commission finds that the plain language of the test claim statute does not *require* collective bargaining, but rather confirms that the code section does not prohibit collective bargaining or other negotiations on wages and benefits. However, for the activities listed below, the Commission finds that the test claim statutes mandated a new program or higher level of service, and costs mandated by the state:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (c).)

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[1] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

- Each county that does not qualify for the exception provided in section 12301.3, subdivision (d), shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals, with membership as required by section 12301.3, subdivision (a): "No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article." (Welf. & Inst. Code, §§ 12301.3, subd. (a), 12302.25, subd. (d).)
- Following the September 14, 2000 amendment by Statutes 2000, chapter 445, counties shall appoint membership of the advisory committee in compliance with Welfare and Institutions Code section 12301.3, subdivision (a)(1) and (a)(4):

  > In counties with fewer than 500 IHSS recipients, at least one member of the advisory committee shall be a current or former provider of in-home supportive services; in counties with 500 or more IHSS recipients, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.
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  > A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee. (Welf. & Inst. Code, § 12301.3, subd. (a).)

- Prior to the appointment of members to a committee required by section 12301.3, subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations. (Welf. & Inst. Code, § 12301.3, subd. (b).)
- The county shall solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12302.25, subd. (d).)
- The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12301.3, subd. (c).)
- Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about IHSS on an ongoing basis. (Welf. & Inst. Code, § 12302.25, subd. (e).)
- One advisory committee formed pursuant to sections 12301.3 or 12301.6, shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees. (Welf. & Inst. Code, § 12301.4.)

The Commission concludes that all claims for reimbursement for the approved activities must be offset by any funds already received from state or federal sources, including funds allocated for

the direct costs of the advisory committee. The Commission further concludes that Government Code section 16262.5, and Welfare and Institutions Code sections 12301.6, 12301.8, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as pled, along with any other test claim statutes and allegations not specifically approved above, do not impose a program, or a new program or higher level of service, subject to article XIII B, section 6.

BACKGROUND

In-Home Supportive Services (IHSS) is a social services program developed to provide necessary care to aged, blind or permanently disabled, low-income persons, with the goal of allowing the individual (hereafter referred to as the "recipient") to remain in their home and out of nursing homes or other institutional care for as long as possible. The services provided range according to the needs of the recipient and can include all manner of housekeeping, including cleaning, laundry, meal preparation, and grocery shopping. In addition, some recipients require and receive additional personal and medical care services: assistance with bathing, grooming and related activities; transportation to medical appointments; and administration of para-medical procedures, including injections. Since its inception in 1973, IHSS has been jointly funded by federal, state, and county government.

The test claim statutes, in part, address the form in which the IHSS care providers are employed, referred to as the "mode of service." Prior law did not require the designation of an employer of record for individual providers. In 1990, a California appellate decision addressed the issue of who was the employer of record for individual providers of IHSS, particularly for the purposes of collective bargaining under the Meyers-Milias-Brown Act (MMBA). In *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761, 765, the court discussed the way that providers were employed under prior law, as follows:

> A county may deliver services under the IHSS program by (1) hiring in-home supportive personnel in accordance with established county civil services requirements, (2) contracting with a city, county, city or county agency, a local health district, a voluntary nonprofit agency, a proprietary agency or an individual, or (3) making direct payment to a recipient for the purchase of services. (Welf. & Inst. Code, § 12302.) Defendant county chose the third alternative.

The court made findings that the county was not a *de facto* employer of record for purposes of collective bargaining, *id.* at pages 772-773:

> Plaintiff insists that the state and the county are joint employers of the IHSS providers and the county's role as a joint employer is sufficient to render the providers employees of the county for purposes of the MMBA.[FN4]
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> FN4. Interestingly, in the attorney general's opinion upon which plaintiff relied below it is stated: "While the concept that IHSS workers may have more than one 'employer' appears appropriate for purposes of some laws, it would seem inappropriate and unworkable for purposes of collective bargaining under California statutes." (68 Ops.Cal.Atty.Gen. 194, 199, *supra.*)
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> The trial court found that the county acts as the agent of the state in administering the IHSS program and concluded that in some circumstances an agent may be a joint employer, a dual employer or a special employer. (See *County of*

Los Angeles v. Workers' Comp. Appeals Bd. (1981) 30 Cal.3d 391, 405, 179 Cal.Rptr. 214, 637 P.2d 681.) However, such a relationship arises only where both the general employer and the special employer have the right to control the employee's activities. (*Ibid.*) The court found the county had no such right of control and therefore was not an employer of the IHSS providers under a dual or special employer theory. ... As previously indicated, substantial evidence supports the trial court's finding that the county does not exercise control over and direct the activities of the IHSS providers.

Creating a distinct change from the case law cited above, the test claim statutes require that all counties establish an employer of record for IHSS providers, other than the recipient of the services. Welfare and Institutions Code section 12302.25, as added by Statutes 1999, chapter 90, provides, in part:

> (a) On or before January 1, 2003, each county shall act as, or establish, an employer for in-home supportive service providers .... Each county may utilize a public authority or nonprofit consortium ..., the contract mode ..., county administration of the individual provider mode ... for purposes of acting as, or providing, an employer ..., county civil service personnel ..., or mixed modes of service authorized pursuant to this article and may establish regional agreements in establishing an employer for purposes of this subdivision for providers of in-home supportive services. ... Upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers pursuant to this subdivision, counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option.[2]

In addition, Welfare and Institutions Code section 12301.3, with certain exceptions, provides that "[e]ach county shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals."

Claimant's Position

County of San Bernardino's June 29, 2001[3] test claim filing alleges that legislative amendments governing the operation of IHSS in California, by Statutes 1999, chapters 90 and 91, and Statutes 2000, chapter 445, "imposed a new state mandated program and cost ... by substantially amending the administrative requirements of the IHSS program."

Employer of Record

The claimant asserts that the legislation "mandates the establishment of an 'employer of record' [for the individuals who provide the in-home care] on or before January 1, 2003." The claimant alleges that this requirement results in multi-million dollar increased costs, with estimates varying widely according to which form of "employer of record" is ultimately selected: a public authority, a contract with an outside agency, or the county itself.

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[2] References to applicable Welfare and Institutions Code sections omitted for ease of reading.

[3] The potential reimbursement period begins no earlier than July 1, 1999, based upon the filing date for this test claim. (Gov. Code, § 17557.)

The claimant is also seeking reimbursement for any collective bargaining that may result if providers unionize after the "employer of record" is established.

Advisory Committee

The claimant asserts that the statutes mandate the creation of county advisory committees, with specific membership requirements of up to eleven members, largely made up of current or past users and providers of IHSS, with participation of only one county employee. At the outset, the advisory committee is to make recommendations on the best method of employing IHSS providers, and establishing an "employer of record." According to Welfare and Institutions Code section 12301.4, the advisory committee is also to have an ongoing role providing "advice and recommendations regarding in-home supportive services."

Claimant asserts that the state funding provided at the time of the test claim filing was inadequate to cover the actual costs of the advisory committee, and seeks to recover the remainder of their claimed costs of creating and operating the advisory committee through mandate reimbursement.

In comments on the draft staff analysis, dated March 26, 2007, the claimant disagrees with the finding that reimbursement does not include "any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining." The claimant maintains that collective bargaining was the intent of the test claim legislation, and that the "costs pertaining to collective bargaining, must be reimbursable." In addition, the claimant maintains that any "costs incurred as part of that new activity [of acting as or establishing an employer of record], such as higher wages and benefits, must be reimbursable.

Interested Party Position

The Director of Labor Relations from the County of Sacramento appeared at the April 16, 2007 Commission hearing to provide support for the claim of the County of San Bernardino. The sworn testimony described the results of collective bargaining with IHSS workers in Sacramento County since the year 2000, under a public authority form of employer of record. According to the testimony, the workers were organized by Service Employees International Union (SEIU) and a two-year agreement was reached in June 2001. Prior to that point, workers were earning minimum wage with no health benefits. Through the negotiated contract, workers received health insurance and an increase in wages to 7.50 in June 2000, $8.50 on October 1, 2001, and then $9.50 on October 1, 2002.[4] The representative also testified as to subsequent negotiations which have resulted in further increases in wages and benefits, as follows:

> Our last collective bargaining agreement was entered into this last December 1st, 2006; and it runs through November 2009. And the wages go up to $10 – they were $10 an hour. They went up to $10.40 per hour as of January 1, 2007. The health insurance will go up to $391.85 as of January 1, 2007. The dental insurance stays at the rate of $11.50.
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> The IHSS office here in Sacramento employs 20 employees now. And the county pays 17.5 cents for every dollar spent.

[4] April 16, 2007 Commission Hearing Transcript, pages 19-22.

My office does the collective bargaining. Over that period of seven years we have billed the public authority a total of $59,675 to do the collective bargaining administration.

Department of Social Services Position

DSS, in comments filed November 9, 2001, disputes the test claim filing. As for the requirement to establish an "employer of record," DSS responds that with the multiple choices available to the county, the claimant has not "shown that the legislation at issue "requires" the county to incur an increase in costs and that therefore a basic element of a reimbursable state mandate is not met here."

In addition, DSS asserts that the test claim legislation does not require that the county engage in collective bargaining, nor does it require an increase of wages and benefits to the providers. DSS also cites case law to support the contention that higher costs of compensation or benefits are not subject to article XIII B, section 6.

DSS also argues that San Bernardino has not claimed all available funds set aside by the state for the advisory committee portion of the test claim, and therefore asserts that this portion of the claim should be dismissed.

In comments on the draft staff analysis, dated March 23, 2007, DSS argues that Government Code section 17556, subdivision (e) applies to deny reimbursement "with respect to the establishment and operation of advisory committees pursuant to Welfare and Institutions Code Sections 12301.3 and 12301.4, [because] revenue, specifically intended to fund the costs of the activities required of the advisory committees, and in an amount sufficient to cover those costs, has been available to the counties from the outset." This argument is address further below.

At the Commission hearing, DSS testified that, regarding the choice of employer-of-record, "[w]e think there is a least-cost method in terms of administrative costs that a county could use; and that it is only these costs that are arguably required by the test claim statutes. And, therefore only those costs should be reimbursable."[5]

Department of Finance Position

DOF, in a letter filed March 6, 2002, also disputes the test claim filing "in its entirety." Specifically, as to the claims of potential costs related to collective bargaining, DOF argues "[e]ven if local governments were in fact required by the test claim statutes to incur these costs, they would not be reimbursable because they are wage/benefit related costs incurred by local governments as a result of state statutes regulating the terms and conditions of employment," which is not a reimbursable state mandate pursuant to case law. In addition, DOF maintains that "local governments retain options pursuant to which there would be no increased costs to them resulting from the employer of record, ... [which] preclude any findings of reimbursable state mandated costs."

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[5] April 16, 2007 Transcript, page 24.

DOF claims that the claimant failed to adequately address the exceptions to "costs mandated by the state" set out in Government Code section 17556, and therefore the test claim "is incomplete under the Commission's regulations and should be returned to the test claimant or disallowed."[6]

DOF also contends that the advisory committee costs are not reimbursable costs mandated by the state "because there is an allocation of funds by DSS pursuant to an appropriation to cover these costs. The test claimant has presented no evidence that these appropriations are insufficient to cover claimed costs as required by the Commission's regulations."

DOF filed comments on the draft staff analysis on March 28, 2007, which are addressed in the analysis below.

At the hearing, DOF stated "[w]e concur with the staff analysis on the finding of the program and the higher level of service."[7] However, DOF also noted that Proposition 1A, "limited the State's ability to reduce funding [for a mandated program,] without notifying locals of suspending the mandates."[8] They also concur with DSS "that much of the advisory committee's activities are funded through the department."[9]

COMMISSION FINDINGS

The courts have found that article XIII B, section 6, of the California Constitution[10] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[11] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[12] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[6] On June 10, 2001, Commission staff issued a completeness review letter finding that all required elements for filing a test claim had been met, and the filing was accepted.

[7] *Id.* at page 25.

[8] *Ibid.*

[9] *Id.* at page 26.

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

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

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

task.[13] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[14]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[15] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[16] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[17]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[18]

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.[19] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[20]

Issue 1: Do the test claim statutes mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?

In order for a test claim statute or executive order to be subject to article XIII B, section 6 of the California Constitution, it must constitute a "program." In *County of Los Angeles v. State of*

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

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

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

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

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

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

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

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

California, the California Supreme Court defined the word "program" within the meaning of article XIII B, section 6 as one that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[21] The court has held that only one of these findings is necessary.[22]

The Commission finds that establishing an in-home supportive services advisory committee and an employer of record imposes a program within the meaning of article XIII B, section 6 of the California Constitution. Several of the Welfare and Institutions Code sections claimed governing the administrative activities of IHSS impose unique requirements on the counties that do not apply generally to all residents and entities in the state.

Next, the analysis must continue to determine if the individual elements of the test claim filing also impose a new program or higher level of service. The courts have defined a "higher level of service" in conjunction with the phrase "new program" to give the subvention requirement of article XIII B, section 6 meaning. Accordingly, "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."[23] A statute or executive order mandates a reimbursable "higher level of service" when, as compared to the legal requirements in effect immediately before the enactment of the test claim legislation, it increases the actual level of governmental service to the public provided in the existing program.[24]

IHSS Employer of Record: Welfare and Institutions Code Section 12302.25, Subdivisions (a)-(c)

Welfare and Institutions Code section 12302.25, subdivision (a), as added by Statutes 1999, chapter 90, requires counties to act as, or establish an employer of record for IHSS providers, other than the state or the individual recipient by January 1, 2003.

Claimant alleges that the test claim statutes "require the establishment of an 'employer of record'" and a "mandate of collective bargaining with providers of IHSS services, as well as the increased costs [of wages and benefits] that will arise once collective bargaining has been instituted."[25]

The county shall establish an employer of record through several options: a contract, public authority, nonprofit consortium, or by the county acting as the employer of record itself, or a combination of the above. There is no mandate for the county to act as the employer of record, but this is one of the options available to the counties; each option can have great impact on the downstream costs of operating IHSS, but this is a choice made at the discretion of each county.

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[21] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[22] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[23] *County of Los Angeles, supra*, 43 Cal.3d 46, 56; *San Diego Unified School District, supra*, 33 Cal.4th 859, 874.

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

[25] Test Claim Filing, pages 13 and 14.

Counties have always had a share of cost for the ongoing administration of IHSS:[26] the test claim statutes do not alter that share of cost, and no downstream administrative activities are newly required as a result of this statute. However, the requirement to *establish* an employer of record pursuant to the test claim statute is not discretionary and requires administrative action on the part of the counties.[27]

DOF filed comments on March 28, 2007, arguing that the test claim statute "requires any county, not in compliance with the mandates of AB 1682 within a specified timeframe, to act as the employer of record." Presumably DOF's argument is that counties did not need to engage in any administrative activities to comply with the law, because they could simply wait and default to become the employer of record. The provision that DOF refers to is section 12302.25, subdivision (j), as amended by Statutes 2002, chapter 1135, operative January 1, 2003. Therefore, counties were required to engage in administrative activities to establish an employer of record from July 12, 1999, the operative date of Statutes 1999, chapter 90, until December 31, 2002. The Commission finds that only on or after January 1, 2003 was the "default" employer of record provision applicable, and any requirement to *establish* an employer of record was no longer mandatory.

Therefore, the Commission finds that Welfare and Institutions Code section 12302.25 imposes a new program or higher level of service for the following new time-limited activity:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[28]

In addition, the Commission finds that Welfare and Institutions Code section 12302.25 imposes a new program or higher level of service for the following new activity:

- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for

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[26] Welfare and Institutions Code section 12306.

[27] DOF, in its comments filed March 28, 2007, continues to argue that the "contract mode" provides a no-cost option for counties to establish an employer of record. The claimant persuasively countered this argument at pages 6-14 of the September 9, 2002 rebuttal, identifying significant administrative costs involved in establishing a contract.

