

**ITEM 3**  
**TEST CLAIM**  
**FINAL STAFF ANALYSIS**  
**AND**  
**PROPOSED STATEMENT OF DECISION**

Education Code Sections 37254, 52378, 52379, 52380  
Statutes 2007, Chapter 526 and Statutes 2007, Chapter 730  
California Code of Regulations, Title 5, Section 1204.5

Register 2004, No. 21, eff. May 19, 2004; Register 2005, No. 33, eff. Aug. 16, 2005; Register  
2006, No. 11, eff. Mar. 16, 2006; and Register 2007, No. 51, eff. Dec. 20, 2007

*High School Exit Examination II*

08-TC-02

San Jose Unified School District, Claimant

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**EXECUTIVE SUMMARY**

Attached is the proposed statement of decision for this matter. This executive summary and draft proposed statement of decision also functions as the final staff analysis, as required by section 1183.07 of the Commission on State Mandates' (Commission) regulations.

**Overview**

The test claim seeks reimbursement for activities related to the California High School Exit Examination (CAHSEE), and related counseling programs to assist pupils in passing the CAHSEE. These counseling programs are the CAHSEE Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program. The claimant has also pled a regulation that addresses the administration of the CAHSEE to 11<sup>th</sup> and 12<sup>th</sup> grade pupils and adult students.

CAHSEE was initially enacted in 1999 for the following reasons:

In March 1999, the California Legislature found that “[l]ocal proficiency standards” set by individual school districts were “generally set below a high school level and [were] not consistent with state adopted academic content standards.” (Stats.1999, 1st Ex.Sess.1999–2000, ch. 1, § 1(a).) The Legislature concluded that “[i]n order to significantly improve pupil achievement in high school and to ensure that pupils who graduate from high school can demonstrate grade level competency in reading, writing, and mathematics, the state must set higher standards for high school graduation.” (Stats.1999, 1st Ex.Sess.1999–2000, ch. 1, § 1(b).)

In order to further this goal, the Legislature directed that defendant “Superintendent of Public Instruction, with the approval of [defendant] State Board of Education, shall develop a high school exit examination in English-language arts and mathematics in accordance with ... statewide academically rigorous content standards adopted by [defendant] State Board of Education....” (Ed.Code, § 60850, subd. (a).) The examination developed under that mandate has come to be known as the CAHSEE. The CAHSEE is administered to all public high school students starting in grade 10, and each student is permitted to continue to take the CAHSEE at each subsequent administration, several times a year, until he or she has passed both sections. (§ 60851, subd. (b).) School districts are required to offer “supplemental instructional programs for pupils ... who do not demonstrate sufficient progress toward passing the [CAHSEE].” (§ 37252, subd. (a); see also § 60851, subd. (f).)<sup>1</sup>

The 2007 test claim statute (Stats. 2007, ch. 526) amended Education Code sections 37254, 52378 and 52380. The amendment implements a settlement resulting from the *Valenzuela v. O’Connell* litigation by ensuring that pupils who fail to pass the CAHSEE by the end of 12<sup>th</sup> grade have remedial assistance. The definition of “intensive instruction and services” in section 37254(c) was amended by the test claim statute to add the following italicized language:

Intensive instruction and services may include, but are not limited to, all of the following:

- (A) Individual or small group instruction.
- (B) The hiring of additional teachers.
- (C) Purchasing, scoring, and reviewing diagnostic assessments.
- (D) Counseling.
- (E) Designing instruction to meet specific needs of eligible pupils.
- (F) Appropriate teacher training to meet the needs of eligible pupils.
- (G) *Instruction in English-language arts or mathematics, or both, that eligible pupils need to pass those parts of the high school exit examination not yet passed. A school district may employ different intensive instruction and services strategies more aligned to the needs and circumstances of pupils who have not passed one or both parts of the high school exit examination by the end of grade 12 as compared to grade 12 pupils with similar needs in a comprehensive high school of the district.*
- (H) *The provision of instruction and services by a public or nonpublic entity, as determined by the local educational agency.*

Education Code section 52379 (Stats. 2007, ch. 730) was amended as part of an annual ‘clean-up’ bill to correct wording in the Middle and High School Supplemental Counseling Program to

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<sup>1</sup> *O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452.

clarify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of \$10,000.

Section 1204.5 of the title 5 regulations was amended effective December 20, 2007 to clarify the number of times pupils and adult students may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations.

The claimant seeks reimbursement to:

- Offer pupils who have failed one or both parts of CAHSEE by the end of 12<sup>th</sup> grade the opportunity to receive intensive support and assistance for two years following the completion of 12<sup>th</sup> grade. A school district may employ different intensive instruction and services strategies aligned to the needs of the pupil, and intensive instruction and services may be provided on Saturdays, evenings, or at a time and location deemed appropriate by the school district. Intensive instruction and services may include individual or small group instruction; the hiring and training of teachers; purchasing, scoring, and reviewing diagnostic assessments; and the provision of instruction and services by a public or nonpublic entity, as determined by the school district.
- Notify pupils in writing that intensive services are available to eligible pupils for two years following 12<sup>th</sup> grade. Notice must also be posted in the school site office, district office, and on the school district's website.
- Ensure that each eligible pupil receives an appropriate diagnostic assessment to identify areas of need.
- Submit an annual report to the Superintendent of Public Instruction (SPI) relating to the provision of intensive instruction and services provided.

### **Procedural History**

The *High School Exit Examination II* test claim was filed by the San Jose Unified School District on October 14, 2008, establishing a potential period of reimbursement beginning on July 1, 2007, or later for statutes and regulations with later effective dates.<sup>2</sup> The Department of Finance filed comments on the test claim on December 4, 2008. Commission staff issued the draft staff analysis and proposed statement of decision on March 20, 2013. Claimant filed comments on the draft staff analysis on April 10, 2013.

### **Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or

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<sup>2</sup> Government Code section 17557(e). The effective date of Statutes 2007, chapter 526 was October 12, 2007. The effective date of Statutes 2007, chapter 730 was January 1, 2008. The operative date of the 2007 version of California Code of Regulations, title 5, section 1204.5, was December 20, 2007.

executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim. The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.<sup>3</sup>

**Claims**

Subject	Description	Staff Recommendation
<p>California Code of Regulations, title 5, section 1204.5 (Register 2004, No. 21, eff. May 19, 2004; Register 2005, No. 33, eff. Aug. 16, 2005), Register 2006, No. 11, eff. Mar. 16, 2006).</p>	<p>This regulation gives pupils in grades 11 and 12 who have not yet passed one or both parts of the CAHSEE up to two opportunities per year to take the section of the test not yet passed with appropriate remediation or supplemental instruction offered before being retested. In addition, pupils shall be provided one opportunity to pass the examination after completing the grade 12 requirements. The regulation was amended in 2005 to give pupils in grade 12 up to three opportunities, or two opportunities in grade 12 and one opportunity after grade 12, to take parts of the exam not yet passed. The regulation was amended again in 2006 to give eligible adult students up to three opportunities per year to take the CAHSEE sections not yet passed.</p>	<p><i>Deny.</i> The Commission does not have jurisdiction over section 1204.5 of the title 5 regulations, as added and amended in 2004, 2005, and 2006, because those versions were not filed within the one-year statute of limitations required by Government Code section 17551(c).</p>
<p>Education Code section 37254 (Stats. 2007, ch. 526).</p>	<p>The 2007 test claim statute amended the CAHSEE Intensive Instruction Program and revised definitions and funding formulas, and required school districts as a condition of receiving funds, to ensure that pupils receive intensive instruction and services,</p>	<p><i>Deny.</i> The 2007 statute does not impose a state-mandated program on school districts because it only imposes activities that are required as a condition of receiving funds. Pursuant to the court’s determination in <i>Kern</i> (2003)</p>

<sup>3</sup> *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802.

	as defined, based on prior results on the CAHSEE, and ensure that pupils who have not passed one or both parts of the CAHSEE by the end of grade 12 are notified in writing of the availability of the services in sufficient time to register for or avail themselves of those services each term for two academic years after completing grade 12.	30 Cal.4th 727, the test claim statute does not legally compel school districts to comply with the required activities. In addition, there is no evidence in the record that school districts are practically compelled to comply with this statute.
Education Code sections 52378 and 52380 (Stats. 2007, ch. 526).	The 2007 statute amended the Middle and High School Supplemental Counseling Program and required school districts, as a condition of funding, to meet with each pupil and if practicable, the parent or guardian of the pupil to explain the availability of intensive instruction and services for up to two academic years after completing grade 12, or until passing both parts of the CAHSEE, whichever comes first,. Reporting requirements were also modified.	<i>Deny.</i> The 2007 amendments do not impose a state-mandated program on school districts. The new requirements are imposed as a condition of receiving funds. Pursuant to the court's determination in <i>Kern</i> (2003) 30 Cal.4th 727, the test claim statute does not legally compel school districts to comply with the required activities. In addition, there is no evidence in the record that school districts are practically compelled to comply with this statute.
Education Code section 52379 (Stats. 2007, Ch. 730)	This section was amended to specify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of \$10,000.	<i>Deny.</i> This amendment imposes no requirements on school districts, and, thus, does not constitute a state-mandated program.
California Code of Regulations, title 5, section 1204.5. (Register 2007, No. 51, eff. Dec. 20, 2007.)	This regulation was amended to clarify the number of times pupils and adult students may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations.	<i>Deny.</i> This amendment does not mandate a new program or higher level of service on school districts. There is no increase in the number of times per year pupils or adult students may take the CAHSEE and no indication that successive administration of the test for grade 11 pupils,

		as provided in subdivision (d), imposes a higher level of service on a school district.
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**Analysis**

**A. The test claim was properly filed within the statute of limitations for Education Code sections 37254, 52378, 52379, and 52380, as amended by Statutes 2007, chapters 526 and 730, and the 2007 version of section 1204.5 of the title 5 regulations.**

In order for the Commission to take jurisdiction and make a reimbursement determination on a statute or executive order pled in a test claim, the test claim must be filed within the one-year statute of limitations required by Government Code section 17551(c), which requires that test claim 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.”

