

COMMISSION ON STATE MANDATES

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September 21, 2015

Mr. Keith B. Petersen
SixTen and Associates
P.O. Box 340430
Sacramento, CA 95834-0430

Ms. Jill Kanemasu
State Controller's Office
Accounting and Reporting
3301 C Street, Suite 700
Sacramento, CA 95816

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

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**
Notification of Truancy, 10-904133-I-10 and 13-904133-I-12
Education Code Section 48260.5
Statutes 1983, Chapter 498
Fiscal Years: 2003-2004, 2004-2005, 2005-2006, and 2006-2007
Riverside Unified School District, Claimant

Dear Mr. Petersen and Ms. Kanemasu:

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

Written Comments

Written comments may be filed on the draft proposed decision by **October 12, 2015**. You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Please see <http://www.csm.ca.gov/dropbox.shtml> on the Commission's website for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.3.)

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

Hearing

This matter is set for hearing on **Thursday, December 3, 2015**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The proposed decision will be issued on or about November 19, 2015. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

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

Heather Halsey
Executive Director

ITEM __
INCORRECT REDUCTION CLAIM
DRAFT PROPOSED DECISION

Education Code Section 48260.5

Statutes 1983, Chapter 498

Notification of Truancy

Fiscal Years 2003-2004, 2004-2005, 2005-2006, and 2006-2007

10-904133-I-10 and 13-904133-I-12

Riverside Unified School District, Claimant

EXECUTIVE SUMMARY

Overview

This analysis addresses reductions made by the State Controller's Office (Controller) to Riverside Unified School District's (claimant's) reimbursement claims for costs incurred during fiscal years 2003-2004 through 2006-2007 under the *Notification of Truancy* program.

The following issues are in dispute:

- Documentation requirements to substantiate the number of initial notifications of truancy issued;
- Reductions based on notifications of truancy issued for pupils who were not subject to compulsory attendance under the Education Code;
- Reductions based on notifications of truancy issued for pupils who accumulated three but not four unexcused absences or occurrences of tardiness; and
- The use of statistical sampling to support the reduction.

As explained herein, the Controller's reductions based on lacking or insufficient source documentation are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support. Staff further finds that reductions based on notifications of truancy issued for pupils not subject to compulsory education under the Education Code by virtue of being under age six or over age eighteen are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support. However, staff finds that reductions based on notifications of truancy issued for pupils who accumulated three but not four absences during the school year are incorrect as a matter of law, but reductions based on notifications issued for pupils who did not accumulate three absences are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support. Staff further finds that, with respect to the reduction for one notification in Finding 2 based on lack of sufficient documentation, the Controller has not identified any specific reason for the reduction or any evidence to support the

reduction, and therefore that reduction is entirely lacking in evidentiary support. And, staff ultimately finds that the use of statistical sampling to calculate a dollar figure for reduction of costs claimed is not arbitrary, capricious, or entirely lacking in evidentiary support.

The Notification of Truancy Program

Under California’s compulsory education laws, children between the ages of six and 18 are required to attend school full-time, with a limited number of specified exceptions.¹ A pupil who accumulates a certain number or absences or instances of tardiness is deemed to be in violation of the compulsory education requirement, and is a truant.² Statutes 1983, chapter 498 added Education Code Section 48260.5, which specified as follows:

- (a) Upon a pupil's initial classification as a truant, the school district shall notify the pupil's parent or guardian, by first-class mail or other reasonable means, of the following:
 - (1) That the pupil is truant.
 - (2) That the parent or guardian is obligated to compel the attendance of the pupil at school.
 - (3) That parents or guardians who fail to meet this obligation may be guilty of an infraction and subject to prosecution pursuant to Article 6 (commencing with Section 48290) of Chapter 2 of Part 27.
- (b) The district also shall inform parents or guardians of the following:
 - (1) Alternative educational programs available in the district.
 - (2) The right to meet with appropriate school personnel to discuss solutions to the pupil's truancy.

On November 29, 1984, the Board of Control, the predecessor to the Commission on State Mandates (Commission), determined that Education Code Section 48260.5, as added by Statutes 1983, chapter 498, imposed a reimbursable state-mandated program to develop notification forms and provide written notice to the parents or guardians of the truancy.³

Accordingly, the Board of Control’s test claim decision and the parameters and guidelines adopted by the Commission found that section 48260.5 imposed a state-mandated program requiring that upon a student’s classification as a truant, the school must notify the pupil’s parent or guardian. At the time of the test claim decision and adoption of the parameters and guidelines, section 48260, as enacted in 1976, which was found not to impose any mandated activities, provided that a truancy occurs when a student is “absent from school without valid

¹ Education Code section 48200.