[28] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[29]

DSS, in its November 9, 2001 test claim comments, provides a rebuttal to the mandate claim for collective bargaining costs:

> The claimant, on page 2 of the mandate summary, characterizes the legislation at issue as mandated collective bargaining between the employer of record and the providers. A careful reading of the statutes, however, reveals no such mandate. The statutes at issue do not mandate collective bargaining. Collective bargaining rights and duties are established and controlled by other state and federal laws that operate upon labor relations. The mandate to establish an employer for Individual Providers (IPs) for purposes of the [MMBA] or any other applicable state and federal laws makes no statement on whether IPs will organize or whether any representative will be able to force collective bargaining upon counties under [MMBA] or any other provision. What the legislation does is to require counties to appoint, name or otherwise establish the entity that will respond in the event there is a right or obligation to engage in collective bargaining that IPs posses[s] under other law. If collective bargaining between the employer of record and the providers is mandated by law it is not the law at issue that does so.

Subdivision (b) states: "Nothing in this section shall prohibit any negotiations or agreement regarding collective bargaining or any wage and benefit enhancements." The Commission finds that the plain language of the test claim statute does not *require* collective bargaining, but rather confirms that the code section does not prohibit collective bargaining or other negotiations on wages and benefits.[30] The Commission finds that Welfare and Institutions Code section 12302.25, subdivision (b), does not mandate a new program or higher level of service for collective bargaining.

Subdivision (c) provides: "Nothing in this section shall be construed to affect the state's responsibility with respect to the state payroll system, unemployment insurance, or workers' compensation and other provisions of Section 12302.2 for providers of in-home supportive services." This section maintains the existing law regarding the state's responsibilities under section 12302.2, which addresses certain withholding and contribution requirements when

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[29] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[30] In comments on the draft staff analysis, dated March 26, 2007, the claimant states that "the fundamental rule of statutory construction is [to] ascertain legislative intent," citing *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645. The claimant then quotes the Legislative Counsel's Digest for Assembly Bill No. 1682 to argue that collective bargaining costs are reimbursable. While the case law cited is correct, it is equally fundamental that "[t]he statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861. Moreover, the Legislative Counsel's Digest is not determinative of the ultimate issue whether a statute constitutes a state-mandated program under article XIII B, section 6. (*City of San Jose, supra,* 45 Cal.App.4th 1802, 1817.)

paying individual IHSS providers. This section is only applicable to the state, and clarifies that the test claim statute is to have no impact on another provision of law; therefore, the Commission finds that Welfare and Institutions Code section 12302.25, subdivision (c) does not mandate a new program or higher level of service.

In addition, while counties may incur increased costs for higher wages and benefits as an indirect result of the requirement to act as or establish an employer of record, a showing of increased costs is not determinative of whether the legislation imposes a reimbursable state-mandated program. The California Supreme Court has repeatedly ruled that evidence of additional costs alone do not result in a reimbursable state-mandated program under article XIII B, section 6.[31] The Court also found in *Lucia Mar, supra,* 44 Cal.3d 830, 835:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.

Comments filed by the state agencies, DOF and DSS, both assert that case law interpreting article XIII B, section 6, including *County of Los Angeles, supra, City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, and *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, results in a finding that "increases in employment benefits or compensation, as the result of legislation that does not directly mandate the increase, are not considered a "new program or "higher level of service in an existing program" as meant by the Constitution."[32]

In *County of Los Angeles, supra,* 43 Cal.3d 46, the Court addressed the costs incurred as a result of legislation that required local agencies to provide the same increased level of workers' compensation benefits for their employees as private individuals or organizations were required to provide to their employees. The Supreme Court recognized that workers' compensation is not a new program and, thus, the court determined whether the legislation imposed a higher level of service on local agencies.[33] The court defined a "higher level of service" as "state mandated *increases in the services provided* by local agencies in existing programs." (Emphasis added.)

> 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."

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[31] *County of Los Angeles, supra,* 43 Cal.3d at page 54; see also, *Kern High School Dist., supra,* 30 Cal.4th 727, 735.

[32] DSS Comments, filed November 9, 2001, page 5. DOF's Comments, filed March 6, 2002, page 4, expresses similar arguments.

[33] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

The Supreme Court in *County of Los Angeles* 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.[34]

The court held that reimbursement for the increased costs of providing workers' compensation benefits to employees was not required.

> Section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. 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. Workers' compensation is administered by the state ... 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. (*Id.* at pp. 57-58, fn. omitted.)

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." (*San Diego Unified School Dist., supra*, 33 Cal.4th 859, 875.) In this sense, the present test claim is also indistinguishable from the analysis presented by the Court in *County of Los Angeles*.

City of Richmond, supra, 64 Cal.App.4th 1190, similarly held that requiring local governments to provide death benefits to local safety officers, under both PERS and the workers' compensation system, did not constitute a higher level of service to the public. The court stated:

> Increasing the cost of providing services cannot be equated with requiring an increased level of service under a section 6 analysis. 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.[35]

The court also found 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."[36]

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[34] *Id.* at pages 56-57.

[35] *City of Richmond, supra,* 64 Cal.App. 1190, 1196.

[36] *Id.* at page 1197.

In *City of Anaheim, supra*, 189 Cal.App.3d 1478, the court determined that an increase in PERS benefits to retired employees, which resulted in a higher contribution rate by local governments, does not constitute a higher level of service to the public. In this case the court found that:

> While focusing on the exceptions to reimbursement, City conveniently presumes that [the test claim statute] mandated a higher level of service on local government, a prerequisite to reimbursement when an existing program is modified.
>
> City's claim for reimbursement must fail for the following reasons: (1) [the test claim statute] did not compel City to do anything, (2) any increase in cost to City was only incidental to PERS' compliance with [the test claim statute], and (3) pension payments to retired employees do not constitute a "program" or "service" as that term is used in section 6.[37]

The court in *Anaheim* found that an increase in pension benefits to employees was not a "program" or "service" within the meaning of article XIII B, section 6.[38] The claimant in *City of Anaheim*:

> argues that since [the test claim statute] specifically dealt with pensions for *public* employees, it imposed unique requirements on local governments that did not apply to all state residents or entities. [Footnote omitted; emphasis in original.]

However, the court continued:

> Such an argument, while appealing on the surface, must fail. As noted above, [the statute] mandated increased costs to a state agency, not a local government. Also, PERS is not a program administered by local agencies.
>
> Moreover, the goals of article XIII B of the California Constitution "were to protect residents from excessive taxation and government spending... [and] preclud[e] a shift of financial responsibility for carrying out governmental functions from the state to local agencies.... Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage-costs which all employers must bear-neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services." (*County of Los Angeles v. State of California, supra*, 43 Cal.3d at p. 61.) *Similarly,* 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.* [Emphasis added, footnote omitted.]

Therefore, the court concluded that the test claim statute did "not fall within the scope of section 6."[39]

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[37] *City of Anaheim, supra*, 189 Cal.App.3d at page 1482.

[38] *Ibid.*

[39] *Id.* at pages 1483-1484.

In *San Diego Unified School Dist., supra,* 33 Cal.4th at pages 876-877, the Court held:

> Viewed together, these cases (*County of Los Angeles, supra,* 43 Cal.3d 46, *City of Sacramento, supra,* 50 Cal.3d 51, and *City of Richmond, supra,* 64 Cal.App.4th 1190) illustrate the circumstance that 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 constitutes an *increased or higher level* of the resulting "service to the public" under article XIII B, section 6, and Government Code section 17514. [Emphasis in original.]

The test claim statutes create a situation where the employer may be faced with "a higher cost of compensation to its employees." As held by the court, in *City of Anaheim, supra,* "[t]his is not the same as a higher cost of providing services to the public." Therefore, the Commission finds that any increased wage and benefit costs that may be incurred indirectly following implementation of Welfare and Institutions Code section 12302.25, is not a new program or higher level of service.

IHSS Advisory Committee: Welfare and Institutions Code Sections 12301.3, 12301.4, and 12302.25, Subdivisions (d) & (e)

Welfare and Institutions Code section 12301.3, was added by Statutes 1999, chapter 90. The amendments by Statutes 2000, chapter 445, are indicated by underline, as follows:

> (a) Each county shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals. No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article.
>
> (1)(A) In counties with fewer than 500 recipients of services provided pursuant to this article or Section 14132.95, at least one member of the advisory committee shall be a current or former provider of in-home supportive services.
>
> (B) In counties with 500 or more recipients of services provided pursuant to this article or Section 14132.95, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.
>
> (2) Individuals who represent organizations that advocate for people with disabilities or seniors may be appointed to committees under this section.
>
> (3) Individuals from community-based organizations that advocate on behalf of home care employees may be appointed to committees under this section.
>
> (4) A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee, but may designate any county employee to provide ongoing advice and support to the advisory committee.
>
> (b) Prior to the appointment of members to a committee required by subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations.

(c) The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services.

(d) Any county that has established a governing body, as provided in subdivision (b) of Section 12301.6, prior to July 1, 2000, shall not be required to comply with the composition requirements of subdivision (a) and shall be deemed to be in compliance with this section.

Welfare and Institutions Code section 12301.4, was added by Statutes 1999, chapter 90. The amendments by Statutes 2000, chapter 445, are indicated by underline, as follows:

(a) Each advisory committee established pursuant to Section 12301.3 or 12301.6 shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees.

(b) Each county shall be eligible to receive state reimbursements of administrative costs for only one advisory committee and shall comply with the requirements of subdivision (e) of Section 12302.25.

Welfare and Institutions Code section 12302.25, subdivision (d), as added by Statutes 1999, chapter 90, provides that prior to implementing the "employer of record" requirement, "a county shall establish an advisory committee as required by Section 12301.3 and solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services."

Subdivision (e) provides that "Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about the program on an ongoing basis."

A test claim statute mandates a new program or higher level of service within an existing program when it compels a claimant to perform activities not previously required.[40] Establishing, maintaining and taking advice from an advisory committee regarding the operation of IHSS was not required of counties prior to Statutes 1999, chapter 90. Therefore, the Commission finds that the plain language of Welfare and Institutions Code sections 12301.3, 12301.4, and 12302.25, subdivisions (d) and (e), mandates a new program or higher level of service, for the following new activities:

- Each county that does not qualify for the exception provided in section 12301.3, subdivision (d), shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals, with membership as required by section 12301.3, subdivision (a): "No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal

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

assistance services paid for through public or private funds or as recipients of services under this article." (Welf. & Inst. Code, §§ 12301.3, subd. (a), 12302.25, subd. (d).)[41]

- Following the September 14, 2000 amendment by Statutes 2000, chapter 445, counties shall appoint membership of the advisory committee in compliance with Welfare and Institutions Code section 12301.3, subdivision (a)(1) and (a)(4):

  > In counties with fewer than 500 IHSS recipients, at least one member of the advisory committee shall be a current or former provider of in-home supportive services; in counties with 500 or more IHSS recipients, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.
  >
  > A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee. (Welf. & Inst. Code, § 12301.3, subd. (a).)[42]

- Prior to the appointment of members to a committee required by section 12301.3, subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations. (Welf. & Inst. Code, § 12301.3, subd. (b).)[43]

- The county shall solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12302.25, subd. (d).)[44]

- The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12301.3, subd. (c).)[45]

- Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to section 12301.3, prior to making policy and funding decisions about IHSS on an ongoing basis. (Welf. & Inst. Code, § 12302.25, subd. (e).)[46]

- One advisory committee formed pursuant to sections 12301.3 or 12301.6, shall provide ongoing advice and recommendations regarding in-home supportive services to the county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and

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[41] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[42] As amended by Statutes 2000, chapter 445 (oper. Sept. 14, 2000.)

[43] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[44] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[45] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[46] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

administrative agency of the public authority, nonprofit consortium, contractor, and public employees. (Welf. & Inst. Code, § 12301.4.)[47]

Since 1992, Welfare and Institutions Code section 12301.6 has provided an option for counties to "[c]ontract with a nonprofit consortium to provide for the delivery of in-home supportive services ... or ... [e]stablish, by ordinance, a public authority to provide for the delivery of in-home supportive services." According to the September 1999 California State Audit Report on In-Home Supportive Services,[48] provided by the claimant as Exhibit 4 to the test claim, "As of June 1999, 6 of the State's 58 counties—Alameda, San Mateo, San Francisco, Santa Clara, Los Angeles, and Contra Costa—had elected to create public authorities for the delivery of in-home supportive services," under the optional program described in Welfare and Institutions Code section 12301.6. Therefore, those counties, plus any others meeting the exception described in section 12301.3, subdivision (d), are not required to *establish* an advisory committee, but they may be subject to the ongoing requirements of section 12301.4.[49]

DSS does not dispute that the formation and continuing operation of advisory committees pursuant to Welfare and Institutions Code sections 12301.3 and 12301.4 results in an entirely new program or higher level of service to the public. However, both DSS and DOF argue that it is already being sufficiently funded by the state.[50] This is addressed at Issue 3, below, regarding "costs mandated by the state."

Issue 2: Are the remaining test claim statutes subject to article XIII B, section 6 of the California Constitution?

Several code sections pled were not in fact substantively amended by the test claim statutes, and therefore are not subject to article XIII B, section 6.

Welfare and Institutions Code section 2 provides: "[t]he provisions of this code, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations, and not as new enactments."[51] The

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[47] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[48] Subtitled "Since Recent Legislation Changes the Way Counties Will Administer the Program, the Department of Social Services Needs to Monitor Service Delivery."

[49] Government Code section 17565 provides that if a claimant "at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

[50] DOF's March 6, 2002 comments, pages 3-4, also argue that because the advisory committees "relate to the process of determining the rate of pay and benefits and of paying workers who provide services administered or overseen by the county, there is no "program" ... for which reimbursement is required." The cases cited by DOF in support of this proposition do not include facts where there were distinct administrative activities *required* by the test claim statutes, in addition to the higher contribution costs alleged, therefore, the Commission finds that this argument does not preclude a finding of a new program or higher level of service.

[51] This is in accordance with the California Supreme Court decision, which held that "[w]here there is an express repeal of an existing statute, and a re-enactment of it at the same time, or a repeal and a re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the

Commission finds that a renumbering, reenactment or restatement of prior law does not impose a reimbursable state-mandated program to the extent that the provisions and associated activities remain unchanged.

Welfare and Institutions Code Section 12301.6

Welfare and Institutions Code section 12301.6 provides an option for counties to "[c]ontract with a nonprofit consortium to provide for the delivery of in-home supportive services ... or ... [e]stablish, by ordinance, a public authority to provide for the delivery of in-home supportive services." It was amended by Statutes 1999, chapter 90,[52] but then repealed and reenacted in its original form by Statutes 1999, chapter 91; both statutes were effective and operative on July 12, 1999. Government Code section 9605 provides: "In the absence of any express provision to the contrary in the statute which is enacted last, it shall be conclusively presumed that the statute which is enacted last is intended to prevail over statutes which are enacted earlier at the same session ... ." Thus Statutes 1999, chapter 91 conclusively prevails over chapter 90 with respect to Welfare and Institutions Code section 12301.6 so that no language was changed when compared to prior law. Therefore, the Commission finds that Welfare and Institutions Code section 12301.6 was not substantively amended by the test claim statutes and is not subject to article XIII B, section 6.

Welfare and Institutions Code Section 12301.8

Similarly, Welfare and Institutions Code section 12301.8 was added by Statutes 1999, chapter 90[53] and repealed entirely by Statutes 1999, chapter 91, both effective and operative on July 12, 1999. Government Code section 9605 also applies here, therefore, due to the repeal in Statutes 1999, chapter 91, Welfare and Institutions Code section 12301.8 never operated as law. Thus, the Commission finds that Welfare and Institutions Code section 12301.8 was never operative and is not subject to article XIII B, section 6.

Several test claim statutes do not impose a new program or higher level of service because they do not require any new activities or impose a cost shift pursuant to article XIII B, section 6.

A test claim statute or executive order mandates a new program or higher level of service within an existing program when it compels a local agency to perform activities not previously required,[54] or when legislation requires that costs previously borne by the state are now to be paid by local agencies. Thus, in order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must order or command that local governmental agencies perform an activity or task, or result in "a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial

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old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time." (*In re Martin's Estate* (1908) 153 Cal. 225, 229.)

[52] Statutes 1999, chapter 90 would have amended the cost sharing provision between the state and the county for operating a public authority or nonprofit consortium under section 12301.6.

[53] Statutes 1999, chapter 90 would have added specific state cost-sharing language for increased wages and benefits, above the federal minimum wage, for IHSS providers employed through a public authority, nonprofit consortium, or contract.

