

COMMISSION ON STATE MANDATES

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August 18, 2014

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Ms. Andra Donovan
San Diego Unified School District
Legal Services Office
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Ms. Jill Kanemasu
State Controller's Office
Accounting and Reporting
3301 C Street, Suite 700
Sacramento, CA 95816

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

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**
Emergency Procedures, Earthquake, and Disasters, 04-4241-I-01
Education Code Sections 35295, 35296, 35297, 40041.5 and 40042
Statutes 1984, Chapter 1659
Fiscal Years 2001-2002 and 2002-2003
San Diego Unified School District, Claimant

Dear Mr. Palkowitz, Ms. Donovan, and Ms. Kanemasu:

The draft proposed decision for the above-named matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the draft proposed decision by **September 8, 2014**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, December 5, 2014**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The proposed decision will be issued on or about November 21, 2014. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Please contact Eric Feller at (916) 323-3562 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Heather Halsey".

Heather Halsey
Executive Director

ITEM __
INCORRECT REDUCTION CLAIM
DRAFT PROPOSED DECISION

Education Code Sections 35295, 35296, 35297, 40041.5 and 40042,
Statutes of 1984, Chapter 1659

Emergency Procedures, Earthquake, and Disasters
Fiscal Years 2001-2002 and 2002-2003
04-4241-I-01

San Diego Unified School District, Claimant

EXECUTIVE SUMMARY

Overview

This incorrect reduction claim (IRC) challenges reductions made by the State Controller's Office (Controller) to reimbursement claims for the *Emergency Procedures, Earthquake, and Disasters* program in fiscal years 2001-2002 and 2002-2003 for salaries, benefits, and related indirect costs in the amount of \$1,127,211. The Controller reduced the claims on the ground that the San Diego Unified School District (claimant) did not provide adequate source documentation to support most of the employee hours claimed, and did not use a valid statistical methodology to determine the average time per position. This IRC presents the following issues:

- Whether the documentation requirements in the parameters and guidelines as amended in 1991 or 2003 govern the Controller's audit.
- Whether the Controller's reduction of claims is consistent with the documentation requirements in the parameters and guidelines and correct as a matter of law.

Claimant requests a determination from the Commission on State Mandates (Commission) pursuant to Government Code section 17551(d) that the Controller incorrectly reduced the claims and requests that the Controller reinstate the \$1,127,211 reduction.

Procedural History

Claimant signed and dated its 2001-2002 reimbursement claim for the *Emergency Procedures, Earthquake, and Disasters* program on November 27, 2002 and its 2002-2003 reimbursement claim for this program on December 8, 2003. Controller issued the draft audit report on August 27, 2004. Claimant submitted comments to the Controller on the draft audit report on September 23, 2004. Controller issued the final audit report on October 15, 2004. Claimant filed this IRC on March 24, 2005. Controller filed comments on the IRC on October 17, 2005. Commission staff issued a draft proposed decision on the IRC on August 18, 2014.

Commission Responsibilities

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state-mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the statement of decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. 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 6.¹ The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. 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."²

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support.³ This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.⁴ The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with claimant.⁵ In addition, section 1185.2(c) of the Commission's regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.⁶

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation.

¹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

² *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

³ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

⁴ *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

⁵ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

⁶ Government Code section 17559(b): [A] claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record."

Issue	Description	Staff Recommendation
<p>Whether the documentation requirements in parameters and guidelines as amended in 1991 or 2003 govern the Controller's audit.</p>	<p>Controller assumes that the parameters and guidelines, amended on May 29, 2003, govern the audit because they expressly state that they apply to the reimbursement period beginning July 1, 2000. The 2003 parameters and guidelines added the requirement for claimants to maintain <i>contemporaneous</i> source documents, among other changes.</p>	<p>The documentation requirements in the parameters and guidelines as amended in 1991 govern the audit of the 2001-2002 and 2002-2003 reimbursement claims.</p> <p>An amendment that affects the substantive rights and liabilities of the parties cannot be applied retroactively if due process considerations prevent it. Here, the 2003 amended parameters and guidelines were not in effect when the costs were incurred in fiscal years 2001-2002 and 2002-2003, and claimant did not have sufficient notice of the new documentation requirements when the reimbursement claims were filed. In addition, the court in <i>Clovis Unified School Dist. v. Chiang</i> (2010) 188 Cal.App.4th 794, 799 determined that the parameters and guidelines that were in effect when the state-mandated costs were incurred are the parameters and guidelines that govern the audit.</p>
<p>Whether the Controller's reduction of claims is consistent with the documentation requirements in the parameters and guidelines is correct as a matter of law.</p>	<p>Claimant provided time logs for 115 employees, out of over 7216 total employees in its 2001-2002 reimbursement claim, and 45 time logs out of 9872 employees in its 2002-2003 reimbursement claim. However, documentation of</p>	<p><i>Deny</i> – The claimant did not comply with the documentation requirements of the parameters and guidelines.</p> <p>The 1991 parameters and guidelines require that reimbursement claims be</p>

