

**COMMISSION ON STATE MANDATES**

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December 12, 2013

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

Mr. David Scribner  
Max8550  
2200 Sunrise Boulevard, Suite 240  
Gold River, CA 95670

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

Re: **Adopted Statement of Decision**  
*Standardized Testing and Reporting (STAR) II and III, 05-TC-02, 05-TC-03,*  
*and 08-TC-06*  
Education Code Sections 60601 et al.  
San Diego Unified School District, Grant Joint Union High School District,  
and Twin Rivers Unified School District, Claimants

Dear Mr. Palkowitz and Mr. Scribner:

On December 6, 2013, the Commission on State Mandates adopted the statement of decision to deny the test claim on the above-entitled matter.

Please contact Heidi Palchik at (916) 323-3562 if you have any questions.

Sincerely,



Heather Halsey  
Executive Director

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60615, 60630, 60640, 60641, 60642.5 as added or amended by Statutes 1995, Chapter 975; Statutes 1997, Chapter 828; Statutes 1999, Chapter 735; Statutes 2000, Chapter 576; Statutes 2001, Chapter 20; Statutes 2001, Chapter 722; Statutes 2002, Chapter 1168; Statutes 2003, Chapter 773; Statutes 2004, Chapter 183; Statutes 2004, Chapter 233; Statutes 2005, Chapter 676; Statutes 2007, Chapter 174; Statutes 2007, Chapter 730; Statutes 2008, Chapter 473; Statutes 2008, Chapter 757

California Code of Regulations, Title 5, Sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868; Register 2005, No. 34 (Sept. 21, 2005), Register 2006, No. 45 (Dec. 8, 2006)<sup>1</sup>

Filed on August 15, 2005, by San Diego Unified School District, Claimant.

Filed on September 21, 2005, by Grant Joint Union High School District, Claimant

Filed on June 25, 2009, by Twin Rivers Unified School District, Claimant

Case Nos.: 05-TC-02, 05-TC-03, and 08-TC-06

*Standardized Testing and Reporting II and III*

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 December 6, 2013)*

**PROPOSED STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on December 6, 2013. Art Palkowitz appeared on behalf of claimant San Diego Unified School District. Jillian Kissee and Kathy Lynch appeared on behalf of the Department of Finance.

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<sup>1</sup> Test Claim 08-TC-06 refers to regulations effective February 2007, but there were no test claim regulations effective on that date.

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

The Commission adopted the proposed statement of decision to deny the test claim by a vote of 7-0.

### **Summary of the Findings**

Each spring, California students in grades 2 through 11 take a series of standardized tests administered under the Standardized Testing and Reporting program (STAR). The STAR program was first enacted in 1997 and has gone through many changes over the years. These consolidated test claims plead statutes enacted from 1995 through 2008, and amendments to title 5 regulations adopted in 2005 and 2006. The Commission does not have jurisdiction over several statutes and regulations pled, however, because the Commission has already issued a prior final decision on the Education Code sections added by Statutes 1997, chapter 828, and the test claims were filed beyond the statute of limitations for several other statutes and regulations pled. The Commission finds that the following statutes and regulations have been properly pled and are analyzed in this decision to determine whether they impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Education Code section 60640 as amended by Statutes 2003, chapter 773;
- Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641 as amended by Statutes 2004, chapter 233;
- Education Code section 60641 as amended by Statutes 2008, chapter 473;
- Education Code sections 60630, 60640, 60641, and 60642.5 as amended by Statutes 2008, chapter 757; and
- California Code of Regulations, title 5, sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 as amended by Register 2005, No. 34 (eff. September 21, 2005).

The Commission finds that these statutes and regulations require school districts to perform the following new activities:

- Beginning July 1, 2004, administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11. Beginning October 7, 2005, school districts are required to administer the primary language test to those pupils in nonpublic schools in grades 3 to 11, instead of grades 2 to 11. (Ed. Code, § 60640(g), as amended by Stats. 2004, ch. 233.)
- Effective September 21, 2005, district STAR coordinators are required to
  - Immediately notify CDE of any security breaches or testing irregularities in the district before, during, or after the test administration. (Cal. Code Regs., tit. 5, § 857(b)(9); Register 2005, No. 34.)
  - Ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing. (Cal. Code Regs., tit. 5, § 857(b)(10), as added by Register 2005, No. 34.)

- Train test site coordinators to oversee the test administration at each school. (Cal. Code Regs., tit. 5, § 857(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, the STAR test site coordinators are required to
  - Submit the signed security agreement to the district STAR coordinator prior to the receipt of test materials. (Cal. Code Regs., tit. 5, § 858(b)(4); Register 2005, No. 34.)
  - Ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but excused from testing. (Cal. Code Regs., tit. 5, § 858(b)(9), as added by Register 2005, No. 34.)
  - Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859. (Cal. Code Regs., tit. 5, § 858(b)(11); Register 2005, No. 34.)
  - Train all test examiners, proctors, and scribes for administering the tests. (Cal. Code Regs., tit. 5, §§ 851(e) and 858(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, provide *all* information specified in section 861(a) to the contractor for those pupils enrolled on the first day the tests are administered and who do not in fact take a STAR test. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, provide the following new information to the contractor for each pupil tested:
  - The pupil's full name;
  - Date of English proficiency reclassification;
  - If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient;
  - California School Information Services (CSIS) Student Number once assigned;
  - For English learners, length of time in California public schools and in school in the United States;
  - Participation in the National School Lunch Program;
  - County and district of residence for pupils with Individualized Education Programs (IEPs);
  - Special testing conditions and/or reasons for not being tested. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, establish a periodic delivery schedule, which conforms to section 866(a) and (b), to accommodate test administration periods within the school district. (Cal. Code Regs., tit. 5, § 866(b); Register 2005, No. 34.)

The Department of Finance argues that these requirements do not result in state-mandated costs within the meaning of article XIII B, section 6, because the activities were enacted to implement the testing requirements of federal law, through the No Child Left Behind Act.

The Commission does not need to reach the federal law issue, however. As described in this decision, the Commission finds that the state has appropriated state and federal funds sufficient to pay for the costs of the new required activities. This funding, by law, “shall first be used” to offset costs that may be claimed through the state mandates reimbursement process for the STAR program and there is no evidence in the record of increased costs mandated by the state beyond the funding appropriated to school districts. Thus, there are no costs mandated by the state pursuant to Government Code section 17556(e).

Accordingly, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514. The Commission therefore denies these consolidated test claims.

## **COMMISSION FINDINGS**

### **I. Chronology**

- 08/15/2005 Claimant San Diego Unified School District (SDUSD) filed the *Star II* test claim (05-TC-02) with the Commission.
- 09/21/2005 Claimant Grant Joint Union High School District (GJUHSD) filed the *STAR III* test claim (05-TC-03).
- 10/06/2005 Commission staff consolidated test claims 05-TC-02 and 05-TC-03 and named it the *STAR II* test claim.
- 11/04/2005 Department of Finance (Finance) requested extension of time to file comments.
- 02/08/2006 Finance filed comments on test claims 05-TC-02 and 05-TC-03.
- 06/25/2009 Claimant Twin Rivers Unified School District (TRUSD) filed the *STAR III* test claim 08-TC-06.
- 09/13/2013 Commission staff consolidated test claim 05-TC-02 and 05-TC-03 with 08-TC-06.
- 09/24/2013 Commission staff issued the draft staff analysis and proposed statement of decision.
- 10/11/2013 Claimant requested a 30-day extension of time to file comments.

### **II. Background**

Each spring, California pupils in grades 2 through 11 take a series of standardized tests through the Standardized Testing and Reporting program (STAR). The STAR program was first enacted in 1997 and the test results are a major component used for calculating each school’s Academic Performance Index, which measures the growth in academic performance. These results are also used for determining whether elementary and middle schools are making adequate yearly progress in helping pupils become proficient on the California content standards, as required by the federal No Child Left Behind Act of 2001.

The STAR program has gone through many changes over the years. Currently, the STAR program includes four tests: California Standards Tests (CSTs), a series of standards-based assessments in English language arts, mathematics, science, and history/social science at specified grade levels); the California Modified Assessment (CMA), a standards-based test for many pupils with exceptional needs who have individualized education programs (IEPs); the California Alternate Performance Assessment (CAPA), for pupils with significant cognitive disabilities who are unable to take the other two tests; and the Standards-based Tests in Spanish (STS), required for pupils who receive instruction in their primary language or have been enrolled in a school in the United States for less than 12 months. Pupils taking the Standards-based Tests in Spanish are also required to take one of the standards-based tests in English.

Before 2008-2009, the STAR program also included the California Achievement Test, Sixth Edition Survey (CAT/6), a national norm-referenced test. In 2009, the CAT/6 was eliminated and is no longer administered.

The state has provided funding to school districts to administer the STAR program pursuant to Education Code section 60640(h) and section 870 of the title 5 regulations. The funding is generally appropriated to school districts on a per test basis and is intended to pay for the following administrative activities and costs:

1. All staffing costs, including the costs incurred by the district coordinator and the test site coordinator, staff training, and other staff expenses related to testing.
2. All expenses incurred at the school district and test site level related to testing.
3. All transportation costs of delivering and retrieving tests and test materials within the school district.
4. All costs associated with mailing the parent reports.
5. All costs associated with pre-identification of answer sheets and consumable test booklets, and other activities intended to provide the complete and accurate data required by section 861 of the regulations.<sup>2</sup>

Federal funding is also available and has been appropriated to school districts for the STAR program.

#### **A. Overview of the Statutes and Regulations Pled.**

These test claims plead statutes enacted from 1995 through 2008. The earliest test claim statute, Statutes 1995, chapter 975 (AB 265), established the Leroy Greene California Assessment of Academic Achievement Act, which required the Superintendent of Public Instruction (SPI) and the State Board of Education (SBE) to approve a plan for the creation of incentives to promote the improvement of pupil academic achievements. The Act required, among other things, developing a system of assessments of applied academic skills administered to pupils in grades 4, 5, 8, and 10. It also required the SBE, not later than January 1, 1998, to adopt statewide academically rigorous content standards and performance standards pursuant to specified recommendations in core curriculum areas.

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<sup>2</sup> California Code of Regulations, title 5, section 870.

Two years later, Statutes 1997, chapter 828 (SB 376) amended the 1995 statute to repeal the pupil testing incentive program and instead established the STAR Program in grades 2 to 11, inclusive, as specified. Statutes 1997, chapter 828 prohibited SBE from waiving any statutes or regulations that implement the STAR program. It required limited English proficient pupils, under certain conditions, to take a test in their primary language if one was available. It did not require individuals with exceptional needs to be assessed.

SBE designated the Stanford 9 as the norm-referenced achievement test, which was first administered in grades 2 to 11 in spring 1998. In 2002, SBE selected the CAT/6 Survey to replace the Stanford 9 test.

In 1999, the Legislature (Stats. 1999, ch. 735, SB 366) required SBE to adopt a performance standards system that, among other things, was aligned to the state's academically rigorous content standards. Statutes 1999, chapter 735 changed how and when test results were made available and required test publishers to enter into a contract with CDE instead of with each school district. It also required publishers to provide valid and reliable individual pupil and aggregate scores in certain content areas. It required SBE to annually establish the minimum funding to be apportioned to school districts and to annually establish the amount each test publisher is paid per test administered pursuant to the contracts.

The following year, Statutes 2000, chapter 576 (AB 2812), required the SPI to provide for developing an assessment instrument that measures the degree to which pupils achieve the academically rigorous content standards and performance standards, to the extent standards have been adopted by SBE. The standards-based achievement test was required to include, at a minimum, a direct writing assessment once in elementary school and once in middle or junior high school and other items of applied academic skills if deemed valid and reliable and if resources are made available for their use.

Statutes 2001, chapter 20 (SB 245), required the test results to be returned to the district as specified by SBE, rather than, as under prior law, no later than July 30 in the same academic year and calendar year in which the test was administered. It also changed the way make-up tests were provided for pupils who were absent, and changed the deadlines for publishers to make test results available.

Statutes 2001, chapter 722 (SB 233) extended the sunset date for the Assessment Act to January 1, 2005, and deleted obsolete provisions regarding the assessment of applied academic skills. It required the achievement test to contain English and language arts, mathematics, and science and made other conforming changes. The standards-based achievement test was renamed the California Standards Tests (CSTs) and was required to include an assessment in history/social science in at least one elementary or middle school grade level selected by SBE, and in science in at least one elementary or middle school grade level selected by SBE. The statute also modified reporting requirements, and made changes to other testing programs.

In 2002, the Education Code was amended (Stats. 2002, ch. 1168, AB 1818) to state that history-social science shall not be in the grade 9 assessment of the CSTs unless SBE adopts academic content standards for a grade 9 history-social science course.

Statutes 2003, chapter 773 (AB 1485) reduced the administration of the norm-referenced achievement test (CAT/6), effective in the 2004-2005 fiscal year, to grades 3 and 8 (instead of grades 2-11 required under prior law). The CAT/6 testing was changed to grades 3 and 7 by

Statutes 2004, chapter 233. Also in 2004, a code maintenance bill was enacted that made non-substantive changes to Education Code section 60640. (Stats. 2004, ch. 183, AB 3082.)

Statutes 2004, chapter 233 (SB 1448) extended the sunset date for the STAR program from January 1 2005 to January 1, 2011. This bill also extended testing grades 3-11 with the CSTs until January 1, 2011 and eliminated second grade testing as of July 1, 2007. The 2004 statute also required administering the CAT/6 (the national norm-referenced test) in grades 3 and 7 (as opposed to grades 3 and 8 in prior law). It amended legislative intent language, reporting requirements, and made other changes. According to the legislative history of SB 1448, “failure to reauthorize the STAR testing program could result in the loss of up to \$3 billion in federal funds.”<sup>3</sup>

Statutes 2005, chapter 676 (SB 755) required a pupil identified as limited English proficient who is enrolled in any of grades 2 to 11, inclusive, and who either receives instruction in his or her primary language or has been enrolled in a school in the United States for less than 12 months, to take a test in his or her primary language if a test is available. Prior law required limited English proficient pupils to take a test in their primary language if a test is available and if fewer than 12 months have elapsed after their initial enrollment in any public or nonpublic school. The bill also required the SPI, with the approval of SBE, to annually release to the public at least 25% of the test items from the CSTs administered in the previous year.

Statutes 2007, chapter 174 (SB 80) extended the requirement to test second grade with the CSTs (that was scheduled to sunset on July 1, 2007 by Stats. 2004, ch. 233) to January 1, 2011. This bill also extended the sunset date for the CAT/6 national norm-referenced test from July 1, 2007 to July 1, 2011.

Statutes 2007, chapter 730 made non-substantive changes to Education Code section 60640.

Statutes 2008, chapter 757 eliminated the CAT/6 norm-referenced test as a required part of the STAR program, effective September 30, 2008.

The claimants have also pled the regulations implementing the STAR program (Cal. Code Regs., tit. 5, § 850 et seq.) operative September 21, 2005, which made various changes that CDE described in the Notice of Proposed Rulemaking as follows:

The purposes of the proposed amendments are to provide consistency with the regulations for the California High School Exit Examination (CAHSEE) and the California English Language Development Test (CELDT) by clarifying current language and adding definitions and language as needed to add and amend language regarding the use of variations, accommodations, and modifications; to make technical changes to correct inconsistent language, terms, and capitalization in the existing regulations; to modify the provisions for below-grade-level testing; to incorporate information about the use of released items for the California Standards Tests (CSTs); to modify test material delivery and return dates to eliminate the mixture of working and calendar days; to add the California Alternate Performance Assessment (CAPA) as appropriate; to strengthen some test security language; to add a statement to the STAR Test Security Affidavit

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<sup>3</sup> Assembly Floor, Third Reading Analysis of SB 1448 (2003-2004 Reg. Sess.) as amended July 28, 2004, page 3.



indicating that test examiners and proctors have been trained to administer the tests; to expand the student demographic data collected to meet the requirements for federal and state reporting; to clarify requirements related to including test results in pupils' permanent records as required by *Education Code* Section 60607; to reinforce the confidentiality of summary data that is based on test results for ten or fewer pupils; and to modify the process for completing Apportionment Information Reports required by *Education Code* Section 60640(j).

In the Initial Statement of Reasons, CDE stated that “some of the proposed amendments are required to enable the state to comply with the requirements of the federal No Child Left Behind Act of 2001.”

The STAR regulations were amended again (operative Dec. 8, 2006) to revise testing windows for the CSTs, CAT/6 and Standards-Based test in Spanish. The amendments also clarify and ensure consistency, remove the names of specific tests, and incorporate the designated primary language test regulations that were in Article 3 into Articles 1 and 2.<sup>4</sup>

#### **B. The Federal No Child Left Behind Act of 2001.**

Some tests in the STAR program meet the assessment and accountability provisions of Title I of the No Child Left Behind Act of 2001 (NCLB),<sup>5</sup> which Congress enacted as a reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA). It requires states that participate and receive federal funds to administer:

[A] set of high-quality, yearly student academic assessments that include, at a minimum, academic assessments in mathematics, reading or language arts, and science that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school in the State in enabling all children to meet the State's challenging student academic achievement standards, except that no State shall be required to meet the requirements of this part relating to science assessments until the beginning of the 2007–2008 school year.<sup>6</sup>

Title I of NCLB also requires that the assessments measure pupil proficiency as follows:

Such assessments shall--

[¶]...[¶] (v)(I) except as otherwise provided for grades 3 through 8 under clause vii, measure the proficiency of students in, at a minimum, mathematics and reading or language arts, and be administered not less than once during—

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<sup>4</sup> CDE, Notice of Proposed Rulemaking, Amendment to Title 5, California Code of Regulations, Regarding Standardized Testing and Reporting Program, May 19, 2006, page 2.

<sup>5</sup> CDE, Standardized Testing and Reporting Program: Annual Report to the Legislature,” July 2012, pages 3-4.

<sup>6</sup> 20 USC 6311 (b)(3)(A).

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(II) beginning not later than school year 2007–2008, measure the proficiency of all students in science and be administered not less than one time during—

(aa) grades 3 through 5;

(bb) grades 6 through 9; and

(cc) grades 10 through 12;

(vi) involve multiple up-to-date measures of student academic achievement, including measures that assess higher-order thinking skills and understanding;

(vii) beginning not later than school year 2005–2006, measure the achievement of students against the challenging State academic content and student academic achievement standards in each of grades 3 through 8 in, at a minimum, mathematics, and reading or language arts, except that the Secretary may provide the State 1 additional year if the State demonstrates that exceptional or uncontrollable circumstances, such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, prevented full implementation of the academic assessments by that deadline and that the State will complete implementation within the additional 1-year period;<sup>7</sup>

NCLB also includes the following reporting provisions in Title I, requiring the assessments to:

(xii) produce individual student interpretive, descriptive, and diagnostic reports, consistent with clause (iii) that allow parents, teachers, and principals to understand and address the specific academic needs of students, and include information regarding achievement on academic assessments aligned with State academic achievement standards, and that are provided to parents, teachers, and principals, as soon as is practicably possible after the assessment is given, in an understandable and uniform format, and to the extent practicable, in a language that parents can understand;

(xiii) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged, except that, in the case of a local educational agency or a school, such disaggregation shall not be required in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student.<sup>8</sup>

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<sup>7</sup> 20 USC 6011 (b)(3)(C).

<sup>8</sup> 20 USC 6011 (b)(3)(C).

In a case that focused on the educational requirements and funding provisions of Title I of NCLB, a Federal Appellate court stated the following:

In contrast to prior ESEA iterations, NCLB “provides increased flexibility of funds, accountability for student achievement and more options for parents.” 147 Cong. Rec. S13365, 13366 (2001) (statement of Sen. Bunning). The Act focuses federal funding more narrowly on the poorest students and demands accountability from schools, with serious consequences for schools that fail to meet academic-achievement requirements. *Id.* at 13366, 13372 (statements of Sens. Bunning, Landrieu, and Kennedy). States may choose not to participate in NCLB and forgo the federal funds available under the Act, but if they do accept such funds, they must comply with NCLB requirements. See, e.g., 20 U.S.C. § 6311 (“For any State desiring to receive a grant under this part, the State educational agency shall submit to the Secretary a plan....”) (emphasis added); see also *Spellings*, 453 F.Supp.2d at 469 (“In return for federal educational funds under the Act, Congress imposed on states a comprehensive regime of educational assessments and accountability measures.”).