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

responsibility for a required program for which the State previously had complete or partial financial responsibility."[55]

Government Code Section 16262.5

Government Code section 16262.5 provides that counties "shall not be reduced for the state share of the nonfederal costs for the administration of the In-Home Supportive Services program," under certain circumstances. This section was amended by Statutes 1999, chapter 90, to extend the period of time that this provision was applicable from June 30, 1998 to June 30, 2001, and amended other references to fiscal years consistent with this extension. The section generally provides an opportunity for fiscal relief for counties that are reducing funding for administrative activities county-wide in their budget, and also seek to reduce the administrative costs of IHSS in their budget.

Claimant alleges that this section, as amended, "extends the period for which the counties shall not be reduced for the state share of nonfederal costs for administration of the IHSS program but limits the state share of those costs."[56]

The costs of IHSS have been shared between federal, state and county government since the inception of the program. The test claim statute extended a county fiscal relief program for two additional fiscal years which functioned to provide applicant counties with a reduced share of administrative costs of IHSS. Extending the number of years of fiscal relief available to counties does not require new activities on the part of the claimant, and does not transfer from the state to local agencies "financial responsibility for a required program," as described in article XIII B, section 6, subdivision (c), of the California Constitution. Therefore, the Commission finds that Welfare and Institutions Code section 16262.5, as amended by Statutes 1999, chapter 90, does not mandate a new program or higher level of service.

Welfare and Institutions Code Sections 14132.95, 17600 and 17600.110

Statutes 1999, chapter 90 amended Welfare and Institutions Code section 17600, by *deleting* subdivision (b)(4), which eliminated the "In-Home Supportive Services Registry Model Subaccount" from the Sales Tax Account of the Local Revenue Fund.

The deleted language was originally added to the code by Statutes 1993, chapter 100. An uncodified portion of Statutes 1999, chapter 90, (§ 12), provides that "The unencumbered amount residing in the In-Home Supportive Services Registry Subaccount of the Sales Tax Account of the Local Revenue Fund on January 1, 2000, shall be transferred to the General Fund." Statutes 1999, chapter 90 also deleted Welfare and Institutions Code section 17600.110, which previously provided that "(a) Moneys in the In-Home Supportive Services Registry Model Account shall be available for allocation by the Controller for the purposes of Section 12301.6."

Welfare and Institutions Code section 14132.95 is a detailed description of IHSS eligibility services and funding, established by prior law. Statutes 1999, chapter 90, deleted subdivision (k)(3)(A) – (C), which previously specified the allocation of the subaccount funding in Welfare and Institutions Code section 17600.110. This funding was earmarked for "the establishment of

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[55] California Constitution, article XIII B, section 6, subdivision (c).

[56] Test Claim Filing, page 9.

an entity specified in Section 12301.6." Prior law allowed a county "*at its option*, [to] elect to"[57] contract with a nonprofit consortium or establish a public authority, to provide IHSS.

The removal of specific state subaccount funding tied to a discretionary program[58] does not require a claimant to perform new activities, nor does it transfer from the state to local agencies "financial responsibility for a required program," as described in article XIII B, section 6, subdivision (c), of the California Constitution. The Commission finds that Statutes 1999, chapter 90, amending Welfare and Institutions Code sections 14132.95, 17600 and 17600.110, does not mandate a new program or higher level of service.

Welfare and Institutions Code section 12302.7

Welfare and Institutions Code section 12302.7 was repealed by Statutes 1999, chapter 90. Prior to repeal of the law, the code section provided for an optional method for counties to contract for IHSS. The section had an inoperative date of July 1, 2001, and an automatic repealer provision operative January 1, 2002. The earlier repeal of this section did not operate to place any new requirements on counties. Therefore, the Commission finds that the repeal of Welfare and Institutions Code section 12302.7 does not mandate a new program or higher level of service.

Welfare and Institutions Code Section 12303.4

As amended by Statutes 1999, chapter 90, language was stricken from Welfare and Institutions Code section 12303.4, as follows:

> (a)~~(1)~~ Any aged, blind, or disabled individual who is eligible for assistance under this chapter or Chapter 4 (commencing with Section 12500), and who is not described in Section 12304, shall receive services under this article which do not exceed the maximum of 195 hours per month.
>
> ~~(2) Recipients served in modes of delivery other than the individual provider mode shall be limited in the maximum number of service hours per month to 195 hours times the statewide wage rate per hour for the individual provider mode as calculated by the department and by dividing this product by the hourly cost of the mode of service to be provided.~~
>
> (b)~~(1)~~ Any aged, blind, or disabled individual who is eligible for assistance under this chapter or Chapter 4 (commencing with Section 12500), who is in need, as determined by the county welfare department, of at least 20 hours per week of the services defined in Section 12304, shall be eligible to receive services under this article, the total of which shall not exceed a maximum of 283 hours per month.
>
> ~~(2) Recipients served in modes of delivery other than the individual provider mode shall be limited in the maximum number of service hours per month to 283 hours times the statewide wage rate per hour for the individual provider as calculated by the department and dividing this product by the hourly cost rate of the mode of service to be provided.~~

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[57] Welfare and Institutions Code section 12301.6

[58] *Ibid.*

The claimant alleges "this section amends the total hours of services a qualified recipient is entitled to receive."[59]

Prior law allowed for reduction of the number of hours per month of service that a recipient might otherwise be eligible for, when the provider was employed in a method other than the individual provider mode. As an example, if the provider was paid through a contract with an hourly cost rate of $10 per hour, but the current state wage rate for individual providers was $8, a recipient otherwise eligible for 283 hours would be limited to approximately 226 hours. This could keep costs to the state and county comparable between the individual provider mode and another mode of service with a higher negotiated hourly cost rate, but could also result in a cut in services to the recipient.

Statutes 1999, chapter 90 eliminated this exception to the maximum number of hours of eligibility for a recipient. The Commission finds that Welfare and Institutions Code section 12303.4, by removing an exception to the maximum number of hours a recipient is eligible to receive, does not require any activities on the part of the counties and thus does not mandate a new program or higher level of service.

Welfare and Institutions Code Section 12306.1

Welfare and Institutions Code section 12306.1, as added by Statutes 1999, chapter 91, provides:

> Notwithstanding paragraph (3) of subdivision (c) of Section 12301.6, with regard to wage increases negotiated by a public authority pursuant to Section 12301.6, for the 1999-2000 fiscal year the state shall pay 80 percent, and each county shall pay 20 percent, of the nonfederal share of paid increases up to fifty cents ($0.50) above the hourly statewide minimum wage. This section shall be applicable to wage increases negotiated prior to or during the 1999-2000 fiscal year.

This section was repealed by Statutes 2000, chapter 108, effective and operative July 10, 2000.[60] Welfare and Institutions Code section 12301.6, as referred to in section 12306.1, is a discretionary statute, and the Commission finds that any negotiated wages in excess of the state minimum wage, or cost-sharing resulting from such a statute, are all costs assumed at the option of the county.[61] The Commission finds that Welfare and Institutions Code section 12306.1 did not require any activities on the part of the counties, nor did it transfer from the state to local agencies "financial responsibility for a required program," as described in article XIII B, section 6, subdivision (c), of the California Constitution, and thus did not mandate a new program or higher level of service.

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[59] Test Claim Filing, page 10.

[60] Statutes 2000, chapter 108 was not pled in the test claim.

[61] *Kern High School Dist., supra*, 30 Cal.4th at page 743: "We instead agree with the Department of Finance, and with *City of Merced, supra*, 153 Cal.App.3d 777, that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves."

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

Reimbursement under article XIII B, section 6 is required only if any new program or higher level of service is also found to impose "costs mandated by the state." Government Code section 17514 defines "costs mandated by the state" as any *increased* cost a local agency is required to incur as a result of a statute or executive order that mandates a new program or higher level of service. At the time of filing the test claim, the claimant was required to allege costs in excess of $200, pursuant to Government Code section 17564. The claimant estimated increased costs to the county share of wages and benefits in the range of $10 to 21.7 million after establishing a public authority as the employer of record. In addition, the claimant states that these figures "do not include the administrative costs incurred with: creation and ongoing activities of the advisory committee, costs associated with the creation of any new modality or contracting with same, and costs associated with collective bargaining."

Government Code section 17556 provides, in pertinent part:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds any one of the following:
>
> ...
>
> (c) The statute or executive order imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation. This subdivision applies regardless of whether the federal law or regulation was enacted or adopted prior to or after the date on which the state statute or executive order was enacted or issued.
>
> ...
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies or school districts that result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.
>
> ...

Although IHSS is a joint federal-state-local program, there is no evidence in the record that any of the mandated activities are required by federal law. Therefore, the Commission finds that Government Code section 17556, subdivision (c) does not apply.

The claimant stated that *none* of the Government Code section 17556 exceptions apply. However, DOF specifically argues that the claimant has been provided with funding for the advisory committee activities and that Government Code section 17556, subdivision (e) applies to deny a mandate finding.[62] In the response to comments filed September 9, 2002, page 5, the

[62] DOF Comments, page 1, filed March 6, 2002. DOF's March 28, 2007 comments also include a chart showing funds appropriated for the "IHSS Advisory Committee" through 2005-06.

claimant asserts that of the $11,944 already claimed for the advisory committee expenses "[t]he costs for the Advisory Committee alone have exceeded several times the allotment actually paid by the Department of Social Services."

While state funds already provided must be used to offset any mandate reimbursement claimed, the claimant has provided a declaration that their administrative costs of forming and operating the advisory committee are not being fully reimbursed. To further support this claim, the claimant provided a copy of DSS claiming instructions for the January- March 2001 quarter, which allowed for 100 percent of "IHSS Advisory Committee/Direct Costs," retroactive to July 2000, but required claims for reimbursement of county administrative costs "for supporting the IHSS Advisory Committee," be charged separately under the standard claiming instructions for IHSS. Specifically the document states:

> Costs incurred by the County Welfare Department (CWD) for supporting the IHSS Advisory Committee are not allowable for reimbursement under these codes. Any CWD costs for providing support activities for the IHSS Advisory Committee should be charged to the appropriate IHSS/PCSP claim codes on the County Expense Claim (CEC.)[63]

This requires a county share of costs as required by Welfare and Institutions Code section 12306.[64] Section 12306 requires that the state and county share non-federal administrative costs of IHSS in a 65 percent state/35 percent county split. Requiring the claimant to maintain this share of costs for a mandated new program or higher level of service would defeat the stated purpose of article XIII B, section 6 to "provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service."

Various DSS County Fiscal Letters show that funds have been allocated for reimbursing counties for the direct costs of the mandatory advisory committee on an annual basis since July 2000.[65] However, the reimbursement period for this test claim begins on the operative date of Statutes 1999, chapter 90--July 12, 1999. In addition, the state could also fail to allocate such funds in any future budget year.[66]

Another source of funds noted in the County Fiscal Letters, beginning in fiscal year 2003-04, was for a small number of counties' administrative costs to act as the employer of record for

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[63] County Fiscal Letter (CFL) No. 00/01-48, page 3, issued December 22, 2000, by DSS. (Also, Exh. 2 to Claimant's Response to Comments.)

[64] Claimant Response to Comments, page 5, filed September 9, 2002.

[65] DSS CFL, Nos. 00/01-14, 00/01-33, 00/01-48, 01/02-12, 02/03-28, 02/03-73, 03/04-46, 03/04-51, 04/05-16, 04/05-22, 04/05-27, 05/06-10, 06/07-02.

[66] In *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299, the Court discussed that, subject only to the Governor's veto power, the Legislature has the power to determine how funds are expended in each annual budget: "Legislative determinations relating to expenditures in other respects are binding upon the executive: 'The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds.'"

IHSS providers.[67] In the current fiscal year, 2006-07, this funding is limited to the counties of Alpine and Tuolumne and is for "the cost of administrative activities necessary for counties to act as the employer of record for IHSS providers."[68] However, the mandated activity pursuant to Welfare and Institutions Code section 12302.25 is for the initial *establishment* of an employer of record *on or before January 1, 2003*. Therefore, this funding is not specific to the mandated activity.

The Commission finds that section 17556, subdivision (e) does not apply to disallow a finding of costs mandated by the state, but all claims for reimbursement for the approved activities must be offset by any funds already received from state or federal sources. Thus, for the activities listed in the conclusion below, the Commission finds accordingly that the new program or higher level of service also imposes costs mandated by the state within the meaning of Government Code section 17514, and none of the exceptions of Government Code section 17556 apply.

CONCLUSION

The Commission concludes that Welfare and Institutions Code sections 12301.3, 12301.4, and 12302.25, as added by Statutes 1999, chapter 90 or amended by Statutes 2000, chapter 445 impose new programs or higher levels of service for counties within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, for the following specific new activities:

- From July 12, 1999, until December 31, 2002, each county shall establish an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record through a public authority, nonprofit consortium, contract, county administration of the individual provider mode, county civil service personnel, or mixed modes of service. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated depending on the mode of service adopted, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[69]
- Counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers. This activity is limited to the administrative costs of establishing an employer of record in the individual provider mode, upon request. It does not include mandate reimbursement for any increased wages or benefits that may be negotiated, or any activities related to collective bargaining. (Welf. & Inst. Code, § 12302.25, subd. (a).)[70]
- Each county that does not qualify for the exception provided in section 12301.3, subdivision (d), shall appoint an in-home supportive services advisory committee that shall be comprised of not more than 11 individuals, with membership as required by

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[67] DSS CFL, No. 02/03-73, page 2.

[68] DSS CFL, No. 06/07-02, page 2.

[69] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[70] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

section 12301.3, subdivision (a): "No less than 50 percent of the membership of the advisory committee shall be individuals who are current or past users of personal assistance services paid for through public or private funds or as recipients of services under this article." (Welf. & Inst. Code, §§ 12301.3, subd. (a), 12302.25, subd. (d).)[71]

- Following the September 14, 2000 amendment by Statutes 2000, chapter 445, counties shall appoint membership of the advisory committee in compliance with Welfare and Institutions Code section 12301.3, subdivision (a)(1) and (a)(4):

  > In counties with fewer than 500 IHSS recipients, at least one member of the advisory committee shall be a current or former provider of in-home supportive services; in counties with 500 or more IHSS recipients, at least two members of the advisory committee shall be a current or former provider of in-home supportive services.
  >
  > A county board of supervisors shall not appoint more than one county employee as a member of the advisory committee. (Welf. & Inst. Code, § 12301.3, subd. (a).)[72]

- Prior to the appointment of members to a committee required by section 12301.3, subdivision (a), the county board of supervisors shall solicit recommendations for qualified members through a fair and open process that includes the provision of reasonable written notice to, and reasonable response time by, members of the general public and interested persons and organizations. (Welf. & Inst. Code, § 12301.3, subd. (b).)[73]
- The county shall solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12302.25, subd. (d).)[74]
- The advisory committee shall submit recommendations to the county board of supervisors on the preferred mode or modes of service to be utilized in the county for in-home supportive services. (Welf. & Inst. Code, § 12301.3, subd. (c).)[75]
- Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about IHSS on an ongoing basis. (Welf. & Inst. Code, § 12302.25, subd. (e).)[76]
- One advisory committee formed pursuant to sections 12301.3 or 12301.6, shall provide ongoing advice and recommendations regarding in-home supportive services to the

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[71] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[72] As amended by Statutes 2000, chapter 445 (oper. Sept. 14, 2000.)

[73] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[74] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[75] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

[76] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

county board of supervisors, any administrative body in the county that is related to the delivery and administration of in-home supportive services, and the governing body and administrative agency of the public authority, nonprofit consortium, contractor, and public employees. (Welf. & Inst. Code, § 12301.4.)[77]

The Commission concludes that all claims for reimbursement for the approved activities must be offset by any funds already received from state or federal sources, including funds allocated for the direct costs of the advisory committee. The Commission further concludes that Government Code section 16262.5, and Welfare and Institutions Code sections 12301.6, 12301.8, 12302.7, 12303.4, 12306.1, 14132.95, 17600 and 17600.110, as pled, along with any other test claim statutes and allegations not specifically approved above, do not impose a program, or a new program or higher level of service, subject to article XIII B, section 6.

[77] As added by Statutes 1999, chapter 90 (oper. Jul. 12, 1999).

PUBLIC HEARING

COMMISSION ON STATE MANDATES

--oOo--

TIME: 9:32 a.m.