	<p>actual time spent on the program was not provided for the costs claimed for most of the employees. Instead, the claimant calculated an average time spent on the program for each district employee that did not provide time information, based on the 160 time logs that were submitted to the district. Claimant argues that this method complies with the documentation requirements of the parameters and guidelines.</p>	<p>based on actual salary and benefit costs incurred for employees working on the mandated program. The parameters and guidelines further require claimant to attach a statement listing “the number of hours devoted to their function as they relate to this mandate,” and that the costs claimed be traceable to source documents. The parameters and guidelines do not allow reimbursement based on statistical sampling, a unit cost, or any other reimbursement method that estimates or averages time spent on the mandate. Therefore, the Controller’s reduction of the claims is correct as a matter of law.</p>
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Staff Analysis

A. The Documentation Requirements in the Parameters and Guidelines as Amended in 1991 Govern the Audit of these Reimbursement Claims.

The substantive issue in this IRC turns on the documentation requirements provided in the parameters and guidelines, and whether the claimant complied with the requirements in claiming salary and benefit costs of its employees performing the reimbursable activities.

The Controller assumes that the documentation requirements in parameters and guidelines as amended on May 29, 2003, apply to the audit of the 2001-2002 and 2002-2003 reimbursement claims for salary and benefit costs because the amendment expressly states that the parameters and guidelines apply to the reimbursement period beginning July 1, 2000. The parameters and guidelines were amended to add a new requirement for claimants to support all costs claimed with contemporaneous source documents “created at or near the same time the actual cost was incurred.” The 2003 amended parameters and guidelines were not in effect when the costs in this case were incurred in fiscal year 2001-2002 and 2002-2003.⁷ Thus, the issue is whether the

⁷ There is a possibility that costs may have been incurred in fiscal year 2002-2003 between May 29, 2003 (when the Commission adopted the amendment) and June 30, 2003 (the end of the 2002-2003 fiscal year). However, there is no evidence in the record to support this possibility.

documentation requirements in the 2003 parameters and guidelines can be applied retroactively to costs incurred before the parameters and guidelines amendment was adopted.

Despite the retroactive period of reimbursement for amendments to parameters and guidelines, an amendment cannot be applied retroactively if due process considerations prevent it.⁸ If an amendment affects substantive rights or liabilities of the parties that change the legal consequences of past events, then the application of an amendment may be considered unlawfully retroactive under principles of due process.⁹ A statutory change is substantive if it imposes new, additional, or different liabilities based on past conduct.¹⁰ In addition, due process requires that a claimant have reasonable notice of any substantive change that affects the substantive rights and liabilities of the parties.¹¹

Under these rules, the documentation requirements added to the parameters and guidelines in 2003 must be interpreted to operate prospectively to prevent a denial of due process. Before the amendment was adopted, claimants were not on notice of the requirement to keep *contemporaneous* source documents to support actual salary and benefit costs and, by definition, the claimant cannot go back and recreate *contemporaneous* documents.

In addition, the court in *Clovis Unified School Dist. v. Chiang*, found that the contemporaneous source document rule was an underground regulation that was not authorized in the parameters and guidelines. There, the court determined, consistent with due process principles, that the parameters and guidelines that were in effect when the state-mandated costs were incurred are the parameters and guidelines that govern the audit.¹²

Therefore, the documentation requirements in the parameters and guidelines as amended in 1991 properly governs these reimbursement claims.

B. Claimant Did Not Comply with the Documentation Requirements in the 1991 Parameters and Guidelines and, therefore, the Controller's Reduction of Salaries and Benefits in Fiscal Years 2001-2002 and 2002-2003 is Correct as a Matter of Law.