Title I, Part A, of NCLB, titled “Improving Basic Programs Operated by Local Educational Agencies,” continues to pursue the objectives of the ESEA and imposes extensive educational requirements on participating States and school districts, and, likewise, provides the largest amount of federal appropriations to participating States. For example, in fiscal year 2006, NCLB authorized \$22.75 billion in appropriations for Title I, Part A, compared to \$14.1 billion for the remaining twenty-six parts of NCLB combined. Title I, Part A's stated purposes include meeting “the educational needs of low-achieving children in our Nation's highest-poverty schools, limited English proficient children, migratory children, children with disabilities, Indian children, neglected or delinquent children, and young children in need of reading assistance.” 20 U.S.C. § 6301(2).

In addition to Title I, Part A, NCLB establishes numerous other programs, including a literacy initiative for young children and poor families (Title I, Part B), special services for the education of children of migrant workers (Title I, Part C), requirements that all teachers be “highly qualified” (Title II, Part A), and instruction in English for children with limited English ability (Title III). . . .

To qualify for federal funding under Title I, Part A, States must first submit to the Secretary a “State plan,” developed by the State's department of education in consultation with school districts, parents, teachers, and other administrators. 20 U.S.C. § 6311(a)(1). A State plan must “demonstrate that the State has adopted challenging academic content standards and challenging student academic achievement standards” against which to measure the academic achievement of the State's students. *Id.* § 6311(b)(1)(A). The standards in the State plan must be uniformly applicable to students in all of the State's public schools, and must cover at least reading or language arts; math; and, by the fourth grade, science skills. *Id.* § 6311(b)(1)(C).

States also must develop, and school districts must administer, assessments to determine students' levels of achievement under plan standards. *Id.*

§ 6311(b)(2) (A). These assessments must show the percentage of students achieving “proficiency” among “economically disadvantaged students,” “students from major racial and ethnic groups,” “students with disabilities,” and “students with limited English proficiency.” *Id.* § 6311(b)(2)(C)(v)(II). Schools and districts are responsible for making “adequate yearly progress” (“AYP”) on these assessments, meaning that a minimum percentage of students, both overall and in each subgroup, must attain proficiency. 34 C.F.R. § 200.20(a)(1).

A school's failure to achieve AYP triggers other requirements of Title I, Part A. See 20 U.S.C. § 6316(b). If a school fails to make AYP for two consecutive years, it must be identified by the local educational agency for school improvement. 20 U.S.C. § 6316(b)(1)(A). Among other things, a school in improvement status must inform all of its students, including those who have been assessed as proficient, that they are permitted to transfer to any school within the district that has not been identified for school improvement. *Id.* § 6316(b)(1) (E)(i). The school also must develop a two-year plan setting forth extensive measures to improve student performance, including further education for teachers and possible before- or after-school instruction or summer instruction. *Id.* §§ 6316(b)(3)(A)(iii), (ix).

If a school does not achieve AYP after two years of improvement status, it is “identif[ied] ... for corrective action.” *Id.* § 6316(b)(7)(C)(iv). Corrective action involves significant changes, such as replacing teachers who are “relevant to the failure to make [AYP],” or instituting an entirely new curriculum. *Id.* § 6316(b)(7)(C)(iv)(I). If, after a year of corrective action, a school still has not reached AYP, the district must restructure the school entirely; options for restructuring include “[r]eopening the school as a public charter school,” replacing the majority of the staff, or allowing the State's department of education to run the school directly. *Id.* § 6316(b)(8)(B)(i).

. . . NCLB requires that States use federal funds made available under the Act “only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.” 20 U.S.C. § 6321(b)(1). That is, States and school districts remain responsible for the majority of the funding for public education, and the funds distributed under Title I are to be used only to implement Title I programming, not to replace funds already being used for general programming.<sup>9</sup>

### **C. Prior Commission Decisions on the STAR Program.**

In August 2000, the Commission made a determination on the STAR program, as it existed in 1997, in test claim 97-TC-23 (Stats. 1997, ch. 828). The Commission found that activities related to administering only the norm-referenced test (or CAT/6) and the designated primary language test (or SABE/2) to be reimbursable.

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<sup>9</sup> *School Dist. of City of Pontiac v. Secretary of U.S. Dept. of Education* (2009) 584 F.3d 253, 257-258.

In 2004, the Legislature ordered the Commission to reconsider the STAR decision (Stats. 2004, ch. 216, § 34). On reconsideration, the Commission found that the SABE/2 was a federal mandate and, thus, reimbursement was denied for costs to administer that test. The Commission determined that administering the CAT/6 exam in grades 3 and 7 imposed a reimbursable state mandate on school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code sections 17514, effective July 1, 2004. The Commission also found that:

- All state funds appropriated for STAR must be used to offset all activities associated with administration of the CAT/6 exam; and that in any fiscal year in which school districts are legally required to, they must, “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them” from appropriated state funds;<sup>10</sup> and
- School districts are not required to use Title I funds to offset the activities in the STAR statement of decision (i.e., to administer the CAT/6); and
- All federal Title VI funds appropriated for STAR, in any fiscal year in which school districts are legally required to do so, must be used to offset all activities associated with administration of the CAT/6 exam, and that school districts must “reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them” from appropriated federal Title VI funds.<sup>11</sup>

### **III. Positions of the parties**

#### **A. Claimants’ positions**

The claimants allege that the test claim statutes and regulations impose a reimbursable state-mandated program for school districts under article XIII B, section 6 and Government Code section 17514 to administer the STAR Program.

##### **1. San Diego Unified School District (05-TC-02)**

The test claim filed by SDUSD seeks reimbursement for Statutes 2004, chapter 233, which added and amended Education Code sections 60601-60605, 60605.6, 60606, 60607, 60611, 60640, and 60641. The claimant requests reimbursement for the following activities related to the test administration of the Academic Skill Assessment program and the STAR program:

- Review the requirements of the law and any memoranda issued by CDE, and develop and implement procedures;
- Train administrators, teachers, and school district personnel on the requirements and test administration;
- Administer the tests for the Academic Skill Assessment program and the STAR program;

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<sup>10</sup> Statutes 2004, chapter 208, Item 6110-113-0001, Schedule 3, Provision 8. Statutes 2005, chapter 38, Item 6110-113-0001, Schedule 2, Provision 8.

<sup>11</sup> Statutes 2004, chapter 208, Item 6110-113-0890, Schedule 2, Provision 11. Statutes 2005, chapter 38, Item 6110-113-0890, Schedules 4, 7 and 10, Provision 10.

- Maintain individual records of the tests in pupil records;
- Report individual results to parents or guardians and to the pupils' schools and teachers;
- Collect, collate, and submit to CDE the information on the STAR program apportionment information report;
- Process requests for exemptions from testing filed by parents and guardians;
- Review IEPs of children with disabilities to determine if the IEPs contain an express exemption from testing;
- Determine the appropriate grade level test for special education pupils and provide appropriate testing adaptations and accommodations for these pupils;
- Enter into and administer the contract with the test publisher for the STAR program.

SDUSD estimates costs of \$500,000 to implement the test claim statutes during 2004-2005 and approximately \$550,000 to implement them in 2005-2006 and beyond.

SDUSD did not file written comments on the draft staff analysis.

## 2. Grant Joint Union High School District (05-TC-03)

The test claim filed by GJUHSD requests reimbursement for Statutes 2003, chapter 773, as it added or amended Education Code sections 60640, 60641, and 60642.5, and sections 850-868 of the title 5 regulations<sup>12</sup> that became effective on September 21, 2005. GJUHSD seeks reimbursement to:

- Administer the designated achievement test and standards-based achievement tests to each pupil enrolled in grades 2 to 11;
- Administer the CAPA, as set forth in the pupil's IEP, to each pupil in grades 2 to 11;
- Make arrangements to test pupils in alternative education programs;
- Accept waivers filed by parents or guardians;
- Designate a district and school site STAR coordinator, and implement those coordinator duties;
- Provide the contractor for the designated achievement test and standards-based achievement test with specified information for each pupil;
- Receive and review the apportionment information report with information from the designated achievement test, standards-based achievement test, and the CAPA;
- Forward the STAR pupil report to parents or guardians;
- Maintain individual records of the tests in pupil records;
- Provide the test contractor with specified data for each test site;
- Follow security measures for test administration.

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<sup>12</sup> The test claim did not include sections 850.5, 853.5, 854 or 864.

GJUHSD claims that the test claim statutes and regulations cost \$110,000 to initially implement and \$125,000 in fiscal year 2005-2006 and beyond.

3. Twin Rivers Unified School District (08-TC-06)

TRUSD is a K-12 school district created on July 1, 2008, through the unification of GJUSHD, Del Paso Heights Elementary School District, North Sacramento Elementary School District, and Rio Linda Elementary School District. The test claim filed by TRUSD seeks reimbursement for statutes enacted from 1995 to 2008 that added or amended Education Code sections 60607, 60615, 60630, 60640, 60641, 60642.5, and sections 850 to 863 of the title 5 regulations<sup>13</sup> that were amended, according to claimant, “eff. 2005 and 2/2007.”<sup>14</sup>

Test claim 08-TC-06 is supported by a declaration that claimant will incur approximately \$300,000 in costs in fiscal year 2008-2009.

TRUSD did not file written comments on the draft staff analysis.

**B. State Agencies’ Positions**

Finance, in comments submitted in February 2006 (on test claims 05-TC-02 and 05-TC-03), states that the statute of limitations has passed for filing a claim for the CSTs and the California Alternate Performance Assessment (CAPA). Finance also asserts that the STAR tests are necessary to ensure California’s compliance with NCLB, which is a federal mandate.

No comments have been filed by CDE.

No comments were filed on the draft staff analysis.

**IV. Discussion**

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>15</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>16</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

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<sup>13</sup> The test claim did not include sections 850.5, 853.5, 854 or 864.

<sup>14</sup> The test claim regulations were actually amended operative September 21, 2005 and December 8, 2006.

<sup>15</sup> *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

<sup>16</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>17</sup>
2. The mandated activity either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>18</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>19</sup>
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>20</sup>

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.<sup>21</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>22</sup> 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.”<sup>23</sup>

#### **A. Jurisdictional and Pleading Issues.**

There are three test claims under consideration in this analysis. The first test claim (05-TC-02) was filed by SDUSD and pleads Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641, as amended by Statutes 2004, chapter 233. SDUSD’s test claim does not present any pleading or jurisdictional issues. Therefore, these code

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<sup>17</sup> *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, at p. 874.

<sup>18</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>19</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

<sup>20</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

<sup>21</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>22</sup> *County of San Diego, supra*, 15 Cal.4th 68, 109.

<sup>23</sup> *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.



sections as amended in 2004 are analyzed below to determine whether they impose a reimbursable state-mandated program on school districts.

The other two test claims filed by GJUSHD and TRUSD (05-TC-03 and 08-TC-06), however, do present pleading and jurisdictional issues as discussed below.

**1. Test claim filed by Grant Joint Union High School District (05-TC-03)**

GJUHS D filed its test claim on September 21, 2005, requesting reimbursement as a result of Statutes 2003, chapter 773, as it amended Education Code sections 60640, 60641, and 60642.5, and sections 850-868 of the title 5 regulations that became operative on September 21, 2005.

**a) The test claim was not abandoned when GJUHS D ceased to exist because, upon its creation, TRUSD stepped into the shoes of GJUHS D, inheriting the rights and liabilities of the former district.**

On November 8, 2007, after the test claim was filed, local voters passed Measure B to unify GJUHS D, Del Paso Heights Elementary School District, North Sacramento Elementary School District, and Rio Linda Elementary School District and to create a new school district, TRUSD, effective July 1, 2008. Thus, effective July 1, 2008, the four existing school districts, including GJUHS D, no longer exist. Since GJUHS D no longer exists and can no longer act as a test claimant, the question of whether test claim 05-TC-03 has been abandoned arises.<sup>24</sup>

The Commission finds that the test claim has not been abandoned. The school district unification passed by Measure B provided that the new unified school district, TRUSD, assumed the rights and responsibilities of all the school districts included within the unification.<sup>25</sup> Thus, for purposes of test claim 05-TC-03, TRUSD assumed the rights of GJUHS D as the test claimant and may continue to request reimbursement for the statutes and regulations properly pled in the claim.<sup>26</sup>

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<sup>24</sup> Section 1183.081 of the Commission’s regulations authorizes the Commission’s executive director to deem a test claim “abandoned.” If, after notice of abandonment, another local agency files a request to substitute for the original test claimant, the new requester is deemed the “test claimant.”

<sup>25</sup> County of Sacramento, Analysis of Measure B, June 19, 2007, page 1.

<sup>26</sup> When TRUSD submitted the third test claim, 08-TC-06, it stated in the cover letter an intent to withdraw the second test claim, 05-TC-03, filed by the GJUSHD. According to section 1183.08 of the Commission’s regulations, withdrawal is accomplished “upon written application to the executive director any time before a decision is adopted,” and requires “written application in accordance with section 1181.2 of these regulations.” Claimant’s notice of intent to withdraw test claim 05-TC-03 in the cover letter for test claim 08-TC-06 upon Commission staff’s “review and acceptance” merely communicates intent to withdraw the test claim in the future. The test claim, however, has not been withdrawn in accordance with the Commission’s regulations.

- b) Of the statutes and regulations in test claim 05-TC-03, only Education Code section 60640, as amended by Statutes 2003, chapter 773 and sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 of the title 5 regulations as amended by Register 2005, No. 34, have been properly pled.**

The test claim mistakenly pleads Education Code section 60641 and 60642.5 as alleged to be amended by Statutes 2003, chapter 773. However, these code sections were not amended by Statutes 2003, chapter 773. Section 60641 was amended by Statutes 2001, chapter 722 and Statutes 2004, chapter 233, and again in 2008 and 2009. Section 60642.5 was amended by Statutes 2001, chapter 722; Statutes 2002, chapter 1168; and Statutes 2008, chapter 757. As further described below, sections 60641 and 60642.5 as amended in 2004 and 2008 have been properly pled in the other consolidated claims, and are analyzed in this decision. However, sections 60641 and 60642.5, as allegedly amended in 2003, do not exist.

The Commission finds that Education Code section 60640, as repealed and replaced by Statutes 2003, chapter 773 has been properly pled. Statutes 2003, chapter 773 had a delayed operative date of July 1, 2004. According to a declaration filed by claimant's predecessor agency GJUHS, the district first incurred costs as a result of the statute three months after the statute's operative date in October 2004. There is no evidence in the record rebutting this fact. Government Code section 17551(c) states that a test claim shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later. Section 1183(c) of the Commission's regulations interprets and implements the 12-month statute of limitations requirement of Government Code section 17551(c), and provides that the latter phrase of the statute, "within 12 months" of first incurring costs, means "by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant." In this case, the claimant alleges it first incurred costs in October 2004 (within fiscal year 2004-2005), and had until June 30, 2006 (the end of the following fiscal year) to file the test claim on the 2003 version of section 60640. The test claim was filed on September 21, 2005, and is, therefore, timely filed for purposes of pleading section 60640 as repealed and replaced by the Statutes 2003, chapter 773.

In addition, the Commission finds that the test claim is timely filed with respect to sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 of the title 5 regulations as amended by Register 2005, No. 34.

Therefore, with respect to test claim 05-TC-03, TRUSD is the test claimant and the following statute and regulations have been properly pled and are within the jurisdiction of the Commission: Education Code section 60640, as amended by Statutes 2003, chapter 773, and sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 of the title 5 regulations effective September 21, 2005 (Register 2005, No. 34).

## **2. Test claim filed by Twin Rivers Unified School District (08-TC-06)**

The third test claim (08-TC-06) was filed by TRUSD on June 24, 2009, and pleads Education Code section 60640 as added or amended from 2003 to 2008; section 60641 as added or amended from 1997 to 2008; section 60642.5 as added or amended from 2000-2008; section 60607, as added or amended from 1995 to 2004; section 60615 as added in 1995; and section

60630 as added or amended from 1995 to 2008. TRUSD also requests reimbursement for the title 5 regulations “eff. 2005 and 2/2007.” The test claim regulations were actually amended operative September 21, 2005 (Register 2005, No. 34) and December 8, 2006 (Register 2006, No. 45).

Part of TRUSD’s claim is duplicative of the statutes and regulations pled in the other two test claims that have been properly pled and are analyzed in this decision. These include Education Code 60607, as amended by Statutes 2004, chapter 233; Education Code section 60640, as amended by Statutes 2003, chapter 733, and Statutes 2004, chapter 233; Education Code section 60641, as amended by Statutes 2004, chapter 233; and the title 5 regulations effective September 21, 2005 (Register 2005, No. 34).

However, there are jurisdictional and pleading issues with respect to some of the remaining statutes and regulations pled by TRUSD.

- a) The Commission does not have jurisdiction over Education Code sections 60607, 60630, and 60641, as amended by Statutes 1997, chapter 828, because the Commission has already issued a prior decision on those statutes.**

The Commission does not have jurisdiction over Education Code sections 60607, 60630, and 60641, as amended by Statutes 1997, chapter 828, because these code sections were included in a prior test claim determined by the Commission and approved for reimbursement in *Standardized Testing and Reporting (STAR, 97-TC-23*, and reconsidered in 04-RL-9723-01 as directed by the Legislature). A Commission decision that becomes final and has not been set aside by a court cannot be reconsidered.<sup>27</sup>

- b) The Commission only has jurisdiction over Education Code sections 60630, 60640, 60641, and 60642.5 as amended by Statutes 2008, chapter 473, and Statutes 2008, chapter 757, and does not have jurisdiction over the other statutes and regulations pled in 08-TC-06 since they were filed outside the statute of limitations.**

Government Code section 17551(c) generally requires a test claim to be filed not later than 12 months following the effective date of a statute or executive order. TRUSD filed its test claim on June 25, 2009, and the only statutes that became effective within the one-year statute of limitations are Statutes 2008, chapter 473, and Statutes 2008, chapter 757, which amended Education Code sections 60630, 60640, 60641, and 60642.5. All other statutes and regulations pled by TRUSD became effective between 1995 and 2006, more than one year before the test claim was filed on June 25, 2009 and, thus, raise statute of limitations issues.

TRUSD asserts that the Commission has jurisdiction over all statutes and regulations pled since it first incurred costs on July 28, 2008, within the first month the district unification was effective.<sup>28</sup> In this regard, section 17551(c) does provide that a test claim is timely if it is filed within 12 months of incurring increased costs as a result of a statute or executive order. Section 1183 of the Commission’s regulations defines the phrase “within 12 months” of incurring costs

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<sup>27</sup> *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

<sup>28</sup> Test Claim 08-TC-06, page 34.

to mean “by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.”

TRUSD is therefore attempting to use its status as a newly created school district to seek reimbursement for statutes and regulations that became effective more than 12 months before the test claim was filed. By TRUSD’s interpretation, any newly-created local government could file a test claim without being affected by the statute of limitations, since the new local government can only first incur costs from the time of its formation. Because test claims are treated as class action claims, TRUSD seeks to make all school districts eligible for reimbursement based on its status as a newly-formed entity.