DATE: Monday, April 16, 2007

PLACE: Resources Building
First Floor Auditorium
1416 Ninth Street
Sacramento, California

--oOo--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

--oOo--

Reported by:
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BE IT REMEMBERED that on Monday, April 16, 2007, commencing at the hour of 9:32 a.m., thereof, at Resources Building, Auditorium, Sacramento, California, before me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the following proceedings were held:

--oOo--

CHAIR GENEST: All right, good morning.

Am I audible out there in the audience? Are we all audible?

If you can't hear, raise your hand.

This meeting of the Commission on State Mandates will come to order.

Paula, can you call roll?

MS. HIGASHI: Ms. Bryant?

MEMBER BRYANT: Here.

MS. HIGASHI: Mr. Chivaro?

MEMBER CHIVARO: Here.

MS. HIGASHI: Mr. Glaab?

MEMBER GLAAB: Here.

MS. HIGASHI: Mr. Lujano?

MEMBER LUJANO: Here.

MS. HIGASHI: Ms. Olsen?

MEMBER OLSEN: Here.

MS. HIGASHI: Mr. Worthley?

MEMBER WORTHLEY: Here.

MS. HIGASHI: Mr. Genest?

CHAIR GENEST: Here.

MS. HIGASHI: The items 1, 2 -- we have no items 1, 2, 3, and 4. And we will proceed to Item 6.

And at this time what I'd like to do is have all of the parties and witnesses in the audience who are here to present testimony or to represent parties on any of the test-claim items, to please stand.

(Several persons stood.)

MS. HIGASHI: Do you solemnly swear or affirm that the testimony which you are about to give is true and correct based on your personal knowledge, information, or belief?

(A chorus of "I do's" was heard.)

MS. HIGASHI: Thank you very much.

CHAIR GENEST: So should we follow up the witnesses on Item 6?

MS. HIGASHI: Yes. Our first Item is Item 6, Commission Counsel Katherine Tokarski will present it.

MS. TOKARSKI: Good morning.

The test-claim statutes for *In-Home Supportive Services II* require that all counties establish an "employer of record" for IHSS care providers other than the recipient of the services. The test-claim statutes also require counties to appoint an in-home supportive

services advisory committee with specific membership requirements.

The claimant asserts that the state funding provided at the time of the test-claim filing was inadequate to cover the actual cost of the advisory committee and seeks to recover the remainder of their claimed costs of creating and operating an advisory committee through the mandate reimbursement.

This remains an issue of dispute for the state agencies who have filed comments arguing that adequate funds have been appropriated for the mandatory advisory committees.

The claimant also alleges that the requirement to establish an "employer of record" results in multimillion-dollar increased costs for wages and benefits, with estimates varying widely according to which form of "employer of record" is ultimately selected: a public authority, a contact with an outside agency, or the county itself. The claimant is also seeking reimbursement for any collective bargaining that may result if providers unionize after the "employer of record" is established.

Staff finds that while counties may incur increased costs for higher wages and benefits as an indirect result of the requirement to act as or establish

an "employer of record," as stated repeatedly by the courts, a showing of increased costs is not determinative of whether the legislation imposes a reimbursable state-mandated program.

The test-claim statutes create a situation where the employer may be faced with a higher cost of compensation to its employees. As held by the Court, "*This is not the same as a higher cost of providing services to the public.*" Therefore, staff finds that any increased wage and benefit costs that may be incurred indirectly following implementation of the test-claim statutes is not a new program or higher level of service.

In addition, staff finds that the plain language of the test-claim statute does not require collective bargaining but, rather, confirms that the code section does not prohibit collective bargaining or other negotiations on wages and benefits.

Staff recommends the Commission adopt the staff analysis to partially approve this test claim for the new administrative activities listed in the conclusion beginning at page 27.

Will the parties and witnesses please state your names for the record?

MS. TER KEURST: Hi. I'm Bonnie Ter Keurst, and I'm with the County of San Bernardino.

MR. BURDICK: I don't think that microphone is on yet.

None of the microphones are working? Not even this one -- oh, you know what?

Do they work now?

AUDIENCE: Yes.

MR. BURDICK: And they thought I wasn't high-tech enough.

One button did it all.

MS. TER KEURST: Hi. I'm Bonnie Ter Keurst, and I'm with the County of San Bernardino.

MR. BURDICK: I'm Allan Burdick, and I'm representing the California State Association of Counties.

MR. LAKICH: I'm Steve Lakich. I'm the Director of Labor Relations representing the County of Sacramento.

MR. NORRIS: Jim Norris. I'm with the California Department of Social Services.

MS. CASTAÑEDA: Carla Castañeda, Department of Finance.

MS. GEANACOU: Susan Geanacou, Department of Finance.

CHAIR GENEST: Who is going to start?

MS. SHELTON: The claimant, normally.

MS. TER KEURST: Good morning.

I wanted just to make a brief comment, and that is we are in support of the items that the staff has found to be reimbursable.

And with that, I'm going to turn it over to some experts in the field.

MR. BURDICK: Thank you very much, Members of the Board -- or Members of the Commission. How did I say that? I've only been to a few of these Commission meetings in my day.

Again, Allan Burdick on behalf of the California State Association of Counties.

And we're here today, essentially, to argue that this very major, substantial piece of legislation, which established and changed, really, and brought to the counties the responsibility to be the employer of record, and to enter into and to participate in the collective-bargaining process is a reimbursable state-mandated program. We believe that these issues probably should be found to be reimbursable, and the details should be put over to the Parameter-and-Guideline process, because it's a very detailed process in terms of what's eligible or not.

If we get into the discussion about, is there a possibility or a requirement for increased compensation

or not, I think there would have to be a showing somehow that almost on an individual basis, on a county-by-county, as to whether or not that occurred.

But there clearly is a whole new responsibility that was placed on counties by the legislation.

I'd like to introduce Steve Lakich, who is the director of Labor Relations for the County of Sacramento. Steve served several years for the State of California as its deputy director of Labor Relations. He then also had a number of years with the City of Sacramento as their director of Labor Relations, and now with the County of Sacramento.

I think Steve went through this whole process from beginning to end. And he can show you how the legislation requirements require them to implement and carry out this legislation since its passage.

So with that, I would turn it over to Steve.

MR. LAKICH: Thank you, Allan.

Good morning, Members of the Commission. My office represents the public authority of Sacramento County, which is the IHSS program. They're now up to about 18,000 home-care workers. When we first started in the year 2000, we had about 9,200 home-care workers. So the program has grown substantially.

But when the Meyers-Millias-Brown Act was

amended to include the IHSS program to make the either 58 counties the employer of record for collective-bargaining purposes for the IHSS workers, our board of supervisors established an employee relations ordinance, upon my recommendation, to have the rules established for recognition in the event a union attempted to organize the IHSS workers. And we did that in August of 2000. It was within two or three months the SEIU, which is the Service Employees International Union, petitioned the public authority for recognition. That is an option they had under the Meyers-Millias-Brown Act that it covered for. When they elected that option, they had to show an interest of at least 30 percent of the IHSS workers, some 9,200, in order to petition for the election.

When we received the petition, we asked the State Mediation Service to conduct a secret ballot election. It was an on-site -- I'm sorry, a mail ballot; and we had to mail those ballots to all 9,200 employees.

And the vote came in something like a 15-to-1 ratio, that they won the election.

With that, we went into collective bargaining with the SEIU. It lasted a good five to six months. We reached our first agreement with SEIU in June of 2001. That is a two-year agreement.

The wages at that point, before they got recognition, was minimum wage, $5.75 an hour. And that wage went up to $7.50 an hour in June of 2000; and then went to $8.50 an hour on October 1, 2001; and then to $9.50 an hour on October 1, 2002.

Also, for the first time the IHSS workers were covered under health insurance. And the agency's contribution in the first year was $160 per month, and it was with the Kaiser plan. In the second year, it went up to $180 per month per eligible participant. That first year, the contract expired in 2003. And we then entered into our second collective-bargaining agreement effective July 1, 2003, and that ran through to October 31, 2004.

During the term of that agreement, the wages went up $9.50 per hour; and the health insurance contribution went up to $224 per month.

The third collective bargaining agreement was entered into on November 1, 2004; and it ran for two years, to November 30th, 2006. The wages stayed initially at $9.50 an hour, and then went up to $10 an hour as of January 1, 2006.

The agency's contribution for health insurance went up to $281 per month; and for the first time, entered into a dental plan. And that cost the agency

$11.50 per month.

Our last collective bargaining agreement was entered into this last December 1st, 2006; and it runs through November 2009.

And the wages go up to $10 -- they were $10 an hour. They went up to $10.40 per hour as of January 1, 2007. The health insurance will go up to 391.85 as of January 1, 2007. The dental insurance stays at the rate of $11.50.

The IHSS office here in Sacramento employs 20 employees now. And the county pays 17.5 cents for every dollar spent.

My office does the collective bargaining. Over that period of seven years we have billed the public authority a total of $59,675 to do the collective bargaining administration.

So are there any questions?

MR. BURDICK: I'd like to do a quick summary, if I could. And that's essentially just to kind of put this in place and help to set the parameters, is prior to this legislation, the State was responsible for setting the wage. They made a determination as to what was a reimbursable wage for these in-home supportive services workers. I remember a number of legislative hearings with SEIU and others flowing in to convince the State as

to what it should do and how it should set that wage. And they would set the wage for those.

This legislation made a major shift. What it did is it shifted to counties the responsibility for these employees, which it had no responsibility with before for the determination of the employment of these particular people.

As Steve pointed out, it also subjected him to the full collective bargaining process. And I think you all are aware that the Meyers-Millias-Brown Act is very similar to the State Employer Relations Act, which requires full-blown collective bargaining and counties are now subject to the PERB. And in the event it is found that they are not bargaining in good faith, that activity will go to the PERB, the bargaining group, and they can come back and force the county then to renegotiate to provide for a fair result in their bargaining.

So this is a new program and a total shift of responsibility for the employment and the determination of salaries, wages, and benefits for these -- in Sacramento's case, over 9,000 at that time -- in-home supportive services workers.

Thank you very much.

MR. NORRIS: Good morning, Members of the

Commission. I just have a couple comments to make with regard to this test claim.

DSS would like to submit these two comments for your consideration.

The first concerns the staff's "employer of record" finding. Namely, the staff's findings are that the county administrative costs incurred in establishing an "employer of record" are fully reimbursable, no matter what method of compliance is chosen by the County. We think that there is a least-cost method in terms of administrative costs that a county could use; and that it is only these costs that are arguably required by the test-claim statute. And, therefore, only those costs should be reimbursable.

Under the statute, the county is free to choose a more costly method of compliance when a central less-costly method is available. To the extent a county chooses a more costly method, we think that any costs incurred above those associated with the least-costly method of compliance are not, in fact, required by the statute.

We think that this concept should be expressed in the staff's analysis and the proposed Statement of Decision in such a way as to limit those findings.

We also would like to make a comment with

respect to the county's activities in connection with the advisory committees. We noticed that included in this list of county activities subject to reimbursement are two activities that appear to be advisory committee activities rather than county activities. These are located on page 5 of the proposed Statement of Decision.

We think to the extent that these items are intended to describe the advisory committee activities, that these activities involve advisory committee direct costs that are provided for us through the existing appropriations expressed in the test-claim statute.

That's all I have.

MS. CASTAÑEDA: Carla Castañeda with the Department of Finance.

We concur with the staff analysis on the finding of the program and the higher level of service.

We have two minor objections. One, on page 26 of the staff analysis, the second paragraph from the bottom, beginning with "various," the last statement, "*In addition, the State allocate such funds of any future budget year.*" We would note that the Proposition 1-A amendments to the Constitution in 2004 have limited the State's ability to reduce finding without notifying locals of suspending the mandates.

In addition to that, we also concur with the

Department of Social Services that much of the advisory committee's activities are funded through the department. And we'd note that during the parameters-and-guidelines phase.

MS. GEANACOU: Susan Geanacou, Department of Finance.

I have one additional comment I'd like to add. It regards some of the testimony you've heard this morning about collective bargaining. We would simply affirm the recommended staff analysis portion, particularly that on pages 13 through 16 regarding collective bargaining claimed costs; that the statutes clearly state that collective bargaining is not prohibited. In other words, it's authorized, but in no way is it required. And, in other words, it is discretionary. And so any increased labor costs in the form of wages or benefits are not reimbursable, notwithstanding the testimony you heard this morning from the County of Sacramento.

Thank you.

CHAIR GENEST: I have a question of a couple folks, if I could go first here.

For CSAC or either of the two county representatives, whoever wants to speak to it, what do you say about the staff's statement that the courts have

made it clear? I don't want to mischaracterize this, but it's something to the effect the courts have made clear that the costs of additional salaries, increased salaries, would not be reimbursable? Did I say that correctly? Close enough?

MS. GEANACOU: Close enough.

CHAIR GENEST: So what is your response to that?

MR. BURDICK: Well, we disagree, I think, with that finding, specifically. There is, I think, an interpretation that can be made from statute that the Commission staff has been taking is that those costs are not reimbursable.

Our interpretation of those cases is that, if there is a new service required or an activity required that results in a cost, that that is a reimbursable state mandate.

If you take the Commission's and staff's interpretation, you could interpret it to say that the State of California could impose any reporting requirements that it wants on local agencies and that would not be a benefit to the public. It could be a new program, it could be an increased level of service or a requirement on the county, but there would be no responsibility whatsoever, if you follow that

interpretation, to reimburse counties.

And we do not believe that that is a proper interpretation of the cases by the Court, nor do we believe that the State could impose those programs and avoid reimbursement under the provisions of Article XIIIB, Section 6.

CHAIR GENEST: I also had a question for the Department of Health Services representative.

You refer to -- and I may have a series of questions here -- you refer to the least-cost approach.

Have you quantified that? Do you know what the least cost would be?

MR. NORRIS: No, I haven't. But it would be on a county-by-county basis. But I think it could be determined for each county which method of compliance would be the least costly for that county in its circumstances. And any choice of compliance that requires costs above those, I think, would be discretionary costs, in that the county would have had a least-cost method to use to comply with the statute.

CHAIR GENEST: Then I guess my follow-up to that is, the State does fund the administrative costs of in-home supportive services?

MR. NORRIS: Yes.

CHAIR GENEST: And we pay some percentage of

the total?

MR. NORRIS: We do.

CHAIR GENEST: And the county pays the other percent back after the federal amount is subtracted?

MR. NORRIS: Yes, this is correct.

CHAIR GENEST: And I think the county said 17 and a half for the program.

But does that apply to the administration of the program as well?

MR. NORRIS: The administration -- the sharing ratio may be a little bit different. I'm not exactly sure what it is. But certainly there's a federal, state, and county share involved in the administration.

CHAIR GENEST: I guess my question on this may be more appropriate for our P's & G's, but I still have a question now. If you in the department allocate money that assumes a certain total, and then you allocate the state's share of that total for administration, did you allocate or add any money to the total for these administrative costs, either at the least-cost level or any other level, when you allocated money after this law was enacted?

MR. NORRIS: I don't know the answer to that. I don't have it with me. One of our finance experts --

CHAIR GENEST: I think the record shows that there wasn't.

But my question isn't exactly that. It's, what about the rest of it? In other words, does the State Department of Social Services know exactly what every item of cost that a county undertakes to run this program is, and do you budget precisely? Or is it done in some generalized fashion that is more or less adequate, in your view, to fund the total package of administrative costs?

MR. NORRIS: As I understand it, the administrative costs are precisely those -- the administrative costs that the department allocates are precisely those that the County claims. And I don't think that we allocated any sort of general way but, rather, we allocate to the claim that the county submits.

CHAIR GENEST: Well, did the county submit claims for this cost to the department, when you were building your allocation?

MR. NORRIS: I'm not sure about that. I think that those costs were built into the county's claim. I'm not certain about that, though.

CHAIR GENEST: Well, that seems to me a pretty important question.

I don't know if Finance has an answer to that.

I don't recall that being in the record.

MS. CASTAÑEDA: As we understand it, from the advisory committee, the Department budgets $53,000 per county, but they do pay on what is actually claimed.

On the other pieces, we don't know.

CHAIR GENEST: Does any other member of the committee have a question?