Parameters and guidelines adopted by the Commission are required to provide instructions for eligible claimants to prepare reimbursement claims for the direct and indirect costs of a state-mandated program, and also identify the supporting documentation required to be retained during the period subject to audit.¹³ The reimbursement claims filed by the claimants are,

⁸ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527.

⁹ *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.

¹⁰ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527.

¹¹ *In. re Cindy B.* (1987) 192 Cal.App.3d 771, 783-784.

¹² *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 812-813.

¹³ Government Code section 17557; California Code of Regulations, title 2, section 1183.7.

likewise, required as a matter of law to be filed in accordance with the parameters and guidelines.¹⁴

The parameters and guidelines as amended in 1991 require actual costs to be claimed. With respect to claiming the actual costs of employee salaries and benefits, a claimant is required to attach a statement “listing of each employee, describ[ing] their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate.”¹⁵ In addition, the parameters and guidelines require that the costs claimed be traceable to source documents, which must be kept on file and made available to the Controller for auditing purposes.¹⁶

According to the audit, documentation of actual time spent on the program was not provided for the costs claimed for most of the employees. Instead, the claimant calculated an average time spent on the program for each district employee that did not provide time information, based on small percentage of time logs that were submitted to the district. Claimant argues that this method complies with the documentation requirements of the parameters and guidelines.

Staff finds that the claimant did not comply with the documentation requirements of the parameters and guidelines since no information on the actual time spent on the program by employees that did not submit time logs was provided. Rather, the claims were based on an approximation of actual costs in the form of a random moment sampling study. There is no provision in the 1991 parameters and guidelines for a statistical sampling, a unit cost, or any other reimbursement method that estimates or averages time or costs. The parameters and guidelines require actual costs to be claimed, supported by a statement and documentation listing “each employee, describ[ing] their function, their hourly rate of pay and related employee benefit cost *and the number of hours devoted to their function as they relate to this mandate.*” (Emphasis added.)

Accordingly, the Controller’s reduction of salaries and benefits in fiscal years 2001-2002 and 2002-2003 is correct as a matter of law.

Conclusion

Staff finds that the Controller’s reduction of \$1,127,211 from the claimant’s reimbursement claims for fiscal years 2001-2002 and 2002-2003 is correct as a matter of law.

Staff Recommendation

Staff recommends that the Commission adopt the proposed decision to deny the IRC and authorize staff to make any technical, non-substantive changes following the hearing.

¹⁴ Government Code sections 17561(d)(1); 17564(b); and 17571; *Clovis Unified School Dist., supra*, 188 Cal.App.4th 794, 812-813.

¹⁵ Exhibit A, IRC, page 17.

¹⁶ Exhibit A, IRC, page 18.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM
ON:

Education Code Sections 35295, 35296,
35297, 40041.5 and 40042;

Statutes of 1984, Chapter 1659

Fiscal Years 2001-2002 and 2002-2003

San Diego Unified School District, Claimant

Case No.: 04-4241-I-01

*Emergency Procedures, Earthquake, and
Disasters*

DECISION PURSUANT TO
GOVERNMENT CODE SECTION 17500 ET
SEQ.; CALIFORNIA CODE OF
REGULATIONS, TITLE 2, DIVISION 2,
CHAPTER 2.5. ARTICLE 7

(Adopted December 5, 2014)

DECISION

The Commission on State Mandates (Commission) heard and decided this incorrect reduction claims (IRC) during a regularly scheduled hearing on December 5, 2014. [Witness list will be included in the adopted decision.]

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission [adopted/modified] the proposed decision to [approve/partially approve/deny] the IRC at the hearing by a vote of [vote count will be included in the adopted decision].

Summary of the Findings

This IRC by the San Diego Unified School District (claimant) challenges reductions made by the State Controller’s Office (Controller) to salaries and benefits and related indirect costs of \$1,127,211 claimed for fiscal years 2001-2002 and 2002-2003 to comply with the *Emergency Procedures, Earthquake, and Disasters* program. The Controller reduced the claims on the grounds that the claimant did not comply with the documentation requirements of the parameters and guidelines to support the vast majority of the employee hours claimed. Instead, the claimant used a “random moment sampling” methodology to determine the average time spent on the program per employee based on time logs submitted by a limited number of employees. The Controller approved the claims for the actual time that schoolsite employees documented on time logs, and reduced the claims that were not supported by adequate source documentation.