There is no issue regarding the Commission’s jurisdiction over Education Code section 52379, as amended by Statutes 2007, chapter 730 and section 1204.5 of the title 5 regulations, as amended by Register 2007, no. 51, because the test claim was filed within one year of the effective date of the statute and regulation.

However, the parties dispute whether the test claim was filed within the statute of limitations for the remaining test claim statutes: Education Code sections 37254, 52378, and 52380 as amended by Statutes 2007, chapter 526, and section 1204.5 of the regulations as adopted and amended in 2004, 2005, and 2006. The test claim was stamped *received* on October 14, 2008, over one year past the effective dates of these statutes and regulation.

Staff finds that the test claim, with respect to Education Code sections 37254, 52378, and 52380, as they were amended by Statutes 2007, chapter 526, and effective on October 12, 2007, was properly filed within the statute of limitations and that the Commission has jurisdiction over these test claim statutes. The Commission’s regulations state that, for meeting filing deadlines, a mailed filing is timely if “the filing was mailed by first class mail no later than the expiration of the time for filing. . .”<sup>4</sup> Thus, in this case, the test claim had to be mailed by October 12, 2008, for the claim to be timely with respect to these code sections. The 2008 calendar shows that October 12, 2008, the deadline for mailing this test claim, was a Sunday, a day when there is *no* mail pick-up or delivery. Monday, October 13, 2008, was Columbus Day, a Federal holiday and a day when there was no mail pick-up or delivery, and the filing was received on Tuesday, October 14, 2008. Since the test claim was delivered on that date, it had to have been mailed before the Sunday, October 12<sup>th</sup> deadline. The Commission can take judicial notice of these calendar dates and usual days of mailing.<sup>5</sup>

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<sup>4</sup> California Code of Regulations, title 5, section 1181(g).

<sup>5</sup> Evidence Code section 452(g)(h), allowing judicial notice of facts and propositions that are of common knowledge, are not reasonably subject to dispute, and are capable of accurate determination by resort to resources that are reasonably indisputable; California Code of Regulations, title 2, section 1187.5(c).

Staff also finds that the test claim, with respect to section 1204.5 of the title 5 regulations, as that regulation was adopted in 2004, and amended in 2005 and 2006, was not timely filed and, thus, the Commission does not have jurisdiction to determine whether those versions of the regulation impose a reimbursable state-mandated program.

**B. The test claim statutes and regulation do not impose a state-mandated program on school districts.**

**1. The 2007 amendments to the CAHSEE Intensive Instruction Program (Ed. Code, § 37254, Stats. 2007, ch. 526) do not impose a state-mandated program.**

The CAHSEE Intensive Instruction Program was adopted in 2005 to assist “eligible pupils” defined as pupils required to pass the CAHSEE, but who have failed to pass one or more parts of the exam. Before the test claim statute was enacted, the program offered eligible pupils “intensive instruction and services,” which according to the 2005 statute, “may include, but are not limited to, all of the following: (A) Individual or small group instruction. (B) The hiring of additional teachers. (C) Purchasing, scoring, and reviewing diagnostic assessments. (D) Counseling. (E) Designing instruction to meet specific needs of eligible pupils. (F) Appropriate teacher training to meet the needs of eligible pupils.” The statute also provided how the SPI was to allocate funds, and required school districts to ensure, as a condition of funding, that eligible pupils receive appropriate diagnostic assessments and intensive instruction and services based on the diagnostic assessments. Districts also had to demonstrate that funds would be used to supplement and not supplant existing services, and report the number of eligible pupils at each high school in the district. Annual district reporting was also required.

The CAHSEE Intensive Instruction Program (Ed. Code, § 37254) was amended by the 2007 test claim statute as follows:

- Revised the definition of eligible pupil in subdivision (a) as follows: “For purposes of this section, “eligible pupil” means a pupil who ~~is required to pass~~ has not met the California High School Exit Examination requirement for high school graduation pursuant to . . . and who has failed one or both part of that examination by the end of grade 12.”
- Revised the funding formula in subdivision (b) to require the SPI to determine a per pupil funding rate by dividing the amount of appropriated funds by the number of eligible pupils in grade 12, as reported by school districts.
- Added two additional services to the definition of “intensive instruction and services” in subdivision (c)(3)(G) and (H) as follows:
  - (G) Instruction in English-language arts or mathematics, or both, that eligible pupils need to pass those parts of the high school exit examination not yet passed. A school district may employ different intensive instruction and services strategies more aligned to the needs and circumstances of pupils who have not passed one or both parts of the high school exit *examination by the end of grade 12 as compared to grade 12 pupils with similar needs* in a comprehensive high school of the district.
  - (H) The provision of instruction and services by a public or nonpublic entity, as determined by the local educational agency.

- Amended subdivision (d) by requiring school districts, as a condition of receiving funds for intensive instruction and services, to perform the following activities:
  - Ensure that each pupil receives intensive instruction and services based on prior results on the CAHSEE;
  - Ensure that all pupils who have not passed one or both parts of the CAHSEE by the end of grade 12 are notified in writing before the end of each school term of the availability of the services in sufficient time to register for or avail themselves of those services each term for two consecutive academic years thereafter and are notified of the right to file a complaint regarding those services as specified, and post the notice in the school office and on the district Web site, as specified.
  - Ensure that all pupils who have not passed one or both parts of the high school exit examination by the end of grade 12 have the opportunity to receive intensive instruction and services as needed based on the results of the diagnostic assessment and prior results on the high school exit examination, as specified, for up to two consecutive academic years after completion of grade 12 or until the pupil passes both parts of the high school exit examination, whichever comes first. A school district shall employ strategies for intensive instruction and services that are most likely to result in these pupils passing the parts of the high school exit examination that they have not yet passed.
  - Ensure that all English learners who have not passed one or both parts of the high school exit examination by the end of grade 12 have the opportunity to receive intensive instruction and services provided, as specified. Include services to improve English proficiency as needed based on the results of the diagnostic assessment and prior results on the high school exit examination, as specified, to pass those parts of the high school exit examination not yet passed, for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first. A school district shall employ strategies for intensive instruction and services that are most likely to result in these pupils passing the parts of the high school exit examination that they have not yet passed.
  - Submit an annual report to the appropriate county superintendent of schools that describes the manner and frequency in which eligible pupils were notified of the intensive instruction and services provided.

Staff finds that section 37254, as amended by Statutes 2007, chapter 526, does not impose a state-mandated program on school districts. Because it simply revised definitions of “eligible pupil,” and “intensive instruction and services,” and altered the funding formula for the CAHSEE Intensive Instruction Program and because, according to section 37254(d), all of the requirements in 37254 are imposed as “a condition of receiving funds.” In the 2012-2013 State Budget Act, over \$72 million was appropriated for the purposes of Education Code section 37254.<sup>6</sup> There is no legal requirement for school districts to seek or receive funds for the

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<sup>6</sup> See Item 6110-204-0001, Provision 1, Statutes 2012, chapters 21 and 29.



CAHSEE Intensive Instruction Program. School districts make a local decision to apply for funding.<sup>7</sup> A local decision that results in a school district incurring costs does not constitute a state mandate.<sup>8</sup> According to the Supreme Court’s interpretation of a state-mandated program in *Kern*, downstream requirements that result from a discretionary decision (such as the decision to receive funds) do not impose a state mandate.<sup>9</sup>

In addition, there is no evidence that school districts are practically compelled to perform the activities.

Thus, staff finds that Education Code section 37254 (Stats. 2007, ch. 526) does not impose a state-mandated program on school districts

**2. The 2007 amendments to the Middle and High School Supplemental Counseling Program (Ed. Code, §§ 52378 & 52380, Stats. 2007, ch. 526) do not impose a state-mandated program**

The purpose of the Middle and High School Supplemental Counseling Program is to increase the number of school counselors who serve pupils in grades 7 to 12. The new counselors help provide pupils with information on all educational and vocational options available to them. Funding available is first intended to serve pupils in grades 7 to 12, with additional attention to those who have failed or are at risk of failing the CAHSEE, or are at risk of not graduating due to insufficient credits.

Before the test claim statute was enacted, school districts that maintain grades 7 through 12 were required, as a condition of receiving funds, to adopt a supplemental counseling program at a public meeting of the governing board and to meet with each pupil to explain the pupil’s academic records and educational options. The Middle and High School Supplemental Counseling Program, in Education Code section 52378, was amended by the 2007 test claim statute to require school districts to add the following requirements to the program as a condition of receiving funds:

- The program shall include a provision for a counselor to meet with each pupil and if practicable, the parent or legal guardian of the pupil, to explain the availability of intensive instruction and services as required by section 37254(c), for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first, for pupils who have not passed one or both parts of the CAHSEE by the end of grade 12. (§ 52378(a)(2).)
- Inform the pupil who has not passed one or both parts of the CAHSEE of the option of intensive instruction and services. (§ 52378(b)(4).)

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<sup>7</sup> CDE, “Guidance: Application for Categorical Funding” last reviewed July 16, 2012. <<http://www.cde.ca.gov/fg/aa/co/ca12sguiappcatprog.asp> > as of May 1, 2013.

<sup>8</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

<sup>9</sup> *Dept. of Finance v. Commission on State Mandates (Kern.)* (2003) 30 Cal.4th 727, 731, 742-743.

- For a pupil enrolled in grade 12, include in the options for continuing his or her education if he or she fails to meet graduation requirements, the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first. (§ 52378(c)(1)(D).)
- During a conference with each specified pupil, and his or her parent or guardian, where the pupil is informed of the consequences of not passing the CAHSEE, the school counselor shall also apprise the pupil of the remediation strategies, high school courses, and alternative education options available to the pupil. These options shall include the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first. (§ 52378(e)(5).)