The Commission finds that TRUSD’s test claim is not timely filed on the older statutes and regulations that became effective between 1995 and 2006. As indicated above, local voters passed Measure B on November 8, 2007, to unify four existing school districts (GJUHSD, Del Paso Heights Elementary School District, North Sacramento Elementary School District, and Rio Linda Elementary School District) and to create a new school district, TRUSD, effective July 1, 2008. Pursuant to the provisions of Measure B, all obligations and responsibilities of the existing four districts became the obligations and responsibilities of the new unified school district, without change in enrollment or the classification of employees of the former districts. Measure B provides that “No students would be required to change schools as a result of the proposed unification;” that “employees of the existing four districts will become employees of the new district;” and pursuant to Education Code sections 35555 and 35556, that the unification shall not affect the classification of certificated and non-certificated employees already employed by any school district affected. The former school districts, by law, were required to comply with all statutes and regulations governing the STAR exam and incur those costs per pupil when the law became effective. The Commission may presume that the law was followed by the former districts and the costs were in fact incurred.<sup>29</sup> Since the obligations and responsibilities of the existing districts for testing and administering the STAR exam became the obligations and responsibilities of TRUSD for the same population of pupils, it cannot be said that the costs resulting from these older provisions in law were new or were first incurred in July 2008, as asserted by the claimant. Under the provisions of Measure B, TRUSD incurred the same per-pupils costs (and received the same per-pupil apportionment from the state) for administering the STAR program as the former districts that were unified to create TRUSD.

Moreover, there is no indication in the plain language of Government Code section 17551(c), or in the legislative history of the two bills that established a statute of limitations for filing test claims, that the Legislature intended to allow the filing of a new test claim on old statutes and regulations long required to be complied with by all local governments, whenever a new local government is created.<sup>30</sup> Such an interpretation would make the statute of limitations on class

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<sup>29</sup> There is a presumption that the former districts’ official duties were regularly performed. (Evid. Code, § 664.)

<sup>30</sup> Statutes 2002, chapter 1124 first established a statute of limitations for filing test claim as “three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision.” Statutes 2004, chapter 890 amended section 17551(c) to provide that “test claims shall be filed not later than 12 months following the effective date of a statute or

action claims pointless. The Legislature used the term “*increased costs*” in section 17551(c) and not merely “costs” because local governments eligible to claim reimbursement already exist and have the right to file a test claim seeking reimbursement from the state on behalf of all other local governments similarly affected by the statute or executive order. As the courts have held, the language of a statute should not be given a literal meaning if doing so would result in absurd consequences that the Legislature did not intend. In such circumstances, the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.<sup>31</sup>

Therefore, the Commission finds that the TRUSD test claim was not timely filed with respect to the following statutes and regulations: Education Code sections 60607 (as added and amended by Stats. 1995, ch. 975, and Stats. 2001, ch. 722); 60615 (as added by Stats. 1995, ch. 975); 60630 (as added and amended by Stats. 1995, ch. 975 and Stats. 2001, ch. 722); 60640 (as amended by Stats. 2004, ch. 183; Stats. 2005, ch. 676; and Stats. 2007, chs. 174 and 730); 60641 (as amended by; Stats. 1999, ch. 735; and Stats. 2001, chs. 20 and 722); and 60642.5 (as added and amended by Stats. 2000, ch. 576; Stats. 2001, ch. 722, Stats. 2002, ch. 1168); and California Code of Regulations, title 5, sections 850 et seq. (as amended by Register 2006, No. 45).

**3. Conclusion regarding the statutes and regulations in these consolidated claims that have been properly and timely pled.**

The Commission finds that, for purposes of this consolidated test claim, the following statutes and regulations have been properly pled and are analyzed below to determine whether they impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

- Education Code section 60640 as amended by Statutes 2003, chapter 773;
- Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641 as amended by Statutes 2004, chapter 233;
- Education Code section 60641 as amended by Statutes 2008, chapter 473;
- Education Code sections 60630, 60640, 60641, and 60642.5 as amended by Statutes 2008, chapter 757; and
- California Code of Regulations, title 5, sections 850, 851, 852, 853, 855, 857, 858, 859, 861, 862, 863, 864.5, 865, 866, 867, 867.5, and 868 as amended by Register 2005, No. 34 (eff. September 21, 2005).

**B. Do the test claim statutes and regulations impose a reimbursable state-mandated program?**

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executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”

<sup>31</sup> *Mundy v. Superior Court* (1995) 31 Cal.App.4th 1396, 1402.

## **1. New requirements imposed by the test claim statutes and regulations**

The statutes and regulations that have been properly pled are analyzed below to determine if they impose any new requirements, increasing the level of service provided by school districts. If not, reimbursement is not required under article XIII B, section 6.<sup>32</sup>

### **a) Education Code section 60640, as amended by Statutes 2003, chapter 773**

Education Code section 60640 establishes the STAR program and governs the administration of the test. Before the 2003 amendment, section 60640 required each school district to administer an achievement test (national norm-referenced test or CAT/6) and a standards-based achievement test to each of its pupils in grades 2 to 11. Statutes 2003, chapter 773 changed the requirement beginning July 1, 2004, to administer the national norm-referenced achievement test (CAT/6) to pupils in grades 3 and 8 rather than to all pupils in grades 2 through 11, and continued the requirement that the standards-aligned achievement test be administered to pupils in grades 2 to 11. The purpose of the amendment is described in the legislative history as follows:

This bill revises state standardized testing requirements so that, effective with the 2004-05 school year, the "off the shelf" norm referenced test will only be administered in grades 3 and 8. The norm-referenced test is not aligned to California standards, whereas the more comprehensive test that is aligned to California's adopted content standards will still be administered in grades 2 through 11.

These provisions were previously approved in the Education Committee as part of the budget trailer bill, AB 1266. The reduced administration of the "of the shelf" test was originally proposed to save costs in the 2003-04 year. Since the new testing schedule will not become effective until 2004-05, this proposal is no longer necessary to implement the 2003-04 Budget Act.<sup>33</sup>

Based on the plain language of the statute, Education Code section 60640 as amended by Statutes 2003, chapter 773, does not impose any new requirements on school districts, but reduces existing requirements.

### **b) Education Code sections 60601, 60602, 60603, 60604, 60605, 60605.6, 60606, 60607, 60611, 60640, 60641 as amended by Statutes 2004, chapter 233**

In 2004, the Legislature reauthorized the STAR program to prevent "the loss of up to \$3 billion in federal funds" and made various changes to the statutes governing the program.<sup>34</sup> According to the legislative history of the statute,

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<sup>32</sup> *San Diego Unified School Dist., supra*, 33 Cal.4th at pgs. 874-875.

<sup>33</sup> Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of AB 1485 (2003-2004 Reg. Sess.), amended September 8, 2003.

<sup>34</sup> Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of SB 1448 (2003-2004 Reg. Sess.), as amended July 28, 2004.

This bill, sponsored by the State Superintendent of Public Instruction, proposes to reauthorize the STAR program for grades 3 through 11 until January 1, 2011 and sunset second grade testing on July 1, 2007. Without this bill, the state's assessment program will cease on January 1, 2005. Failure to continue the STAR testing program may result in a significant loss of federal NCLB funds.<sup>35</sup>

As described below, the Commission finds that the amendments made by Statutes 2004, chapter 233 to Education Code section 60640(g) impose one new requirement on school districts.

**1) Education Code section 60601 as amended in 2004 extends the sunset date for the STAR program until January 1, 2011, but does not impose any new requirements on school districts.**

Education Code section 60601 was amended in 2004 to extend the sunset date for the STAR program from January 1, 2005, until January 1, 2011. As amended, section 60601 states the following: "This chapter shall remain in effect only until January 1, 2011, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2011, deletes or extends that date."

Amending the sunset date continues the operation of existing law, but does not itself, impose any new state-mandated duties on school districts.<sup>36</sup> Therefore, the Commission finds that section 60601, as amended by Statutes 2004, chapter 233, does not impose any requirements on school districts.

**2) Education Code sections 60602 and 60603 as amended in 2004 provide statements of legislative intent and define terms, but do not require school districts to perform any activities.**

Education Code sections 60602 and 60603 provide a statement of legislative intent and define terms for the STAR program. The 2004 statute amended section 60602(a) as follows:

(B) It is the intent of the Legislature in enacting this chapter to provide a system of individual assessment of pupils that has as its primary purpose, the primary purpose, of assisting teachers, administrators, pupils, and their parents, and teachers to identify individual academic strengths and weaknesses, in order to improve teaching and learning. It is further the intent of the Legislature in enacting this chapter to determine the effectiveness of school districts and schools, as measured by the extent to which pupils demonstrate knowledge of the fundamental academic skills, as well as the ability to apply those skills. In order to accomplish these goals, the Legislature finds and declares that California should adopt a coordinated and consolidated testing program to do all of the following:

- (1) The Legislature recognizes that, in addition to statewide assessments that will occur as specified in this chapter, school districts will conduct additional ongoing pupil diagnostic assessment and provide information regarding pupil

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<sup>35</sup> Senate Rules Committee, Office of Senate Floor Analysis, Third Reading Analysis of SB 1448 (2003-2004 Reg. Sess.), as amended July 28, 2004.

<sup>36</sup> *Perkins Mfg. Co. v. Clinton Const. Co. of California* (1931) 211 Cal. 228, 238.

performance based on those assessments on a regular basis to parents or guardians and schools. The Legislature further recognizes that local diagnostic assessment is a primary mechanism through which academic strengths and weaknesses are identified.

In addition, subdivisions (d) and (e) were added to section 60602 as follows:

- (d) It is the intent of the Legislature, insofar as is practically feasible and following the completion of annual testing, that the content, test structure, and test items in the assessments that are part of the Standardized Testing and Reporting Program become open and transparent to teachers, parents, and pupils, to assist all stakeholders in working together to demonstrate improvement in pupil academic achievement. A planned change in annual test content, format, or design, should be made available to educators and the public well before the beginning of the school year in which the change will be implemented.
- (e) It is the intent of the Legislature that the results of the California Standards Tests be available for use, after appropriate validation, academic credit, or placement and admissions processes, or both, at postsecondary educational institutions.

The definitions in Education Code section 60603 were also amended by the 2004 statute. Section 3 of the bill added a definition of “diagnostic assessment,” as follows:

- (6) “Diagnostic assessment” means interim assessments of the current level of achievement of a pupil that serves both of the following purposes: (A) The identification of particular academic standards or skills a pupil has or has not yet achieved. (B) The identification of possible reasons that a pupil has not yet achieved particular academic standards or skills.

Section 3 of the bill also amended the definition of “End of course exam,” to delete a reference to the Golden State Exams as follows: “End of course exam means a comprehensive and challenging assessment of pupil achievement in a particular subject area or discipline ~~such as the Golden State Exams.~~” The amendments made by section 3 of the bill became inoperative on July 1, 2007 and were repealed as of January 1, 2008.

Section 4 of the bill added another section 60603 to the Education Code beginning July 1, 2007, and amended the definition of “Diagnostic assessment” to add the word “frequent” as follows:

- (6) “Diagnostic assessment” means frequent, interim assessments of the current level of achievement of a pupil that serves both of the following purposes: (A) The identification of particular academic standards or skills a pupil has or has not yet achieved. (B) The identification of possible reasons that a pupil has not yet achieved particular academic standards or skills.

In addition, the definition of “statewide pupil assessment program,” in section 60603(a)(11) was amended to require testing pupils in grades 3 to 11, inclusive, rather than grades 2 to 11 under the original statute.



The Commission finds that Education Code sections 60602 and 60603 (as amended and added by Stats. 2004, ch. 233) do not impose any requirements on school districts.

**3) Education Code section 60604 as amended and added in 2004, imposes duties on the SPI, but does not require school districts to perform any activities.**

Statutes 2004, chapter 233, sections 5 and 6 amend Education Code section 60604 to make it inoperative on July 1, 2007, and add a new section 60604 effective July 1, 2007, to eliminate the CSTs for second grade pupils. Education Code section 60604(a)(2) provides that beginning July 1, 2007, the Superintendent of Public Instruction (SPI) shall design and implement a statewide pupil assessment program that includes the following:

A method of working with publishers to ensure valid, reliable, and comparable individual, grade-level, school-level, district-level, county-level, and statewide scores in grades ~~2~~ 3 to 11, inclusive, that is based on the achievement test designated pursuant to subdivision (b) of Section 60605.

Education Code section 60604 imposes duties on the SPI, but does not impose any new requirements on school districts.

**4) Education Code section 60605 as amended and added by Statutes 2004, chapter 233, imposes duties on the SBE, but does not impose any requirements on school districts.**

Under prior law, Education Code section 60605 required the SBE to adopt statewide academically rigorous content standards in the core curriculum areas of reading, writing, and mathematics to serve as a basis for assessing the academic achievement of individual pupils and schools. By November 1, 1998, SBE was required to adopt statewide performance standards “in the core curriculum areas of history/social science and science.” The remaining provisions in section 60605 specify how the standards were to be adopted, how the assessments for the standards were to be adopted, and other requirements, such as holding regional hearings on the standards and adopting regulations for the assessments. Section 60605(b)(1) also requires the test to include all specified basic academic skills in grades 2 to 7, and the core curriculum areas of English and language arts, mathematics, and science in grades 9 to 11, inclusive.

Statutes 2004, chapter 233 included two versions of section 60605. Section 7 of the bill made non-substantive changes and added, in section 60605(h), a sunset provision that stated that “this section shall become inoperative on July 1, 2007, and, as of January 1, 2008, is repealed, unless a later enacted statute . . . deletes or extends the dates on which it becomes inoperative and is repealed.”

Section 8 of the bill amended section 60605 to become operative on July 1, 2007, and added a requirement to section 60605(b)(1) that SBE notify publishers of the opportunity to submit for consideration tests of achievement. The tests were to include all the basic academic skills in reading, spelling, written expression and mathematics in grades 3 to 8 (rather than grades 2 to 8 under prior law) and the core curriculum areas of English and language arts, mathematics, and science in grades 9 to 11, inclusive.

Based on the plain language of Statutes 2004, chapter 233, Education Code section 60605, as amended and added, imposes duties on the SBE, but does not impose any requirements on school districts.

**5) Education Code sections 60605.6 and 60606 as amended and added by Statutes 2004, chapter 233 impose duties on state agencies, but do not require school districts to perform any activities.**

Under prior law, the SPI, subject to available funds in the annual Budget Act and upon SBE approval, was required in section 60605.6 to contract for the development and distribution of workbooks for tenth graders that contained information on the high school exit exam. Separate workbooks for grades 2 to 11 were to be distributed for the national norm-referenced achievement test (CAT/6, the test described in former section 60642) and the standards-based achievement tests (CSTs, the test described in section 60642.5), with specified content and sample questions to assist pupils and their parents with standards-based learning.

Section 9 of Statutes 2004, chapter 233 amended section 60605.6 to add a sunset provision making the section inoperative on July 1, 2007, and made other non-substantive changes. Section 10 of the statute added section 60605.6, effective July 1, 2007, containing identical provisions as the section 60605.6 set to sunset in section 9, except that the workbooks for the CAT/6 and the CSTs were to be distributed to pupils in grades 3 to 11, instead of 2 to 11.

Section 60605.6 as amended and added by Statutes 2004, chapter 233, imposes requirements on the SPI to “contract for the development and distribution” of the workbooks, but does not impose any requirements on school districts.

Statutes 2004, chapter 233 also amended existing section 60606 and made it inoperative on July 1, 2007, and added a new section 60606 operative July 1, 2007, both of which require the SBE, after designing the CSTs and writing tests, to submit the tests to the Statewide Pupil Assessment Review Panel for review. Section 60606 requires the panel to consist of six members who are appointed to serve two-year uncompensated terms, and who review the tests for compliance with Education Code section 60614. Section 60614 prohibits the assessments from containing “any questions or items that solicit, or invite disclosure of a pupil’s, or his or her parents’ or guardians’, personal beliefs or practices in sex, family life, morality, or religion nor shall it contain any question designed to evaluate personal behavioral characteristics.” The panel’s findings and recommendations are to be reported to SBE within ten days of receiving the tests. If the panel fails to report within the required ten days, the test is “deemed acceptable to the panel.”<sup>37</sup>

Education Code section 60606, as amended and added by the 2004 test claim statute, imposes duties on the SBE, but does not impose any requirements on school districts.

**6) Education Code sections 60607 and 60641, as amended by Statutes 2004, chapter 233, do not impose new requirements on school districts.**

Since 1995, each pupil has been required to have an individual record of achievement or accomplishment as specified in Education Code section 60607 that contains the results of the achievement test that is part of the STAR program. The records of accomplishment are required to be private and may not be released to any person other than a parent or guardian or teacher, counselor or administrator directly involved with the pupil, without the express written consent of the parent or guardian, or a pupil that has reached the age of majority or is emancipated. The

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<sup>37</sup> Former Education Code section 60606(d), now in Education Code section 60606(e).

legislative intent expressed prior to the enactment of Statutes 2004, chapter 233 was for school districts and schools to use the test results to “provide support to pupils and parents or guardians in order to assist pupils in strengthening their development as learners, and thereby to improve their academic achievement and performance in subsequent assessments.”<sup>38</sup>

Preexisting law (§ 60641(a)) also required CDE to ensure that school districts report in writing the individual results of each pupil test administered to the pupil’s parent or guardian, school, and teachers, and to include the test results in the pupil’s records. Individual pupil test results may only be released with the permission of the pupil’s parent or guardian.

Statutes 2004, chapter 233 amended section 60607(c) to provide that a pupil or his or her parent or guardian may authorize the release of pupil results to a postsecondary educational institution for purposes of credit, placement, or admission as follows:

(c) (1) Any pupil results or a record of ~~achievement~~accomplishment shall be private, and may not be released to any person, other than the pupil’s parent or guardian and a teacher, counselor, or administrator directly involved with the pupil, without the express written consent of either the parent or guardian of the pupil if the pupil is a minor, or the pupil if the pupil has reached the age of majority or is emancipated.

(2) (A) Notwithstanding paragraph (1), a pupil or his or her parent or guardian may authorize the release of pupil results or a record of accomplishment to a postsecondary educational institution for the purposes of credit, placement, or admission.

(B) Notwithstanding paragraph (1), the results of an individual pupil on the California Standards Test may be released to a postsecondary educational institution for the purposes of credit, placement, or admission.

Nearly identical language was also added to Education Code section 60641(a)(3)(B). In addition, Statutes 2004, chapter 233 amended section 60641(a)(3)(A) to add the following underlined text:

However, except as provided in this section, individual pupil test results may only be released with the permission of either the pupil’s parent or guardian if the pupil is a minor, or the pupil if the pupil reached the age of majority or is emancipated.

Statutes 2004, chapter 233 also added section 60641(d), requiring CDE to ensure that the CSTs that are “augmented for the purpose of determining credit, placement, or admission of a pupil in a postsecondary educational institution inform a pupil in grade 11 that he or she may request that the results from the assessment be released to a postsecondary educational institution.” The reference in section 60641(d) to an augmented CSTs is part of the Early Assessment Program (EAP) (Ed. Code, § 99300 et seq.), which is a collaborative effort among K-12 schools, the California State University, California Community Colleges, SBE, and CDE. Under the EAP, 11th graders are encouraged to take an “augmented version” of the CSTs that includes additional English-language arts and math questions and a written essay. The results of the augmented version, once scored, indicate a pupil’s readiness for college-level English-language arts and

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<sup>38</sup> Education Code section 60607(b) as added by Statutes 1995, chapter 975.

math. Those whose scores indicate they are not ready are encouraged to take classes during their senior year to improve and strengthen their skills. The goal of the EAP is to have high school graduates enter the California State University or a California community college fully prepared to do college-level work.<sup>39</sup>

The purpose of these amendments to release test results was stated as follows: “It is the intent of the Legislature that the results of the California Standards Tests be available for use, after appropriate validation, academic credit, or placement and admissions processes, or both, at postsecondary educational institutions.”<sup>40</sup>

The Commission finds that Education Code sections 60607 and 60641, as amended by the Statutes 2004, chapter 233 do not impose new requirements on school districts. Preexisting law requires furnishing, releasing, or granting access to pupil records,<sup>41</sup> including standardized test results,<sup>42</sup> to parents of current or former pupils (or pupils 18 or over or who attend an institution of postsecondary education),<sup>43</sup> and requires school districts to have procedures for granting parental requests for furnishing copies of *all* pupil records.<sup>44</sup> Access to pupil records includes “a request to release a copy of any record.”<sup>45</sup> The list of people who have access to pupil records without written consent includes a “pupil 16 years of age or older or having completed the 10<sup>th</sup> grade who requests access.”<sup>46</sup> School districts are allowed to “make a reasonable charge in an amount not to exceed the actual cost of furnishing copies of any pupil record;” with some exceptions for former pupil records that are provided free of charge.<sup>47</sup>

In addition, parental authorization to release records is not new. Under preexisting law, in Education Code section 60607(c), as amended by Statutes 2001, chapter 722, parents could consent to have their child’s record released to “any person,” which could have included admissions officers at postsecondary institutions.