The Commission finds that, under principles of due process discussed in the decision, the documentation requirements in the parameters and guidelines as amended in 1991 apply to the 2001-2002 and 2002-2003 reimbursement claims. These parameters and guidelines authorize

reimbursement for actual increased costs and require the claimant to provide “a listing of each employee, describ[ing] their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate.” The parameters and guidelines also require that the costs claimed be traceable to source documents, which must be kept on file and made available to the Controller for auditing purposes.

The Commission finds that the claimant did not comply with the documentation requirements of the parameters and guidelines. There is no provision in the 1991 parameters and guidelines for a statistical sampling, a unit cost, or any other reimbursement method that estimates or averages time or costs. The parameters and guidelines require actual costs to be claimed, supported by a statement and documentation listing “each employee, describ[ing] their function, their hourly rate of pay and related employee benefit cost *and the number of hours devoted to their function as they relate to this mandate.*”

Therefore, the Controller’s reduction of salaries and benefits in fiscal years 2001-2002 and 2002-2003 is correct as a matter of law.

COMMISSION FINDINGS

I. Chronology

- 11/27/2002 Claimant signed reimbursement claim for fiscal year 2001-2002¹⁷
- 12/08/2003 Claimant signed reimbursement claim for fiscal year 2002-2003¹⁸
- 08/27/2004 Controller issued draft audit report.¹⁹
- 09/23/2004 Claimant submitted comments on Controller’s draft audit report²⁰
- 10/15/2004 Controller issued final audit report²¹
- 03/24/2005 Claimant filed this IRC.
- 10/17/2005 Controller filed comments on the IRC.
- 08/18/2014 Commission staff issued a draft proposed decision on the IRC.

II. Background

The Emergency Procedures, Earthquake, and Disasters Program

The *Emergency Procedures, Earthquake, and Disasters* program was enacted by Statutes 1984, chapter 1659, in recognition that California would experience moderate to severe earthquakes in

¹⁷ Exhibit A, IRC pages 4 and 26.

¹⁸ Exhibit A, pages 4 and 39.

¹⁹ Exhibit A, page 71. The draft audit report is not part of the record.

²⁰ Exhibit A, page 86.

²¹ Exhibit A, page 67.

the foreseeable future and that all public and private schools should develop an earthquake emergency procedure system.²² The program required the governing board of each school district and the superintendent of schools for each county to establish an earthquake emergency procedure system in every public or private school building having an occupant capacity of 50 or more pupils or more than one classroom that shall include all of the following:

- (a) A school building disaster plan, ready for implementation at any time, for maintaining the safety and care of students and staff.
- (b) A drop procedure. As used in this article, “drop procedure” means an activity whereby each student and staff member takes cover under a table or desk, dropping to his or her knees, with the head protected by the arms, and the back to the windows. A drop procedure practice shall be held at least once a semester in secondary schools.
- (c) Protective measures to be taken before, during, and following an earthquake.
- (d) A program to ensure that the students and staff are aware of, and properly trained in, the earthquake emergency procedure system.²³

The 1984 statute also required the governing board of any school district to: (a) grant the use of school facilities for mass care and welfare shelters to public agencies such as the American Red Cross in the event of a disaster or other emergency affecting the public health and welfare; and (b) cooperate with such public agencies in furnishing and maintaining those services as the governing board may deem necessary to meet the needs of the community.²⁴

The Commission approved the test claim on July 23, 1987, and adopted parameters and guidelines for the program on March 23, 1989 for costs incurred beginning July 1, 1985. The parameters and guidelines authorize reimbursement to establish emergency procedure systems; provide instruction to employees and students about the earthquake emergency procedures; and provide district facilities, grounds, and equipment to public agencies for mass care and welfare shelters. On February 28, 1991, the Commission amended the parameters and guidelines to clarify that reimbursement was not required for in-classroom teacher time to instruct students about the earthquake emergency procedure systems.

On May 29, 2003, the Commission amended the parameters and guidelines for the period of reimbursement from July 1, 2000 through June 30, 2003, to clarify that reimbursement for the emergency and disaster procedures is limited to earthquake emergencies only. In addition, amendments to the supporting documentation requirements were made, requiring claimants to support all costs claimed with contemporaneous source documents. Other amendments to boilerplate language were also made. Reimbursement claims filed for costs incurred after

²² Former Education Code section 35295 (Stats. 1984, ch. 895).

²³ Education Code sections 35926, 35297.

²⁴ Former Education Code section 40041.5. This IRC does not involve the activities required by former Education Code section 40041.5.