MEMBER WORTHLEY: Mr. Chairman, just to respond to the point that you brought up about, this is kind of a common theme, we're going to hear several times today, and that is about this concept that we have case law which indicates that increased costs, in and of themselves, do not necessarily reflect an increased or enhanced service. The key there is "*in and of themselves.*" What are they tied to? If they're tied to an enhancement of service, then they should be reimbursable.

I would submit to you that the test claim presented today is an indication of the fact it's an enhancement. When you go from minimum wage, with no benefits, to $10.40 an hour and over $4, I think it is, in benefits, to employees, and your employees go from 9,000 to 18,000, if that's not an enhancement, my gosh, I don't know what would be an enhancement. In other words, if it was a bad situation, people would be leaving the

business. Instead, they're flocking to this business because it's an enhancement.

And we're saying that just because it's an increased cost, we shouldn't have to reimburse them. I'm saying the increased costs are related to the enhancement which results from the services provided; and, therefore, the State should be bound.

MS. TER KEURST: Can I add just a brief comment to that?

I addressed this in the staff analysis, and I asked some other people to because I in no way claim to be an expert in this field.

But I did want to comment on that particular item, because that's more an issue of how the mandate process works.

And one of the things in the legislative intent was that this law was put there expressly for the purpose of collective bargaining, requiring DSS to establish a timetable for all of this to happen. But it's expressly for an employer of IHSS personnel for purposes of collective bargaining.

So it's not just a matter of there's a new law and the wages were a result of. This law was created to address the wages and the need for these people.

And in the response that I wrote, I quoted from

a case, the Select Base Materials v. Board of Equalization case, where it says, "*The fundamental rule of statutory construction is that the Court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.*"

And our position is, the purpose of the law in this case was to establish a procedure for collective bargaining.

CHAIR GENEST: Does staff have a response?

MS. TOKARSKI: Yes, I addressed that citation at the bottom of page 13, footnote 26. And certainly that is a correct statement of statutory construction. However, the essential purpose of statutory construction is not determined by that. The statute's plain meaning should control when the plain meaning is clear, and you do not go to leg. intent language.

The legislative language that deals with collective bargaining in this entire test-claim statute scheme is limited to the language that's found in the middle of that page 13.

"*Nothing in this section shall prohibit any negotiations or agreement regarding collective bargaining or any wage and benefit enhancements.*" And therefore staff found that the plain language of the test-claim statute did not require collective bargaining, but

confirms that the code section does not prohibit collective bargaining.

You can also say that any negotiations undertaken as part of collective bargaining, once that road is gone down, are then also at the discretion of the counties. There is nothing that required them to grant health benefits or dental benefits or get the salaries up as high as they went. That's all undertaken at the option of the county at that point, that level of negotiation. And that's certainly not required by this test-claim statutory scheme.

CHAIR GENEST: It seems like we have two issues here. One is, the one you're talking about, whether the salaries -- the additional -- the higher cost of the salaries are reimbursable mandates in themselves, which the staff analysis says they are not. But the other issue is, the administrative costs, in the case of one county, 59,000 over several years, I think you said it was, whether those are reimbursable.

And I'm fairly convinced myself by the staff's analysis on the salary issue.

I'm not so sure about the reimbursability of the administrative costs because I don't know what -- it's not as if this is an entire program in itself. This is a shared program with many requirements and many

activities that are funded in a shared way by the State and the counties.

We heard from the Department of Social Services that counties then submit bills, and we pay a share of that bill, the feds pay a share, and the counties pay the rest. And we don't know whether, I guess, whether bills were submitted by counties for this purpose.

So I'm a little unclear on whether even the administrative -- where the administrative costs fit in the larger question of the whole program. So I'm not sure I can support the staff analysis in that respect without knowing more about how the program budget was built, what is funded in it, how accurate it is. In other words, does the State know with great certainty that every cost is covered by the budget, and any additional requirement must be funded in order for it to be affordable within the shared scheme? I don't think this budget is that precise. I think there's probably lots of room within the allocation, which is a fairly large allocation, especially relative to the kinds of costs we're talking about here.

So I'm a little unclear on that. And it sounds likes you're going to have disagreement on the salary issue as well.

MEMBER WORTHLEY: Mr. Chairman, in going to

what you're talking about, I think there is -- I would support your position. I think I hear you saying that even though it doesn't -- the statute on its face does not require that there be negotiations -- collective negotiations or bargaining, the fact of the matter is, the State created a scheme whereby bargaining became feasible.

It was infeasible before because you had every essentially employer was every person who hired an individual person to take care of them. But we created an agency that's where the county then became the employer of record.

At that point then it became possible for them to organize. In fact, they did. I'd doubt out of 58 counties that there's one county that didn't organize. Just as it happened in Sacramento County, it happened in my county, in Tulare County. And then consequently, once they organized, then you were bound by state law to collective bargaining. So it was a foreseeable outcome of the statute that you would have this sort of thing happening.

And then once they became organized, then the counties had become responsible for bargaining. So you're bound by state law at that point to comply.

So I would think that at least that portion of

it should be reimbursable because it's foreseeable in the scheme created by the statute that the result that would happen, in fact, had happened.

CHAIR GENEST: If I understand you, I don't think we do agree. Because I think if you're arguing that the salaries are reimbursable --

MEMBER WORTHLEY: I'm talking now about the administrative costs.

CHAIR GENEST: Administrative costs?

MEMBER WORTHLEY: I'm talking about the costs of negotiations and so forth. Because once they become organized, then we have no -- you can't back out and say, "Oh, we don't want to negotiate." You're obligated by state law at that point to negotiate.

CHAIR GENEST: I would agree with that.

The only question that I have -- and maybe it's not for this hearing but would be for the P's & G's aspect -- is whether that cost is already covered within the overall allocation. That's my question.

MEMBER WORTHLEY: I don't believe it is.

CHAIR GENEST: Only because the overall allocation, as far as we know, is not really precise. And counties cause it to go up by virtue of adding more bills for the next year to be covered. So I don't know if it's covered or not.

MS. TOKARSKI: Welfare and Institutions Code section 12306 requires a state and county split of non-federal administration costs. So when the State Legislature, by these statutes, required additional administrative activities that were not previously required and did not provide funding -- 100 percent funding -- then there's still a county share of costs, whether it be 17 and a half or 35 percent, depending on whether there's a federal part of the costs covered. Then you have unreimbursed costs mandated by the state, you know, according to this analysis.

And the precise amount that was funded, it shouldn't matter exactly because there is a share of administrative costs to the county under this formula.

Now, for the advisory committee costs that's referred to by the state agencies, there is language in DSS claiming instructions that allows for 100 percent reimbursement of advisory committee direct costs. And it's very specific, and it allows certain costs and doesn't allow other costs.

That doesn't cover the entire time period, reimbursement period, for the test claim. But that's an example of where the State has taken action to provide 100 percent reimbursement of -- in this case not administrative costs, but direct costs.

That's not true of any of the other findings that I'm recommending.

MR. BURDICK: Mr. Chair, if I could just make two comments in response to the Department of Social Services.

I think the first one is, the legislation provides option for counties to adopt. And their position is, it should be the least-costly one.

And I think the Legislature, in providing options for counties, provides those options for you to look at, to make a determination of which of those options best fit your particular situation.

And there is no requirement in the mandate process that you adopt the least costly. I think the whole intent in government is to find the one that's the most effective and efficient and meets the needs of the people; and not necessarily, you know, costs should not be -- is one of the factors that should be considered, but it should not be the governing factor and the only factor.

Secondly, I'd like Mr. Lakich to just comment. I think the discussion is going -- there seems to be some agreement on the requirement to bargain. But I'd just like Mr. Lakich to again comment on the obligation of the county under the statute.

MR. LAKICH: Under the Meyers-Millias-Brown Act, it's the employees who have the option to organize if they so choose. By amending the MMB and including home-care workers, it's the home-care workers that have the discretion to organize or not to organize, not the employers.

And once the employees decide to organize and there's a secret-ballot election, the county is obligated then to deal with that union's exclusive representative. It has to continue to do so until the employees elect, if they do, to decertify the union.

So the discretion under the law is with the employees and not the employer.

MEMBER LUJANO: Is this under all four options or just when the county decides to be the employer of record?

MR. LAKICH: It's the employer of record.

MR. BURDICK: Yes.

MEMBER LUJANO: No. Well, there's four options. So is it under all four options if they go with the contract or if they go with a non-profit consortium, they can organize and then the county has to deal with them; or is it only when the county becomes the employer of record?

MR. LAKICH: I believe it would be all four

options. If the purpose of putting the home care workers under the Meyers-Millias-Brown Act was to create an employer of record for collective-bargaining purposes, whatever options you selected, I think you'd be obligated. The employees could organize to have collective bargaining.

We elected to have the public authority as an option because it was the best fit for the board of supervisors, because our board then becomes the public authority. And it made it a lot simpler to meet with me and others in closed session to deal with the collective-bargaining issues.

But if they elected to do it under contract, they still would have, in my view, the right to have collective bargaining.

MR. BURDICK: And I think you'll find that in the vast majority of counties, that the public authority option is the option that has been determined best for this particular program.

CHAIR GENEST: Does the Department of Social Services -- did you have something to say?

MR. NORRIS: Yes. Just to the point about the options that are available.

Of the four options that were available to the County, the mandate was merely to establish an employer

of record. And the options were given as to how to do that.

Some of those options didn't involve the County becoming involved in any sort of collective bargaining at all. For example, if the contract mode had been chosen, the providers that were at that time not subject to any sort of collective bargaining were to be transferred over to the contract mode; then the contractor, as the employer, would have been subject to whatever labor relations laws were applicable, including collective bargaining if necessary.

So had that option been chosen by any county, there would have been no need for the county to be involved in any sort of collective bargaining, no collective-bargaining admin costs would have been involved -- none of that.

I think that it's only if the county chooses -- actively chooses to become the employer, that any sort of costs, if there are, for collective-bargaining purposes, come into play.

CHAIR GENEST: Can we get staff's response to that point? In other words, you're saying that there is a reimbursable mandate. Here in the administrative requirement, I think it has to do mostly with the advisory committee. But this just sounds like perhaps

that wouldn't be true.

So can you respond to what he said about that?

MS. TOKARSKI: As far as the advisory committee, there has to be an advisory committee established.

CHAIR GENEST: Under all four options?

MS. TOKARSKI: Under all four options, to help the county board of supervisors to determine which option to choose.

So the advisory committee is mandatory. The only exception to that is for counties, and I believe San Francisco City and County, that had already established a public authority prior to the enactment of this statute. And we think that affects maybe six counties.

And everybody else needed to establish an advisory committee in order to go forward and choose the appropriate form of employer of record for that particular county.

CHAIR GENEST: So is that the only reimbursable mandate that you are identifying in your recommendations?

MS. TOKARSKI: There is the very first activity, I think is what Mr. Norris is referring to, and that's the middle of page 27. It's a time-limited activity from the July 12, 1999, beginning of the

operation of the statute, to December 31st, 2002, which, on January 1st, 2003, the counties were required to have selected their employer of record.

So the activity is to establish the employer of record for in-home support services providers, limited to the administrative costs that were incurred by the county workers to implement this part of the mandate. It does not include any reimbursement for increased wages or benefits that may be negotiated.

But there's clearly -- according to the filings by the County of San Bernardino, they went through a lot of behind-the-scenes activities to form their employer of record.

CHAIR GENEST: Any other -- oh, excuse me.

MS. SHELTON: It also does not include, according to this bullet, any activities related to collective bargaining, as well.

CHAIR GENEST: Okay. So are there any questions from any members of the Commission?

MEMBER WORTHLEY: Mr. Chair, I just have one statement. I mean, in a certain sense, that's a semantic issue. Somebody has to pay. Whatever way you choose to go, somebody has to pay. And, ultimately, it comes back to the county and state and federal government pay. So you could use whatever form you'd want, but they're going

to charge you a fee if they're a for-profit organization. So that was the reason why most counties went with the public authority, is to try to control costs. Because if they hire somebody else to do the services, who might then enter into a contract with somebody else to perform the actual negotiation services, you end up paying and paying and paying more.

So by doing it in-house, the attempt is to try to control costs.

Ultimately, to use some other form of means by which you do the negotiations for you, you're going to end up paying for that. The county still pays for it.

So whatever way you chose, it still comes back to the counties, the state, and federal government for paying for these services. By doing it with the public authority the intent was to control those costs.

All they can do is negotiate for you to come back and say, "This is what we negotiated. Pay up." And so the idea of controlling costs internally was for the benefit of the public authority. So I see that as really a semantic issue.

You can choose whatever one you want; but the bottom line is, you ended up having to pay for it.

CHAIR GENEST: Does anybody here -- are we ready to make a motion on this?

I was initially uncomfortable with the staff recommendations just because I didn't know how this particular reimbursable mandate fit into the overall funding for the program. And maybe that's still a question. But maybe this isn't the part of the process for that question to be addressed. So I guess I'm now comfortable with the staff recommendation.

If there's anybody here who is willing to make that motion.

MEMBER BRYANT: I'll move the staff recommendation.

CHAIR GENEST: Do we have a second?

MEMBER LUJANO: I'll second.

CHAIR GENEST: All in favor?

(A chorus of "ayes" was heard.)

CHAIR GENEST: Opposed?

MEMBER WORTHLEY: No.

MEMBER OLSEN: No.

MEMBER GLAAB: No.

CHAIR GENEST: Should we do a roll call on that?

MS. HIGASHI: Ms. Bryant?

MEMBER BRYANT: Aye.

MS. HIGASHI: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HIGASHI: Mr. Glaab?

MEMBER GLAAB: No.

MS. HIGASHI: Mr. Lujano?

MR. LUJANO: Aye.

MS. HIGASHI: Ms. Olsen?

MEMBER OLSEN: No.

MS. HIGASHI: Mr. Worthley?

MEMBER WORTHLEY: No.

MS. HIGASHI: Mr. Genest?

CHAIR GENEST: Yes. Aye.

MS. HIGASHI: The motion carries.

CHAIR GENEST: Okay, what's the next item?

MS. HIGASHI: The next item is Item 7.

MS. TOKARSKI: Item 7 is the Statement of Decision for the item you just heard.

The sole issue before the Commission is whether the proposed Statement of Decision accurately reflects the Commission's decision on the *In-Home Supportive Services II* test claim. Staff recommends that the Commission adopt the proposed Statement of Decision beginning on page 3, which accurately reflects the staff analysis and recommendation on this test claim.

Minor changes, including those that reflect the hearing testimony and vote count will be included when issuing the final Statement of Decision.

CHAIR GENEST: Do we have a motion?

MEMBER LUJANO: Move approval.

MEMBER BRYANT: Second.

CHAIR GENEST: All in favor?

(A chorus of "ayes" was heard.)

CHAIR GENEST: Opposed?

MEMBER GLAAB: No.

MEMBER WORTHLEY: No.

CHAIR GENEST: Roll call.

MS. HIGASHI: Ms. Bryant?

MEMBER BRYANT: Aye.

MS. HIGASHI: Mr. Chivaro?

MEMBER CHIVARO: Aye.

MS. HIGASHI: Mr. Glaab?

MEMBER GLAAB: No.

MS. HIGASHI: Mr. Lujano?

MEMBER LUJANO: Aye.

MS. HIGASHI: Ms. Olsen?

MEMBER OLSEN: Abstain.

MS. HIGASHI: Mr. Worthley?

MEMBER WORTHLEY: No.

MS. HIGASHI: And Mr. Genest?

CHAIR GENEST: Aye.

MS. HIGASHI: Adopted.

MS. HIGASHI: The motion is carried.