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<sup>39</sup> Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of SB 946 (2007-2008 Reg. Sess.) as amended Aug. 14, 2008, page 2.

<sup>40</sup> Education Code section 60602(e) (added by Stats. 2004, ch. 233).

<sup>41</sup> Pupil records include “any item of information directly related to an identifiable pupil, other than directory information [as defined] which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.” (Ed. Code, § 49061(b).)

<sup>42</sup> California Code of Regulations, title 5, section 432(b).

<sup>43</sup> Education Code section 49061(a), as last amended by Statutes 2003, chapter 862.

<sup>44</sup> Education Code section 49069, as amended by Statutes 1977, chapter 36.

<sup>45</sup> Education Code section 49061(e), as last amended by Statutes 2003, chapter 862.

<sup>46</sup> Education Code section 49076(a)(6), as last amended by Statutes 2003, chapter 862.

<sup>47</sup> Education Code section 49065, as last amended by Statutes 1977, chapter 36. “No charge shall be made for furnishing (1) up to two transcripts of former pupils’ records or (2) up to two verifications of various records of former pupils. No charge may be made to search for or to retrieve any pupil record.”

Moreover, the Statutes 2004, chapter 233 amendment to section 60641(d), requiring CDE to ensure that a test that is augmented for the purpose of determining credit, placement, or admission of a pupil in a postsecondary educational institution, inform a pupil in grade 11 that he or she may request that the results from the assessment be released to a postsecondary educational institution, is a requirement imposed on CDE and not a requirement on school districts.

Accordingly, the Commission finds that Education Code sections 60607 and 60641, as amended by Statutes 2004, chapter 233, do not impose new requirements on school districts.

**7) Education Code section 60611, as amended by Statutes 2004, chapter 233, does not impose new requirements on school districts.**

Since it was added by Statutes 1995, chapter 975, Education Code section 60611 has prohibited cities, counties, a city and county, district superintendents of schools, or principals or teachers, from carrying on any program of specific preparation of pupils for any statewide pupil assessment program or a particular test. Statutes 2004, chapter 233 added subdivision (b) to section 60611 as follows:

City, county, city and county, district superintendent of schools, principal, teacher of an elementary and secondary school, including a charter school, *may* use instructional materials provided by the department or its agents in the academic preparation of pupils for the statewide pupil assessment if those instructional materials are embedded in an instructional program that is intended to improve pupil learning. (Emphasis added.)

The plain language of this amendment authorizes, but does not require school districts to use instructional materials to prepare pupils for the statewide pupil assessment.<sup>48</sup> Thus, the Commission finds that section 60611(b) as added by Statutes 2004, chapter 233 does not impose any required activities on school districts.

Statutes 2004, chapter 233 also deleted the first word (“No”) in Education Code section 60611(a):

~~No~~ (a) A city, county, city and county, ~~or~~ district superintendent of schools, or principal or teacher of any elementary or secondary school, including a charter school shall carry on any program of specific preparation of ~~the~~ pupils for the statewide pupil assessment program or a particular test used therein.

The plain language of the amendment to section 60611(a) that deleted the first word “no,” made the statute read as if school districts were required to carry on a program of specific preparation for statewide pupil assessment. However, the deletion of the word “no” was a drafting error. A legislative committee report stated that a subsequent statute (Stats. 2005, ch. 676) “[c]orrects an error made by Chapter 233, of 2004 [the test claim statute] in order to clarify existing law that *prohibits* the use of specific test preparation programs that are not part of a larger curriculum.”<sup>49</sup>

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<sup>48</sup> Education Code section 75: “‘Shall’ is mandatory and ‘may’ is permissive.”

<sup>49</sup> Senate Committee on Education, Analysis of SB 755 (2005-2006 Reg. Sess.) as amended February 22, 2005, page 2.

In addition, the Legislative Counsel's Digest for the test claim statute (SB 1448, Stats. 2004, ch. 233), states:

Existing law prohibits a city, county, city and county, or district superintendent of schools or principal or teacher of any elementary or secondary school from carrying on any program of specific preparation of the pupils for the statewide pupil assessment program or a particular test used in the statewide pupil assessment program.

This bill would, in addition, place that prohibition on a charter school, but would exempt from that prohibition instructional materials provided by the State Department of Education if those instructional materials are embedded in an instructional program that is intended to improve pupil learning.<sup>50</sup>

The Legislative Counsel's Digest mentions extending the prohibition for specific preparation to a charter school, but makes no mention of requiring schools to "carry on any program of specific preparation" as the plain, but unintended, language of the Statutes 2004, chapter 233 amendment to section 60611(a) would indicate.<sup>51</sup>

In short, the legislative history Statutes 2004, chapter 233 and of subsequent corrective legislation (Stats. 2005, ch. 676) makes clear that Statutes 2004, chapter 233 erroneously omitted the word "no" in Education Code section 60611(a). The Commission, like a court, may disregard a statute's drafting error where the legislative intent is clear and correction will best carry out the legislative intent.<sup>52</sup>

Accordingly, the Commission finds that Education 60611, as amended by the 2004 test claim statute, does not impose new requirements on school districts

**8) Education Code section 60640(g) as amended and added by Statutes 2004, chapter 233 imposes a new requirement on school districts to administer the primary language test to pupils of limited English proficiency enrolled in grades 2 to 11 in a *nonpublic* school for less than 12 months.**

- i. Administering the national norm-referenced achievement test (CAT/6) to grades 3 and 7, instead of grades 3 and 8 does not impose new requirements on school districts. (Ed. Code, § 60640(b), as amended by Stats. 2004, ch. 233)

As indicated above, Education Code section 60640 establishes the STAR program and governs the administration of the test. Before Statutes 2004, chapter 233 was enacted, Statutes 2003, chapter 733 amended section 60640 to require each school district to administer to each of its pupils in grades 3 and 8 the national norm-referenced achievement test designated by SBE pursuant to section 60642 and a standards-based achievement test designated by SBE pursuant to

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<sup>50</sup> The Legislative Counsel's Digest may be used to determine legislative intent. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 35.

<sup>51</sup> See also California Code of Regulations, title 5, section 854 that prohibits specific preparation materials for the STAR exams except as provided by CDE.

<sup>52</sup> *Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 368.

section 60642.5 for pupils in grades 2 to 11, inclusive. That provision was to become operative on July 1, 2004.

Section 15 of Statutes 2004, chapter 233 amended section 60640(b), commencing July 1, 2004, to change the grade requirements for the administration of the national norm-referenced achievement test (or CAT/6). Statutes 2004, chapter 233 requires each school district to administer the national norm-referenced achievement test to pupils in grades 3 and 7, instead of grades 3 and 8, and makes the statute inoperative on July 1, 2007. Section 16 of the bill then added section 60640 back to the Education Code, commencing on July 1, 2007, to continue the same requirement to administer the test to pupils in grades 3 and 7. CDE requested that the test not be administered to pupils in grade 8 because by the time the test scores of 8th graders were available to their middle or junior high schools, the pupils had already graduated from the school.<sup>53</sup> Section 60640(b), as amended in 2004 (Stats. 2004, ch. 233), does not increase the testing requirements of school districts since it simply requires that the test be administered in the 7<sup>th</sup>, rather than 8<sup>th</sup> grade. Therefore, the Commission finds that Education Code section 60640 as amended by Statutes 2004, chapter 233 does not impose new requirements on school districts.

ii. Administering the primary language test to pupils with limited English proficiency (Ed. Code, §§ 60640(f)(g), as amended by Stats. 2004, ch. 233)

As indicated above, immediately before the enactment of Statutes 2004, chapter 233, the law required school districts to administer to pupils in grades 3 and 8 the national norm-referenced achievement test (CAT/6), and to pupils in grades 2 through 11, a standards-based achievement test.<sup>54</sup> In addition to the national norm-referenced achievement test and the standards-based achievement test (CSTs), the law also required school districts to administer a primary language test, if one was available, to pupils of limited English proficiency who had been enrolled in any of grades 2 to 11 in any public school in the state for *less than* 12 months before the administration of the test. School districts had the option of administering a primary language test to English learner pupils enrolled in a public school for *more than* 12 months before the administration of the test.<sup>55</sup> In addition, pupils in special education programs were required to be tested, unless specifically exempted by their IEP, and school districts had the option of testing these pupils with a designated primary language test if the pupil was limited English proficient.<sup>56</sup>

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<sup>53</sup> Senate Committee on Education, Analysis of SB 1448 (2003-2004 Reg. Sess.) amended April 15, 2004, pages 3-4.

<sup>54</sup> Education Code section 60640, as amended by Statutes 2003, chapter 733.

<sup>55</sup> Education Code section 60640, as originally enacted by Statutes 1997, chapter 828. Former California Code of Regulations, title 5, section 880(a) also stated the following: “In addition to the designated achievement test and the standards-based achievement tests, school districts shall administer to English language learners who are enrolled in any of grades 2 to 11, inclusive, a designated primary language test if less than 12 months have elapsed after initial enrollment in any public school in this state and it a test has been designated in the pupil’s primary language.”

<sup>56</sup> Education Code section 60640(e), as amended by Statutes 2002, chapter 492, which provides the following: “Pursuant to paragraph (17) of subsection (a) of Section 1412 of Title 20 of the United States Code, individuals with exceptional needs, as defined in Section 56026, shall be

Statutes 2004, chapter 233 made some changes to these provisions for fiscal year 2004-2005. Section 15 of Statutes 2004, chapter 233 added subdivision (f)(3) to section 60640 to require CDE to “use funds made available pursuant to Title VI of the federal No Child Left Behind Act of 2001 and appropriated by the annual Budget Act for the purpose of developing and adopting primary language assessments that are aligned to the state academic content standards.” The added provision specifies that the exams be developed and adopted for reading/language arts and mathematics in the dominant primary language of limited-English proficient pupils, determined by the count in the annual language census of limited-English-proficient pupils. Statutes 2004, chapter 233 also added other provisions in section 60640(f)(3) regarding the administration of the primary language assessment, choosing a contractor to develop the assessment, the grade order of developing the assessment, retention of ownership rights to the assessment and test items, a CDE report on developing and implementing the initial primary language assessment, and recommendations for future assessments and funding requirements. These amendments to section 60640(f)(3) are imposed on CDE, and do not require school districts to perform any activities.

In addition, Statutes 2004, chapter 233 added Education Code section 60640(f)(3)(B) to provide the following: “Once a dominant primary language assessment is available for use for a specific grade level, it shall be administered in place of the assessment designated pursuant to paragraph (1) for that grade level.” Paragraph (1) of subdivision (f) is the provision that allows schools, at their option, to have pupils who have been enrolled in a public school district for more than 12 months with limited English proficiency, take a second achievement test in their primary language. Subdivision (f)(1) states the following:

(f)(1) *At the option of the school district*, pupils with limited English proficiency who are enrolled in any of grades 2 to 11, inclusive, may take a second achievement test in their primary language. Primary language tests administered pursuant to this subdivision and subdivision (g) shall be subject to the requirements of subdivision (a) of Section 60641. These primary language tests shall produce individual pupil scores that are valid and reliable. (Emphasis added.)

Thus, the Commission finds that Education Code section 60640(f)(3)(B) does not impose any required activities on school districts. School districts that choose to have these pupils take a second test in their primary language do not incur state-mandated costs because the schools are participating in a voluntary program.<sup>57</sup>

In addition, Section 15 of Statutes 2004, chapter 233, amended section 60640(g) as follows:

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included in the testing requirement of subdivision (b) with appropriate accommodations in administration, where necessary, and those individuals with exceptional needs who are unable to participate in the testing, even with accommodations, will be given an alternate assessment.” See also, Former California Code of Regulations, title 5, section 881(b) (Register 2001, No. 19), which provided that “Pupils in special education programs may be tested with a designated primary language test, if applicable, unless the individualized education program for the pupil specifically exempts the pupil from testing.”

<sup>57</sup> *Kern Unified School Dist.* (2003) 30 Cal.4<sup>th</sup> 727, 745.



A pupil of limited English proficiency who is enrolled in any of grades 2 to 11, inclusive, shall be required to take a test in ~~their~~his or her primary language if a test is available, and if fewer than 12 months have elapsed after ~~their~~his or her initial enrollment in any public or nonpublic school in the state.

The reference in the statute to a nonpublic school is new, and by the plain language of the statute, expands the requirement to administer the achievement test in the pupil's primary language (which is taken in addition to the national norm-referenced achievement test and the standards-based achievement test administered in English) to those pupils initially enrolled in a *nonpublic* school for less than 12 months. Education Code section 56034 defines a nonpublic school as a private, nonsectarian (nonreligious) school that enrolls individuals with exceptional needs pursuant to an IEP. Under federal law, every child is entitled to a free and appropriate public education in the least restrictive setting that meets the child's needs. When a child has exceptional needs that cannot be met in a public school setting, that child may be educated in a nonpublic school at public expense.<sup>58</sup> Education Code section 56365 states that the services shall be provided pursuant to state and federal law and under contract with the local educational agency, "to provide the appropriate special educational facilities, special education, or designated instruction and services required by the individual with exceptional needs if no appropriate public education program is available." The tuition of a pupil in a nonpublic school is paid by the public local education agency that places the pupil in the nonpublic school based on the pupil's individual needs. Placement in nonpublic schools can be made outside of the state pursuant to section 56365(e), after documentation of efforts by the local educational agency to utilize public schools or to locate an appropriate nonpublic, nonsectarian school or agency program within the state. Section 56365(b) states that "pupils enrolled in nonpublic, nonsectarian schools and agencies under this section shall be deemed enrolled in public schools . . . ."

The Commission finds that the requirement to administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11 is a new requirement imposed on school districts beginning July 1, 2004. Under prior law, school districts had the option of administering a primary language test to special education pupils who were English learners pursuant to former section 881 of the title 5 regulations. Administering the primary language test, in addition to the national norm-referenced achievement test and the standards-based achievement test, is now required for those pupils enrolled for less than 12 months in a nonpublic school. Pursuant to section 60640(k), the requirement was to become inoperative on July 1, 2007. However, effective October 7, 2005, Education Code section 60640(g) was amended again by Statutes 2005, chapter 676 to provide that a pupil, in grades 3 to 11, receiving instruction in his or her primary language or who has been enrolled "in a school in the United States" for less than 12 months shall be required to take the primary language test as follows:

A pupil identified as limited English proficient pursuant to the administration of a test made available pursuant to Section 60810 who is enrolled in any of grades 3 to 11, inclusive, and who either receives instruction in his or her primary language

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<sup>58</sup> 20 United States Code, sections 1400, et seq; Code of Federal Regulations, title 20, section 300.146.

or has been enrolled in a school in the United States for less than 12 months shall be required to take a test in his or her primary language if a test is available.

As indicated in part A of this decision, the Commission does not have jurisdiction to determine if the 2005 statute imposes a reimbursable state-mandated program. Thus, with respect to the language in the statute requiring the primary language test for pupils who “receive instruction in his or her primary language,” findings cannot be made. However, the requirement to administer the primary language test to those pupils, in grades 3 to 11, enrolled in a nonpublic school for less than 12 months continues with the plain language of the 2005 statute, which states that the primary language test is required for those enrolled in “a school in the United States” for less than 12 months. “A school in the United States” includes a nonpublic school, which by definition in Education Code section 56365(b), deems those pupils enrolled in a public school.<sup>59</sup>

Accordingly, the Commission finds that Education Code section 60640(g), as amended by section 15 of Statutes 2004, chapter 233, imposes the following new requirement on school districts beginning July 1, 2004:

- To administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11. Beginning October 7, 2005, school districts are required to administer the primary language test to those pupils in nonpublic schools in grades 3 to 11, instead of grades 2 to 11.
- c) **Education Code sections 60630, 60640, 60641, and 60642.5 as added and amended by Statutes 2008, chapters 473 and 757**

Statutes 2008, chapter 757 was an education budget trailer bill that amended Education Code section 60640 (Stats. 2008, ch. 757) to remove the requirement for school districts to assess pupils with the national norm-referenced achievement test (CAT/6) in grades 3 and 7. Specifically, Statutes 2008, chapter 757, removed from section 60640(b) reference to the “achievement test designated by the State Board of Education pursuant to Section 60642” and removed other references to section 60642 in section 60640 (f)(1) and (f)(3)(C). Removing these provisions requires less testing and imposes no new requirements on school districts.

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<sup>59</sup> Section 16 of the 2004 test claim statute then added a new section 60640 to the Education Code for the 2007-2008 fiscal year, and required that the standards-based achievement test be administered to pupils in grades 3 to 11, instead of students in grades 2 to 11. With respect to pupils with limited English proficiency, section 60640(g), required the following for fiscal year 2007-2008:

(g) A pupil identified as limited English proficient pursuant to the administration of a test provided by Section 60810, who is enrolled in any of grades 3 to 11, inclusive, and has not been reclassified as proficient in English pursuant to reclassification procedures required to be developed by Section 313, shall be required to take a test in her or her primary language if a test is available and if fewer than 12 months have elapsed after his or her initial enrollment in any public school in the state.

Section 16 never took effect, however, because of the amendment to the statute by Statutes 2005, chapter 676.

Statutes 2008, chapter 757 also makes non-substantive amendments to section 60642.5, which, since 2000, has required the SPI to provide for development of the standards-based achievement test (CSTs). The subject areas and grades to be tested are listed in section 60642.5, along with the criteria SBE must consider in approving a contract for development or administration of the CSTs.

In addition, Statutes 2008, chapter 757 makes non-substantive amendments to section 60630. Section 60630 requires the SPI to prepare and submit an annual report to the Legislature and the SBE with an analysis of the results and test scores of the STAR program that may include specified factors. Since 1997, section 60630(b) has required school districts to “submit to the State Department of Education whatever information the department deems necessary to carry out this section.” Statutes 2008, chapter 757 made the following non-substantive amendment to subdivision (b): “School districts shall submit to the ~~State Department of Education~~ department whatever information the department deems necessary to carry out this section.”

Thus, Statutes 2008, chapter 757 amendments to sections 60630 and 60642.5 removed references to the national norm-referenced achievement test in these statutes and made no other substantive changes that require school districts to perform any new activities.

Finally, the Legislature amended section 60641 in 2008, through chapters 473 and 757. Chapter 473 amended section 60641(a)(3)(B) to add the following underlined text: “Notwithstanding subparagraph (A), a pupil or his or her parent or guardian may authorize the release of individual pupil results to a postsecondary educational institution for the purpose of credit, placement, determination of readiness for college-level coursework, or admission.” Chapter 473 also amended section 60641(d) as follows:

The department shall ensure that a California Standards Test that is augmented for the purpose of determining credit, placement, or ~~admission~~ readiness for college-level coursework of a pupil in a postsecondary educational institution inform a pupil in grade 11 that he or she may request that the results from that assessment be released to a postsecondary educational institution.

These amendments do not impose any required activities on school districts.

Statutes 2008, chapter 757, amended section 60641 by deleting references to section 60642, the national norm-referenced test in section 60641(a) and (b), and made other non-substantive changes. Statutes 2008, chapter 757 did not impose any requirements on school districts.