June 30, 2003, were to be filed under consolidated parameters and guidelines for *Emergency Procedures, Earthquake Procedures, and Disasters and Comprehensive School Safety Plans*.

Statutes 2004, chapter 895 (AB 2855) amended former Education Code sections 35295, 35296, and 35297, and repealed section 38132 (former § 40041.5) from the *Emergency Procedures* decision, removing public school districts from the state-mandated requirements to establish earthquake emergency procedure systems. The amended parameters and guidelines state that this program is no longer reimbursable after December 31, 2004.²⁵

Controller's Audit Adjustments and Summary of the Issues

The Controller issued its final audit report on October 15, 2004, finding that the claimant submitted time logs for only a small fraction of its employees to comply with the program, and the Controller allowed reimbursement for the actual time spent on the mandate supported by the time logs. However, claimant did not have documentation of the actual time spent on the program by the vast majority of employees and, instead, calculated an average time spent on the program for each district employee. The Controller found that the methodology the claimant used to determine the mean time per position was not a valid statistical analysis, and reduced the costs claimed on the ground that the claimant did not provide adequate source documentation to support the costs claimed. The claimant challenges the Controller's findings and requests that the \$1,127,211 reduced, be reinstated.

This IRC presents the following issues:

- Whether the documentation requirements in the parameters and guidelines as amended in 1991 or 2003 govern the Controller's audit.
- Whether the Controller's reduction of claims is consistent with the documentation requirements in the parameters and guidelines and is correct as a matter of law.

III. Positions of Parties

A. San Diego Unified School District

Claimant contends that the Controller incorrectly reduced its claims. Claimant argues that random moment sampling, its method of determining the actual costs of performing the mandated activities, is federally approved. The time logs submitted were completely random because claimant did not play a role in determining which school sites submitted a time log. Moreover, each school site annually reviews and prepares or updates an emergency preparedness plan as required by the Collective Negotiations Contract, which is sufficient documentation to prove each school site performed the mandated activities.

²⁵ Commission on State Mandates, *Emergency Procedures, Earthquake Procedures, and Disasters and Comprehensive School Safety Parameters and Guidelines*, 04-PGA-24 (CSM-4241, 98-TC-01, 99-TC-10) Education Code Sections 35294.1, 35294.2, 35294.6, and 35294.8, 35295, 35296, 35297, 40041.5 and 40042, Statutes 1984, Chapter 1659 (AB 2786), Statutes 1997, Chapter 736 (SB 187), Statutes 1999, Chapter 996 (SB 408), as amended March 29, 2006.

B. State Controller's Office

The Controller contends that the audit adjustments are correct and in accordance with the parameters and guidelines, as amended in 2003, and that this IRC should be denied. The Controller found that claimant's methodology to determine the mean time per position was not a valid statistical analysis because the statistical projections were based on employees who submitted time logs rather than employees or school sites randomly selected. And except for teachers/librarians in fiscal year 2001-2002, claimant's sample sizes were not statistically valid based on a 95 percent confidence level and a precision rate of +/-8 percent. The sample sizes, in addition to the non-random selection, prevented projecting the sample data to all school site employees. The Controller also found that claimant made several inconsistent and unsupported adjustments to the data. Additionally, the Controller found that for the vast majority of school site staff, claimant did not provide documentation to support actual time that employees spent to perform mandated activities. Thus, the Controller allowed only the actual time that schoolsite employees documented on time logs.²⁶

IV. Discussion

Government Code section 17561(b) authorizes the Controller to audit the claims filed by local agencies and school districts and to reduce any claim for reimbursement of state mandated costs that the Controller determines is excessive or unreasonable.

Government Code Section 17551(d) requires the Commission to hear and decide a claim that the Controller has incorrectly reduced payments to the local agency or school district. If the Commission determines that a reimbursement claim has been incorrectly reduced, section 1185.9 of the Commission's regulations requires the Commission to send the decision to the Controller and request that the costs in the claim be reinstated.

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. 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 6.²⁷ The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. 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."²⁸

²⁶ Exhibit A, pages 70-75.

²⁷ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

²⁸ *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.²⁹ Under this standard, the courts have found that:

When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'" ... "In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . ." [Citations.] When making that inquiry, the " 'court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.'" [Citation.]"³⁰

The Commission must also review the Controller's audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.³¹ In addition, section 1185.2(c) of the Commission's regulations requires that any assertion of fact by the parties to an IRC must be supported by documentary evidence. The Commission's ultimate findings of fact must be supported by substantial evidence in the record.³²

A. The Documentation Requirements in the Parameters and Guidelines that were Amended in 1991 Govern the Audit of these Reimbursement Claims.