West's Ann.Cal.Welf. & Inst.Code § 12302.25

C

Effective: January 01, 2003

West's Annotated California Codes Currentness
Welfare and Institutions Code (Refs & Annos)
Division 9. Public Social Services (Refs & Annos)
Part 3. Aid and Medical Assistance (Refs & Annos)
Chapter 3. State Supplementary Program for Aged, Blind and Disabled (Refs & Annos)
Article 7. In-Home Supportive Services (Refs & Annos)

➡§ 12302.25. Employers for in-home supportive services (IHSS) providers; compliance documentation; contents; failure to provide compliance documentation; counties deemed employers of IHSS personnel by operation of law

(a) On or before January 1, 2003, each county shall act as, or establish, an employer for in-home supportive service providers under Section 12302.2 for the purposes of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code and other applicable state or federal laws. Each county may utilize a public authority or nonprofit consortium as authorized under Section 12301.6, the contract mode as authorized under Sections 12302 and 12302.1, county administration of the individual provider mode as authorized under Sections 12302 and 12302.2 for purposes of acting as, or providing, an employer under Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code, county civil service personnel as authorized under Section 12302, or mixed modes of service authorized pursuant to this article and may establish regional agreements in establishing an employer for purposes of this subdivision for providers of in-home supportive services. Within 30 days of the effective date of this section, the department shall develop a timetable for implementation of this subdivision to ensure orderly compliance by counties. Recipients of in-home supportive services shall retain the right to choose the individuals that provide their care and to recruit, select, train, reject, or change any provider under the contract mode or to hire, fire, train, and supervise any provider under any other mode of service. Upon request of a recipient, and in addition to a county's selected method of establishing an employer for in-home supportive service providers pursuant to this subdivision, counties with an IHSS caseload of more than 500 shall be required to offer an individual provider employer option.

(b) Nothing in this section shall prohibit any negotiations or agreement regarding collective bargaining or any wage and benefit enhancements.

(c) Nothing in this section shall be construed to affect the state's responsibility with respect to the state payroll system, unemployment insurance, or workers' compensation and other provisions of Section 12302.2 for providers of in-home supportive services.

(d) Prior to implementing subdivision (a), a county shall establish an advisory committee as required by Section 12301.3 and solicit recommendations from the advisory committee on the preferred mode or modes of service to be utilized in the county for in-home supportive services.

(e) Each county shall take into account the advice and recommendations of the in-home supportive services advisory committee, as established pursuant to Section 12301.3, prior to making policy and funding decisions about the program on an ongoing basis.

(f) In implementing and administering this section, no county, public authority, nonprofit consortium, contractor, or a combination thereof, that delivers in-home supportive services shall reduce the hours of service for any recipient below the amount determined to be necessary under the uniform assessment guidelines established by the

department.

(g) Any agreement between a county and an entity acting as an employer under subdivision (a) shall include a provision that requires that funds appropriated by the state for wage increases for in-home supportive services providers be used exclusively for that purpose. Counties or the state may undertake audits of the entities acting as employers under the terms of subdivision (a) to verify compliance with this subdivision.

(h) On or before January 15, 2003, each county shall provide the department with documentation that demonstrates compliance with the January 1, 2003, deadline specified in subdivision (a). The documentation shall include, but is not limited to, any of the following:

(1) The public authority ordinance and employee relations procedures.

(2) The invitations to bid and requests for proposal for contract services for the contract mode.

(3) An invitation to bid and request for proposal for the operation of a nonprofit consortium.

(4) A county board of supervisors' resolution resolving that the county has chosen to act as the employer required by subdivision (a) either by utilizing county employees, as authorized by Section 12302, to provide in-home supportive services or through county administration of individual providers.

(5) Any combination of the documentation required under paragraphs (1) to (4), inclusive, that reflects the decision of a county to provide mixed modes of service as authorized under subdivision (a).

(i) Any county that is unable to provide the documentation required by subdivision (h) by January 15, 2003, may provide, on or before that date, a written notice to the department that does all of the following:

(1) Explains the county's failure to provide the required documentation.

(2) Describes the county's plan for coming into compliance with the requirements of this section.

(3) Includes a timetable for the county to come into compliance with this section, but in no case shall the timetable extend beyond March 31, 2003.

(j) Any county that fails to provide the documentation required by subdivision (h) and also fails to provide the written notice as allowed under subdivision (i), shall be deemed by operation of law to be the employer of IHSS individual providers for purposes of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code as of January 15, 2003.

(k) Any county that provides a written notice as allowed under subdivision (i), but fails to provide the documentation required under subdivision (h) by March 31, 2003, shall be deemed by operation of law to be the employer of IHSS individual providers for purposes of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code as of April 1, 2003.

(l) Any county deemed by operation of law, pursuant to subdivision (j) or (k), to be the employer of IHSS individual providers for purposes of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1 of the Government Code shall continue to act in that capacity until the county notifies the department that it has established another employer as permitted by this section, and has provided the department with the documentation required under subdivision (h) demonstrating the change.

(m) Section 10605 may be applied in each county that has not complied with this section by January 1, 2003.

CREDIT(S)

West's Ann.Cal.Welf. & Inst.Code § 12302.25

(Added by Stats.1999, c. 90 (A.B.1682), § 6, eff. July 12, 1999. Amended by Stats.2002, c. 1135 (A.B.2235), § 3.)

CROSS REFERENCES

Public social services, conflict between waiver and statute, controlling terms, see Welfare and Institutions Code § 12317.2.

Public social services, legislative intent, IHSS Plus Waiver, see Welfare and Institutions Code § 14132.951.

West's Ann. Cal. Welf. & Inst. Code § 12302.25, **CA WEL & INST § 12302.25**

Current through Ch. 28 of 2007 Reg.Sess. urgency legislation

END OF DOCUMENT

21 Cal.4th 489, 981 P.2d 543, 87 Cal.Rptr.2d 702, 99 Cal. Daily Op. Serv. 6719, 1999 Daily Journal D.A.R. 8553
(Cite as: 21 Cal.4th 489, 981 P.2d 543)

▷

Sierra Club v. San Joaquin Local Agency Formation Com.
Cal. 1999.

SIERRA CLUB et al., Plaintiffs and Appellants,
v.
SAN JOAQUIN LOCAL AGENCY FORMATION COMMISSION, Defendant and Respondent;
CALIFIA DEVELOPMENT GROUP et al., Real Parties in Interest and Respondents.
No. S072212.

Supreme Court of California
Aug. 19, 1999.

SUMMARY

The trial court dismissed a petition for a writ of mandate filed by an environmental group and others, challenging a local agency formation commission's approval of a proposed city annexation, on the ground that plaintiffs had failed to exhaust their administrative remedies under Gov. Code, § 56857, subd. (a), which provides that a person or agency "may" seek rehearing of a commission action. (Superior Court of San Joaquin County, No. CV001997, Bobby W. McNatt, Judge.) The Court of Appeal, Third Dist., No. C027361, affirmed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that, when the Legislature has provided that a person or agency " may" seek reconsideration or rehearing of an adverse administrative agency decision, that person or agency need not exercise that rehearing option prior to seeking judicial recourse. The exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review arises. A person or agency is not required, after an agency's final decision, to raise for a second time the same evidence and legal arguments previously raised solely to exhaust administrative remedies. The court further held that this new judicial rule was entitled to retroactive application. (Opinion by Werdegar, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Administrative Law § 95--Judicial Review and Relief--Mandamus--Quasi-Legislative Determination:Municipalities § 7--Alteration and Disincorporation-- Annexation--Agency Determination.
A determination regarding a proposed city annexation by a local agency formation commission is quasi-legislative; judicial review thus arises under the ordinary mandamus provisions of Code Civ. Proc., § 1085, rather than the administrative mandamus provisions of Code Civ. Proc., § 1094.5.

(2) Administrative Law § 86--Judicial Review and Relief--Exhaustion of Administrative Remedies.
Exhaustion of administrative remedies is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. Exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.

(3) Administrative Law § 88--Judicial Review and Relief--Exhaustion of Administrative Remedies--Particular Applications--When Rehearing Prescribed.
When the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have

made.

(4a, 4b, 4c, 4d, 4e, 4f) Administrative Law § 89--Judicial Review and Relief--Exhaustion of Administrative Remedies--Exceptions--When Statute Provides Person or Agency "May" Seek Reconsideration of Adverse Agency Decision.
The trial court erred in dismissing a petition for a writ of mandate filed by an environmental group and others, challenging a local agency formation commission's approval of a proposed city annexation, on the ground that plaintiffs had failed to exhaust their administrative remedies by failing to request rehearing of the agency's decision under Gov. Code, § 56857, subd. (a), which provides that a person or agency "may" seek rehearing of a commission action. When the Legislature has provided that a person or agency "may" seek reconsideration or rehearing of an adverse administrative agency decision, that person or agency need not exercise that rehearing option prior to seeking judicial recourse. The exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement ***491** that the administrative proceeding must be completed before the right to judicial review arises. A person or agency is not required, after an agency's final decision, to raise for a second time the same evidence and legal arguments previously raised solely to exhaust administrative remedies. Furthermore, this new judicial rule was entitled to retroactive application, which would not create any unusual hardships. (Overruling *Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198 [137 P.2d 433], *Clark v. State Personnel Bd.* (1943) 61 Cal.App.2d 800 [144 P.2d 84], and *Child v. State Personnel Bd.* (1950) 97 Cal.App.2d 467 [218 P.2d 52], to the extent they held otherwise.)
[See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 309.]
(5) Administrative Law § 87--Judicial Review and Relief--Exhaustion of Administrative Remedies--Purpose.
The basic purpose of the doctrine of exhaustion of administrative remedies is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief. Even when the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review.

(6) Courts § 39.5--Decisions and Orders--Doctrine of Stare Decisis-- Opinions of California Supreme Court.
It is a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, is based on the assumption that certainty, predictability, and stability in the law are the major objectives of the legal system; that is, that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law. It is likewise well established, however, that this policy is a flexible one which permits the California Supreme Court to reconsider, and ultimately to depart from, its own prior precedent in an appropriate case. Although the doctrine of stare decisis does indeed serve important values, it nevertheless should not shield court-created error from correction.

(7) Courts § 37--Decisions and Orders--Doctrine of Stare Decisis-- Application--Significant Legislative Reliance on Prior Decision.
***492** The significance of stare decisis is highlighted when legislative reliance is potentially implicated. Certainly, stare decisis has added force when the Legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, since overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

(8) Administrative Law § 89--Judicial Review and Relief--Exhaustion of Administrative Remedies--Exceptions--Administrative Procedure Act--Failure to Seek Rehearing.
The Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.), which governs a substantial

portion of the administrative hearings held in this state, were the final culmination of a detailed Judicial Council administrative law study ordered by the Legislature two years earlier. The Legislature determined the right to judicial review under the APA would not be affected by failure to seek reconsideration before the agency in question, because of the council's finding that the policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists. In the absence of compelling language in the APA to the contrary, it is assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report.

(9a, 9b) Courts § 39.5--Decisions and Orders--Prospective and Retroactive Decisions--Judicial Discretion--Factors Considered.
A decision of the California Supreme Court overruling one of its prior decisions ordinarily applies retroactively. A court may decline to follow that standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the hardships imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases. All things being equal, it is preferable to apply decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action.

COUNSEL
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Meyers, Nave, Riback, Silver & Wilson, Andrea J. Saltzman and Rick W. Jarvis for Seventy Four California Cities as Amicus Curiae on behalf of Real Parties in Interest and Respondents.

WERDEGAR, J.

In *Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198 [137 P.2d 433] (*Alexander*), we held that when the Legislature has provided that a petitioner before an administrative tribunal "may" seek reconsideration or rehearing [FN1] of an adverse decision of that tribunal, the petitioner always must seek reconsideration in order to exhaust his or her administrative remedies prior to seeking recourse in the courts. The *Alexander* rule has received little attention since its promulgation, and several legal scholars and at least one Court of Appeal have expressed the belief that the rule has been abandoned or legislatively abrogated. That conclusion was premature; the rule remains controlling law. However, as it serves little practical purpose and is inconsistent with procedure in parallel contexts, we hereby abandon it. This is not to say that reconsideration of agency actions need never be sought prior to judicial review. Such a request is necessary *494 where appropriate to raise matters not previously brought to the agency's attention. We simply see no necessity that parties file pro forma requests for reconsideration raising issues already fully argued before the agency, and finally decided in the administrative decision, solely to satisfy the procedural requirement imposed in *Alexander*.

FN1 The terms "reconsideration" and "rehearing" are used interchangeably by the literature and case authority in this area, as well as by the parties to this appeal.

Perceiving no fundamental difference between the two terms for purposes of this case, we will do the same.

I. Factual and Procedural History

In early 1996, the City of Lathrop (City) approved a proposal for a large development project on several thousand acres of farmland outside of city limits. A plan was approved, an environmental impact report (EIR) was certified, and a development agreement was executed. A second plan was approved to double the capacity of the City's wastewater treatment facility, and a separate EIR was certified for that project.

Proceedings were commenced before the San Joaquin Local Agency Formation Commission (SJLAFCO) to obtain approval of the City's annexation of the territory. The Sierra Club, the San Joaquin Farm Bureau Federation, Eric Parfrey and Georgianna Reichelt (collectively petitioners) objected in that proceeding. SJLAFCO overruled their objections and approved the proposed annexation; it also adopted a finding of overriding considerations with regard to the environmental impacts identified in the EIR.

Parfrey sent a letter to SJLAFCO requesting reconsideration of the approval. In the letter he asserted the required $700 filing fee for the reconsideration would be forthcoming. The next day he withdrew his request and, together with the other petitioners, filed this mandamus petition in the superior court. The suit named SJLAFCO as respondent, and various developers including Califia Development Group (Califia), the City and others as real parties in interest. The petition alleged a lack of substantial evidence to support the finding of overriding considerations with respect to the environmental impacts identified in the EIR and, alternatively, that SJLAFCO failed to follow the applicable statutory provisions related to territory annexation.

Califia moved to dismiss the petition. Observing that Government Code section 56857, subdivision (a) provides that an aggrieved person may request reconsideration of an adverse local agency formation commission (LAFCO) resolution, Califia argued that under the authority of *Alexander*, *supra*, 22 Cal.2d at page 200, such a request is a mandatory prerequisite to filing in the courts. Petitioners responded that the *Alexander* rule is no longer good law, as reflected in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1475 [277 Cal.Rptr. 481]. The trial court granted the motion to dismiss. *495

The Court of Appeal affirmed. The majority concluded dismissal was compelled by *Alexander*, despite its view that the *Alexander* rule is "outmoded" and "presents a fitful trap for the unwary." We granted review.

II. The LAFCO Statutory Scheme

LAFCO's are administrative bodies created pursuant to the Cortese-Knox Local Government Reorganization Act of 1985 (Gov. Code, § 56000 et seq.) to control the process of municipality expansion. The purposes of the act are to encourage "planned, well-ordered, efficient urban development patterns with appropriate consideration of preserving open-space lands within those patterns" (*id.*, § 56300), and to discourage urban sprawl and encourage "the orderly formation and development of local agencies based upon local conditions and circumstances" (*id.*, § 56301). (1) A LAFCO annexation determination is quasi-legislative; judicial review thus arises under the ordinary mandamus provisions of Code of Civil Procedure section 1085, rather than the administrative mandamus provisions of Code of Civil Procedure section 1094.5. (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 387, 390 [142 Cal.Rptr. 873].)

Government Code section 56857, subdivision (a) provides: "Any person or affected agency *may* file a written request with the executive officer requesting amendments to or reconsideration of any resolution adopted by the commission making determinations. The request shall state the specific modification to the resolution being requested." (Italics added.) Such requests must be filed within 30 days of the adoption of the LAFCO resolution, and no further

action may be taken on the annexation until the LAFCO has acted on the request. (*Id.*, subds. (b), (c).) Nothing in the statutory scheme explicitly states that an aggrieved party must seek rehearing prior to filing a court action.

III. The *Alexander* Rule

(2) That failure to exhaust administrative remedies is a bar to relief in a California court has long been the general rule. In *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715] (*Abelleira*), a referee issued a ruling awarding unemployment insurance benefits to striking employees. The affected employers filed a petition for a writ of mandate without first completing an appeal to the California Employment Commission, as required by the statutory scheme. The appellate court issued an alternative writ and a temporary restraining order blocking payment of the benefits. We, in turn, issued a peremptory writ of prohibition restraining the appellate court from enforcing its writ and order. In so doing, we stated *496 the general rule that exhaustion of administrative remedies "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts.... [E]xhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Id.* at p. 293, italics in original.)

The employers in *Abelleira* argued that completing the administrative process would have been futile because the commission had already ruled against their position in prior decisions based upon similar facts. We rejected this argument, noting that a civil litigant is not permitted to bypass the superior court and file an original suit in the Supreme Court merely because the local superior court judge might be hostile to the plaintiff's views. "The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide." (*Abelleira, supra*, 17 Cal.2d at p. 301.)