² Education Code section 48260.

³ Exhibit X, Board of Control, Brief Written Statement for Adopted Mandate on the *Notification of Truancy* test claim (SB 90-4133).

excuse *more than three days* or tardy in excess of 30 minutes on each of *more than three days* in one school year...”⁴

The original parameters and guidelines were adopted by the Commission on August 27, 1987, and authorized reimbursement for the one-time activities of planning implementation, revising school district policies and procedures, and designing and printing the notification forms. Reimbursement was also authorized for ongoing activities to identify pupils to receive the initial notification and prepare and distribute the notification by first class mail or other reasonable means.

The Commission amended the parameters and guidelines on July 22, 1993, effective beginning July 1, 1992, to add a unit cost of \$10.21, adjusted annually by the Implicit Price Deflator, for each initial notification of truancy distributed, in lieu of requiring the claimant to provide documentation of actual costs to the Controller. The parameters and guidelines further provide that “school districts incurring unique costs within the scope of the reimbursable mandated activities may submit a request to amend the parameters and guidelines to the Commission for the unique costs to be approved for reimbursement.”⁵ These are the parameters and guidelines applicable to this claim.⁶

As later amended by Statutes 1994, chapter 1023 (SB 1728) and Statutes 1995, chapter 19 (SB 102), section 48260 provided that a pupil would be classified a truant “who is absent from school without valid excuse *three full days* in one school year, or tardy or absent for more than any 30-minute period during the school day without a valid excuse on *three occasions* in one school year, or any combination thereof...”⁷ At the same time, the Legislature amended section 48260.5 to require the school to also notify parents that a pupil may be subject to prosecution under section 48264; that a pupil may be subject to suspension or restriction of driving privileges under section 13202.7 of the Vehicle Code; and that it is recommended that the parent or guardian accompany the pupil to school and attend classes with the pupil for one day.⁸ Those amendments were incorporated into the parameters and guidelines on January 31, 2008, effective July 1, 2006, at the Legislature’s direction, however, reimbursement for the program under the amended parameters and guidelines remained fixed at a unit cost of \$10.21, adjusted annually by the Implicit Price Deflator (\$19.63 for fiscal year 2013-14).⁹

⁴ Education Code section 48260 (Stats. 1976, ch. 1010).

⁵ Exhibit A, IRC 10-904133-I-10, page 46.

⁶ The parameters and guidelines as amended in 2008 are not applicable to this IRC.

⁷ Education Code section 48260, as amended by Statutes 1994, chapter 1023 and Statutes 1995, chapter 19.

⁸ Education Code section 48260.5, as amended by Statutes 1994, chapter 1023.

⁹ Statutes 2007, chapter 69 (AB 1698).

Procedural History

On February 5, 2010, the Controller issued the final audit report.¹⁰ On November 1, 2010, claimant filed Incorrect Reduction Claim (IRC) 10-904133-I-10.¹¹

On August 24, 2012, the Controller issued a revised audit report.¹² On November 15, 2013, the claimant filed a revised IRC (13-904133-I-12), which was consolidated with IRC 10-904133-I-10.¹³ On October 3, 2014, the Controller filed written comments on the consolidated IRCs.¹⁴

On September 21, 2015, Commission staff issued the draft proposed decision.¹⁵

Commission Responsibilities

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

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

The Commission must review questions of law, including interpretation of parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁶ The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."¹⁷

With regard to the Controller's audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to

¹⁰ Exhibit A, IRC 10-904133-I-10, page 59.

¹¹ Exhibit A, IRC 10-904133-I-10, page 1.

¹² See Exhibit B, IRC 13-904133-I-12, page 14.

¹³ Exhibit B, IRC 13-904133-I-12, page 1.

¹⁴ Exhibit C, Controller's Comments.

¹⁵ Exhibit D, Draft Proposed Decision.