The substantive issue in this IRC turns on the documentation requirements provided in the parameters and guidelines, and whether the claimant complied with the requirements in claiming salary and benefit costs of its employees performing the reimbursable activities.

The Controller assumes that the documentation requirements in the parameters and guidelines, as amended on May 29, 2003, apply to the audit of the 2001-2002 and 2002-2003 reimbursement claims for these costs.³³ That amendment was adopted following a request from the State Controller's Office, dated September 19, 2001, and pursuant to former section 1183.2 of the

²⁹ *Johnston v. Sonoma County Agricultural* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

³⁰ *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th at 547-548.

³¹ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

³² Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

³³ See Exhibit B, State Controller's Office comments on the IRC, page 10.

Commission's regulations,³⁴ the request established a period of reimbursement going back to July 1, 2000. The parameters and guidelines amended in 2003 added a new requirement for claimants to support all costs claimed with contemporaneous source documents "created at or near the same time the actual cost was incurred." The 2003 amended parameters and guidelines were not in effect when the costs in this case were incurred.³⁵ Thus, the issue is whether the documentation requirements in the 2003 parameters and guidelines can be applied retroactively to costs incurred before the parameters and guidelines amendment was adopted. The Commission finds that the documentation requirements in the 2003 parameters and guidelines do not apply to the audit of the 2001-2002 and 2002-2003 claims.

Parameters and guidelines are regulatory in nature and are interpreted the same as regulations and statutes.³⁶ Despite the retroactive period of reimbursement for amendments to parameters and guidelines, an amendment cannot be applied retroactively if due process considerations prevent it.³⁷ If an amendment affects substantive rights or liabilities of the parties that change the legal consequences of past events, then the application of an amendment may be considered unlawfully retroactive under principles of due process.³⁸ A statutory change is substantive if it imposes new, additional, or different liabilities based on past conduct.³⁹ In addition, due process requires that a claimant have reasonable notice of any substantive change that affects the substantive rights and liabilities of the parties.⁴⁰

Although the court in *Clovis Unified School Dist. v. Chiang* found that the contemporaneous source document rule (CSDR) was an underground regulation and was not authorized in the parameters and guidelines, the court did determine which parameters and guidelines governed the audit of the programs at issue in that case, consistent with these due process rules. In *Clovis*, the Controller requested that the court take judicial notice that the Commission adopted the contemporaneous source document rule by later amending the parameters and guidelines. The court denied the request and stated the following:

³⁴ The provision is currently in Government Code section 17557(d) as of Statutes 2004, chapter 890.

³⁵ There is a possibility that costs may have been incurred in fiscal year 2002-2003 between May 29, 2003 (when the Commission adopted the amendment) and June 30, 2003 (the end of the 2002-2003 fiscal year). However, there is no evidence in the record to support this possibility.

³⁶ *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 799.

³⁷ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527.

³⁸ *Department of Health Services v. Fontes* (1985) 169 Cal.App.3d 301, 304-305; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; 287-292; *Murphy v. City of Alameda* (1993) 11 Cal.App.4th 906, 911-912.

³⁹ *City of Modesto v. National Med, Inc.* (2005) 128 Cal.App.4th 518, 527.

⁴⁰ *In. re Cindy B.* (1987) 192 Cal.App.3d 771, 783-784.

We deny this request for judicial notice. This is because the central issue in the present appeal concerns the Controller's policy of using the CSDR *during the 1998 to 2003 fiscal years*, when the CSDR was an underground regulation. This issue is not resolved by the Commission's *subsequent* incorporation of the CSDR into its Intradistrict Attendance and Collective Bargaining Programs' P & G's. (Emphasis in original.)⁴¹

The court further determined that the parameters and guidelines that were in effect when the state-mandated costs were incurred are the parameters and guidelines that govern the audit.⁴²

Therefore, with respect to the documentation requirements added to the parameters and guidelines in 2003, they must be interpreted to operate prospectively to prevent a denial of due process. Before the amendment was adopted, claimants were not on notice of the requirement to keep *contemporaneous* documents to support actual salary and benefit costs and, by definition, the claimant cannot go back and recreate *contemporaneous* documents.