**d) Amendments to the Title 5 regulations by Register 2005, No. 34.**

SBE adopted regulations in 2005 to amend sections 850 *et seq.*, of the title 5 regulations relating to the STAR program, effective on September 21, 2005. According to the Initial Statement of Reasons for the regulations, the 2005 amendments were adopted to:

. . . clarify the specific student demographic data that districts must provide, provide information about the use of questions publicly released for the California Standards Tests, add requirements for the California Alternate Performance Assessment (CAPA), modify all dates associated with the Program to working days, and modify the process for collecting information required for providing apportionments to districts for costs associated with the Program. Changes to the regulations were also made in order to ensure consistency among the assessment

programs, including the California High School Exit Examination (CAHSEE) and the California English Language Development Test (CELDT). Additionally, some of the proposed amendments are required to enable the state to comply with the requirements of the federal No Child Left Behind Act of 2001.<sup>60</sup>

To address federal guidelines that authorize states, beginning in the 2004-2005 school year, to not include a pupil with a significant medical emergency in the participation rate calculation, the 2005 regulations included a definition for significant medical emergency. The regulations also defined data provided by each school district to the test contractor for each pupil in grades 2 through 8 who is not tested due to a significant medical emergency. The 2005 amendments to the regulations are analyzed below.

### **1) Definitions (Cal. Code Regs., tit. 5, § 850)**

Section 850 sets forth definitions for 19 terms used in the STAR testing program. Register 2005, No. 34, amended this section to “update and clarify the definitions.” This regulation defines terms, but does not impose any required activities on school districts. The definitions that are relevant to any new required activity are discussed further below.

### **2) Pupil Testing (Cal. Code Regs., tit. 5, § 851)**

Section 851(a) was amended to add the standards-based achievement test (CSTs) required to be administered to pupils enrolled in grades 2 to 11 as follows:

(a) School districts shall administer the designated achievement test and standards-based achievement tests to each eligible pupil enrolled in any of grades 2 to 11, inclusive, in a school district on the date testing begins in the pupil’s school.

Administration of the standards-based achievement test (CSTs), however, is not a new requirement. Immediately before the effective date of the 2005 amendment to section 851, school districts were required to test pupils in grades 2-11 with “the standards-based achievement test provided for in Section 60642.5,” beginning in the 2004-2005 fiscal year as follows:

(b) Commencing in the 2004–05 fiscal year and each fiscal year thereafter, and from the funds available for that purpose, each school district, charter school, and county office of education shall administer to each of its pupils in grades 3 and 8 the achievement test designated by the State Board of Education pursuant to Section 60642 and *shall administer to each of its pupils in grades 2 to 11, inclusive, the standards-based achievement test provided for in Section 60642.5.* The State Board of Education shall establish a testing period to provide that all schools administer these tests to pupils at approximately the same time during the

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<sup>60</sup> CDE, Initial Statement of Reasons, Standardized Testing and Reporting (STAR) Program, revised June 23, 2004.

instructional year, except as necessary to ensure test security and to meet the final filing date. (Emphasis added.)<sup>61</sup>

Section 853(b) of the preexisting regulations also required administering the standards-based achievement tests in accordance with the manuals and instructions provided by the contractor. Thus, California Code of Regulations, title 5, section 851(a) as amended by Register 2005, No. 34, does not impose new requirements on school districts.

Section 851(b) was added by Register 2005, No. 34, to require school districts to administer the CAPA to those pupils with significant cognitive disabilities in grades 2 through 11, and ages 7 through 16 in ungraded programs. The CAPA is an alternative assessment individually administered to assess these pupils' achievement on a subset of California's Academic Content Standards.<sup>62</sup> Section 851(b) states the following:

(b) School districts shall administer the CAPA, as set forth in the pupil's IEP, to each eligible pupil in any of grades 2 to 11, inclusive, in a school district during the period specified by the test contractor. Pupils in ungraded special education classes shall be tested, if they are 7 to 16 years of age.

The requirement to administer the CAPA is not new, however. Since 2002, Education Code section 60640(e) has provided, pursuant to the federal Individuals with Disabilities Education Act (IDEA), that individuals with exceptional needs shall be included in the testing requirements of the STAR program with appropriate accommodations in administration, where necessary. The statute further provides that those individuals with exceptional needs who are unable to participate in the testing, even with accommodations, shall be given an alternate assessment.<sup>63</sup> CAPA was first administered in 2003<sup>64</sup> and was governed by section 853(b), as it existed when the 2005 regulations became effective, to provide that the CAPA shall be administered and returned by school districts in accordance with the manuals and instructions provided by the contractor, and in accordance with testing variations, accommodations, and modifications specified in section 853.5. Therefore, section 851(b) of the title 5 regulations as amended by Register 2005, No. 34, does not impose new requirements on school districts.

In addition, former section 851(d) was renumbered to section 851(e) and amended to provide the following:

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<sup>61</sup> Education Code section 60640(b), as added by Statutes 2003, chapter 773, beginning in the 2004-2005 fiscal year.

<sup>62</sup> California Code of Regulations, title 5, section 850(d) and (h).

<sup>63</sup> Statutes 2002, chapter 492 added subdivision (e) to section 60640 to state the following: "Pursuant to Section 1412(a)(17) of Title 20 of the United States Code, individuals with exceptional needs, as defined in Section 56026, shall be included in the testing requirement of subdivision (b) with appropriate accommodations in administration, where necessary, and those individuals with exceptional needs who are unable to participate in the testing, even with accommodations, shall be given an alternate assessment." This provision currently remains in section 60640.

<sup>64</sup> CDE memorandum "State Board of Education-Adopted CAPA Performance Level," February 2009.

No test may be administered in a ~~private home or location~~ hospital ~~unless the test is administered by either a certificated employee of the district or an employee of a nonpublic school pursuant to Education Code section 66365 who holds a credential and the employee signs a security affidavit~~ except by a test examiner. No test shall be administered to a pupil by the parent or guardian of that pupil. This subdivision does not prevent classroom aides from assisting in the administration of the test under the supervision of a credentialed school district employee provided that the classroom aide does not assist his or her own child and that the classroom aide signs a security affidavit.

A “test examiner” is defined in section 850(k), a subdivision that was added by Register 2005, No. 34, to mean “an employee of a school district or an employee of a nonpublic school *who has been trained to administer the tests* and has signed a STAR Test Security Affidavit. For the CAPA, the test examiner must be a certificated or licensed school staff member.” (Emphasis added.)

Thus, under former section 851, the tests could be administered by either a certificated employee of the district or an employee of a nonpublic school who holds a credential and signs a security affidavit. This section as amended by Register 2005, No. 34 now requires that the test be administered by a test examiner who, by definition, can still be an employee of a school district or an employee of a nonpublic school, but is now required for the first time to be trained to administer the tests. Pursuant to section 858(b)(12) as amended by Register 2005, No. 34, and discussed further below in the analysis, the STAR test site coordinator is required to provide the training to the test examiner. According to the 2005 STAR District and Test Site Coordinator Manual, the “2005 STAR Examiner Training video should be used as part of the training.”<sup>65</sup>

Thus, section 851(e) of the 2005 title 5 regulations, as amended by Register 2005, No. 34, imposes a new requirement for school districts to train test examiners on the administration of the STAR tests.

### **3) Pupil Exemptions (Cal. Code Regs., tit. 5, § 852)**

Section 852 authorizes a parent to submit to a school a written request to excuse his or her child from any or all parts of any of the STAR tests. The regulation also prohibits school districts or district employees from soliciting or encouraging exemptions from testing. Register 2005, No. 34 amended section 852 by *deleting* the following sentence from subdivision (b) and moving the substance of the language to section 850(d)(2):

(b) Pupils in special education programs shall be tested with the designated achievement test and the standards-based achievement tests unless the individualized educational program for the pupil specifically states that the pupil will be assessed with the California Alternate Performance Assessment or (CAPA).

Section 850(d)(2) now defines an eligible pupil for the CAPA as “any pupil with a significant cognitive disability in grades 2 through 11, and ages 7 through 16 in ungraded programs, whose IEP states that the pupil is to take the CAPA.”

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<sup>65</sup> CDE, STAR District and Test Site Coordinator Manual, Version 2-2005, page 20.

This amendment is not substantive. Therefore, section 852 as amended by Register 2005, No. 34 does not impose any new required activities on school districts.

**4) Administering below grade level testing for pupils with IEPs (Cal. Code Regs., tit. 5, § 853)**

Register 2005, No. 34 amended section 853(c) for the 2004-2005 school year with respect to out-of-level, or below-grade-level testing of special education pupils with IEPs. States are required to demonstrate adequate yearly progress, measured in part by large-scale assessment programs and made public through accountability data. In an attempt to create more inclusive large-scale assessment practices for pupils who have not been exposed to grade-level curriculum, some states have added out-of-level testing as a component of large-scale assessment programs. Out-of-level testing is the administration of a test at a level that is above or below the pupil's grade level in school. Typically, this means testing only pupils with disabilities below the grade in which their same-age peers are enrolled.<sup>66</sup>

The Register 2005, No. 34 regulations amended section 853(c) as follows:

(c) For the ~~2003-04~~ 2004-05 school year ~~only~~, pupils with IEPs specifying below-grade-level testing in grades 5 4 through 11 may be tested one or two grades below their enrollment grade. Pupils with IEPs specifying below-grade-level testing in grade three may be tested one grade level below their enrollment grade. The test level must be specified in the ~~student's~~ pupil's IEP. ~~Out-of-level~~ Below-grade-level testing shall be used only if the ~~student~~ pupil is not receiving grade-level ~~instruction~~ curriculum as specified by the California academic content standards, and is so indicated on the IEP. ~~Students~~ Pupils tested ~~out-of-level~~ below-grade-level must complete all tests required for the grade at which they are tested and shall be administered ~~only one level of the tests~~ the tests for only one grade level. ~~Out-of-level testing is not allowed for pupils in grades 2, 3, and 4. No out-of-level testing shall be allowed at any grade beginning with the 2004-05 school year.~~

Under prior law, section 853(c) allowed below-grade-level testing (either one or two grades below the pupil's enrollment grade) for pupils in grades 5 to 11, if specified in the pupil's IEP and the pupil is not receiving "grade level instruction." No out-of-level testing was allowed for pupils in grades 2 through 4, and no out-of-level testing was allowed for the 2004-2005 school year.

The Register 2005, No. 34 amendment expanded the pupils eligible to take below grade level testing for the 2004-2005 school year to pupils in grade 4 (who may be tested one or two grades below the enrollment grade), and to pupils in grade 3 (who may be tested one grade level below the enrollment grade), if below-grade-level testing is specified in the IEP and the pupil is not receiving grade level "curriculum that is specified by the California academic content standards."

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<sup>66</sup> National Center on Educational Outcomes, "Reporting Out-of-Level Test Scores: Are These Students Included in Accountability Programs," October 2003.  
<<http://www.cehd.umn.edu/NCEO/onlinepubs/OOLT10.html>> [as of November 13, 2013.]

CDE explained this amendment in the Final Statement of Reasons as follows:

The change in Section 853(c) is not a restriction. For the last two years below-grade-level testing was allowed only for students in grades five through eleven and beginning with the 2004-05 school year no below-grade-level testing was to be allowed. The proposed amendment to the regulations expands the option of below-grade-level testing to grades three and four and allows its use during the 2004-05 school year.<sup>67</sup>

The plain language of the regulation (“may be tested”) and the Final Statement of Reasons both indicate that below-grade-level testing is an option allowed for testing pupils with IEPs.<sup>68</sup> Therefore, section 853 (Register 2005, No. 34) does not impose any requirements on school districts.

#### **5) Testing Period (Cal. Code Regs., tit. 5, § 855)**

Section 855 defines the testing period, designating a 21-day window during which testing is to be completed. The Register 2005, No. 34 amendment to section 855 deleted the definition of an eligible pupil for purposes of the writing assessment, and moved that definition to section 850(d)(4).<sup>69</sup> Section 855 as amended by Register 2005, No. 34 does not impose any requirements on school districts.

#### **6) Test ordering and handling (Cal. Code Regs., tit. 5, §§ 864.5-867.5)**

There are five sections of the regulations that govern how test materials are ordered (§ 864.5), transported (§ 865), delivered to the school district (§ 866), delivered to each test site (§ 867) and retrieved by contractors (§ 867.5).

##### **i) Test Order Information (Cal. Code Regs., tit. 5, § 864.5)**

Section 864.5 requires school districts to submit order information for each test site to the contractor in order to provide for the schools’ testing needs. The Register 2005, No. 34 amendments to section 864.5 are shown in ~~strikeout~~ and underline as follows:

(a) The school district shall provide to the ~~publisher~~ contractor, no later than December 1 of the year immediately prior to the year of test administration, the following data for each test site of the school district, by grade level:

~~(1) CBEDS enrollment~~

~~(2) Current enrollment~~

(1) Number of pupils to be tested

~~(2)(3)~~ Valid county district school (CDS) codes

~~(3)(4)~~ Number of tests without adaptation

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<sup>67</sup> SBE, “Standardized Testing and Reporting (STAR) Program; Adopt Amendments to Title 5 Regulations” Agenda Item #6, Final Statement of Reasons, September 2004, page 3.

<sup>68</sup> Education Code section 75: “‘Shall’ is mandatory and ‘may’ is permissive.”

<sup>69</sup> The definition is currently in section 850(h)(4).



~~(4)(5)~~ Numbers of special version tests with adaptations by type of adaptation including, but not limited to, Braille and large print.

~~(5)(6)~~ Number of directions for administration needed, by grade level.

~~(6)(7)~~ First date of testing in the school district, including the dates for each testing wave test administration period, if applicable.

~~(8) Date or dates on which delivery of materials to the school district is requested.~~

(b) Each school district that elects pre-identification of answer documents shall ~~provide to the publisher no fewer than 45 days prior to the first date of testing in the school district,~~ submit an electronic file that includes all of the information required in Section 861. The file must be submitted in accordance with the timeline, format, and instructions provided by the contractor.

(c) If the testing materials are lost or destroyed while in the possession of the school district, and the ~~publisher~~ contractor provides the school district with replacement materials, the school district is responsible for the cost of all replacement materials.

(d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests ~~scored, the number of parent requests pursuant to Education Code section 60615, and the number of individualized education program exemptions pursuant to Education Code section 60640(e)~~ submitted for scoring including tests for non-tested pupils and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the ~~publisher~~ contractor by the Department as part of the contract ~~with the publisher~~ for the current year.

These amendments do not impose any new required activities on school districts that increase the level of service provided to the public.

Section 864.5(a)(1) now requires school districts to report to the publisher the “number of pupils tested,” rather than enrollment information. There is nothing in the record to indicate that reporting the “number of pupils tested” provides a higher level of service to the public than reporting enrollment under the CBEDS program and current enrollment information required under prior law. CBEDs data is enrollment data collected by school districts and reported to CDE an “information day” in October. School enrollment for CBEDs is determined by an unduplicated count by grade, gender, and racial/ethnic designation of pupils enrolled on Information Day and reported to the state.<sup>70</sup> Both are methods provide information to the test contractor for purposes of ordering a sufficient number of tests.

The amendments to sections 864.5(a)(5) and (a)(7) renumbered those provisions to subsections (4) and (6) respectively, and made non-substantive, clarifying changes that do not impose any new required activities. Section 864(a)(5) was amended to provide that “~~(4)(5)~~ Numbers of

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<sup>70</sup> See generally, CDE, CBEDs Administrative Manual.

special version tests with adaptations by type of adaptation including, but not limited to, Braille and large print.” Similarly, section 864.5(a)(7) was clarified to change “testing wave” to “test administration period.”

In addition, the Register 2005, No. 34 regulations deleted former section 864.5(a)(8), which had required the district to report to the test publisher the requested date or dates of delivery for test materials, but did not impose any new required activities.

Therefore, California Code of Regulations, title 5, section 864.5(a), as amended by Register 2005, No. 34, does not impose new required activities on school districts.

The Register 2005, No. 34 regulations also amended section 864.5(b) as follows:

Each school district that elects pre-identification of answer documents shall ~~provide to the publisher no fewer than 45 days prior to the first date of testing in the school district,~~ submit an electronic file that includes all of the information required in Section 861. The file must be submitted in accordance with the timeline, format, and instructions provided by the contractor.

This amendment to 864.5(b) does not impose any requirements on school districts. The plain language makes the file submission requirements conditional on the school district’s discretionary decision to elect pre-identification answer documents. Requirements imposed due to participating in a discretionary program are not reimbursable state mandates.<sup>71</sup>

Finally, the amendment to section 864.5(d) altered the penalty formula if the school district places an excessive order for tests for any school, as follows:

(d) If the school district places an order for tests for any school that is excessive, the school district is responsible for the cost of materials for the difference between the sum of the number of pupil tests ~~scored, the number of parent requests pursuant to Education Code section 60615, and the number of individualized education program exemptions pursuant to Education Code section 60640(e)~~ submitted for scoring including tests for non-tested pupils and 90 percent of the tests ordered. In no event shall the cost to the school district for replacement or excessive materials exceed the amount per test booklet and accompanying material that is paid to the publisher contractor by the Department as part of the contract ~~with the publisher~~ for the current year.

The payment of the penalty for excessive orders is not new and does not provide a higher level of service to the public. In addition, the payment of the penalty depends on the actions of the school district, and is not triggered by a state-mandated requirement.

Accordingly, California Code of Regulations, title 5, section 864.5, as amended by Register 2005, No. 34, does not impose any new required activities.

ii) Transportation of Exams (Cal. Code Regs., tit. 5, § 865)

District test site coordinators are responsible for transporting STAR exams to test sites, as specified in section 865. The regulation was amended by Register 2005, No. 34 as follows:

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<sup>71</sup> *Kern Unified School Dist., supra*, 33 Cal. 4<sup>th</sup> 859, 880.

(a) Upon arrival of the test materials at a single location designated by each school district, the school district's ~~STAR program~~ district STAR coordinator shall provide the ~~publisher~~ contractor with a signed receipt certifying that all cartons were received.

(b) The security of the test materials that have been duly delivered to the school district is the sole responsibility of the school district until all test materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the ~~publisher~~ contractor for return to the contractor.

(c) Secure transportation within a school district is the responsibility of the school district once materials have been duly delivered to the school district. The school district is responsible for secure delivery of test materials to non-public schools to which district pupils with disabilities are assigned.

The Commission finds that the amendments to subdivisions (a) and (b) are clarifying amendments and do not impose any new required activities. In addition, there is nothing in the record to indicate that the school district providing a signed receipt to the carrier "certifying that all cartons were received" (in §865(a)) provides a higher level of service to the public than providing the publisher with "a signed receipt" as required under the prior version of section 865(a). The amendment clarifies what the receipt contains.

In addition, the following sentence was added in the Register 2005, No. 34 amendment to section 865(c): "The school district is responsible for secure delivery of test materials to non-public schools to which district pupils with disabilities are assigned." CDE received a comment on the proposed regulation requesting that nonpublic schools receive test materials directly from the contractor. CDE gave the following response in the Final Statement of Reasons:

Education Code Section 60640(b) requires each school district, charter school, and county office of education to administer to each of its pupils the tests within the STAR Program. Education Code Section 56366 states that the role of the nonpublic, nonsectarian school or agency shall be maintained and continued as an alternative special education service available to districts, special education local plan areas, county offices, and parents. The nonpublic, nonsectarian school or agency is required to provide all services specified in students' Individualized Education Programs (IEPs). School districts, charter schools, and county offices of education retain responsibility for ensuring that students enrolled in them are tested as part of the STAR Program. Additionally, California County/District/School (CDS) Codes are used for all aspects of the STAR Program including ordering materials and reporting results. Since nonpublic, nonsectarian schools or agencies are not assigned CDS codes; the Program contractor cannot work directly with the nonpublic, nonsectarian schools and agencies.<sup>72</sup>

As stated in the discussion of Education Code section 60640(g) above, Education Code section 56034 defines a nonpublic school as a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an IEP. Under federal law, every child is entitled to a free and

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<sup>72</sup> CDE, Final Statement of Reasons, Standardized Testing and Reporting (STAR) Program Regulations, September 8, 2004, page 2.

appropriate public education in the least restrictive setting that meets the child’s needs. When a child has exceptional needs that cannot be met in a public school setting, that child may be educated in a nonpublic school at public expense.<sup>73</sup> Education Code section 56365 states that the services shall be provided pursuant to state and federal law and under contract with the local educational agency, “to provide the appropriate special educational facilities, special education, or designated instruction and services required by the individual with exceptional needs if no appropriate public education program is available.” The tuition of a pupil in a nonpublic school is paid by the public local education agency that places the pupil in the nonpublic school based on the pupil’s individual needs. Education Code section 56365(b) states that “pupils enrolled in nonpublic, nonsectarian schools and agencies under this section shall be deemed enrolled in public schools . . . .”