¹⁶ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

¹⁷ *County of Sonoma*, supra, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.¹⁸

The Commission must also review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with claimant.¹⁹ In addition, sections 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.²⁰

Claims

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

Issue	Description	Staff Recommendation
Reductions based on insufficient documentation to support the number of initial truancy notifications issued.	The parameters and guidelines do not state what type of documentation is required, and accordingly the claimant argues that the parameters and guidelines require only documentation that shows the number of initial truancy notifications issued. However, the parameters and guidelines also require documentation to support the reimbursement claimed.	<i>Correct</i> – The parameters and guidelines require documentation to support the reimbursement claimed; therefore at least some documentation is required to support the validity of the notifications issued. Here, the claimant provided attendance records, and those records did not support the number of notifications claimed.
Reductions based on initial truancy notifications issued for pupils not subject to the compulsory	Section 48260 defines a truant as a pupil subject to compulsory education who is absent or tardy on three or more occasions within one school year. Section 48200 provides that only pupils between the ages of 6 and 18 are subject to compulsory full-time education.	<i>Correct</i> – Pupils under age 6 and over age 18 are not subject to compulsory full-time education, and therefore cannot be, by definition, truant. Therefore, an initial notification of truancy issued for such a pupil is not within

¹⁸ *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

¹⁹ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

²⁰ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

<p>education provisions of the Education Code.</p>	<p>The Controller reduced costs claimed for initial notifications of truancy for pupils under age 6 and over age 18, because the Controller determined that such pupils could not be, by definition, truant.</p>	<p>the scope of the mandated program. This reduction is correct as a matter of law.</p>
<p>Reductions based on initial truancy notifications for which the Controller concluded that pupils had not accumulated the required number of unexcused absences to be classified as a truant under the mandate program.</p>	<p>The parameters and guidelines in effect from July 22, 1993 until July 1, 2006 require schools to issue notification to a parent or guardian upon a pupil’s initial classification as truant, as defined in Education Code section 48260. The notice, pursuant to section 48260.5, was required, during the audit period, to include notice that the pupil is a truant; that the parent or guardian is obligated to compel the pupil’s attendance; that parents or guardians who fail to do so may be guilty of an infraction and subject to prosecution; that alternative educational programs are available in the district; and that the parent or guardian has the right to meet with school personnel to discuss the pupil’s truancy.</p> <p>The Controller reduced costs claimed for initial notifications of truancy based on the definition of a truant referenced in the parameters and guidelines under “Summary of Mandate.” However, pursuant to amendments effected by Statutes 1994, chapter 1023 and Statutes 1995, chapter 19, this reference to the definition in the parameters and guidelines was no longer consistent with the Education Code during the audit period.</p>	<p><i>Partially correct-</i> To the extent reductions were made based on initial truancy notifications for pupils with fewer than three unexcused absences, those reductions are correct as a matter of law since, at the time costs were incurred, Education Code section 48260 defined a truant as a pupil who accumulates three or more unexcused absences or tardies in excess of 30 minutes. However, reductions for notices for pupils with three or more absences are incorrect as a matter of law. Though the definition in Education Code section 48260 changed between the adoption of the test claim decision and the fiscal years in question here, the mandated program under section 48260.5, as added in 1983, did not change. Section 48260 is merely definitional and describes the triggering event for performance of the mandated activities. Here, though the auditor was reasonably confused by the inclusion of the former definition under the summary of the mandate in parameters and guidelines, section 48260 was never approved as imposing any activity and a reduction based on a provision of former law that</p>

		is no longer applicable and did not impose the mandate is incorrect as a matter of law.
Reductions based on an extrapolation of an unsupported finding of a single instance of insufficient documentation within the Controller's sample.	The Controller reduced costs claimed for initial notifications of truancy based on one instance within the Controller's sample of a notification that the Controller found was not supported by sufficient documentation. However, neither the audit report nor the IRC narrative provides any more specific information on the nature of the insufficient documentation.	<i>Incorrect</i> – There is no evidence in the record to explain the nature of the insufficiency in documentation, and no evidence that the insufficiency is of a type that is repeated elsewhere in the population of notifications claimed. Therefore, this reduction and the inclusion of this reduction within the error rate extrapolated to the whole population is entirely lacking in evidentiary support.
Reductions made by extrapolation of statistical sampling.	The Controller reduced costs in the subject audits by sampling a small number of initial notifications sent to parents or guardians and determining whether those notifications were sent in accordance with the parameters and guidelines (i.e., sent upon the fourth occurrence of an unexcused absence or unexcused tardiness). Based upon the number of notifications that the Controller determined were sent earlier than required under the former definition of truancy, the Controller calculated an error rate and applied that rate to all remaining notifications during the audit period, reducing costs claimed accordingly.	<i>Partially correct</i> – As discussed above, reductions for notices for pupils with three or more unexcused absences or tardies are incorrect as a matter of law; that conclusion extends to reductions based on an extrapolation of those incorrect reductions. However, with regard to the notices for which costs were correctly reduced, there is no law or regulation on point that proscribes the Controller's statistical sampling and extrapolation methodology as an auditing method. Based on the minimal unit cost applied to each transaction (i.e., each notification issued), auditing by sampling and extrapolation is a practical and reasonable audit decision, and denying that tool would impose an unreasonable burden on the Controller to