Education Code section 52380 was also amended by the 2007 test claim statute to revise the school district reporting requirement, which is also required as a condition of receiving funds, to provide assurance that the school district has complied with section 52378(e) and to send the report to the Superintendent of Public Instruction and the county superintendent of schools.

Staff finds that sections 52378 and 52380, as amended by Statutes 2007, chapter 526, do not impose a state-mandated program on school districts. These code sections impose requirements as “a condition of receiving funds.” There is no legal requirement for school districts to seek or receive funds for the Middle and High School Supplemental Counseling Program. School districts make a local decision to apply for funding. A local decision that results in a school district incurring costs does not constitute a state mandate.<sup>10</sup> According to the Supreme Court’s interpretation of a state-mandated program in the *Kern High School District* case, downstream requirements that result from a discretionary decision do not impose a state mandate.<sup>11</sup>

In addition, there is no evidence in the record that school districts are practically compelled to perform these activities.

Thus, staff finds that Education Code sections 52378 and 52380 (Stats. 2007, ch. 526) do not impose a state mandate on school districts.

**3. The 2007 amendment to the Middle and High School Supplemental Counseling Program funding provision (Ed. Code, § 52379, Stats. 2007, ch. 730) does not impose a state-mandated program.**

Education Code section 52379 (Stats. 2007, ch. 730) was amended as part of an annual ‘clean-up’ bill to correct wording in the Middle and High School Supplemental Counseling Program to specify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of \$10,000. The amendment describes how funding is allocated for the counseling program, but imposes no requirements on a school district. Thus, staff finds that Education Code 52379 (Stats. 2007, ch. 730) does not impose a state-mandated program on school districts.

<sup>10</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

<sup>11</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731, 742-743.

**4. The 2007 amendment to the regulation governing grade 11 and 12 and adult student testing dates (Cal.Code Regs., tit.5, § 1204.5, as amended by Reg. 2007, No. 51.) does not impose a state mandate**

Section 1204.5 of the title 5 regulations was amended operative December 20, 2007 to clarify the number of times pupils may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations. The amendments do not increase the number of times per year pupils may take the CAHSEE. Both before and after the 2007 amendment, eligible pupils in grade 11 may take the CAHSEE up to two times per year, eligible pupils in grade 12 may take the CAHSEE up to three times per year, and eligible adult students may take the CAHSEE up to three times per year. There is nothing to indicate that allowing successive administrations for grade 11 pupils in subdivision (d) imposes a higher level of service on a school district beyond that provided under prior law. Because it imposes no new requirements on school districts, staff finds that California Code of Regulations, title 5, section 1204.5 (Register 2007, No. 51, operative and effective on Dec. 20, 2007) does not impose a state-mandated new program or higher level of service.

**Conclusion and Staff Recommendation**

Based on the foregoing, staff finds that Education Code sections 37254, 52378, 52379 and 52380, as amended by Statutes 2007, chapters 526 and 730, and section 1204.5 of the title 5 regulations, as amended in 2007 (Register 2007, No. 51) do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

Staff also finds that the test claim, with respect to section 1204.5 of the title 5 regulations as adopted in 2004 and amended in 2005 and 2006, was not filed within the one-year statute of limitations required by Government Code section 17551(c) and, thus, the Commission does not have jurisdiction to make findings on those versions of the regulation.

Staff recommends that the Commission adopt the proposed statement of decision to deny the test claim.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:

Education Code Sections 37254, 52378,  
52379, 52380

Statutes 2007, Chapter 526 and  
Statutes 2007, Chapter 730.

California Code of Regulations, Title 5,  
Section 1204.5

Register 2004, No. 21, eff. May 19, 2004;  
Register 2005, No. 33, eff. Aug. 16, 2005;  
Register 2006, No. 11, eff. Mar. 16, 2006; and  
Register 2007, No. 51, eff. Dec. 20, 2007

Filed on October 14, 2008

By San Jose Unified School District, Claimant.

Case No.: 08-TC-02

*High School Exit Examination II*

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

*(Adopted May 24, 2013)*

**PROPOSED STATEMENT OF DECISION**

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 24, 2013. [Witness list will be included in the final statement of decision.]

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

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

**Summary of the Findings**

The Commission finds that Education Code sections 37254, 52378, 52379 and 52380, as amended by Statutes 2007, chapters 526 and 730, and section 1204.5 of the title 5 regulations, as amended in 2007 (Register 2007, No. 51) do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

The statutes require school districts to perform counseling, instruction, and reporting activities "as a condition of receiving funds" to help pupils pass the California High School Exit Exam. Pursuant to the court's determination in *Kern*,<sup>12</sup> the test claim statutes do not legally compel

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<sup>12</sup> *Department of Finance v. Commission on State Mandates (Kern.)* (2003) 30 Cal.4th 727.

school districts to comply with the required activities. In addition, there is no evidence in the record that school districts are practically compelled to comply with these statutes and regulation.

The Commission also finds that the 2007 amendments of section 1204.5 of the title 5 regulations do not constitute a state-mandated program because the amendments are merely clarifying, or impose requirements that do not constitute a new program or higher level of service.

The Commission further finds that the test claim, with respect to section 1204.5 of the title 5 regulations as adopted in 2004 and amended in 2005 and 2006 were not filed within the one-year statute of limitations required by Government Code section 17551(c) and, thus, the Commission does not have jurisdiction to make findings on those versions of the regulation.

Accordingly, the Commission denies this test claim.

## COMMISSION FINDINGS

### I. Chronology

- 10/14/08 Claimant, San Jose Unified School District, filed the test claim with the Commission.<sup>13</sup>
- 10/22/08 Commission staff issued the notice of complete test claim and schedule for comments.
- 12/04/08 Department of Finance (Finance) filed comments on the test claim.
- 03/20/13 Commission staff issued the draft staff analysis and proposed statement of decision.
- 04/10/13 Claimant filed comments on the draft staff analysis and proposed statement of decision.

### II. Background

This test claim addresses activities related to the California High School Exit Examination (CAHSEE), and the Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program, both of which assist pupils to pass the CAHSEE.

#### A. The High School Exit Exam

The requirement to administer the CAHSEE was initially enacted in 1999. The background for the examination was summarized in the 2006 case of *O'Connell v. Superior Court* as follows:

In March 1999, the California Legislature found that “[l]ocal proficiency standards” set by individual school districts were “generally set below a high

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<sup>13</sup> The potential period of reimbursement begins on July 1, 2007 (Gov. Code, § 17557(e).) or later with statutes and regulations with subsequent effective dates. The effective date of Statutes 2007, chapter 526 was October 12, 2007. The effective date of Statutes 2007, chapter 730 was January 1, 2008. The operative date of the 2007 version of California Code of Regulations, title 5, section 1204.5, was December 20, 2007.

school level and [were] not consistent with state adopted academic content standards.” (Stats.1999, 1st Ex.Sess.1999–2000, ch. 1, § 1(a).) The Legislature concluded that “[i]n order to significantly improve pupil achievement in high school and to ensure that pupils who graduate from high school can demonstrate grade level competency in reading, writing, and mathematics, the state must set higher standards for high school graduation.” (Stats.1999, 1st Ex.Sess.1999–2000, ch. 1, § 1(b).)

In order to further this goal, the Legislature directed that defendant “Superintendent of Public Instruction, with the approval of [defendant] State Board of Education, shall develop a high school exit examination in English-language arts and mathematics in accordance with ... statewide academically rigorous content standards adopted by [defendant] State Board of Education....” (Ed.Code, § 60850, subd. (a).) The examination developed under that mandate has come to be known as the CAHSEE. The CAHSEE is administered to all public high school students starting in grade 10, and each student is permitted to continue to take the CAHSEE at each subsequent administration, several times a year, until he or she has passed both sections. (§ 60851, subd. (b).) School districts are required to offer “supplemental instructional programs for pupils ... who do not demonstrate sufficient progress toward passing the [CAHSEE].” (§ 37252, subd. (a); see also § 60851, subd. (f).)<sup>14</sup>

The CAHSEE has two parts: English-language arts and mathematics through algebra I. By law, each part is aligned with California’s academic content standards adopted by the State Board of Education (SBE). All eligible pupils<sup>15</sup> in California public schools must satisfy the CAHSEE requirement, as well as all other state and local graduation requirements, to receive a high school diploma.

The state budget act provides funds to administer the CAHSEE. Because of the mandate finding in the first *High School Exit Exam* test claim (00-TC-06, discussed below), every fiscal year since 2004-2005, the state budget act has included the following language as part of the CAHSEE appropriation: “Local education agencies accepting funding from these schedules shall reduce their estimated and actual mandate reimbursement claims by the amount of funding provided to them from these schedules.”<sup>16</sup>

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<sup>14</sup> *O’Connell v. Superior Court* (2006) 141 Cal.App.4th 1452.

<sup>15</sup> An eligible pupil is “a person enrolled in a California public school in grade 10, 11, or 12, including those pupils placed in a nonpublic school through the individualized education program (IEP) process pursuant to Education Code section 56365, who has not passed both the English-language arts section and the mathematics section of the CAHSEE.” (Cal. Code Regs, tit. 5, § 1200, subd. (e)).

<sup>16</sup> Statutes 2004, chapter 208, Item 6110-113-0001, Provision 8; Statutes 2005, chapters 38, 39, Item 6110-113-001, Provision 8; Statutes 2006, chapters 47, 48, Item 6110-113-001, Provision 6; Statutes 2007, chapters 171 & 172, Provision 7; Statutes 2008, chapters 268, 269, Item 6110-113-001, Provision 7; Statutes 2009, chapter 1 (4<sup>th</sup> Ex. Sess), Item 6110-113-001, Provision 7.