We then stated: "It should be observed also that this argument is completely answered by those cases which apply the rule of exhaustion of remedies to rehearings. Since the board has already made a decision, if the argument of futility of further application were sound, then surely this is the instance in which it would be accepted. (3) But it has been held that where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made. [Citations.]" (*Abelleira, supra*, 17 Cal.2d at pp. 301-302.)

Two years later we issued *Alexander, supra*, 22 Cal.2d 198. In that case two civil service employees sought a writ of mandate directing the State Land Commission to reinstate them after the State Personnel Board had upheld their dismissals in an administrative proceeding. The Civil Service Act at the time provided that employees "may apply" for a rehearing within 30 days of receiving an adverse decision of the State Personnel Board. The employees did not seek rehearing before filing the writ petition, and the deadline for doing so passed. The trial court sustained the defendants' demurrer. (*Id.* at p. 199.)

We affirmed. "The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state. (*Abelleira v. District Court of Appeal*, 17 Cal.2d 280 [109 P.2d 942, 132 A.L.R. 715], *497 and cases cited at pages 292, 293, 302.) The provision for a rehearing is unquestionably such a remedy.... [¶] The petitioners ask this court to distinguish between a provision in a statute which requires the filing of a petition for rehearing before an administrative board as a condition precedent to commencing proceedings in the courts [citations], and a provision such as in the present act which it is claimed is permissive only. The distinction is of no assistance to the petitioners under the rule. If a rehearing is available it is an administrative remedy to which the petitioners must first resort in order to give the board an opportunity to correct any mistakes it may have made. As noted in the Abelleira case, *supra*, at page 293, the rule must be enforced uniformly by the courts. Its enforcement is

not a matter of judicial discretion. It is true, the Civil Service Act does not expressly require that application for a rehearing be made as a condition precedent to redress in the courts. But neither does the act expressly designate a specific remedy in the courts. So that where, as here, the act provides for a rehearing, but makes no provision for specific redress in the courts and resort to rehearing as a condition precedent, the rule of exhaustion of administrative remedies supplies the omission." (*Alexander*, *supra*, 22 Cal.2d at pp. 199-200.)

Justices Carter and Traynor each dissented. [FN2] Both dissents noted that the Legislature has the ability to make an administrative rehearing a mandatory requirement if it chooses to do so, and that it had already done so explicitly in two statutory schemes enacted prior to *Alexander*. (22 Cal.2d at p. 201 (dis. opn. of Carter, J.); *id.* at pp. 204-205 (dis. opn. of Traynor, J.).) Justice Carter further emphasized that the majority's broad interpretation of the exhaustion requirement is contrary to the principles of procedure ordinarily applicable in judicial and quasi-judicial forums. (*Id.* at p. 201.) For example, a litigant need not make a motion for a new trial before pursuing an appeal after final judgment in the trial court, nor must that litigant petition the Court of Appeal for rehearing prior to seeking review (or, at that time, hearing) before the Supreme Court after the appellate court issues its decision. (*Ibid.*) Justice Traynor additionally noted that the majority's interpretation was neither compelled by *Abelleira* (22 Cal.2d at p. 205) nor in accordance with the federal rule (*id.* at p. 204).

> FN2 Chief Justice Gibson did not participate in the decision.

In 1945, the Legislature passed the Administrative Procedure Act (APA) (then Gov. Code, § 11500 et seq., now Gov. Code, § 11340 et seq.), which governs a substantial portion of the administrative hearings held in this state. The APA and related legislative enactments were the final culmination of a detailed Judicial Council administrative law study ordered by the Legislature *498 two years earlier. [FN3] The Judicial Council reported its conclusions and recommendations in its Tenth Biennial Report to the Governor and the Legislature. With regard to permissive rehearings, the report states: "The [draft] statute provides ... that the right to judicial review is not lost by a failure to petition for reconsideration. The Council decided that the established policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists.... [¶] The proposals in the field of judicial review are in substantially the form in which they were submitted publicly in a tentative draft. They have received general approval from the agencies and from members of the bar and the Council believes that the enactment of these recommended statutes will produce a substantial improvement in our present procedure for the judicial review of administrative orders and decisions." (Judicial Council of Cal., 10th Biennial Rep. (1944) Rep. on Administrative Agencies Survey, p. 28.)

> FN3 The Judicial Council was entrusted to "make a thorough study of the subject ... of review of decisions of administrative boards, commissions and officers ... [and] formulate a comprehensive and detailed plan ... [including] drafts of such legislative measures as may be calculated to carry out and effectuate the plan." (Stats. 1943, ch. 991, § 2, p. 2904.)

In enacting the APA, the Legislature concurred with this recommendation. Government Code section 11523 controls judicial review of agency rulings under the APA and provides that "[t]he right to petition shall not be affected by the failure to seek reconsideration before the agency." Of course, section 11523 applies only in proceedings arising under the APA.

Over the next half-century, the *Alexander* rule remained controlling authority but garnered little attention in either case law or legal scholarship. *Alexander* was expressly followed in two early decisions. (*Clark v. State Personnel Board* (1943) 61 Cal.App.2d 800 [144 P.2d 84]; *Child v. State Personnel Board* (1950) 97 Cal.App.2d 467 [218

P.2d 52].) While over the decades *Alexander* was cited in decisions several dozen other times, the citation was nearly always a reference to the *Abelleira* principle, i.e., the general proposition that one must exhaust administrative remedies before seeking recourse in the courts.

The specific effect of failing to seek a seemingly permissive rehearing was not at issue in another published case until *Benton v. Board of Supervisors* , *supra*, 226 Cal.App.3d 1467. In *Benton*, opponents of a California Environmental Quality Act (CEQA) decision by a county board of supervisors did not request reconsideration by the board before seeking a writ of mandate in the s uperior court. The Court of Appeal rejected the argument the petitioners *499 had failed to exhaust administrative remedies, concluding that because county ordinances and CEQA guidelines expressly denied the board any authority to reconsider its decision, there was no additional remedy to pursue. (*Id.* at pp. 1474-1475.)

The Court of Appeal went on to bolster its conclusion, stating: "Second, even if we assume arguendo that the board had the authority to reconsider its adoption of the mitigated negative declaration, we are satisfied that the Bentons exhausted their administrative remedies. At one time, the California Supreme Court required an aggrieved person to apply to the administrative body for a rehearing after a final decision had been issued in order to exhaust administrative remedies. (*Alexander v. State Personnel Bd.* (1943) 22 Cal.2d 198, 199-201 [137 P.2d 433]; see 3 Witkin, Cal. Procedure ([4th]ed. [1996]) Actions, § [309, p. 398].) This holding-criticized by at least one legal scholar as 'extreme'-has been repealed by statute. (Gov. Code, § 11523 [Administrative Procedure Act cases]; see 3 Witkin, Cal. Procedure, *supra*, § 309, p. 398].) Therefore, we are not bound by it. The Bentons complied with the exhaustion requirement when they filed a timely appeal of the commission's decision to the board and argued their position before that body. [Citations.]" (*Benton v. Board of Supervisors*, *supra*, 226 Cal.App.3d at p. 1475, fn. omitted.)

The Legislature, of course, did not directly overturn the *Alexander* rule by enacting the APA, because the procedural changes it created were limited to APA cases. To directly repudiate the *Alexander* rule, the Legislature would have had to enact a contrary statute of general application, providing that in all cases not otherwise provided for by statute or regulation, the failure to seek reconsideration before an administrative body does not affect the right to judicial review. The *Alexander* rule thus remains the controlling common law of this state, even though the only recent case specifically to discuss that rule opined it is no longer in force.

IV. Merits of the *Alexander* Rule

(4a) We have reconsidered the *Alexander* rule and come to the conclusion that it suffers from several basic flaws. First, the *Alexander* rule might easily be overlooked, even by a reasonably alert litigant. At the most basic level, when a party has been given ostensibly permissive statutory authorization to seek reconsideration of a final decision, that he or she is affirmatively *required* to do so in order to obtain recourse to the courts is not intuitively obvious. Even to attorneys, the word "may" ordinarily means just that. It does not mean "must" or "shall." *500

Likewise, attorneys and litigants familiar with the rudiments of court procedure know that one need not make a request for a new trial prior to filing an appeal of an adverse judgment, nor seek reconsideration of an adverse appellate decision prior to seeking review in this court. Without receiving explicit notification from within the statutory scheme, they are unlikely to anticipate that a different rule will apply in administrative proceedings. This requirement, indeed, may not be apparent even to practitioners with experience in administrative law, since under the APA a rehearing opportunity styled as permissive is actually permissive, and not a mandatory prerequisite to court review. (Gov. Code, § 11523.)

Nor would an attorney familiar with federal law be placed on notice. The relevant section of the federal Administrative Procedure Act, 5 United States Code section 704, provides: "Except as otherwise

expressly required by statute, agency action otherwise final is final for the purposes [of judicial review] whether or not there has been presented or determined an application ... for any form of reconsideration ...." In spite of the citations to federal case law in the *Alexander* majority opinion, this is the common law rule in federal courts and had been for decades before *Alexander* was decided. (See, e.g., *Prendergast v. N. Y. Tel. Co.* (1923) 262 U.S. 43, 48 [43 S.Ct. 466, 468, 67 L.Ed. 853]; *Levers v. Anderson* (1945) 326 U.S. 219, 222 [66 S.Ct. 72, 73-74, 90 L.Ed. 26].) [FN4]

> FN4 Neither federal case relied upon by the *Alexander* majority actually holds that a rehearing must be sought whenever available. In each case, the litigants attempted to raise issues before the courts that had never been raised in the proceeding before the administrative tribunal. (*Vandalia R. R. v. Public Service Comm.* (1916) 242 U.S. 255 [37 S.Ct. 93, 61 L.Ed. 276]; *Red River Broadcasting Co. v. Federal C. Commission* (D.C. Cir. 1938) 98 F.2d 282.) Neither case stands for anything more than a general exhaustion principle, a la *Abelleira*.

In sum, even an alert legal practitioner could overlook the necessity of seeking rehearing, as a condition to judicial review, until after the deadline to act had passed, and many who petition before administrative bodies do so without the benefit of legal training. In recent years, moreover, even an awareness of the rehearing issue might not have avoided the potential pitfall, given that the only recent Court of Appeal decision (*Benton v. Board of Supervisors*, *supra*, 226 Cal.App.3d at p. 1475) declares the rule to have been legislatively repealed, and a leading treatise on California procedure, citing that decision, strongly implies the rule is no longer in force. [FN5] ***501**

> FN5 Witkin states: "In [*Alexander*], a split court took the extreme position that the exhaustion doctrine included a requirement of application to the administrative body for a *rehearing* of its final determination. [Citation.] This view was later repudiated by statute, both for the Personnel Board (Govt.C. 19588) and for agencies under the Administrative Procedure Act (Govt.C. 11523)." (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 309, p. 398, italics in original.) Some specific practice guides are even more emphatic in their view the *Alexander* rule is no longer good law. (See, e.g., 1 Fellmeth & Folsom, Cal. Administrative and Antitrust Law (1992) § 8.04, p. 361 ["Although at one time a litigant was required to seek a rehearing or petition for reconsideration, that requirement is no longer commonly applied." (Fn. omitted.)]; 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 1997) § 23.100, pp. 1015-1016 ["The continuing vitality of the *Alexander* rule ... is questionable."].)

Of course, circumstances can exist where enforcement of a judicially created procedural rule is justifiable even though the rule is neither intuitively expected nor consistent with other procedural schemes. If the *Alexander* rule were necessary to the purposes behind the doctrine of exhaustion of administrative remedies, or at least significantly advanced those purposes, then its usefulness might well outweigh its drawbacks. This does not appear to be the case.

(5) "There are several reasons for the exhaustion of remedies doctrine. ' The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' (*Morton v. Superior Court* [(1970)] 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533].) Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980 [201 Cal.Rptr.

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(5) "There are several reasons for the exhaustion of remedies doctrine. ' The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief.' (*Morton v. Superior Court* [(1970)] 9 Cal.App.3d 977, 982 [88 Cal.Rptr. 533].) Even where the administrative remedy may not resolve all issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor 'because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency.' (*Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 980 [201 Cal.Rptr.

379].) It can serve as a preliminary administrative sifting process (*Bozaich v. State of California* (1973) 32 Cal.App.3d 688, 698 [108 Cal.Rptr. 392]), unearthing the relevant evidence and providing a record which the court may review. (*Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 476 [131 Cal.Rptr. 90, 551 P.2d 410].)" (*Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d 1232, 1240-1241 [230 Cal.Rptr. 382].)

(4b) In cases such as this, however, the administrative record has been created, the claims have been sifted, the evidence has been unearthed, and the agency has already applied its expertise and made its decision as to whether relief is appropriate. The likelihood that an administrative body will reverse itself when presented only with the same facts and repetitive legal arguments is small. Indeed, no court would do so if presented with such a motion for reconsideration, since such a filing is expressly barred by statute. (Code Civ. Proc., § 1008.)

We also think it unlikely the *Alexander* rule has any substantial effect in reducing the burden on the courts. When the parties are aware of the rule and *502 comply with it, the administrative body presented with the same facts and arguments is unlikely to reverse its decision. The only likely consequence is delay and expense for both the parties and the administrative agency prior to the commencement of judicial proceedings. Of course, the courts' burden is marginally reduced by the occasional case when a party, unaware of the rule, fails to comply and thus is barred from seeking judicial review, but we believe the striking of potentially meritorious claims solely to clear them from a court's docket should not stand as a policy goal in and of itself.

The primary useful purpose the rule might serve was expressed in *Alexander* itself. Theoretically, the rule "give[s] the [administrative body] an opportunity to correct any mistakes it may have made." (*Alexander*, *supra*, 22 Cal.2d at p. 200.) We presume, however, that the decisions of the various agencies of this state are reached, in the overwhelming majority of the proceedings undertaken, only after due consideration of the issues raised and the evidence presented. While occasional mistakes are an unfortunate by-product of all tribunals, judicial or administrative, the fact remains that a petition for reconsideration, raising the same arguments and evidence for a second time, will not likely often sway an administrative body to abandon the conclusions it has reached after full prior consideration of those same points.

We are not alone in our reasoning. After a multiyear consideration and public review process, the California Law Revision Commission recently issued a report recommending a complete overhaul and consolidation of the myriad statutes for judicial review of California agency decisions under one uniform procedural scheme. (Judicial Review of Agency Action (Feb. 1997) 27 Cal. Law Revision Com. Rep. (1997) p. 13 (Revision Report).) The commission's proposed legislation provides in pertinent part: "all administrative remedies available within an agency are deemed exhausted ... if no higher level of review is available within the agency, whether or not a rehearing or other lower level of review is available within the agency, unless a statute or regulation requires a petition for rehearing or other administrative review." (*Id.*, § 1123.320, p. 75.) The comment to this section is clear: "Section 1123.320 restates the existing California rule that a petition for a rehearing or other lower level administrative review is not a prerequisite to judicial review of a decision in an adjudicative proceeding. See former Gov't Code § 11523, Gov't Code § 19588 (State Personnel Board). This overrules any contrary case law implication. *Cf.* Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433 (1943)." (*Id.* at pp. 75-76.)

The Revision Report also contains several background studies by Professor Michael Asimow, who was retained by the commission as a special *503 consultant for this project. In discussing this issue, Professor Asimow opines: "Both the existing California APA and other statutes provide that a litigant need not request reconsideration from the agency before pursuing judicial review. However, the common law rule in California may be otherwise [citing *Alexander*]. A request for

reconsideration should never be required as a prerequisite to judicial review unless specifically provided by statute to the contrary." (Revision Rep., *supra*, at pp. 274-275, fns. omitted.) We recognize that, to date, the Legislature has not acted on the Law Revision Commission's recommendations; we do not suggest that the unenacted recommendation reflects the current state of California law. It does reflect, however, the opinion of a learned panel as to the wisdom of and necessity for the *Alexander* rule.