The Commission finds that the addition of the sentence in section 865(c) stating that “the school district is responsible for secure delivery of test materials to non-public schools to which district pupils with disabilities are assigned,” is clarifying of existing law and does not impose any new requirements on school districts. Since 2002, Education Code 60640(e) has required that individuals with exceptional needs be included in the testing requirements of the STAR program.<sup>74</sup> Immediately before the adoption of the Register 2005, No. 34 regulations, school districts were required to make the “necessary” arrangements to test all eligible pupils in alternative education programs or programs conducted off campus.<sup>75</sup> The prior regulations also specified that no test may be administered in a private home or location unless it was administered by either a certified employee of the school district or an employee of a nonpublic school who holds a credential and signs a security agreement.<sup>76</sup> Thus, under prior law, public school districts were required to make arrangements “necessary” to test pupils in nonpublic schools, an alternative education program, and the tests could be administered by an employee of a nonpublic school. Making arrangements necessary to test the pupils in a nonpublic school includes securing delivery of the tests. The regulation as amended by Register 2005, No. 34 simply clarifies that the public school district, where the pupil is considered enrolled, secures the delivery of the test to the nonpublic school.

Accordingly, California Code of Regulations, title 5, section 865, as amended by Register 2005, No. 34, does not impose new requirements on school districts.

iii. School District Delivery (Cal. Code Regs., tit. 5, § 866)

Section 866 governs delivery of test materials to school districts. Section 866 was amended by Register 2005, No. 34 as follows:

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<sup>73</sup> 20 United States Code, sections 1400, et seq.; Code of Federal Regulations, title 20, section 300.146.

<sup>74</sup> Statutes 2002, chapter 492.

<sup>75</sup> Former California Code of Regulations, title 5, section 851(b), renumbered without amendment to section 851(c) by the 2005 regulations.

<sup>76</sup> Former California Code of Regulations, title 5, section 851(d), which was amended and renumbered to section 851(e) by the 2005 regulations.

(a) No school district shall receive its multiple-choice test materials more than ~~twenty-five (25)~~ twenty (20) or fewer than ten (10) ~~calendar~~ working days prior to the first day of testing in the school district. A school district that has not received multiple-choice test materials from the ~~test publisher~~ contractor at least ten (10) ~~calendar~~ working days before the first date of testing in the school district shall notify the ~~publisher~~ contractor and the Department on the tenth working day before testing is scheduled to begin that the school district has not received its materials. Deliveries of multiple-choice test materials to single school districts shall use the schedule in Section 867.

~~(b) School districts shall return all designated achievement tests and standards-based achievement tests and test materials to the publisher within five (5) working days of the last test date in the school district, including makeup testing days or six (6) days after any statutory deadline, whichever date is earlier.~~

~~(b)(e)~~ A school district and the ~~publisher~~ contractor ~~may~~ shall establish a periodic delivery ~~and retrieval~~ schedule to accommodate ~~wave test administration dates~~ test administration periods within the school district. Any schedule established must conform to Sections 866(a) and (b) for each test administration period.

(c) No school district shall receive its writing test materials more than ten (10) or fewer than five (5) working days before the day on which the writing tests are to be administered.

The amendments made to subdivisions (a) and (c) change when school districts receive the multiple choice and writing test materials, but do not impose any new required activities on school districts.

The amendment to subdivision (b), however, does impose a new requirement on school districts to establish a periodic delivery schedule with the contractor to accommodate test administration periods within the district. Before the Register 2005, No. 34 amendment, the activity was discretionary. Thus, section 866(b) imposes the following new requirement on school districts:

- Establish a periodic delivery schedule, which conforms to section 866(a) and (b), to accommodate test administration periods within the school district.

iv. Test site delivery and return (Cal. Code Regs., tit. 5, § 867)

Section 867 governs test delivery from the district to the test site and return of tests to the designated district location. The Register 2005, No. 34 amendments made the following changes:

(a) No school or other test site shall receive any multiple-choice test or related test materials more than ten (10) ~~working days~~ or fewer than five (5) working days prior to the first day of testing scheduled at the school or test site.

~~(b) Upon completion of a testing wave at a site, including makeup testing, all tests and test materials shall be returned to the school district location designated by the STAR program district coordinator.~~

(b) All multiple-choice testing materials shall be returned to the school district location designated by the district STAR coordinator no more than two (2) working days after testing is completed for each test administration period.

~~(c) Designated achievement tests and standards-based achievement tests and test materials shall not be retained at the test site for more than two (2) working days after the last day of test administration including makeup testing days or after any statutory deadline, whichever is earlier. No school or other test site shall receive any writing test materials more than six (6) or fewer than two (2) working days before the test administration date.~~

(d) Writing test materials shall be returned to the district STAR coordinator no more than one day after the day scheduled for makeup testing.

These amendments change delivery and return deadlines, but do not add any new required activities. Under prior law, school districts were required to receive tests and testing materials, and return the materials to the district STAR coordinator after testing was complete.<sup>77</sup> The change in the delivery and return deadlines does not provide a higher level of service to the public.

v. Retrieval of materials by contractor (Cal. Code Regs., tit. 5, § 867.5)

Section 867.5 requires school districts to ensure that test materials are inventoried, packaged, labeled and returned to the test contractor. The Register 2005, No. 34 amendment reduces the number of days (from six to five) after the statutory deadline for school districts to have their multiple-choice test materials returned to the contractor. The Register 2005, No. 34 amendment (in subdivision (b)) also specifies a separate, two-day timeframe for returning writing tests and test materials, as follows:

(a) The school district shall ensure that multiple-choice testing materials are inventoried, packaged, and labeled in accordance with instructions from the publisher contractor, and returned to a single school district location for pickup by the publisher contractor within five (5) working days following completion of testing in the school district and in no event later than five (5) working days after any applicable statutory deadline each test administration period. All school districts must have their multiple-choice testing materials returned to the publisher contractor no later than six (6) five (5) working days after any statutory deadline.

(b) School districts shall return all writing tests and test materials to the contractor no more than two (2) working days after the makeup day specified for the writing test.

Although the amendment changes the deadlines for returning materials, the activity of returning test materials to the contractor is the same as prior law in section 867.5(a). Thus, the Register 2005, No. 34 amendments to section 867.5 do not impose a new activity on school districts.

**7) Duties of the District STAR coordinator (Cal. Code Regs., tit. 5, § 857)**

Each school year, the superintendent of a school district is required to designate an employee of the district to act as the district STAR coordinator. The district coordinator serves as the school

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<sup>77</sup> Former California Code of Regulations, title 5, section 867(b)(c). In addition, former California Code of Regulations, title 5, section 897, governed the return procedure for the designated primary language test. Section 897 repealed in 2006 (Register 2006, No. 45.)

district representative and the liaison between the school district, the test contractor, and CDE for all matters relating to the STAR program.<sup>78</sup> The Register 2005, No. 34 regulations made substantive amendments and added new requirements to the district coordinator's responsibilities in subdivision (b) as described below.

Section 857(b)(2) was amended as follows:

Determining school district and individual school test and test material needs in conjunction with schools within the district and the test publisher contractor, using ~~California Basic Education Data System (CBEDS)~~ and current enrollment data and communicating school district test and test material needs to the publisher contractor on or before December 1.

The amendments to section 857(b)(2) do not require school districts to perform a new activity or higher level of service. Determining test material needs for schools within the district using "current enrollment data," does not provide a higher level of service to the public when compared to prior law, which required the district STAR coordinator under former section 857(b)(2), to determine the district and schools' testing needs using CBEDs data. As indicated above, CBEDs data is enrollment data and, thus, the district coordinator is performing the same function of determining testing needs based on enrollment.

Section 857(b)(3) was amended by setting deadlines when the district STAR coordinator is required to oversee the distribution of tests and test materials to the test sites. This amendment establishes deadlines, but does not impose any new required activities on school districts.

The first sentence of section 857(b)(4) was also amended to clarify that the district STAR coordinator is required to coordinate the testing and makeup days for those pupils of the district enrolled in a nonpublic school as follows:

Coordinating the testing and makeup testing days for the school district and for those pupils of the district who are enrolled in nonpublic schools within any required time periods with the school test site coordinators. Overseeing the collection of all pupil data as required to comply with Section 861.

The added language in the first sentence of subdivision (b)(4) does not impose a new requirement on school districts. Under existing law, school districts were required to administer the testing requirements of the STAR program to all pupils, including those individuals with exceptional needs.<sup>79</sup> As stated above, pupils enrolled in a nonpublic school are considered enrolled in the local educational agency that placed them. In addition, school districts were required to make all necessary arrangements to test all eligible pupils in the district, including those in alternative education programs.<sup>80</sup> The language requiring the district STAR coordinator to coordinate testing and makeup testing days for the district, including those pupils enrolled in a nonpublic school, clarifies the law, but does not impose a new requirement.

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<sup>78</sup> California Code of Regulations, title 5, section 857(a).

<sup>79</sup> Education Code section 60640(e), as amended by Statutes 2002, chapter 492.

<sup>80</sup> Former California Code of Regulations, title 5, section 851(b), renumbered without amendment to section 851(c) by the Register 2005, No. 34 regulations.

In addition, the second sentence to section 857(b)(4) was added to state the following: “Overseeing the collection of all pupil data as required to comply with Section 861.” This sentence clarifies existing law, but does not require school districts to perform a new activity. Under preexisting law, section 861 of the regulations required the “school district” to submit the pupil data required under section 861 to the publisher or contractor of the STAR exams. In addition, former section 857(c), which was removed by the 2005 amendment, required the district coordinator to certify to CDE that the district had “collected all data and information as required by Sections 861 and 862.” Thus, the amendment to section 857(b)(4) for the district coordinator to oversee pupil data collection merely clarifies who at the district level oversees data collection, but does not result in a new school district activity.

The Register 2005, No. 34 amendment to section 857(b)(5) and (b)(6) alters the district coordinator’s duties to submit the security agreement to the contractor, and to expressly include administering and providing security for the CAPA as follows:

(b) The ~~STAR program~~ district STAR coordinator's responsibilities shall include, but not be limited to, all of the following duties: [¶]...[¶]

(5) Maintaining security over the designated achievement test, ~~and~~ the standards-based achievement tests, the CAPA and test data using the procedure set forth in Section 859. The ~~STAR program~~ district STAR coordinator shall sign the security agreement set forth in Section 859 and submit it to the contractor prior to receipt of the test materials from the contractor.

(6) Overseeing the administration of the designated achievement test, and the standards-based achievement tests, and the CAPA to eligible pupils.

Submitting the security agreement to the contractor does not impose a new requirement or provide a higher level of service to the public because under former section 857(c), the district STAR coordinator was required to certify to CDE “that the school district has maintained the security and integrity of the designated achievement test and the standards-based achievement tests.” There is nothing in the record to indicate that submitting the security agreement to the contractor is a higher level of service than certifying to CDE that the district has maintained the security and integrity of the STAR tests.

As for administering and providing security for the CAPA, preexisting law, in section 853(b), states:

(b) The standards-based achievement tests and the California Alternate Performance Assessment shall be administered and returned by school districts in accordance with the manuals and other instructions provided by the contractor, and in accordance with testing variations, accommodations, and modifications specified in Section 853.5. The procedures shall include, but are not limited to, those designed to insure the uniform and standard administration of the tests to pupils, the security and integrity of the test content and test items, and the timely provision of all required student and school level information.<sup>81</sup>

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<sup>81</sup> Register 2004, No. 6, operative February 3, 2004.



Preexisting law required school districts to administer the CAPA and to “insure . . . the security and integrity of the [CAPA] test content and test items.” The test claim regulation identifies who at the district level is responsible for administration and security. Thus, the Register 2005, No. 34 amendments to section 857(b)(5) and (b)(6) regarding the CAPA administration and security, do not impose new requirements on school districts.

The Register 2005, No. 34 amendment also added section 857(b)(9), which requires for the first time the district STAR coordinator to immediately notify CDE “of any security breaches or testing irregularities in the district before, during, or after the test administration.” Under prior law (in former § 857(c)), the district superintendent and district coordinator were required to certify to CDE with respect to the CSTs and CAT/6 the following:

[T]hat the school district has maintained the security and integrity of the designated achievement test and the standards-based achievement tests; collected all data and information as required by Sections 861 and 862; returned to the test publisher all test materials, answer documents, and other materials included as part of the designated achievement test and the standards-based achievement tests in the manner and as otherwise required by the test publisher;

Thus, the activity required by section 857(b)(9) to notify CDE of security breaches or testing irregularities is a new requirement.

Section 857(b)(10) was also added by Register 2005, No. 34 to state the following: “Ensuring that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing.” This requirement is also new. Under prior law, the district site coordinator was required to determine the school district and individual school test and test material needs using current enrollment data.<sup>82</sup> The district coordinator was also required to oversee and certify the collection and return of all test materials and test data to the publisher.<sup>83</sup> But the district coordinator was not required to ensure that an answer document was submitted for scoring for each eligible pupil *enrolled* in the district on the first day of testing. Not all pupils take the STAR tests. Pupils who are enrolled on the first day of testing may be excused from the tests if a parent or guardian submits to the school a written request to excuse his or her child from any or all parts of any of the STAR tests pursuant to section 852. In addition, pupils with significant medical emergencies that preclude the pupil from taking the test or makeup test can also be excused from the STAR testing. And under former section 858(9), the test site coordinator, under existing law, was required to ensure that an answer document was submitted for each pupil *tested*. There was no requirement to submit answer documents for each pupil enrolled. Thus, the requirement imposed on the district coordinator to ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing is a new requirement.

Finally, section 857(b)(12), as added by Register 2005, No. 34 requires district STAR coordinators to train test site coordinators to oversee the test administration at each school. This

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<sup>82</sup> California Code of Regulations, title 5, section 857(b)(2), as last amended by Register 2001, No. 19.

<sup>83</sup> California Code of Regulations, title 5, section 857(b)(7), (c), as last amended by Register 2001, No. 19.

is a new requirement. Prior law did not require district STAR coordinators to perform training. Thus, the Commission finds that section 857(b)(12) constitutes a state-mandated new program or higher level of service for district STAR coordinators to train test site coordinators to oversee the test administration at each school.

Accordingly, the Register 2005, No. 34 regulations imposed the following new requirements on the school district STAR coordinator:

- Immediately notify CDE of any security breaches or testing irregularities in the district before, during, or after the test administration. (Cal. Code Regs., tit. 5, § 857(b)(9), as added by Register 2005, No. 34.)
- Ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing. (Cal. Code Regs., tit. 5, § 857(b)(10), as added by Register 2005, No. 34.)
- Train test site coordinators to oversee the test administration at each school. (Cal. Code Regs., tit. 5, § 857(b)(12), as added by Register 2005, No. 34.)

#### **8) Duties of the STAR test site coordinator (Cal. Code Regs., tit. 5, § 858)**

Under existing law, a STAR test site coordinator is designated at each school site to be available through August 15 in a calendar year for purposes of resolving discrepancies or inconsistencies in materials or errors in reports. Register 2005, No. 34 regulations that amended section 858 of the regulations added new requirements for the test site coordinator as described below.

The 2005 amendment to section 858(a) authorizes either the superintendent of the school district or the district STAR coordinator to designate a test site coordinator. Under prior law, only the school district superintendent could designate a test site coordinator. This gives the district more flexibility in appointing a STAR test site coordinator, but does not impose any new requirements on school districts.

Section 858(b)(2) was amended as follows:

Overseeing the acquisition and distribution of tests and test materials at the test site, including but not limited to, distributing test materials to test examiners on each day of testing in accordance with the contractor's directions.

The added language is a clarification of the existing requirement to distribute test materials at the test site, and does not impose a new requirement on the test site coordinator.

Section 858(b)(4) was amended to provide that the test site coordinator maintain security over the CAPA. This amendment is clarifying of existing law and does not impose a new requirement on school districts. Preexisting law required school district administration of the CAPA with “procedures . . . designed to insure . . . the security and integrity of the test content and test items.”<sup>84</sup> Thus, the Register 2005, No. 34 regulation specifies who is responsible for the test security, but does not impose new activities on the school district.

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<sup>84</sup> California Code of Regulations, title 5, section 853(b) (Register 2004, No. 6, Operative February 3, 2004).

The amendment to section 858(b)(4) also added a requirement for the test site coordinator to submit the security agreement described in section 859 to the district STAR coordinator prior to the receipt of the test materials. Under prior law, the test site coordinator was required to sign the security agreement and certify to the district coordinator that the test site has maintained security and integrity of the tests.<sup>85</sup> However, submitting the security agreement to the STAR district coordinator is a new required activity.

Section 858(b)(5) was amended as follows:

Arranging for and overseeing the administration of the designated achievement test, and the standards-based achievement tests, and the CAPA to eligible pupils at the test site.

This amendment clarifies the administration of tests, but does not require a new district activity. In addition, administering the CAPA was required under preexisting law.<sup>86</sup> Thus, the 2005 amendment to section 858(b)(5) does not impose a new requirement on school districts.

Section 858(b)(9) was added as follows: “Ensuring that an answer document is submitted for scoring for each eligible pupil enrolled in the school on the first day of testing.” Under prior law, the test site coordinator was required to ensure that one scannable answer document is submitted for each pupil *tested*. The requirement now is to ensure that an answer document is submitted for each pupil *enrolled* on the first day of testing, but do not take one of the STAR tests. As a result, the new requirement imposed on the test site coordinator by section 858(b)(9) is to ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but are excused from testing because the parent or guardian submits a written request,<sup>87</sup> or the pupil who is absent from school when the test (and any makeup test) is administered for a significant medical emergency.

The newly designated section 858(b)(10) was amended by Register 2005, No. 34 as follows:

Ensuring that for each pupil tested only one scannable answer document is submitted for scoring, except that for each pupil tested at grades ~~4 or grade 7~~, for which the contractor has designated the use of more than one answer document. ~~a~~An answer document for the STAR writing assessment administered pursuant to Section 855(c) shall be submitted in addition to the answer document for the multiple choice items.”

This amendment does not require a new district activity. Both before and after the Register 2005, No. 34 amendment, section 858 required the test site coordinator to ensure that one scannable answer document per pupil was submitted for scoring for multiple choice tests, in addition to ensuring that a writing assessment answer document was submitted for pupils taking the writing test.

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<sup>85</sup> Former California Code of Regulations, title 5, sections 858(b)(4) and 858(c).

<sup>86</sup> California Code of Regulations, title 5, section 853(b) (Register 2004, No. 6, Operative February 3, 2004).

<sup>87</sup> Education Code section 60615; California Code of Regulations, title 5, section 852.

Finally, the Register 2005, No. 34 amendments added subdivision (b)(11) and (12) to section 858 to require the test site coordinator to perform the following activities:

(11) Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859.

(12) Train all test examiners, proctors, and scribes for administering the tests.<sup>88</sup>

These activities are new and were not required under prior law.