## **B. Preexisting Counseling Programs to Help Pupils Pass the CAHSEE**

The 1999 legislation that established the CAHSEE also required school districts to offer summer school instructional programs for pupils who do not demonstrate sufficient progress toward passing the CAHSEE.<sup>17</sup> Later legislation enacted in 1999 expanded the “summer school” requirement to authorize school districts to offer the instructional programs after school, Saturdays, or during intersession, or in any combination of summer, after school, Saturdays, or intersession instruction, as long as they were in addition to the regular schoolday.<sup>18</sup> A 2000 statute changed this program’s name from the Summer School Instructional Program to the Supplemental Instructional Program and authorized instructional programs to also be offered before school and for those pupils who were enrolled in grade 12 during the previous year.<sup>19</sup> The 2000 statute also altered the funding for supplemental instruction from an average daily attendance basis to a calculation based on hours of supplemental instruction.

In 2005, school districts were authorized to use the Supplemental Instructional Program funds to provide intensive instruction and services to pupils who failed one or both parts of the CAHSEE. “Intensive instruction and services” was defined to include, but not be limited to: individual or small group instruction; hiring additional teachers; purchasing, scoring, and reviewing diagnostic assessments; counseling; designing instruction to meet specific needs of eligible pupils; and appropriate teacher training to meet the needs of eligible pupils.<sup>20</sup> The Superintendent of Public Instruction was to rank schools and give highest priority to those with the highest percentage of pupils who had failed one or both parts of the CAHSEE, and then apportion six hundred dollars (\$600) per eligible pupil to school districts on behalf of those schools identified until the funds were exhausted.<sup>21</sup> In 2006, this apportionment was changed to a per-pupil rate for the number of eligible pupils in grade 12, with a maximum per pupil rate of \$500, increased annually as specified.<sup>22</sup>

Statutes 2006, chapter 79 enacted the Middle and High School Supplemental Counseling Program “for the purpose of providing additional counseling services to pupils in grades 7 to 12, inclusive.”<sup>23</sup> This broader counseling program was added to the preexisting counseling program for pupils not demonstrating sufficient progress toward passing the CAHSEE. The legislation requires schools, as a condition of receiving funds, to:

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Statutes 2010, chapter 712, Item 6110-113-0001, Provision 7. Statutes 2011, chapter 33, Item 6110-113-0001, Provision 7.

<sup>17</sup> Education Code section 37252 (Stats. 1999-2000x1, ch. 1).

<sup>18</sup> Education Code section 37252 (d) (Stats. 1999, ch. 78).

<sup>19</sup> Education Code section 37252 (c) and (d) (Stats. 2000, ch. 72).

<sup>20</sup> Education Code section 37254 (d) (Stats. 2005, ch. 234).

<sup>21</sup> Education Code section 37254 (c) (Stats. 2005, ch. 234).

<sup>22</sup> Education Code section 37254 (b) & (c) (Stats. 2006, ch. 79).

<sup>23</sup> Education Code section 52378.

[I]dentify pupils who are at risk of not graduating with the rest of their class, are not earning credits at a rate that will enable them to pass the high school exit examination, or do not have sufficient training to allow them to fully engage in their chosen career.”<sup>24</sup>

The schools are required to take specified measures to help these identified pupils graduate from high school.

### **C. The Test Claim Statutes and Regulation**

Statutes 2007, chapter 526 amended the CAHSEE Intensive Instruction and Services Program (§ 37254) and Middle and High School Supplemental Counseling Program (§§ 52378 & 52380) requirements. These amendments revise the definition of "eligible pupil" as follows: “as follows: “For purposes of this section, “eligible pupil” means a pupil who ~~is required to pass~~ has not met the California High School Exit Examination requirement for high school graduation pursuant to . . . and who has failed one or both part of that examination by the end of grade 12.” This statute also revised the funding calculation and changed the definition of “intensive instruction and services” to add the following italicized language to Education Code section 37254(c):

Intensive instruction and services may include, but are not limited to, all of the following:

- (A) Individual or small group instruction.
- (B) The hiring of additional teachers.
- (C) Purchasing, scoring, and reviewing diagnostic assessments.
- (D) Counseling.
- (E) Designing instruction to meet specific needs of eligible pupils.
- (F) Appropriate teacher training to meet the needs of eligible pupils.

*(G) Instruction in English-language arts or mathematics, or both, that eligible pupils need to pass those parts of the high school exit examination not yet passed. A school district may employ different intensive instruction and services strategies more aligned to the needs and circumstances of pupils who have not passed one or both parts of the high school exit examination by the end of grade 12 as compared to grade 12 pupils with similar needs in a comprehensive high school of the district.*

*(H) The provision of instruction and services by a public or nonpublic entity, as determined by the local educational agency.*

Statutes 2007, chapter 526 also required schools to ensure that pupils who have not passed one or both parts of the CAHSEE are informed of, and have available, services in time for the pupils to avail themselves of those services each term for two consecutive academic years beyond grade

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<sup>24</sup> Education Code section 52378 (b) (Stats. 2006, ch. 79).



12, and imposes other notification requirements, including the posting of notices in 10th, 11th, and 12th grade classrooms regarding pupil eligibility for the CAHSEE remedial services available beyond 12th grade. Additionally, it required schools to ensure that eligible pupils and English learners have the opportunity to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first. Finally, it modified requirements for annual reporting to the Superintendent of Public Instruction (SPI).

The Senate Floor Analysis of Statutes 2007, chapter 526 described it as follows:

This bill implements a proposed settlement agreement in the *Valenzuela v. O'Connell* lawsuit by placing conditions on the receipt of funding that requires school districts to provide intensive instruction and services to pupils who have not passed the high school exit examination by the end of twelfth grade. [¶]...[¶]

A lawsuit filed by plaintiffs (*Valenzuela v. O'Connell*) contends that pupils that have otherwise met graduation requirements but have not received a diploma due to a failure to pass one or both portions of the CAHSEE have been disadvantaged by an unequal education system that did not adequately teach the materials on the exam. While the suit has not halted the implementation of the CAHSEE as a graduation requirement, the Court of Appeals has recommended that the parties agree to a means of providing equal access and adequate remedial assistance to students that have not passed the exam. The bill reflects an effort to settle the suit.<sup>25</sup>

The *Valenzuela* court concluded, among other things, that “the trial court's determination that plaintiffs were likely to prevail on their primary equal protection claim was supported by substantial evidence and legally proper.”<sup>26</sup> Statutes 2007, chapter 526 implemented a resolution to the *Valenzuela* litigation by ensuring that pupils who fail to pass the exit examination have remedial assistance.

Another test claim statute, Statutes 2007, chapter 730, amended Education Code section 52379 as part of an “annual Education ‘clean-up’ bill that makes various non-controversial revisions to statute.”<sup>27</sup> The amendment to section 52379 “[c]orrects wording in the Middle and High School Supplemental Counseling Program to specify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of \$10,000.”<sup>28</sup>

The CAHSEE regulations are in section 1200 et seq. of title 5 of the California Code of Regulations. Claimant pled section 1204.5, which was adopted in 2004 to give pupils in grades

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<sup>25</sup> Senate Rules Committee, Third Reading Analysis of AB 347 (2007-2008 Reg. Sess.) as amended September 6, 2007, page 5.

<sup>26</sup> *Valenzuela v. O'Connell* (2006) 141 Cal.App.4th 1452, 1457.

<sup>27</sup> Senate Committee on Education, Analysis of SB 132 (2007-2008 Reg. Sess.) as amended March 26, 2007, page 5.

<sup>28</sup> *Id.*, page 5.

11 and 12 who have not yet passed one or both parts of the CAHSEE up to two opportunities per year to take the section of the test not yet passed. Eligible pupils, according to the regulation, should be offered appropriate remediation or supplemental instruction before being retested. Eligible pupils shall be provided one opportunity to pass the examination after completing the grade 12 requirements.<sup>29</sup> The regulation was amended in 2005 to give pupils in grade 12 up to three opportunities, or two opportunities in grade 12 and one opportunity after grade 12, to take parts of the exam not yet passed.<sup>30</sup> The regulation was amended again in 2006 to give eligible adult students up to three opportunities per year to take the CAHSEE sections not yet passed.<sup>31</sup>

Section 1204.5 was amended again effective December 20, 2007 to clarify the number of times pupils and adult students may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations.<sup>32</sup>

#### **D. Prior Commission Decision on the *High School Exit Exam* Program**

On March 25, 2004, the Commission issued a decision on the *High School Exit Exam* test claim (00-TC-06).<sup>33</sup> The Commission found that the test claim legislation imposed a reimbursable state-mandated program on school districts, beginning on July 1, 2000, to perform the following activities:

- Adequate notice: notifying parents of *transfer* students who enroll after the first semester or quarter of the regular school term that, commencing with the 2003-04 school year, and each school year thereafter, each pupil completing 12<sup>th</sup> grade will be required to successfully pass the CAHSEE. The notification shall include, at a minimum, the date of the CAHSEE, the requirements for passing the CAHSEE, and the consequences of not passing the CAHSEE, and that passing the CAHSEE is a condition of graduation (Ed. Code, § 60850(e)(1) & (f)(1).);
- Documentation of adequate notice: maintaining documentation that the parent or guardian of each pupil received written notification of the CAHSEE (Cal. Code Regs., tit. 5, § 1208.);
- Determining English language skills: determining whether English-learning pupils possess sufficient English language skills at the time of the CAHSEE to be assessed with the CAHSEE (§ 1217.5);

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<sup>29</sup> Register 2004, No. 21, operative May 19, 2004.

<sup>30</sup> Register 2005, No. 33, operative August 16, 2005.

<sup>31</sup> Register 2006, No. 11, operative March 16, 2006.

<sup>32</sup> Register 2007, No. 51. CDE, Initial Statement of Reasons, California High School Exit Exam Regulations, February 20, 2007, page 1.