Therefore, the documentation requirements in the parameters and guidelines as amended in 1991 properly governs these reimbursement claims.

B. Claimant Did Not Comply with the Documentation Requirements in the Parameters and Guidelines and, therefore, the Controller's Reduction of Salaries and Benefits in Fiscal Years 2001-2002 and 2002-2003 is Correct as a Matter of Law.

The Commission finds that the Controller's reduction of salary and benefit costs is correct as a matter of law.

Parameters and guidelines adopted by the Commission are required to provide instructions for eligible claimants to prepare reimbursement claims for the direct and indirect costs of a state-mandated program, and also identify the supporting documentation required to be retained during the period subject to audit.⁴³ The reimbursement claims filed by the claimants are, likewise, required as a matter of law to be filed in accordance with the parameters and guidelines.⁴⁴

Under the section on "reimbursable activities," the 1991 parameters and guidelines list the following reimbursable personnel costs for emergency procedures:

The salaries and related employee benefits of employees with assigned responsibility to prepare and implement district emergency and disaster plans and procedures. The salaries and related employee benefits of non-teacher district employees, including consultants, directly engaged in providing instruction to

⁴¹ *Clovis Unified School Dist.*, *supra* 188 Cal.App.4th 794, 809, fn. 5.

⁴² *Id.* at pages 812-813.

⁴³ Government Code section 17557; California Code of Regulations, title 2, section 1183.7.

⁴⁴ Government Code sections 17561(d)(1); 17564(b); and 17571; *Clovis Unified School Dist.*, *supra*, 188 Cal.App.4th 794, 812-813.

other employees and students of the district in earthquake and disaster procedures. The cost incurred by the district of employees attending these meetings to receive instruction.

Under “Claim Preparation,” the 1991 parameters and guidelines list the following documentation requirements:

Attach a statement [to each claim] showing the **actual increased costs** incurred to comply with the mandate which summarizes these costs as follows: 1. Emergency Procedures; Salaries, employee benefits; Printing, postage and supplies. [Emphasis added.]

[¶]...[¶]

A listing to support the following reimbursable items **shall be** provided:

1. Emergency procedures
 - a. For those employees whose function is to prepare and implement emergency plans and to provide instruction, **provide a listing of each employee**, describe their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate. [Emphasis added.]

[¶]...[¶]

For auditing purposes, **all costs claimed may be traceable to source documents and/or worksheets that show evidence of the validity of such costs. These documents must be kept on file** by the school district submitting the claim for a period of no less than three years from the date of the final payment of the claim pursuant to this mandate, and made available on the request of the State controller [sic] or his agent. [Emphasis added.]

The applicable parameters and guidelines require actual costs to be claimed, and with respect to the actual costs of employee salaries and benefits, a claimant is required to attach a statement “listing of each employee, describ[ing] their function, their hourly rate of pay and related employee benefit cost and the number of hours devoted to their function as they relate to this mandate.”⁴⁵ In addition, the parameters and guidelines require that the costs claimed be traceable to source documents, which must be kept on file and made available to the Controller for auditing purposes.⁴⁶

According to the audit, the district provided time logs for 115 district office employees, out of over 7216 total employees in its 2001-2002 reimbursement claim, and 45 time logs out of 9872

⁴⁵ Exhibit A, IRC, page 17.

⁴⁶ Exhibit A, IRC, page 18.

employees in its 2002-2003 reimbursement claim.⁴⁷ The Controller allowed the costs claimed for those employees that provided time and wage information. However, no documentation supporting the time spent on the program was provided for the remaining employees. Instead, the claimant calculated a mean average time spent on the program for each district employee that did not provide time information based on the 160 time logs that were submitted to the district.

Claimant asserts that the method used to determine costs is valid, arguing that the method is federally approved. The claimant also contends that the Collective Negotiations Contract between the district's Board of Education and the San Diego Education Association, for the period between July 1, 2003 and June 30, 2006, is documentation that sufficiently shows that claimant incurred the mandated costs during the 2001-2002 and 2002-2003 fiscal years. The claimant states the following:

The District's method of determining the actual costs of performing the mandated activities is federally approved [citing to OMB Circular A-87]. The time logs submitted were completely random, because the District did not play a role in determining which school sites were to submit a time log. The District performed a random moment sampling (RMS) test, which is in line with OMB circular A-87 and is used in determining worker effort. These statistical analyses of the time logs provided by the sites were used to determine the actual time spent by all school site personnel on the mandate.