Therefore, the Commission finds that the Register 2005, No. 34 amendments to section 858 of the title 5 regulations impose the following new requirements on the school test site coordinator:

- Submit the signed security agreement to the district STAR coordinator prior to the receipt of test materials. (Cal. Code Regs., tit. 5, § 858(b)(4), as added by Register 2005, No. 34.)
- Ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but excused from testing. (Cal. Code Regs., tit. 5, § 858(b)(9), as added by Register 2005, No. 34.)
- Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859. (Cal. Code Regs., tit. 5, § 858(b)(11), as added by Register 2005, No. 34.)
- Train all test examiners, proctors, and scribes for administering the tests. (Cal. Code Regs., tit. 5, § 858(b)(12), as added by Register 2005, No. 34.)

**9) STAR test security agreement and test security affidavit (Cal. Code Regs., tit. 5, § 859)**

Section 859 contains the STAR test security agreement that must be signed by STAR district and test site coordinators and the STAR test security affidavit, which must be signed by all test examiners, proctors, scribes, and other persons having access to the tests and test materials. The

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<sup>88</sup> California Code of Regulations, title 5, section 850(k) defines “test examiner” to mean “an employee of a school district or an employee of a nonpublic school who has been trained to administer the tests and has signed a STAR Test Security Affidavit. For the CAPA, the test examiner must be a certified or licensed school staff member.”

Section 850(l) defines a “test proctor” as “an employee of a school district, or a person assigned by a nonpublic school to implement a pupil’s IEP, who has received training designed to prepare him or her to assist the test examiner in the administration of tests within the STAR program.”

Section 850(m) defines “scribe” to mean “an employee of a school district, or a person assigned by a nonpublic school to implement a pupil’s IEP, and is required to transcribe a pupil’s responses to the format required by the test. A student’s parent or guardian is not eligible to be a scribe.”

Register 2005, No. 34 amendment to section 859 added language in section 859(a) as follows: “All STAR ~~program~~ district and site coordinators (coordinators) shall sign the STAR Test Security Agreement set forth in Subdivision (b) before receiving any STAR Program tests or test materials.” The language requiring the signature of the agreement “before receiving any STAR program or tests or test materials” clarifies the timing of the signature, but does not impose any new required activities on school districts.

The remaining amendments to subdivision (b) modify the terms of the STAR test security agreement required to be signed by the district and test site coordinators. Pursuant to section 859(b), the agreement now specifies that the coordinator acknowledges by signature that the CAPA is a secure test. The amendments to the agreement further provide that the coordinator is required to deliver the tests and test materials to only those persons who have executed a STAR test security affidavit, to keep the CAPA materials in a secure locked location when not being used, and to adhere to the contractor’s directions for the distribution of the assessment materials to examiners. The agreement further prohibits coordinators from disclosing the contents of the tests or from reviewing any test items with any other person before, during, or after the test administration.

These amendments do not impose any new required activities. Although the form of the agreement has changed, no new activities are required to be performed by school districts. The updated form is readily available for download on the STAR website – a website for district STAR coordinators developed and maintained by Educational Testing Service (ETS) under contract with CDE.<sup>89</sup> In addition, signing the agreement is not new and the new provisions of the agreement are already required by prior law. As discussed above, administering and providing security for the CAPA was required under preexisting law.<sup>90</sup> Moreover, under preexisting law,<sup>91</sup> all STAR tests were required to be treated securely and kept in a secure locked location, including the CAPA.<sup>92</sup> The preexisting STAR test security affidavit also required the STAR test, including the CAPA, to be administered in accordance with the contractor’s directions.<sup>93</sup> In addition, the language prohibiting the coordinator from disclosing the contents of the test is not new. It was moved from the provisions of the STAR test security affidavit in section 859(d)(6). Thus, the amendments to sections 859(a) and (b) do impose any new requirements on school districts.

Sections 859(c) and (d) address the provisions of the STAR test security affidavit, which is signed by all persons having access to the tests and test materials. Subdivision (c) was amended

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<sup>89</sup> See, STAR security agreement at: <[http://www.startest.org/pdfs/STAR.Security\\_Coord\\_Form.2014.pdf](http://www.startest.org/pdfs/STAR.Security_Coord_Form.2014.pdf)> as of November 15, 2013.

<sup>90</sup> California Code of Regulations, title 5, section 853(b) (Register 2004, No. 6, operative Feb. 3, 2004).

<sup>91</sup> California Code of Regulations, title 5, section 859(b)(3) (Register 2004, No. 6, operative Feb. 3, 2004).

<sup>92</sup> Pupils with exceptional needs have long been required to be included in the testing since the CAPA was first administered in 2003 (Ed. Code, §60640(e), as added by Stats. 2002, ch. 492).

<sup>93</sup> California Code of Regulations, title 5, sections 853(b) and 859(d)(9).

to clarify that “all persons having access” to the tests and test materials “include test examiners, proctors, and scribes” are required to sign the affidavit. This amendment is clarifying of existing law and does not impose new requirements on school districts. All persons having access to the tests and the test materials were required by prior law to sign the security affidavit. In addition, the Register 2005, No. 34 amendment to the affidavit form, which now provides that the person has “been trained to administer the tests,” does not impose a new activity or higher level of service. The requirement to provide the training is addressed in sections 851(e) and 858(b)(12), both of which are analyzed above, and the updated affidavit security form is readily available for download on the STAR website.<sup>94</sup> Thus, the amendments do not require school districts to perform any new activities.

Accordingly, the Commission finds that the Register 2005, No. 34 amendments to section 859 do not impose any new state-mandated requirements on school districts.

#### **10) Reporting data to the contractor for purposes of the reporting required by the API (Cal. Code Regs., tit. 5, § 861)**

Section 861 of the title 5 regulations was originally adopted in 1998 to require each school district to report specified information “for each pupil tested” to the test contractor for “purposes of reporting required by the Academic Performance Index of the Public Schools Accountability Act.” Register 2005, No. 34 amended section 861(a) to require school districts to provide the contractor with the information for each pupil “enrolled on the first day the tests are administered,” instead of “for each pupil tested.” As a result, school districts are now required to provide data for pupils excused from testing whose parents or guardians submit a written request,<sup>95</sup> as well as pupils who are absent from school when the test (and any makeup test) is administered for a significant medical emergency. The requirement to provide *all* information specified in section 861(a) for those pupils enrolled on the first day the tests are administered, who do not in fact take a STAR test, is a new requirement imposed on school districts.

The Register 2005, No. 34 regulations also added the following new information to be provided to the contractor, and the requirement to provide this new information for each pupil tested constitutes a new requirement imposed on school districts:

- The pupil’s full name
- Date of English proficiency reclassification
- If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient
- California School Information Services (CSIS) Student Number once assigned
- For English learners, length of time in California public schools and in school in the United States
- Participation in the National School Lunch Program

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<sup>94</sup> STAR Security Affidavit at: <[http://www.startest.org/pdfs/STAR.Security\\_Admin\\_Form.2014.pdf](http://www.startest.org/pdfs/STAR.Security_Admin_Form.2014.pdf)> as of November 15, 2013.

<sup>95</sup> Education Code section 60615; California Code of Regulations, title 5, section 852.

- County and district of residence for pupils with IEPs
- Special testing conditions and/or reasons for not being tested<sup>96</sup>

According to the Notice of Proposed Rulemaking for the Register 2005, No. 34 regulations, the purpose of the requirement to collect additional pupil data was “to expand the student demographic data collected to meet the requirements for federal and state reporting.”<sup>97</sup>

In addition, the Register 2005, No. 34 regulations added a new subdivision (b) to state the following: “In addition to the demographic data required to be reported in Section 861(a), school districts may report if a pupil in grades 2 through 11 is not tested due to a significant medical emergency.” A “significant medical emergency” is defined in section 850 as a significant accident, trauma, or illness (mental or physical) that precludes a pupil in grades 2 through 11 from taking the STAR tests. An accident, trauma, or illness is significant if it is determined by a licensed physician to preclude a pupil from participating in the tests. The reason for this amendment was stated by CDE as follows:

The grade two through eight California Standards Tests (CSTs) within the STAR Program are used for federal accountability purposes under the No Child Left Behind (NCLB) Act. Beginning in the 2004-05 school year federal guidelines state that “States do not have to include a student with a significant medical emergency in the participation rate calculation.” The proposed additional amendments would add the definition for significant medical emergency as Section 850(r) and would include significant medical emergency under Section 861(b) as data that may be provided by each school district to the test contractor for each pupil in grades two through eight who is not tested due to a significant medical emergency.<sup>98</sup>

Because the plain language of the regulation authorizes school districts to report if a pupil is not tested due to a significant medical emergency, the Commission finds that section 861(b) (Register 2005, No. 34) does not impose a new requirement on school districts.<sup>99</sup>

Former section 861(c) was renumbered to subdivision (d) and amended by Register 2005, No. 34 to require school districts to provide the same information identified in subdivision (a) for each pupil placed in a nonpublic school. This amendment is clarifying of existing law, and does not impose a new requirement on school districts. As previously indicated, pupils placed in nonpublic schools are considered enrolled in the public school district. Since 2002, Education Code 60640(e) has required that individuals with exceptional needs be included in the testing requirements of the STAR program.<sup>100</sup> Immediately before the adoption of Register 2005,

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<sup>96</sup> California Code of Regulations, title 5, section 861(a)(1)(6)(7)(10)(13)(14)(17)(18).

<sup>97</sup> CDE, Notice of Proposed Rulemaking, Standardized Testing and Reporting (STAR) Program, July 23, 2004, page 2.

<sup>98</sup> CDE, Last Minute Memorandum, Standardized Testing and Reporting (STAR) Program: Adopt Amendments to Title 5 Regulations, September 8, 2004, page 1.

<sup>99</sup> Education Code section 75: “‘Shall’ is mandatory and ‘may’ is permissive.”

<sup>100</sup> Statutes 2002, chapter 492.

No. 34, school districts were required to make the “necessary” arrangements to test all eligible pupils in alternative education programs or programs conducted off campus.<sup>101</sup> The prior regulations also specified that no test may be administered in a private home or location unless it was administered by either a certified employee of the school district or an employee of a nonpublic school who holds a credential and signs a security agreement.<sup>102</sup> Section 861 of the regulations required each school district to provide the contractor with the information specified in subdivision (a) for each pupil tested, including those enrolled in “alternative or off campus” programs. Thus, the amendment to section 861(d) does not impose any new required activities on school districts.

Finally, the following language was added by Register 2005, No. 34 to section 861(e):

If the information required by Section 861(a) is incorrect, the school district may enter into a separate agreement with the contractor to have the district’s student data file corrected. The district STAR coordinator shall provide the correct information to the contractor within the contractor’s timeline. Any costs for correcting the student data shall be the district’s responsibility.

The Commission finds that section 861(d) does not impose any required activities on school districts. If a school district mistakenly provides incorrect information to the contractor, the plain language of the regulation authorizes the district to enter into an agreement with the contractor to have a pupil’s data file corrected at the district’s expense. Thus, it is the district’s mistake that triggers any additional costs incurred to correct the mistake.

Accordingly, the Commission finds that section 861 of the title 5 regulations, as amended by Register 2005, No. 34, imposes the following new requirements on school districts to:

- Provide *all* information specified in section 861(a) for those pupils enrolled on the first day the tests are administered and who do not in fact take a STAR test.
- Provide the following new information to the contractor for each pupil tested:
  - The pupil’s full name;
  - Date of English proficiency reclassification;
  - If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient;
  - California School Information Services (CSIS) Student Number once assigned;
  - For English learners, length of time in California public schools and in school in the United States;
  - Participation in the National School Lunch Program;
  - County and district of residence for pupils with IEPs;

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<sup>101</sup> Former California Code of Regulations, title 5, section 851(b), renumbered without amendment to section 851(c) by the 2005 regulations.

<sup>102</sup> Former California Code of Regulations, title 5, section 851(d), which was amended and renumbered to section 851(e) by the 2005 regulations.



- Special testing conditions and/or reasons for not being tested.

### **11) Apportionment Information Report (Cal. Code Regs., tit. 5, § 862)**

Since 2003, Education Code section 60640 has provided that the Superintendent shall apportion funds to school districts to meet the requirements of the STAR program. As a condition of receiving the apportionment payment, Education Code section 60640(j) requires school districts to report to the Superintendent the following information: (1) the number of pupils enrolled in the school district in grades 2 to 11; (2) the number of pupils to whom an achievement test was administered in grades 2 to 11; and (3) the number of pupils who were exempted from the test at the request of their parents or guardians. The amount of funding to be apportioned is governed by section 870 and is determined by the certification of the school district superintendent pursuant to section 862.

Before the enactment of the Register 2005, No. 34 regulations, section 862 required each school district to report specified information to CDE in order to receive the apportionment payment. Register 2005, No. 34 amended section 862 to specify that CDE provides the information to the district, thus eliminating the duty of the district to report to the state. The SBE Agenda Report to adopt the Register 2005, No. 34 amendment to the STAR program regulations states the background for this amendment as follows:

Based on current technology, the Department is now able to produce Apportionment Information Reports for district superintendents to certify. This process results in more accurate reports and a workload reduction for districts.

Therefore receiving this information, instead of reporting the information, constitutes a reduction in the activities required of school districts.

Section 862(c) was then added to state in relevant part the following:

To be eligible for apportionment payment school districts must meet the following conditions:

- (1) The school district has returned all secure test materials, and
- (2) The superintendent of each school district has certified the accuracy of the apportionment information report for examinations administered during the calendar year . . . .

Section 862(c) as amended by Register 2005, No. 34 does not impose any new requirements on school districts. The pre-2005 version of section 857(c) required the STAR district coordinator to return test materials to the publisher. In addition, the district superintendent was required by the pre-2005 version of section 862(b)(1) to certify the accuracy of the apportionment information report.

### **12) Student Reports and Record Labels (Cal. Code Regs, tit. 5, § 863)**

Section 863 requires school districts to forward the STAR student report of the pupil test results to each parent or guardian within 20 days of receiving the reports from the test contractor.

Section 863(b) was amended by Register 2005, No. 34 to require school districts to forward the standards-based tests or CAPA results to the pupil's parent or guardian if they are received by the school after the last day of instruction. This provision does not impose any new requirements

on school districts. Under prior law, section 863(a) (Register 99, No. 4) and Education Code section 60641<sup>103</sup> required reporting individual results of each pupil test administered to the pupil's parent or guardian.

Section 863(c) was added by Register 2005, No. 34 to provide the following:

Schools are responsible for affixing cumulative record labels reporting each pupil's scores to the pupil's permanent school records or for entering the scores into electronic pupil records, and for forwarding the results to schools to which pupils matriculate or transfer. Schools may annotate the scores when the scores may not accurately reflect pupils' achievement due to illness or testing irregularities.

Section 863(c) does not impose any new requirements on school districts. Since 1997, preexisting law has required schools to "include the pupil's test results in his or her pupil records."<sup>104</sup> In addition, since 1997, Education Code section 60607(a) has required each pupil to have an individual record of accomplishment by the end of grade 12 that includes the results of the achievement test required and administered annually as part of the STAR Program.<sup>105</sup> The Notice of Proposed Rulemaking for the amendment to section 863 of the regulations indicates that its purpose is "to clarify requirements related to including test results in pupils' permanent records as required by *Education Code* Section 60607."<sup>106</sup> Preexisting law also requires school districts to forward pupil records, upon request, to schools to which the pupil transfers.<sup>107</sup>

### **13) Discrepancy resolution (Cal. Code Regs., tit. 5, § 868)**

Section 868 was originally adopted in 1998 to require school districts to process discrepancies determined by the publisher or contractor of the tests upon receipt of returned tests and test materials.

The Register 2005, No. 34 amendments to section 868 made non-substantive changes to the language (e.g., changing "designated publisher" to "contractor" and "STAR program district coordinator" to "district STAR coordinator"), which do not impose any new requirements on school districts.

In addition, subdivision (c) was amended to specify that the test site coordinator is required to report to the district coordinator any discrepancy in a shipment of CAPA materials received and to require the district coordinator to remedy the discrepancy as follows.

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<sup>103</sup> See former Education Code section 60641 (b) (Stats. 1997, ch. 828).

<sup>104</sup> Education Code section 60641(a)(3) (added by Stats. 1997, ch. 828).

<sup>105</sup> Education Code section 60607(a) (Stats. 1997, ch. 828).

<sup>106</sup> SBE, "Standardized Testing and Reporting (STAR) Program; Approve Commencement of the Rulemaking Process for the Proposed Amendments to Title 5 Code of Regulations" Agenda Item #8, Notice of Proposed Rulemaking, July 2004, Attachment 2, page 2. The regulations were adopted and became operative on September 21, 2005 (Register 2005, No.34).

<sup>107</sup> Education Code section 49068.

Any discrepancy in a shipment of designated achievement tests or test materials, or standards-based achievement tests or test materials, or CAPA materials received by a test site from the ~~STAR program~~ district STAR coordinator shall be reported to the ~~STAR program~~ district STAR coordinator immediately but no later than two (2) working days of the receipt of the shipment at the testing site. The ~~STAR program~~ district STAR coordinator shall remedy the discrepancy within two (2) working days.

The Commission finds that the Register 2005, No. 34 amendment to subdivision (c) is clarifying of existing law and does not impose any new requirements on school districts. Since 2003, individuals with exceptional needs have been required to be included in the testing requirements of the STAR program.<sup>108</sup> The CAPA, the alternate assessment developed for pupils with exceptional needs, was developed and first administered in 2003.<sup>109</sup> The title 5 regulations in effect immediately before the enactment of the Register 2005, No. 34 amendments required that the CAPA be administered and returned by school districts in accordance with the manuals and other instructions provided by the contractor.<sup>110</sup> The existing regulations also required the district STAR coordinator to serve as the school district representative and the liaison between the school district and the publisher or contractor “for all matters related to the STAR program.”<sup>111</sup> In this respect, the district coordinator had the duty to respond to correspondence and inquiries from the publisher or contractor, the duty to oversee the collection and return of all test data and materials to the publisher or contractor, and the duty to assist the publisher and CDE in the resolution of any discrepancies in the test information and materials.<sup>112</sup> In addition, the STAR test site coordinator had the existing duty to be available to the district coordinator for purposes of resolving discrepancies or inconsistencies in materials or errors in reports.<sup>113</sup> The test site coordinator was also responsible for overseeing the collection and return “of all testing materials” to the district coordinator and assisting the district coordinator and the Department in the resolution of any discrepancies in the test information and materials.<sup>114</sup> Therefore, the Register 2005, No. 34 clarification of language to specifically identify the CAPA in section 868 does not impose new requirements on school districts.

**e) Summary of new required activities imposed by the test claim statute and regulations**

Based on the discussion above, the Commission finds that the following activities are newly required of school districts:

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<sup>108</sup> Education Code section 60640(e), as added by Statutes 2002, chapter 492.

<sup>109</sup> CDE memorandum titled “State Board of Education-Adopted CAPA Performance Level,” February 2009.

<sup>110</sup> California Code of Regulations, title 5, section 853(b).

<sup>111</sup> California Code of Regulations, title 5, section 857(a).

<sup>112</sup> California Code of Regulations, title 5, section 857(b).

<sup>113</sup> California Code of Regulations, title 5, section 858(a).

<sup>114</sup> California Code of Regulations, title 5, section 858(b)(6)(7)(8).