<sup>33</sup> The test claim consisted of Education Code Sections 60850, 60851, 60853, 60855 (Stats. 1999x, ch. 1; Stats. 1999, Ch. 135) and California Code of Regulations, Title 5, Sections 1200 – 1225 in effect March 2003.

- CAHSEE administration: administration of the CAHSEE on SPI-designated dates to all pupils in grade 10 beginning in the 2001-2002 school year, and subsequent administrations for students who do not pass until each section of the CAHSEE has been passed, and administration of the CAHSEE on SPI-designated dates to pupils in grade 9 only in the 2000-2001 school year who wish to take the CAHSEE (Ed. Code, § 60851(a)), except a teacher's time administering the CAHSEE is not a mandate. Administration is limited to the following activities specified in the regulations:
  - Training a test administrator either by a test site or district coordinator as provided in the test publisher's manual. (§§ 1200(g) & 1210(b)(3));
  - Allowing pupils to have additional time to complete the CAHSEE within the test security limits provided in section 1211, but only if additional time is not specified in the pupil's IEP, and only if this activity is performed by a non-teacher certificated employee, such as an employee holding a service credential. (§ 1215);
  - accurately identifying eligible pupils who take the CAHSEE through the use of photo-identification, positive recognition by the test administrator, or some equivalent means of identification (§ 1203);
  - maintaining a record of all pupils who participate in each test cycle of the CAHSEE, including the date each section was offered, the name and grade level of each pupil who took each section, and whether each pupil passed or did not pass the section or sections of the CAHSEE taken (§ 1205);
  - maintaining in each pupil's permanent record and entering in it prior to the subsequent test cycle the following: the date the pupil took each section of the CAHSEE, and whether or not the pupil passed each section of the CAHSEE (§ 1206);
  - designation by the district superintendent, on or before July 1 of each year, of a district employee as the CAHSEE district coordinator, and notifying the publisher of the CAHSEE of the identity and contact information of that individual (§ 1209);
  - for the district coordinator and superintendent, within seven days of completion of the district testing, to certify to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the CAHSEE in the manner required by the publisher (§ 1209); and
  - designation annually by the district superintendent a CAHSEE test site coordinator for each test site (as defined) from among the employees of the school district who is to be available to the CAHSEE district coordinator to resolve issues that arise as a result of administration of the CAHSEE (§ 1210).

- Also, the CAHSEE district coordinator's duties<sup>34</sup> listed in section 1209 and the CAHSEE test site coordinator's duties<sup>35</sup> listed in section 1210 (except for a teacher's time in administering the CAHSEE during the school day); and

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<sup>34</sup> These duties are: (1) responding to inquiries of the publisher, (2) determining district and school CAHSEE test material needs, (3) overseeing acquisition and distribution of the CAHSEE, (4) maintaining security over the CAHSEE using the procedures in section 1211, (5) overseeing administration of the CAHSEE, (6) overseeing collection and return of test material and test data to the publisher, (7) assisting the publisher in resolving discrepancies in the test information and materials, (8) ensuring all exams and materials are received from school test sites no later than the close of the school day on the school day following administration of the CAHSEE, (9) ensuring all exams and materials received from school test sites have been placed in a secure district location by the end of the day following administration of those tests, (10) ensuring that all exams and materials are inventoried, packaged, and labeled in accordance with instructions from the publisher and ensuring the materials are ready for pick-up by the publisher no more than five working days following administration of either section in the district, (11) ensuring that the CAHSEE and test materials are retained in a secure, locked location in the unopened boxes in which they were received from the publisher from the time they are received in the district until the time of delivery to the test sites; (12) within seven days of completion of the district testing, certifying with the Superintendent to CDE that the district has maintained the security and integrity of the exam, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the CAHSEE in the manner required by the publisher.

<sup>35</sup> These duties are: (1) determining site examination and test material needs; (2) arranging for test administration at the site; (3) training the test administrator(s) as provided in the test publisher's manual; (4) completing the Test Security Agreement and Test Security Affidavit prior to the receipt of test materials; (5) overseeing test security requirements, including collecting and filing all Test Security Affidavit forms from the test administrators and other site personnel involved with testing; (6) maintaining security over the examination and test data as required by section 1211; (7) overseeing the acquisition of examinations from the school district and the distribution of examinations to the test administrator(s); (8) overseeing the administration of the CAHSEE to eligible pupils... at the test site; (9) overseeing the collection and return of all testing materials to the CAHSEE district coordinator no later than the close of the school day on the school day following administration of the high school exit examination; (10) assisting the CAHSEE district coordinator and the test publisher in the resolution of any discrepancies between the number of examinations received from the CAHSEE district coordinator and the number of examinations collected for return to the CAHSEE district coordinator; (11) overseeing the collection of all pupil ...data as required to comply with sections 1204, 1205, and 1206 of the title 5 regulations; (12) within three working days of completion of site testing, certifying with the principal to the CAHSEE district coordinator that the test site has maintained the security and integrity of the examination, collected all data and information as required, and returned all test materials, answer documents, and other materials included as part of the CAHSEE in the manner and as otherwise required by the publisher.

- delivery of CAHSEE booklets to the school test site no more than two working days before the test is to be administered (§ 1212).
- Test security/cheating: Doing the following to maintain test security:
  - for CAHSEE test site coordinators to ensure that strict supervision is maintained over each pupil being administered the CAHSEE, both while in the testing room and during any breaks (§ 1211(a));
  - limiting access to the CAHSEE to pupils taking it and employees responsible for its administration (§ 1211(b));
  - having all CAHSEE district and test site coordinators sign the CAHSEE Test Security Agreement set forth in subdivision (d) of section 1211 of the title 5 regulations (§ 1211(c));
  - abiding by the Test Security Agreement by limiting access to persons in the district with a responsible, professional interest in the test's security. The Agreement also requires the coordinator to keep on file the names of persons having access to exam and test materials, and who are required to sign the CAHSEE Test Security Affidavit, and requires coordinators to keep the tests and test materials in a secure, locked location, limiting access to those responsible for test security, except on actual testing dates (§ 1211(d));
  - CAHSEE test site coordinators deliver the exams and test materials only to those actually administering the exam on the date of testing and only on execution of the CAHSEE Test Security Affidavit (§ 1211(e));
  - for persons with access to the CAHSEE (including test site coordinators and test administrators) to acknowledge the limited purpose of their access to the test by signing the CAHSEE Test Security Affidavit set forth in subdivision (g) (§ 1211(f));
  - CAHSEE district and test site coordinators control of inventory and use of appropriate inventory control forms to monitor and track test inventory (§ 1211(h));
  - being responsible for the security of the test materials delivered to the district until the materials have been inventoried, accounted for, and delivered to the common or private carrier designated by the publisher (§ 1211(i));
  - providing secure transportation within the district for test materials once they have been delivered to the district (§ 1211(j)); and
  - marking the test "invalid" and not scoring it for any pupil found to have cheated or assisted others in cheating, or who has compromised the security of the CAHSEE, and notifying each eligible pupil before administration of the CAHSEE of these consequences of cheating (§ 1220).
- Reporting data to the SPI: providing CAHSEE data to the SPI or independent evaluators or the publisher is a state mandate. Specifically, providing the following information on

each pupil tested: (1) date of birth, (2) grade level, (3) gender, (4) language fluency and home language, (5) special program participation, (6) participation in free or reduced priced meals, (7) enrolled in a school that qualifies for assistance under Title 1 of the Improving America's School Act of 1994, (8) testing accommodations, (9) handicapping condition or disability, (10) ethnicity, (11) district mobility, (12) parent education, (13) post-high school plans. (§ 1207); and reporting to the CDE the number of examinations for each test cycle within 10 working days of completion of each test cycle in the school district, and for the district superintendent to certify the accuracy of this information submitted to CDE (§ 1225).

### **III. Position of the Parties and Interested Parties**

#### **A. Claimant's Position**

The claimant alleges that the test claim statutes and regulation impose a reimbursable state-mandated program for school districts under article XIII B, section 6 and Government Code section 17514. The claimant seeks reimbursement to:

- Offer pupils who have failed one or both parts of CAHSEE by the end of 12<sup>th</sup> grade the opportunity to receive intensive support and assistance for two years following the completion of 12<sup>th</sup> grade. A school district may employ different intensive instruction and services strategies aligned to the needs of the pupil, and intensive instruction and services may be provided on Saturdays, evenings, or at a time and location deemed appropriate by the school district. Intensive instruction and services may include individual or small group instruction; the hiring and training of teachers; purchasing, scoring, and reviewing diagnostic assessments; and the provision of instruction and services by a public or nonpublic entity, as determined by the school district.
- Notify pupils in writing that intensive services are available to eligible pupils for two years following 12<sup>th</sup> grade. Notice must also be posted in the school site office, district office, and on the school district's website.
- Ensure that each eligible pupil receives an appropriate diagnostic assessment to identify areas of need.
- Submit an annual report to the Superintendent of Public Instruction (SPI) relating to the provision of intensive instruction and services provided.

The test claim is supported by a declaration from Patrick Day, Director of Maintenance, Operations, Purchasing, Contract Management for the San Jose Unified School District that states: "the estimated annual costs to perform the activities required by Education Code sections 37254 and 52378 are approximately \$375,000." The declaration recognizes funds appropriated in the Budget Act of 2007, but states that "none of the funds have been specifically identified as applicable to the increased activities required by Statutes of 2007, Chapter 526 and Chapter 730."<sup>36</sup>

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<sup>36</sup> Exhibit A, Test Claim, Declaration of Patrick Day, San Jose Unified School District, page 3-4.

Claimant submitted comments on the draft staff analysis on April 10, 2013 that disagreed with the proposed finding regarding the Commission’s lack of jurisdiction over Statutes 2007, chapter 526.

### **B. State Agency Position**

Finance, in comments filed in December 2008, points out that the portion of the test claim related to Statutes 2007, chapter 526 violates the statute of limitations in Government Code section 17551. Because the test claim was filed more than one year after the effective date of this statute, Finance concludes that the Commission has no statutory authority to hear and decide on the parts of the test claim relating to Statutes 2007, chapter 526.