There can be no doubt the District school site staff performed the reimbursable activities. Each school site annually reviews and prepares or updates an emergency preparedness plan, as required by the Collective Negotiations Contract [footnote omitted]. ... Thus, the District has sufficient documentation to prove each school site performed activities of reviewing, preparing, and updating the emergency procedures required by the mandate.⁴⁸

With respect to the Collective Negotiations Contract, claimant specifically cites to page 45 of the contract, section 11.9, which states the following:

During the first month of school, principals and supervisors will annually inform all unit members of the location of district Emergency Procedures relating to assault and/or battery, insults, upbraiding, threats, child abuse, molestations, natural disasters, and suicide threats. Each site supervisor shall discuss with unit members any changes in these procedures, as well as on-site work rules.⁴⁹

The Commission finds that the Collective Negotiations Contract is not relevant to the audit and does not provide sufficient documentation supporting the time spent by the

⁴⁷ Exhibit A, IRC, page 75. The 7216 employees include principals, vice principals, teachers and librarians, but not secretaries and clerks that were included in the 2002-2003 claim. It is unclear how many police officers were involved.

⁴⁸ Exhibit A, page 3.

⁴⁹ Exhibit A, beginning on page 81.

claimant's employees on the program. The contract was not in effect during the fiscal years at issue in this case (2001-2002 and 2002-2003). The contract did not become effective until July 1, 2003. In addition, the section quoted by the claimant simply shows that the contract requires principals and supervisors to inform staff of the location of the emergency plan and any changes contained in the plan. It does not provide evidence that the claimant's employees performed the mandated activities for the required *earthquake* emergency procedure systems.

Moreover, the personnel costs in the claims were not based on actual increased costs as required under the parameters and guidelines since no information on the actual time spent on the program has been provided. Rather, the claims were based on an approximation of actual costs in the form of a random moment sampling study. There is no provision in the 1991 parameters and guidelines for a statistical sampling, a unit cost, or any other reimbursement method that estimates or averages time or costs. The parameters and guidelines require actual costs to be claimed, supported by a statement and documentation listing "each employee, describ[ing] their function, their hourly rate of pay and related employee benefit cost *and the number of hours devoted to their function as they relate to this mandate.*" (Emphasis added.) Thus, the claimant did not comply with these documentation requirements.

Even if a random moment sampling were authorized by the parameters and guidelines, the record shows that the district's methodology did not conform to OMB Circular No. A-87.⁵⁰ According to the Circular, random moment sampling and other approved "substitute systems" for quantifying measures of employee effort must meet acceptable statistical sampling standards, including: "the sampling universe must include all of the employees whose salaries and wages are to be allocated based on sample results except as provided in subsection (c)."⁵¹ But the record indicates that the sampling universe did *not* include all of the employees whose salaries and wages are to be allocated based on the sample results. Rather, claimant's cost projections were based solely on employees who submitted time logs, i.e., a self-selected sample rather than a randomly selected one. Therefore, the statistical methodology did not meet the standard required by OMB Circular No. A-87.

Accordingly, the Controller's reduction of salaries and benefits in fiscal years 2001-2002 and 2002-2003 is correct as a matter of law.

⁵⁰ Exhibit A, IRC, page 78.

⁵¹ Subsection (c) states: "Less than full compliance with the statistical sampling standards noted in subsection (a) may be accepted by the cognizant agency if it concludes that the amounts to be allocated to federal awards will be minimal, or if it concludes that the system proposed by the governmental unit will result in lower costs to Federal awards than a system which complies with the standards." Exhibit A, pages 78-79.

V. Conclusion

The Commission finds that the Controller's audit adjustment of \$1,127,211 to claimant's reimbursement claims for fiscal years 2001-2002 and 2002-2003 is correct as a matter of law. Therefore, this IRC is denied.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On August 18, 2014, I served the:

Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Emergency Procedures, Earthquake, and Disasters, 04-4241-I-01
Education Code Sections 35295, 35296, 35297, 40041.5 and 40042
Statutes 1984, Chapter 1659
Fiscal Years 2001-2002 and 2002-2003
San Diego Unified School District, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 18, 2014 at Sacramento, California.



Heidi J. Palchik
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/15/14

Claim Number: 04-4241-I-01

Matter: Emergency Procedures, Earthquake, and Disasters

Claimant: San Diego Unified School District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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