- Beginning July 1, 2004, administer the primary language test to pupils of limited English proficiency enrolled for less than 12 months in a *nonpublic* school in grades 2 to 11. Beginning October 7, 2005, school districts are required to administer the primary language test to those pupils in nonpublic schools in grades 3 to 11, instead of grades 2 to 11. (Ed. Code, § 60640(g), as amended by Stats. 2004, ch. 233.)
- Effective September 21, 2005, district STAR coordinators are required to
  - Immediately notify CDE of any security breaches or testing irregularities in the district before, during, or after the test administration. (Cal. Code Regs., tit. 5, § 857(b)(9); Register 2005, No. 34.)
  - Ensure that an answer document is submitted for scoring for each eligible pupil enrolled in the district on the first day of testing. (Cal. Code Regs., tit. 5, § 857(b)(10), as added by Register 2005, No. 34.)
  - Train test site coordinators to oversee the test administration at each school. (Cal. Code Regs., tit. 5, § 857(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, the STAR test site coordinators are required to
  - Submit the signed security agreement to the district STAR coordinator prior to the receipt of test materials. (Cal. Code Regs., tit. 5, § 858(b)(4); Register 2005, No. 34.)
  - Ensure that an answer document is submitted for scoring for those pupils enrolled on the first day of testing, but excused from testing. (Cal. Code Regs., tit. 5, § 858(b)(9), as added by Register 2005, No. 34.)
  - Immediately notify the district STAR coordinator of any security breaches or testing irregularities that occur in the administration of the designated achievement test, the standards-based achievement tests, or the CAPA that violate the terms of the STAR Security Affidavit in Section 859. (Cal. Code Regs., tit. 5, § 858(b)(11); Register 2005, No. 34.)
  - Train all test examiners, proctors, and scribes to administer the tests. (Cal. Code Regs., tit. 5, §§ 851(e) and 858(b)(12); Register 2005, No. 34.)
- Effective September 21, 2005, provide *all* information specified in section 861(a) to the contractor for those pupils enrolled on the first day the tests are administered and who do not take a STAR test. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, provide the following new information to the contractor for each pupil tested:
  - The pupil's full name;
  - Date of English proficiency reclassification;
  - If R-FEP pupil scored proficient or above on the California English-language arts test three (3) times since reclassification to English proficient;
  - California School Information Services (CSIS) Student Number once assigned;

- For English learners, length of time in California public schools and in school in the United States;
  - Participation in the National School Lunch Program;
  - County and district of residence for pupils with IEPs;
  - Special testing conditions and/or reasons for not being tested. (Cal. Code Regs., tit. 5, § 861(a); Register 2005, No. 34.)
- Effective September 21, 2005, establish a periodic delivery schedule, which conforms to section 866(a) and (b), to accommodate test administration periods within the school district. (Cal. Code Regs., tit. 5, § 866(b); Register 2005, No. 34.)

The Department of Finance argues that these requirements do not impose state-mandated costs within the meaning of article XIII B, section 6, because the activities were enacted to implement the testing requirements of federal law, through the No Child Left Behind Act. The Commission does not need to reach the federal law issue, however. As described below, the Commission finds that the state has appropriated state and federal funds sufficient to pay for the costs of the new required activities and, thus, there are no costs mandated by the state.

**2. The State Has Appropriated State and Federal Funds For the STAR Program That are Sufficient to Pay for the Costs of the New Required Activities and, Thus, Pursuant to Government Code Section 17556(e), There are no Costs Mandated by the State.**

Government code section 17514 defines “costs mandated by the state” as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. All claimants allege increased costs to comply with the STAR program based on the statutes and regulations pled in their claims, and have also acknowledged the receipt of state and federal funds appropriated for the program.<sup>115</sup> These declarations do not provide any specific information regarding the new required activities described above, or acknowledge the state and federal funding actually received during the potential period of reimbursement beginning July 1, 2004 (based on the filing dates of the 2005 test claims and the first required activity effective on July 1, 2004).

Government Code section 17556(e) provides that the Commission shall not find costs mandated by the state if:

The statute, executive order, or an appropriation in a Budget Act or other bill 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

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<sup>115</sup> SDUSD’s test claim states it incurred costs of \$550,000 to implement the test claim statutes during 2004-2005 and estimates costs of \$550,000 in 2005-2006 and beyond. (Test claim 05-TC-02, p. 15.) GJUHSD’s test claim alleges that the test claim statutes and regulations cost approximately \$110,000 to initially implement and \$125,000 in fiscal year 2005-2006 and beyond. (Test claim 05-TC-03, p. 18.) TRUSD claims it will incur approximately \$300,000 in all costs claimed in fiscal year 2008-2009 and \$325,000 thereafter. (Test claim 08-TC-06, p. 21.)

that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

For the reasons below, the Commission finds that school districts have received state and federal funds specifically intended to pay for the cost of the required activities in an amount sufficient to fund the cost of the activities for all years within the eligible period of reimbursement for this consolidated claim, beginning July 1, 2004 (the effective date of the first required activity). Therefore, Government Code section 17556(e) applies to deny these test claims. Education Code section 60640(h) requires the SPI to apportion funds to school districts to administer the STAR program for each test administered to pupils.<sup>116</sup> Since 2004, significant amounts of state and federal funding have been appropriated to school districts as reflected in the chart below. The plain language of the Budget Acts appropriating the funds require that the appropriation “shall first be used” to offset costs that may be claimed through the state mandates reimbursement process for the STAR program. In addition, federal funds appropriated for the STAR program in Line Item 6110-113-0890 shall be fully expended before the funding provided by the state in Line Item 6110-113-0001 is expended for the same purposes.<sup>117</sup>

<b><u>Fiscal Year</u></b>	<b>State Funding Appropriation for Local Assistance for STAR <u>(Item 6110-113-0001)</u></b>	<b>Federal Funding Appropriation for Local Assistance for STAR <u>(Item 6110-113-0890)</u></b>
2012-2013	\$58,903,000	\$6,381,000 <sup>118</sup>
2011-2012	\$51,279,000	\$12,458,000 <sup>119</sup>
2010-2011	\$49,042,000	\$11,365,000 <sup>120</sup>

<sup>116</sup> See Education Code section 60640 (Stats. 1997, ch. 828).

<sup>117</sup> Items 6110-113-0001 and 6110-113-0890 in Statutes 2012, chapters 21 and 29; Statutes 2011, chapter 33; Statutes 2010, chapter 712; Statutes 2009, chapter 1 (4<sup>th</sup> Ex. Sess.); Statutes 2008, chapters 268 and 269; Statutes 2007, chapters 171 and 172; Statutes 2006, chapters 47 and 48; Statutes 2007, chapters 171 and 172; Statutes 2006, chapters 47 and 48; Statutes 2005, chapters 38 and 39; Statutes 2004, chapter 208. All Budget Acts contain language that says “funds provided in Schedules ...[appropriating the STAR funds] shall first be used to offset any state-mandated reimbursable costs that otherwise may be claimed through the state mandates reimbursement process for the Standardized Testing and Reporting Program ...”

<sup>118</sup> Federal funds appropriated “are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2012, chs. 21 and 29, Item 6110-113-0890, Provision 1.)

<sup>119</sup> Federal funds appropriated “are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2011, ch. 33, Item 6110-113-0890, Provision 1.)

2009-2010	\$50,059,000	\$5,433,000 <sup>121</sup>
2008-2009	\$62,127,000	\$6,065,000 <sup>122</sup>
2007-2008	\$62,124,000	\$8,715,000 <sup>123</sup>
2006-2007	\$65,433,000	\$8,565,000 <sup>124</sup>
2005-2006	\$63,946,000	\$2,180,000 <sup>125</sup>
2004-2005	\$53,836,000	\$8,549,000 <sup>126</sup>

<sup>120</sup> Federal funds appropriated “are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2010, ch. 712, Item 6110-113-0890, Provision 2.)

<sup>121</sup> Federal funds appropriated “are provided for approved contract costs for the development and administration of the California Standards Tests, the Standards-Based Tests in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA) and the Designated Primary Language Test, as part of the STAR program. (Stats. 2009, ch. 1, 4<sup>th</sup> Ex. Sess., Item 6110-113-0890, Provision 2.)

<sup>122</sup> Federal funds appropriated “are provided for approved contract and district apportionment costs for the development and administration of the California Standards Tests, the national Norm-Referenced Test, the Standards-Based Test in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA), and the Designated Primary Language Test, as part of the STAR program. District apportionments for the CAPA shall be \$5 per pupil.” (Stats. 2008, chs. 268 and 269, Item 6110-113-0890, Provision 2.)

<sup>123</sup> Federal funds appropriated “are provided for approved contract and district apportionment costs for the development and administration of the California Standards Tests, the national Norm-Referenced Test, the Standards-Based Test in Spanish, the California Modified Assessment, the California Alternate Performance Assessment (CAPA), and the Designated Primary Language Test, as part of the STAR program. District apportionments for the CAPA shall be \$5 per pupil.” (Stats. 2007, chs. 171 and 172, Item 6110-113-0890, Provision 2.)

<sup>124</sup> Federal funds appropriated “are provided for approved contract and district apportionment costs for the development and administration of the California Standards Test, the national Norm-Referenced Test, the Standards-Based Test in Spanish, the California Modified Assessment, the California Alternate Performance Assessment, and the Designated Primary Language test, as part of the STAR program. District apportionments for the California Alternate Performance Assessment shall be \$5 per pupil.” (Stats. 2006, chs. 47 and 48, Item 6110-113-0890, Provision 2.)

<sup>125</sup> Federal funds appropriated “are provided for approved contract and district apportionment costs related to the Standardized Testing and Reporting Program. Of this amount, \$1.334 million is for the planning and development of science tests.” (Stats. 2005, chs. 38 and 39, Item 6110-113-0890, Provision 2.)

<sup>126</sup> Federal funds appropriated “are provided for approved contract and district apportionment costs related to the Standardized Testing and Reporting program. Of this amount, 1.4 million is for the planning and development of science tests and \$650,000 is for reporting Adequate Yearly

Pursuant to section 870(a) of the title 5 regulations, the amount of funding to be apportioned to the school district is established by SBE based on the number of tests administered to eligible pupils in grades 2 to 11 and the number of answer documents returned with only demographic information for pupils enrolled on the first day of testing who were not tested in the school district. The number of tests administered and the number of demographic answer documents is determined by the certification of the school district superintendent pursuant to section 862 of the title 5 regulations. In 2004, CDE issued an Information Memorandum to the SBE, which describes the apportionments to school districts that year as follows:

The apportionment amounts presented for 2004 are unchanged from last year for the Content Standards Test (CST) and California Achievement Test, Sixth Edition (CAT/6) Survey. The Spanish Assessment of Basic Edition, Second Edition (SABE/2) apportionment for grades 2 and 3 is being decreased by \$0.24 to reflect changes in the pre-ID costs for SABE/2. Including a California Alternative Performance Assessment (CAPA) apportionment in the STAR Program is new and reflects the addition of this assessment to the Program. The current budget includes funds to pay these apportionments.

The amounts recommended for the 2004 STAR district apportionments are:

- \$0.32 for completing demographic information for students not tested with the California Standards Tests and the CAT/6 Survey
- \$2.52 [per test for completing demographic information and administering the California Standards Tests and CAT/6 Survey
- \$2.44 for administering the SABE/2
- \$5.00 for administering the CAPA<sup>127</sup>

In a May 6, 2011 letter to school districts, SBE increased apportionments to districts for each test as follows:

The State Board of Education (SBE) has approved the 2011 STAR apportionment amounts as follows:

- \$0.38 for the completion of demographic information for each student not tested with the CSTs, the CMA, the STS, or the CAPA.
- \$2.52 per student for the completion of demographic information and administration of the CSTs, the CMA, or a combination thereof.
- \$2.52 per student for the completion of demographic information and administration of the STS to Spanish-speaking English learners.
- \$5.00 per student for the completion of demographic information and administration of the CAPA.

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Program pursuant to the No Child Left Behind Act of 2001 (P.L. 107-110.)” (Stats. 2004, ch. 208, Item 6110-113-0890, Provision 2.)

<sup>127</sup> CDE Information Memorandum to the SBE, dated January 29, 2004.



The STAR apportionment funds are unrestricted funds to reimburse school districts and charter schools for costs associated with the STAR Program that are above and beyond the CDE contract with its test contractor. The CDE contract covers the costs of all required STAR Program testing materials, the scoring of answer documents, and the production of reports. Costs associated with optional materials or services (such as the purchase of additional score reports, etc.) are the responsibility of the school district or charter school.<sup>128</sup>

The allocation formula is the same for fiscal year 2012-2013, which CDE lists on its website as:

STAR: \$2.52 per student tested in grades two through eleven with the California Standards Tests (CSTs), California Modified Assessment (CMA), or a combination thereof; \$5.00 per student tested with the California Alternate Performance Assessment (CAPA); \$2.52 per student tested in grades two through eleven with the Standards-based Tests in Spanish (STS); \$0.38 per student not tested with the CST, CMA, STS, or CAPA for whom only demographic data were submitted.<sup>129</sup>

For purposes of the apportionment, the activities and costs covered by the state's funding are defined in section 870 of the regulations to include the following:

- All staffing costs, including the costs incurred by the district coordinator and the test site coordinator, staff training, and other staff expenses related to testing.
- All expenses incurred at the school district and test site level related to testing.
- All transportation costs of delivering and retrieving tests and test materials within the school district.
- All costs associated with mailing the parent reports.
- All costs associated with pre-identification of answer sheets and consumable test booklets, and other activities intended to provide the complete and accurate data required by section 861 of the regulations.

The Commission finds that the itemization of activities and costs identified in section 870 of the regulations and covered by the appropriation includes the costs incurred to comply with the new requirements imposed by the test claim statute and regulations. Thus, the funding is specifically intended to cover the cost of the new required activities within the meaning of Government Code section 17556(e).

The Commission further finds, based on the record, that the appropriations have been sufficient to pay the costs of the new required activities. As indicated above, all claimants allege increased costs and acknowledge state and federal funding for the program. However, their filings do not address the new required activities and do not contain evidence to support their allegation of

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<sup>128</sup> CDE, 2011 Standardized Testing and Reporting Program Apportionment Information, May 6, 2011. Emphasis added.

<sup>129</sup> CDE, "Assessment Apportionments for STAR, CELDT and CAHSEE" last modified August 13, 2012.

actual increased costs mandated by the state to perform these activities. As indicated by the court in *County of Sonoma v. Commission on State Mandates*, a showing of actual increased costs is required.

Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in *increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with "costs" incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas. "*No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes.*" [Citation omitted]. (Emphasis added.)<sup>130</sup>

In this case, the narrative of the test claims filed on behalf of TRUSD and GJUHS D provide more detail on the allegation of costs. These test claims contain a chart alleging that the annual cost per pupil to administer the STAR program is \$12.08, a dollar figure above the amounts approved by SBE and apportioned to the districts on a per-test (between \$2.52 and \$5.00 per test) and per-pupil basis (between \$0.32 and \$0.38 per pupil enrolled who did not take the test, but provided demographic answer documents).<sup>131</sup> The claimants do not identify where the data comes from, and the allegation is not supported by evidence. Pursuant to Government Code section 17559 and sections 1183.03 and 1187.5 of the Commission's regulations, substantial evidence in the record is required to support a finding of costs mandated by the state. If assertions or representations of fact are made in a test claim, they must be supported by documentary evidence, authenticated by declarations signed under penalty of perjury or through testimony under oath or affirmation. Hearsay evidence may supplement or explain other evidence, but shall not be sufficient itself to support a finding. Thus, the narrative in the chart is simply an allegation and does not constitute evidence of costs. Moreover, even if the chart were supported by evidence, the chart is based on data for fiscal years 1997-1998 through 2003-2004, fiscal years *outside* the potential period of reimbursement for this consolidated claim. The effective date of the first required activity begins July 1, 2004, and the effective date for the remaining activities is September 21, 2005. Thus, there is no evidence showing that school districts incurred increased costs to comply with the new required activities beyond the state and federal funds received, which by law must first be applied to "any state-mandated reimbursable costs that otherwise may be claimed through the state mandates reimbursement process for the Standardized Testing and Reporting Program."

The cost issue in this case is similar to what occurred in the *Kern High School District* case,<sup>132</sup> which addressed a statutory requirement for school site councils to comply with modified open meeting act requirements, including posting a notice and an agenda of their meetings. School

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<sup>130</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284.

<sup>131</sup> Test Claim 08-TC-06, page 22; Test Claim 05-TC-03, page 19.

<sup>132</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 746-747.

site councils were created by several state and federal programs that included funding for “reasonable district administrative expenses.”<sup>133</sup> Based on the statutory schemes that created the school site councils, the court noted that the program funding available for the programs was often substantial – “for example, on a statewide basis, funding provided by the state for school improvement programs [citations omitted] for the 1998-1999 fiscal year totaled approximately \$394 million. (Cal. Dept. of Ed., Rep., Budget Act of 1998 (Nov. 1998) p. 52.)”<sup>134</sup> In addition, the statutes allowed school districts to use the program funding for “administrative expenses,” but did not establish a priority use of the funds. Despite the allegations by the claimant of increased costs mandated by the state, the court still denied the claim as follows:

Even if we assume for purposes of analysis that claimants have been legally compelled to participate in the Chacon-Moscone Bilingual-Bicultural Education program, we nevertheless conclude that under the circumstances here presented, the costs necessarily incurred in complying with the notice and agenda requirements under that funded program do not entitle claimants to obtain reimbursement under article XIII B, section 6, because the state, in providing program funds to claimants, already has provided funds that may be used to cover the necessary notice and agenda related expenses.

We note that, based upon the evaluations made by the Commission, the costs associated with the notice and agenda requirements at issue in this case appear rather modest.

FN 16 Costs of compliance with the notice and agenda requirements have been estimated as amounting to approximately \$90 per meeting for the 1994-1995 fiscal year, and incrementally larger amounts in subsequent years, up to \$106 per meeting for the 2000-2001 fiscal year, for each committee or advisory council. . . . Under these formulae, a district that has 10 schools, each with one council or advisory committee that meets 10 times a year, would be forced to incur approximately \$9,000 to \$10,000 in costs to comply with statutory notice and agenda requirements. Presumably, such costs are minimal relative to the funds allocated by the state to the school districts under these programs. . . .

And, even more significantly, we have found nothing to suggest that a school district is precluded from using a portion of the funds obtained from the state for the implementation of the underlying funded program to pay the associated notice and agenda costs. Indeed, the Chacon-Moscone Bilingual-Bicultural Education program explicitly authorizes school districts to do so. (See Ed. Code, § 52168, subd. (b) [“School districts may claim funds appropriated for purposes of this article for expenditures in, but not limited to, the following categories: [¶] ... [¶] (6) Reasonable district administrative expenses. ...”].) We believe it is plain that the

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<sup>133</sup> *Id.* at page 747.

<sup>134</sup> *Id.* at page 732.

costs of complying with program-related notice and agenda requirements qualify as “[r]easonable district administrative expenses.”<sup>135</sup>

Accordingly, the Commission finds that school districts have not incurred increased costs mandated by the state pursuant to Government Code section 17556(e).

## **V. CONCLUSION**

For the foregoing reasons, the Commission finds that the test claim statutes and regulations do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6, of the California Constitution and Government Code sections 17514. The Commission therefore denies these consolidated test claims.

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<sup>135</sup> *Id.* at pages 746-747.

**COMMISSION ON STATE MANDATES**

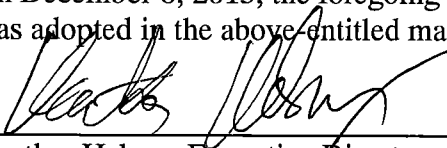
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**RE: Adopted Statement of Decision**

*Standardized Testing and Reporting (STAR) II and III*, 05-TC-02, 05-TC-03,  
and 08-TC-06  
Education Code Sections 60601 et al.  
San Diego Unified School District, Grant Joint Union High School District,  
and Twin Rivers Unified School District, Claimants

On December 6, 2013, the foregoing statement of decision of the Commission on State Mandates was adopted in the above-entitled matter.

  
\_\_\_\_\_  
Heather Halsey, Executive Director

Dated: December 12, 2013

**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 December 12, 2013, I served the:

**Statement of Decision**

*Standardized Testing and Reporting (STAR) II and III*, 05-TC-02, 05-TC-03,  
and 08-TC-06

Education Code Sections 60601 et al.

San Diego Unified School District, Grant Joint Union High School District,  
and Twin Rivers Unified School District, Claimants

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 December 12, 2013 at Sacramento, California.



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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:** 12/9/13

**Claim Number:** 05-TC-02, 05-TC-03, and 08-TC-06

**Matter:** Standardized Testing and Reporting (STAR) II and III

**Claimant(s):** Grant Joint Union High School District  
San Diego Unified School District  
Twin Rivers 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, § 1181.2.)

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