Finance also asserts that the test claim statutes do not impose a state-mandated program because the activities required under the CAHSEE Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program are only required if the claimant chooses to receive state funding and participate in the programs.

Finance also states that funding has been provided in every budget act since 2005 for the CAHSEE Intensive Instruction and Services Program and the Middle and High School Supplemental Counseling Program. According to Finance, in the 2007-2008 school year, claimant applied for and received \$304,066 in CAHSEE Intensive Instruction and Services Program funding, and \$1,008,269 in Middle and High School Supplemental Counseling Program funding. Finance also states that revenue limits are a source of funds for the test claim.

### **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>37</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>38</sup>

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

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>39</sup>

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<sup>37</sup> *County of San Diego v. State of California* (1997)15 Cal.4th 68, 81.

<sup>38</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>39</sup> *San Diego Unified School Dist. v. Commission on State Mandates (San Diego Unified School Dist.)* (2004) 33 Cal.4th 859, at p. 874.

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>40</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>41</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>42</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>43</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>44</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>45</sup>

**A. The test claim was properly filed within the statute of limitations for Education Code sections 37254, 52378, 52379, and 52380, as amended by Statutes 2007, chapters 526 and 730, and the 2007 version of section 1204.5 of the title 5 regulations.**

In order for the Commission to take jurisdiction and make a determination of reimbursement with respect to a statute or executive order pled in a test claim, the test claim must be filed within the applicable statute of limitations required by Government Code section 17551(c) for each statute and executive order. Section 17551(c) states the following:

Local agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of

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<sup>40</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>41</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>42</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>43</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

<sup>44</sup> *County of San Diego, supra*, 15 Cal.4th 68, 109.

<sup>45</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.



incurring increased costs as a result of a statute or executive order, whichever is later.<sup>46</sup>

In this case, there is no issue regarding the Commission's jurisdiction over Education Code section 52379, as amended by Statutes 2007, chapter 730 and section 1204.5 of the title 5 regulations, as amended by Register 2007, Number 51. The test claim was filed within one year of the effective date of this statute and regulation.

However, the parties dispute whether the test claim was filed within the statute of limitations for the remaining test claim statutes: Education Code sections 37254, 52378, and 52380 as amended by Statutes 2007, chapter 526, and section 1204.5 of the regulations as adopted and amended in 2004, 2005, and 2006. The test claim was stamped *received* on October 14, 2008, over one year past the effective dates of these statutes and regulation.

For the reasons below, the Commission finds that the test claim, with respect to Education Code sections 37254, 52378, and 52380, as they were amended by Statutes 2007, chapter 526, was properly filed within the statute of limitations and that the Commission has jurisdiction over these test claim statutes. The Commission also finds that the test claim, with respect to section 1204.5 of the title 5 regulations, as that regulation was adopted in 2004, and amended in 2005 and 2006, was not timely filed and, thus, the Commission does not have jurisdiction to determine whether those versions of the regulation impose a reimbursable state-mandated program.

**1. The test claim seeking reimbursement for Education Code sections 37254, 52378, and 52380, as amended by Assembly Bill 347 (Stats. 2007, ch. 526), was timely filed.**

Three of the code sections in this test claim (Ed Code §§ 37254, 52378, 52380) were amended by AB 347 (Stats. 2007, ch. 526). AB 347 was an urgency bill that took effect on October 12, 2007, the date it was chaptered.<sup>47</sup> The test claim was received on October 14, 2008, more than 12 months after AB 347's effective date (Oct. 12, 2007). Finance argues that the Commission does not have jurisdiction over the code sections amended by AB 347 because the test claim was filed beyond the 12-month statute of limitations in Government Code section 17551(c).

According to the Commission's mail log records, this test claim was received by mail on October 14, 2008.<sup>48</sup> The Commission's regulations define "filing date," for documents filed by mail, as follows:

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<sup>46</sup> Government Code, section 17551(c) (Stats. 2004, ch. 890) effective Jan. 1, 2005. According to the Commission's regulations, "within 12 months of incurring increased costs" means filing by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred. (Cal. Code Regs., tit. 2, § 1183(c).)

<sup>47</sup> Government Code, section 9600 (b) states in part that "urgency statutes shall go into effect immediately upon their enactment."

<sup>48</sup> Exhibit A.

(g) “Filing date” means the date of delivery to the commission's office during normal business hours. For purposes of meeting the filing deadlines required by statute, the filing is timely if:

[¶] . . . [¶]

(1) the filing *was mailed* by first class mail no later than the expiration of the time for filing, or . . . (Emphasis added.)<sup>49</sup>

Under this rule, the date the document is mailed, and not the date the document is received, establishes the date of filing. Thus, in order to comply with the statute of limitations in Government Code section 17551(c) for purposes of the 2007 amendments to Education Code sections 37254, 52378, and 52380, the test claim had to be mailed by October 12, 2008.

The record, however, does not contain evidence showing the date the test claim was mailed. Nevertheless, by reviewing the 2008 calendar for the month of October, the Commission may properly presume that the filing was timely mailed by the October 12, 2008 deadline. The test claim was certified by a representative at San Jose Unified School District on October 7, 2008, and declarations were signed on October 8th and 9th, 2008, and, thus, it can be presumed that the claim was in the possession of the claimant on those dates.<sup>50</sup> The 2008 calendar shows that October 9, 2008 was a Thursday, and October 10, 2008 was a Friday, the last two business days of the week when the mail is picked up and delivered. October 11, 2008, was a Saturday, a day that mail is picked up and delivered, but not considered a business day for schools. October 12, 2008, the deadline for mailing this test claim, was a Sunday, a day when there is *no* mail pick-up or delivery. Monday, October 13, 2008, was Columbus Day, a Federal holiday<sup>51</sup> and a day when there was no mail pick-up or delivery,<sup>52</sup> and the filing was received on Tuesday, October 14, 2008. Since the test claim was delivered by mail, it had to have been mailed before the Sunday, October 12<sup>th</sup> deadline. The Commission can take judicial notice of these calendar dates and the dates of mail delivery, and find that the test claim was mailed before October 12, 2008, in compliance with the one-year statute of limitations required by Government Code section 17551(c).<sup>53</sup>

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<sup>49</sup> California Code of Regulations, title 5, section 1181(g). In 2008, the Commission had not yet implemented the e-filing system.

<sup>50</sup> Both signed by Patrick Day, Director of Maintenance, Operations, Purchasing, Contract Management for the San Jose Unified School District.

<sup>51</sup> See 5 U.S.C. section 6103.

<sup>52</sup> U.S. Postal Service “Mailing Standards of the United States Postal Service Domestic Mail Manual” section 608.3.2. This manual is incorporated into the federal regulations by 39 CFR section 111.1.

<sup>53</sup> Evidence Code section 452(g)(h), allowing judicial notice of facts and propositions that are of common knowledge, are not reasonably subject to dispute, and are capable of accurate determination by resort to resources that are reasonably indisputable; California Code of Regulations, title 2, section 1187.5(c).

Therefore, the Commission has jurisdiction over Education Code sections 37254, 52378, and 52380, as amended by Statutes 2007, chapter 526.

**2. The test claim seeking reimbursement for section 1204.5 of the title 5 regulations, as adopted and amended in 2004, 2005, and 2006, was not timely filed and the Commission does not have jurisdiction to make findings on those versions of the regulation.**

Although the claimant does not state which version of the regulation (Cal. Code Regs., tit. 5, § 1204.5) is being pled in the test claim, the history of section 1204.5 shows that it was adopted in 2004 (Register 2004, No. 21, effective and operative May 19, 2004) and amended three times before the claim was filed: on August 16, 2005 (Register 2005, No. 33, effective and operative Aug. 16, 2005), March 16, 2006 (Register 2006, No. 11, effective and operative Mar. 16, 2006), and December 20, 2007 (Register 2007, No. 51, effective and operative Dec. 20, 1997).

Based on the filing date of the test claim (Oct. 12, 2008), the Commission has jurisdiction only over the version of section 1204.5 of the title 5 regulations that was amended on December 20, 2007 (Register 2007, No. 51) and became effective the same day. The 2004 adoption of section 1204.5, and amendments made in 2005 and 2006 became effective more than 12 months before the filing date of the test claim, and there is no evidence in the record that the claimant first incurred increased costs under those amendments later than the 12-month period after those amendments became effective.

Therefore, the Commission does not have jurisdiction to make findings on section 1204.5 of the title 5 regulations, as adopted and amended in 2004, 2005, and 2006. The 2007 amendment to section 1204.5, however, was timely filed and is analyzed below.

**B. The test claim statutes and regulation do not impose a state-mandated program on school districts.**

**1. The 2007 amendments to the CAHSEE Intensive Instruction Program (Ed. Code, § 37254, Stats. 2007, ch. 526) do not impose a state-mandated program.**

The CAHSEE Intensive Instruction Program was adopted in 2005 to assist “eligible pupils” defined as pupils required to pass the CAHSEE but who have failed to pass one or more parts of the exam. The program offers eligible pupils “intensive instruction and services,” which was defined as:

Intensive instruction and services may include, but are not limited to, all of the following:

- (A) Individual or small group instruction.
- (B) The hiring of additional teachers.
- (C) Purchasing, scoring, and reviewing diagnostic assessments.
- (D) Counseling.
- (E) Designing instruction to meet specific needs of eligible pupils.

(F) Appropriate teacher training to meet the needs of eligible pupils.<sup>54</sup>

The 2005 statute also provided how the SPI was to allocate funds, and required school districts to ensure, as a condition of funding, that eligible pupils receive appropriate diagnostic assessments and intensive instruction and services based on the diagnostic assessments. Districts also had to demonstrate that funds would be used to supplement and not supplant existing services, and report the number of eligible pupils at each high school in the district. Annual district reporting was also required.