Over 50 years ago, the United States Supreme Court suggested that: "motions for rehearing before the same tribunal that enters an order are under normal circumstances mere formalities which waste the time of litigants and tribunals, tend unnecessarily to prolong the administrative process, and delay or embarrass enforcement of orders which have all the characteristics of finality essential to appealable orders." (*Levers v. Anderson*, *supra*, 326 U.S. at p. 222 [66 S.Ct. at pp. 73-74]; see also Rames, *Exhausting the Administrative Remedies: The Rehearing Bog* (1957) 11 Wyo. L.J. 143, 149-153.) We agree. There is little reason to maintain "an illogical extension of this general rule [of exhaustion of administrative remedies that] require[s] an idle act." (Cal. Administrative Mandamus (Cont.Ed.Bar. 1989) § 2.30, p. 52.) Were the issue before us in the first instance, we would have little difficulty concluding that the rule concerning administrative rehearings should be made consistent with judicial procedure, the federal rule, and California's own APA. [FN6]

FN6 An amicus curiae submission from 74 California cities suggests that reversing the *Alexander* rule would interfere with the uniformity of California exhaustion law and create confusion as to which administrative remedies need be followed and which could be bypassed. The concern is overstated. There is nothing uniform about the current state of exhaustion law with regard to permissive reconsideration. Reversal would merely make California common law consistent with the APA, federal law, and parallel judicial procedure. The effect of such a reversal is limited to reconsideration and has no effect on general principles requiring that each available stage of administrative appeal be exhausted.

V. Stare Decisis and Legislative Intent

(6) The issue of whether seemingly permissive reconsideration options in administrative proceedings need be exhausted is not before us for the first time, however, and we do not lightly set aside a 50-year-old precedent of this court. "It is, of course, a fundamental jurisprudential policy that prior *504 applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, 'is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law.' [Citation.] [¶] It is likewise well established, however, that the foregoing policy is a flexible one which permits this court to reconsider, and ultimately to depart from, our own prior precedent in an appropriate case. [Citation.] As we stated in *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924 [221 Cal.Rptr. 575, 710 P.2d 375], '[a]lthough the doctrine [of stare decisis] does indeed serve important values, it nevertheless should not shield court-created error from correction.' " (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296 [250 Cal.Rptr. 116, 758 P.2d 58].)

(7) The significance of stare decisis is highlighted when legislative reliance is potentially implicated. (See, e.g., *People v. Latimer* (1993) 5 Cal.4th 1203, 1213-1214 [23 Cal.Rptr.2d 144, 858 P.2d 611] (*Latimer*).) Certainly, "[*s*]tare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." (*Hilton v. South Carolina Public Railways Comm'n* (1991) 502 U.S. 197, 202

[112 S.Ct. 560, 564, 116 L.Ed.2d 560].)

In *Latimer*, *supra*, 5 Cal.4th 1203, we considered the ongoing vitality of a 30-year-old precedent of this court interpreting Penal Code section 654 as prohibiting multiple punishments for multiple criminal acts when those acts had been committed with a single intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 [9 Cal.Rptr. 607, 357 P.2d 839] (*Neal*).) Although the *Neal* rule had been the subject of criticism, and we acknowledged we might now decide the matter differently had it been presented to us as a matter of first impression (*Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212), we concluded we were not free to do so because of the collateral consequences such a reversal might have on the entire complicated determinate sentencing structure the Legislature had enacted in the intervening years. "At this time, it is impossible to determine whether, or how, statutory law might have developed differently had this court's interpretation of section 654 been different. For example, the limitations the *Neal* rule placed on consecutive sentencing may have affected legislative decisions regarding the length of sentences for individual crimes or the development of sentence enhancements. [¶] ... [¶] ... What would the Legislature have intended if it had *505 known of the new rule? On a more general front, what other statutes and legislative decisions may have been influenced by the *Neal* rule, and in what ways? These are questions the Legislature, not this court, is best equipped to answer." (*Id.* at pp. 1215-1216.)

Of course, principles of stare decisis do not preclude us from ever revisiting our older decisions. Indeed, in the same year we decided *Latimer* we overruled a different sentencing precedent in *People v. King* (1993) 5 Cal.4th 59 [19 Cal.Rptr.2d 233, 851 P.2d 27] (*King*). The primary difference between the cases was the extent to which a reversal of precedent would cast uncertainty on the appropriate interpretation of the other statutes and case law that make up California's criminal sentencing structure. As we explained in *Latimer*, the sentencing precedent at issue in *King* "was a specific, narrow ruling that could be overruled without affecting a complete sentencing scheme. The [rule at issue in *Latimer*], by contrast, is far more pervasive; it has influenced so much subsequent legislation that stare decisis mandates adherence to it. It can effectively be overruled only in a comprehensive fashion, which is beyond the ability of this court. The remedy for any inadequacies in the current law must be left to the Legislature." (*Latimer*, *supra*, 5 Cal.4th at p. 1216.)

(4c) We do not perceive legislative reliance to be a substantial obstacle in this case. Like the precedent at issue in *King*, *Alexander* sets forth a narrow rule of limited applicability. Certainly, no reason appears to believe the rule is a vital underpinning of the entire administrative law structure of California. Unlike the precedent at issue in *Latimer*, little hard evidence suggests the Legislature has affirmatively taken the *Alexander* rule into account in enacting subsequent legislation.

Unlike the rules at issue in both *King* and *Latimer*, the *Alexander* rule is not a matter of statutory interpretation, as it does not hinge on the meaning of specific words as used in a particular statute. It is a rule of procedure that comes into play whenever the Legislature offers parties the option to seek reconsideration of a final administrative decision without specifying in the relevant statute the consequences, if any, of failing to do so. Thus, the Legislature has not had an opportunity affirmatively to acquiesce in the *Alexander* rule by reenacting or reaffirming exact statutory language. (See, e.g., *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 219 [246 Cal.Rptr. 733, 753 P.2d 689]; *Marina Point., Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161].)

Likewise, as noted previously, in order directly to repudiate the *Alexander* rule, the Legislature would have been required to enact a contrary statute of *506 general application, providing that in all cases not otherwise provided for by statute or regulation, the failure to seek reconsideration before an administrative body does not, standing alone, affect the right to judicial review. The Legislature has not enacted such a statute, but that it has not chosen to do so is not necessarily dispositive of its intentions. "The Legislature's failure to act may indicate many

things other than approval of a judicial construction of a statute: the ' " 'sheer pressure of other and more important business,' " ' ' " 'political considerations,' " ' or a ' " 'tendency to trust to the courts to correct their own errors ....' " ' " (*County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404 [179 Cal.Rptr. 214, 637 P.2d 681]; see also *King, supra*, 5 Cal.4th at p. 77; *Latimer, supra*, 5 Cal.4th at p. 1213; *People v. Escobar* (1992) 3 Cal.4th 740, 750-751 [12 Cal.Rptr.2d 586, 837 P.2d 1100].)

No explicit evidence of legislative acquiescence in the *Alexander* rule appears. Neither are there any indications of a legislative view as to the application of the *Alexander* rule specifically to the LAFCO statutory scheme. Respondents argue the Legislature must have enacted Government Code section 56857, subdivision (a) with the implicit understanding the *Alexander* rule would apply and with the affirmative intention that it do so. As we have noted, nothing in the language of the statute compels this conclusion or provides affirmative evidence of legislative approval or disapproval, or even awareness, of the *Alexander* rule.

Respondents alternatively argue that the Legislature invested the LAFCO reconsideration remedy with special significance by providing that, if a request for amendment or reconsideration is filed, the annexation process is suspended until the LAFCO has acted upon the request. (Gov. Code, § 56857, subd. (c).) From this, they extrapolate that the Legislature must consider reconsideration to be especially meaningful in the LAFCO context and, thus, that the Legislature must affirmatively believe requests for reconsideration are a mandatory remedy that must always be exhausted prior to judicial review. We do not agree. These sections merely demonstrate the Legislature considers such requests to have significance when they are actually made. They cast no light on whether the Legislature wants parties to file pro forma requests for reconsideration.

We have not been provided with, nor has our research disclosed, any legislative history demonstrating that, in enacting Government Code section 56857, subdivision (a), the Legislature affirmatively considered the significance of providing a permissive reconsideration remedy to a party who has already obtained a final decision. In lieu of direct indications of legislative *507 intent, respondents argue the Legislature's awareness and approval of the general applicability of the *Alexander* rule may indirectly be demonstrated by the existence of other statutes containing reconsideration options. The Legislature has enacted several statutes that provide for reconsideration before the administrative body, but specify that the right to seek judicial review is *not* affected by the failure to seek reconsideration. Respondents have identified several statutes worded in this manner, in addition to the APA itself. (Wat. Code, § 1126, subd. (b); Health & Saf. Code, § 40864, subd. (a); Gov. Code, § 19588; Stats. 1989, ch. 1392, § 421, pp. 6023-6024, Deering's Wat.-Uncod. Acts (1999 Supp.) Act 2793, p. 162; Stats. 1989, ch. 844, § 504, p. 2777, Deering's Wat.-Uncod. Acts (1999 Supp.) Act 4833, p. 26.) Because these statutes postdate and thus supersede the *Alexander* rule where applicable, their enactment permits an inference of ongoing legislative awareness of the *Alexander* rule. Reversing course at this date, respondents maintain, would render the relevant language in these provisions surplusage.

As petitioners point out, however, at least one statute provides the opposite. Labor Code section 5901 was amended in 1951 to provide in pertinent part: "No cause of action arising out of any final order, decision or award made and filed by a [workers' compensation] commissioner or a referee shall accrue in any court to any person until and unless ... such person files a petition for reconsideration, and such reconsideration is granted or denied." (Stats. 1951, ch. 778, § 14, pp. 2268-2269.) Among other things, the 1951 amendment replaced the word "rehearing" in the statute with the word "reconsideration." (See Historical Note, 45 West's Ann. Lab. Code (1989 ed.) foll. § 5901, p. 177.) Thus, the Legislature chose to fine-tune language in a statute providing that a workers' compensation claimant must request reconsideration of a final decision prior to recourse to the courts, even though the entire provision would be surplusage were we to assume the

Legislature's awareness of the rule of general application provided by *Alexander*.

Further ambiguity may be found in other statutes. Health and Safety Code section 121270, the AIDS Vaccine Victims Compensation Fund statute, provides in pertinent part: "(h) ... Upon the request by the applicant within 30 days of delivery or mailing [of the written decision], the board may reconsider its decision. [¶] (i) Judicial review of a decision shall be under Section 1094.5 of the Code of Civil Procedure, and the court shall exercise its independent judgment. A petition for review shall be filed as follows: [¶] (1) If no request for reconsideration is made, within 30 days of personal delivery or mailing of the board's decision on the application. [¶] (2) If a *508 timely request for reconsideration is filed and rejected by the board, within 30 days of ... the notice of rejection. [¶] (3) If a timely request for reconsideration is filed and granted by the board, ... [within 30 days of the final decision]." Although the statute does not expressly state that a party who fails to seek reconsideration may seek judicial review, by providing for different time limitations depending on whether reconsideration was sought, the statutory wording arguably implies that in enacting the statute the Legislature was operating under the assumption that failure to seek reconsideration of a final administrative decision is not ordinarily a bar to further judicial review. Any such inference, however, is weak.

In sum, all the inferences the parties would have us draw are insubstantial and do not provide us with a sufficient basis to extrapolate legislative approval of the *Alexander* rule. The most one can say is that at times the Legislature has had a specific intention regarding the significance of reconsideration in an administrative scheme and has chosen to craft a statute so as to accomplish its intentions.

We ultimately return to the sole reliable indication of the Legislature's view of the need for the *Alexander* rule. (8) In enacting the APA, the Legislature was aware it was creating a general statutory framework that would be applied by myriad agencies under varying circumstances, not a specific scheme applicable to only one type of administrative hearing. Despite this anticipation of broad applicability, the Legislature determined the right to judicial review under the APA shall not be affected by failure to seek reconsideration before the agency in question, because the "policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists." (Judicial Council of Cal., 10th Biennial Rep., *supra*, at p. 28.)

"[The Tenth Biennial Report] is a most valuable aid in ascertaining the meaning of the statute. While it is true that what we are interested in is the legislative intent as disclosed by the language of the section under consideration, the council drafted this language at the request of the Legislature, and in this respect was a special legislative committee. As part of its special report containing the proposed legislation it told the Legislature what it intended to provide by the language used. In the absence of compelling language in the statute to the contrary, it will be assumed that the Legislature adopted the proposed legislation with the intent and meaning expressed by the council in its report." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 397 [184 P.2d 323]; accord, *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 817 [140 Cal.Rptr. 442, 567 P.2d 1162].) *509

(4d) Neither the APA nor any other statute has any compelling language to the contrary. As best we can surmise, the considered public policy judgment of the Legislature is that the exhaustion of administrative remedies doctrine is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review arises. This judgment is consistent with our own conclusion the *Alexander* rule is neither necessary nor useful.

Respondents argue that if we determine to overrule the *Alexander* rule, the decision should have only prospective effect. We do not agree. (9a) A decision of this court overruling one of our prior decisions ordinarily applies retroactively. (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978 [258 Cal.Rptr. 592, 772 P.2d 1059]; *Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151 [181

Cal.Rptr. 784, 642 P.2d 1305].) Admittedly, "we have long recognized the potential for allowing narrow. exceptions to the general rule of retroactivity when considerations of fairness and public policy are so compelling in a particular case that, on balance, they outweigh the considerations that underlie the basic rule. A court may decline to follow the standard rule when retroactive application of a decision would raise substantial concerns about the effects of the new rule on the general administration of justice, or would unfairly undermine the reasonable reliance of parties on the previously existing state of the law. In other words, courts have looked to the 'hardships' imposed on parties by full retroactivity, permitting an exception only when the circumstances of a case draw it apart from the usual run of cases." (*Newman*, *supra*, at p. 983.)

(4e) We do not perceive that retroactive application of our decision will create any unusual hardships. *Alexander* set forth a rule of very limited application. That the general administration of justice will be significantly affected by its abrogation or many pending actions will be affected is unlikely. No issue of substantial detrimental reliance is present here; no one has acquired a vested right or entered into a contract based on the existence of the *Alexander* rule. (E.g., *Peterson v. Superior Court*, *supra*, 31 Cal.3d at p. 152.) (9b) Finally, all things being equal, we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action. (See, e.g., *Newman v. Emerson Radio Corp.*, *supra*, 48 Cal.3d at p. 990; *Moradi-Shalal v. Fireman's Fund Ins. Companies*, *supra*, 46 Cal.3d at pp. 304-305.)

(4f) Respondents argue that to permit petitioners to receive the benefit of our decision would be inequitable, since they were presumably aware of the *Alexander* rule and made a voluntary decision to ignore it. Respondents *510 infer this awareness solely from petitioner Parfrey's initial request for reconsideration of SJLAFCO's approval of the annexation of the development property, which he later withdrew. In reality, the filing and subsequent withdrawal of a reconsideration request are equally consistent with an understanding that reconsideration is merely permissive as with a belief it is mandatory. Indeed, to assume petitioners consciously chose to expose their action to dismissal on purely procedural grounds is difficult. Moreover, as we have discussed in detail above, although *Alexander* was decided over a half-century ago, the rule of the case has remained relatively obscure since that time, and that a litigant would be uncertain of its vitality today is not at all unlikely. The filing and withdrawal of a request for reconsideration appears to reflect only a judgment that perfecting the request would not be worthwhile.

We hereby overrule *Alexander*, *supra*, 22 Cal.2d 198, and hold that, subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.

We emphasize this conclusion does not mean the failure to request reconsideration or rehearing may never serve as a bar to judicial review. Such a petition remains necessary, for example, to introduce evidence or legal arguments before the administrative body that were not brought to its attention as part of the original decisionmaking process. (See, e.g., 2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 15.8, p. 341.) Our reasoning here is not addressed to new evidence, changed circumstances, fresh legal arguments, filings by newcomers to the proceedings and the like. Likewise, a rehearing petition is necessary to call to the agency's attention errors or omissions of fact or law in the administrative decision itself that were not previously addressed in the briefing, in order to give the agency the opportunity to correct its own mistakes before those errors or omissions are presented to a court. The general exhaustion rule remains valid: Administrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum. Our decision is limited to the narrow situation where one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments

one has previously raised solely to exhaust. administrative remedies under *Alexander.* *511

The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings in accordance with this decision.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred.
Cal. 1999.
Sierra Club v. San Joaquin Local Agency Formation Com.
21 Cal.4th 489, 981 P.2d 543, 87 Cal.Rptr.2d 702, 99 Cal. Daily Op. Serv. 6719, 1999 Daily Journal D.A.R. 8553

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