Section 37254 was amended in 2006 to revise how funding was allocated to schools, and to amend the reporting requirements.<sup>55</sup>

The CAHSEE Intensive Instruction Program was amended by the test claim statute, Statutes 2007, chapter 526 (Ed. Code, § 37254) as follows:

- Revised the definition of eligible pupil in subdivision (a) to include “one who has not passed one or both parts of the CAHSEE “by the end of grade 12.”
- Revised the funding formula in subdivision (b) to require the SPI to determine a per pupil funding rate by dividing the amount of appropriated funds by the number of eligible pupils in grade 12, as reported by school districts.
- Added two additional services to the definition of “intensive instruction and services” in subdivision (c)(3)(G) and (H) as follows:

(G) Instruction in English-language arts or mathematics, or both, that eligible pupils need to pass those parts of the high school exit examination not yet passed. A school district may employ different intensive instruction and services strategies more aligned to the needs and circumstances of pupils who have not passed one or both parts of the high school exit *examination by the end of grade 12 as compared to grade 12 pupils with similar needs* in a comprehensive high school of the district.

(H) The provision of instruction and services by a public or nonpublic entity, as determined by the local educational agency.

- Amended subdivision (d) by requiring school districts, as a condition of receiving funds for intensive instruction and services, to perform the following activities:
  - Ensure that each pupil receives intensive instruction and services based on prior results on the CAHSEE;
  - Ensure that all pupils who have not passed one or both parts of the CAHSEE by the end of grade 12 are notified in writing before the end of each school term of the availability of the services in sufficient time to register for or avail themselves of those services each term for two consecutive academic years thereafter and are notified of the right to file a complaint regarding those services as specified, and post the notice in the school office and on the district Web site, as specified.

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<sup>54</sup> Education Code section 37254 (Stats. 2005, ch. 234).

<sup>55</sup> Statutes 2006, chapter 79.

- Ensure that all pupils who have not passed one or both parts of the high school exit examination by the end of grade 12 have the opportunity to receive intensive instruction and services as needed based on the results of the diagnostic assessment and prior results on the high school exit examination, as specified, for up to two consecutive academic years after completion of grade 12 or until the pupil passes both parts of the high school exit examination, whichever comes first. A school district shall employ strategies for intensive instruction and services that are most likely to result in these pupils passing the parts of the high school exit examination that they have not yet passed.
- Ensure that all English learners who have not passed one or both parts of the high school exit examination by the end of grade 12 have the opportunity to receive intensive instruction and services provided, as specified. Include services to improve English proficiency as needed based on the results of the diagnostic assessment and prior results on the high school exit examination, as specified, to pass those parts of the high school exit examination not yet passed, for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first. A school district shall employ strategies for intensive instruction and services that are most likely to result in these pupils passing the parts of the high school exit examination that they have not yet passed.
- Submit an annual report to the appropriate county superintendent of schools that describes the manner and frequency in which eligible pupils were notified of the intensive instruction and services provided.

The Commission finds that the 2007 amendments to section 37254 are requirements that were imposed, according to the plain language of section 37254(d), as “a condition of receiving funds.” In the 2012-2013 State Budget Act, over \$72 million was appropriated for the purposes of Education Code section 37254.<sup>56</sup> Thus, there is no legal requirement for school districts to seek or receive funds for the CAHSEE Intensive Instruction Program. School districts make a local decision to apply for funding.<sup>57</sup> A local decision that results in a school district incurring costs does not constitute a state-mandated program.<sup>58</sup> According to the Supreme Court’s interpretation of a state-mandated program in the *Kern* case, downstream requirements that result from a discretionary decision (such as the decision to receive funds) are not mandated by the state.<sup>59</sup>

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<sup>56</sup> See Item 6110-204-0001, Provision 1, Statutes 2012, chapters 21 and 29.

<sup>57</sup> CDE, “Guidance: Application for Categorical Funding” last reviewed July 16, 2012. <<http://www.cde.ca.gov/fg/aa/co/ca12sguiappcatprog.asp> > as of May 1, 2013.

<sup>58</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

<sup>59</sup> *Dept. of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 731, 742-743.

Moreover, CDE has interpreted the activities in section 37254 as “voluntary” rather than “mandatory.”<sup>60</sup> The Commission, like a court, gives great weight to the construction of a statute by the administrative officials charged with its enforcement or implementation.<sup>61</sup>

Finding no legal compulsion, a school district may argue it is practically compelled to comply with the 2007 amendments to section 37254. Practical compulsion requires a concrete showing, with evidence in the record, that a school district faces certain and severe penalties, such as double taxation or other draconian consequences for not complying the test claim statute, or that a school district is left with no reasonable alternative but to comply with the statute in order to carry out its core mandatory function to provide educational services to K-12 students.<sup>62</sup> The claimant has not provided any evidence of practical compulsion to participate in the CAHSEE Intensive Instruction Program for this test claim.

If a school district decides not to participate in the CAHSEE Intensive Instruction Program, or elects to discontinue participation in the program, there is no evidence in the record that the district would face “certain and severe penalties” such as “double taxation” or other “draconian measures.” It simply loses continued funding to assist pupils in passing the CAHSEE through this program.

For these reasons, the Commission finds that Education Code section 37254 (Stats. 2007, ch. 526) does not impose a state-mandated program on school districts.<sup>63</sup>

**2. The 2007 amendments to the Middle and High School Supplemental Counseling Program (Ed. Code, §§ 52378 & 52380, Stats. 2007, ch. 526) do not impose a state-mandated program.**

The purpose of the Middle and High School Supplemental Counseling Program is to increase the number of school counselors who serve pupils in grades 7 to 12. The new counselors help provide pupils with information on all educational and vocational options available to them. Funding available is first intended to serve pupils in grades 7 to 12, with additional attention to those who have failed or are at risk of failing the CAHSEE, or are at risk of not graduating due to insufficient credits.<sup>64</sup>

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<sup>60</sup> CDE, “Frequent Questions – Supplemental Instruction” last reviewed April 18, 2013. <<http://www.cde.ca.gov/re/lr/pr/faqs.asp>> as of May 1, 2013. CDE interprets other facets of the Supplemental Instructional Program (e.g., Ed. Code, §§ 37252 and 37252.2) as mandatory.

<sup>61</sup> *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

<sup>62</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 884-887; *Department of Finance (POBRA)*, *supra*, 170 Cal.App.4th 1355, 1362-1368.

<sup>63</sup> Education Code section 37254 was also amended by Statutes 2009, chapter 303, which is not part of this test claim so the Commission makes no finding on it.

<sup>64</sup> CDE, “Frequently Asked Questions” last reviewed February 7, 2013. <<http://www.cde.ca.gov/lr/cg/mc/mhscfaq.asp>> as of May 1, 2013.

Before the 2007 test claim statute was enacted, districts that maintain grades 7 through 12, inclusive, were required to perform two activities under the program as a condition of receiving funds: (1) adopt the program at a public meeting of the governing board, and (2) meet with each pupil to explain the pupil's academic records and educational options, among other things. Education Code section 52378 was amended by the 2007 test claim statute to add the following requirements to the program as a condition of receiving funds:

- The program shall include a provision for a counselor to meet with each pupil and if practicable, the parent or legal guardian of the pupil, to explain the availability of intensive instruction and services as required by section 37254(c), for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first, for pupils who have not passed one or both parts of the CAHSEE by the end of grade 12. (§ 52378(a)(2).)
- Inform the pupil who has not passed one or both parts of the CAHSEE of the option of intensive instruction and services. (§ 52378(b)(4).)
- For a pupil enrolled in grade 12, include in the options for continuing his or her education if he or she fails to meet graduation requirements, the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first. (§ 52378(c)(1)(D).)
- During a conference with each specified pupil, and his or her parent or guardian, where the pupil is informed of the consequences of not passing the CAHSEE, the school counselor shall also apprise the pupil of the remediation strategies, high school courses, and alternative education options available to the pupil. These options shall include the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the CAHSEE, whichever comes first. (§ 52378(e)(5).)

Another code section of the Middle and High School Supplemental Counseling Program (Ed. Code, § 52380) was also amended by the 2007 test claim statute to revise the school district reporting requirement, which is required as a condition of receiving funds, to provide assurance that the school district has complied with section 52378(e)<sup>65</sup> and to send the report to the

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<sup>65</sup> The full text of section 52378(e) states the following:

- (e) During the individual conference described in subdivision (d), the school counselor shall apprise the pupil identified in paragraphs (1) and (2) of subdivision (b), and his or her parent or legal guardian of the following:
- (1) Consequences of not passing the high school exit examination.
  - (2) Programs, courses, and career technical education options available for pupils needed for satisfactory completion of middle or high school.
  - (3) Cumulative records and transcripts of the pupil.
  - (4) Performance on standardized and diagnostic assessments of the

Superintendent of Public Instruction and the county superintendent of schools. The 2007 amendment also required, as a condition of receiving funds, the district to send the report to the Superintendent of Public Instruction and the county superintendent of schools. The 2007 statute added the following underlined provisions:

As a condition of receipt of funds pursuant to this chapter, a school district shall submit an annual report to the Superintendent and the appropriate county superintendent of schools in a manner determined by the Superintendent that describes the number of pupils served, the number of school counselors involved in conferences, the number and percentage of pupils who participated in conferences and who successfully pass the high school exit examination, and the number and percentage of pupils who participated in conferences and who fail to pass one or both sections of the exit examination, and a summary of the most prevalent results for pupils based on the graduation plans developed pursuant to this chapter. The report also shall contain an assurance that the school district has complied with subdivision (e) of Section 52378.

The Commission finds that Education Code sections 52378 and 52380, as amended by Statutes 2007, chapter 526, do not impose a state-mandated program. These code sections impose requirements, according to the plain language in both sections, which are “a condition of receiving funds.” In the 2012-2013 State Budget Act, over \$208 million was appropriated for the purposes of Education Code section 52378. There is no legal requirement for school districts to perform the new activities as a condition receiving additional funds for the Middle and High School Supplemental Counseling Program. School districts make a local decision to apply for this funding.<sup>66</sup> A local decision that results in a school district incurring costs does not constitute

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pupil.

(5) Remediation strategies, high school courses, and alternative education options available to the pupil, including, but not limited to, informing pupils of the option to receive intensive instruction and services for up to two consecutive academic years after completion of grade 12 or until the pupil has passed both parts of the high school exit examination, whichever comes first.

(6) Information on postsecondary education and training.

(7) The score of the pupil on the English language arts or mathematics portion of the California Standards Test administered in grade 6, as applicable.

(8) Eligibility requirements, including coursework and test requirements, and the progress of the pupil toward satisfaction of those requirements for admission to four-year institutions of postsecondary education, including, at least, the University of California and the California State University.

(9) The availability of financial aid for postsecondary education.

<sup>66</sup> CDE, “Frequently Asked Questions” last reviewed February 7, 2013. <<http://www.cde.ca.gov/ls/cg/mc/mhscfaq.asp>> as of May 1, 2013.



a state mandate.<sup>67</sup> According to the Supreme Court’s interpretation of a state-mandated program in the *Kern* case, downstream requirements that result from a discretionary decision do not impose a state mandate.<sup>68</sup>

Nor is there any evidence that school districts are practically compelled to implement the Middle and High School Supplemental Counseling Program. Practical compulsion requires a concrete showing, with evidence in the record, that a school district faces certain and severe penalties, such as double taxation or other draconian consequences for not complying the test claim statute, or that a school district is left with no reasonable alternative but to comply with the statute in order to carry out its core mandatory function to provide educational services to K-12 students.<sup>69</sup> The claimant has not provided evidence of practical compulsion in the record for this test claim.

If a school district decides not to participate in the Middle and High School Supplemental Counseling Program, or elects to discontinue participation in the program, there is no evidence in the record that the district will face “certain and severe penalties” such as “double taxation” or other “draconian measures.” It simply loses continued funding to assist pupils through these supplemental counseling services.

For these reasons, the Commission finds that Education Code sections 52378 and 52380 (Stats. 2007, ch. 526) do not impose a state-mandated program on school districts.

**3. The 2007 amendment to the Middle and High School Supplemental Counseling Program appropriation provision (Ed. Code, § 52379, Stats. 2007, ch. 730) does not impose a state-mandated program.**

Education Code section 52379 was amended by the test claim statute (Stats. 2007, ch. 730) to clarify the funding appropriated under the Middle and High School Supplemental Counseling Program as follows (noted by ~~strikeout~~ and *italics*):

(a) Funds appropriated in the annual Budget Act for the purposes of this chapter shall be allocated to school districts based on an equal amount per pupil enrolled in the district in the prior fiscal year, based on the fall California Basic Educational Data System (CBEDS) enrollment data, in grades 7 to 12, inclusive, with the following minimum-grant exceptions:

(1) Five thousand dollars (\$5,000) for each schoolsite that has 100 or fewer pupils enrolled in any of grades 7 to 12, inclusive.

(2) Ten thousand dollars (\$10,000) for each schoolsite that has ~~between~~ *at least 101 and, but not more than* 200, pupils enrolled in any of grades 7 to 12, inclusive.

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<sup>67</sup> *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 880.

<sup>68</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731, 742-743.

<sup>69</sup> *Kern High School Dist.*, *supra*, 30 Cal.4th 727, 731, 743, 749-754; *San Diego Unified School Dist.*, *supra*, 33 Cal.4th 859, 884-887; *Department of Finance (POBRA)*, *supra*, 170 Cal.App.4th 1355, 1362-1368.

(3) Thirty thousand dollars (\$30,000) or an amount per pupil enrolled, whichever is greater, for each schoolsite with more than 200 pupils enrolled in any of grades 7 to 12, inclusive.

(b) Funds allocated pursuant to this section shall supplement, and not supplant, expenditures made by a school district for school counseling programs.

(c) For purposes of this section, a charter school is not eligible to receive a minimum grant but instead shall receive an amount per pupil enrolled in grades 7 to 12, inclusive.

(d) Funds appropriated in the annual Budget Act for the purposes of this chapter shall be used to provide supplemental counseling services delivered by personnel who hold a valid pupil personnel services credential.

The legislative history of this bill indicates that it is “the annual Education ‘clean-up’ bill that makes various non-controversial revisions to statute.”<sup>70</sup> The amendment to section 52379 was described as “Corrects wording in the Middle & High School Supplemental Counseling Program to specify that school sites with an enrollment in grades 7 through 12 of 101 through and including 200 pupils receive a minimum grant of \$10,000.”<sup>71</sup>

This code section, as amended in 2007, describes how funding is allocated for the counseling program, but imposes no requirements on a school district. Thus, the Commission finds that Education Code 52379 (Stats. 2007, ch. 790) does not impose a state-mandated program on school districts.

**4. The 2007 amendment to the regulation governing grade 11 and 12 and adult student CAHSEE testing dates (Cal.Code Regs., tit.5, § 1204.5, as amended by Reg. 2007, No. 51.) does not impose a state-mandated program.**

The test claim regulation was amended operative December 20, 2007 (Reg. 2007, No. 51) as follows.

§ 1204.5 Grades 11 and 12 and Adult Student Testing Dates.

(a) School districts shall provide eligible pupils in grade 11 at least two opportunities per school year to take the section(s) of the examination not yet passed. Eligible pupils in grade 11 ~~who have not yet passed one or both sections of the examination shall have up to two opportunities per year to may~~ take the section(s) of the examination not yet passed up to two times per school year and may take the examination in successive administrations and may elect to take the examination during these opportunities.

(b) School districts shall provide eligible pupils in grade 12 at least three opportunities per school year to take the section(s) of the examination not yet passed. Eligible pupils in grade 12 ~~shall have up to three opportunities to take the~~

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<sup>70</sup> Senate Committee on Education, Analysis of SB 132 (2007-2008 Reg. Sess.) as amended March 26, 2007, page 5.

<sup>71</sup> *Id.*, page 5.

~~section(s) of the examination not yet passed. The district shall offer either three opportunities during grade 12 or two opportunities in grade 12 and one opportunity in the year following grade 12 to may take the section(s) of the examination not yet passed up to three times per school year and may take the examination in successive administrations. Eligible pupils in grade 12 may elect to take the examination during district-provided opportunities.~~

(c) School districts shall provide eligible adult students at least three opportunities per school year to take the section(s) of the examination not yet passed. Eligible adult students may ~~shall have up to three opportunities per year to take the section(s) of the examination not yet passed~~ up to three times per school year and may take the examination in successive administrations ~~and may elect to take the examination during these opportunities.~~

(d) ~~Districts shall not test eligible pupils in grade 11 in successive administrations within a school year.~~ Eligible pupils in grades 11 and 12 and eligible adult students should be offered appropriate remediation or supplemental instruction before being retested.

This regulation affects eligible pupils and eligible adult students, defined as:

"Eligible pupil" is a person enrolled in a California public school in grade 10, 11, or 12, including those pupils placed in a nonpublic school through the individualized education program (IEP) process pursuant to Education Code section 56365, who has not passed both the English-language arts section and the mathematics section of the high school exit examination.<sup>72</sup>

"Eligible adult student" is a person enrolled in an adult school operated by a school district who is working to attain a high school diploma and has not passed both the English-language arts section and the mathematics section of the high school exit examination. This term does not include pupils who are concurrently enrolled in high school and adult school.<sup>73</sup>

As indicated in the background, the purpose of the amendment was to clarify the number of times pupils may take the CAHSEE in each grade and to permit grade 11 pupils to take the CAHSEE in successive administrations.<sup>74</sup>

The amendments to section 1204.5 do not impose a state-mandated new program or higher level of service. Except for the amendment to subdivision (d) that removes a prohibition on testing grade 11 pupils in successive administrations within a school year, the amendments regarding the

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<sup>72</sup> California Code of Regulations, title 5, section 1200(d) as amended by Register 2007, No. 51, operative December 20, 2007.

<sup>73</sup> California Code of Regulations, title 5, section 1200(c) as amended by Register 2007, No. 51, operative December 20, 2007.

<sup>74</sup> CDE, Initial Statement of Reasons, California High School Exit Exam Regulations, February 20, 2007, page 1.

number of times a pupil may take the CAHSEE are merely clarifying. The amendments do not increase the number of times per year pupils may take the CAHSEE. Both before and after the 2007 amendment, eligible pupils in grade 11 may take the CAHSEE up to two times per year, eligible pupils in grade 12 may take the CAHSEE up to three times per year, and eligible adult students may take the CAHSEE up to three times per year. There is nothing to indicate that allowing successive administrations for grade 11 pupils in subdivision (d) imposes a higher level of service on a school district beyond that provided under prior law. Therefore, the Commission finds that California Code of Regulations, title 5, section 1204.5 (Register 2007, No. 51, operative Dec. 20, 2007) is not a state-mandated new program or higher level of service.

## **V. Conclusion**

Based on the foregoing, the Commission finds that Education Code sections 37254, 52378, 52379, and 52380, as amended by Statutes 2007, chapters 526 and 730, and section 1204.5 of the title 5 regulations, as amended in 2007 (Register 2007, No. 51) do not impose a reimbursable state-mandated program on school districts within the meaning of article XIII B, section 6 of the California Constitution.

The Commission further finds that the test claim, with respect to section 1204.5 of the title 5 regulations as adopted in 2004 and amended in 2005 and 2006, was not filed within the one-year statute of limitations required by Government Code section 17551(c) and, thus, the Commission does not have jurisdiction to make findings on those versions of the regulation.

Accordingly, the Commission denies this test claim.