		<p>review every notice sent. Therefore, extrapolation based on the sampled notices that were correctly reduced only, is not arbitrary, capricious or entirely lacking in evidentiary support. In addition, staff finds that this sampling and extrapolation method does not constitute an underground regulation since there is no evidence that it has been applied generally; nor is it inconsistent with claimant's right to reimbursement for all state-mandated costs incurred, because of the high confidence level.</p>
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Staff Analysis

A. The Controller's Reductions in Finding 1 on the Basis of Insufficient Documentation Are Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The Controller reduced costs claimed for fiscal years 2003-2004 and 2004-2005 totaling \$799, based on its determination that "attendance records did not support the number of initial truancy notifications claimed." The claimant argues that the parameters and guidelines "do not require claimants to maintain a copy of each notification..." and "do not require attendance records to support the number of notifications distributed."²¹ The claimant reasons that "[t]he truanies were recorded and the notices were distributed, therefore, actual costs were incurred, and the Controller does not state that the work was not performed."²²

As amended July 22, 1993, the parameters and guidelines state: "For auditing purposes, documents must be kept on file for a period of 3 years from the date of final payment by the State Controller, unless otherwise specified by statute..." Claimants requesting reimbursement under the "uniform allowance" are required to retain: "Documentation which *indicates the total number* of initial notifications of truancy distributed."²³ But in addition, all claimants are required to "provide *documentation in support of the reimbursement claimed* for this mandated program," and the parameters and guidelines do not limit the type of supporting documentation required.

²¹ Exhibit A, IRC 10-904133-I-10, pages 10-11.

²² Exhibit A, IRC 10-904133-I-10, page 12.

²³ Exhibit A, IRC 10-904133-I-10, pages 45-48.

The Controller interprets the parameters and guidelines to require a claimant to retain attendance records that demonstrate that each and every one of the initial truancy notifications distributed was distributed upon the pupil's initial classification as a truant, and not before. The claimant asserts that it is required only to identify the number of initial notifications of truancy that are issued. It is not clear that attendance records are the *only* documentation that would suffice under the parameters and guidelines, but there is no evidence in the record that any documentation at all was provided for the 57 notifications in issue.

Based on the foregoing, staff finds that the Controller's reduction of costs for a total of 57 initial truancy notifications for fiscal years 2003-2004 and 2004-2005, based on a lack of attendance records to support the notifications, is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

B. The Controller's Reductions in Finding 2 on the Basis of Notifications Issued for Pupils Who Were Not Subject to Compulsory Education Requirements of the Education Code Are Correct as a Matter of Law.

The Controller found 63 unallowable notifications within the audit sample that were issued to pupils under age six or over age eighteen who were not subject to the compulsory education requirements of the Education Code or the *Notification of Truancy* mandate.²⁴ The claimant asserts that notifications of truancy issued for students under age six or over age eighteen should be reimbursable because the Education Code provides that those students are statutorily entitled to attend school.²⁵ The claimant further contends that school districts are required by Education Code section 46000 to record, keep attendance, and report absences of all pupils in accordance with California State Board of Education regulations.²⁶

The claimant is correct that school districts are required to provide free public school to pupils under six and over 18, but the truancy laws apply *only* to those pupils who are subject to compulsory full-time education. Education Code section 48260(a) defines a truant as a pupil subject to compulsory full-time education who is absent or tardy three days in one school year.²⁷ "Compulsory full-time education" is defined in Education Code section 48200 as including "each person between the ages of six and eighteen years."²⁸ Therefore, even though schools are required by state law to report the attendance of all enrolled pupils, the truancy laws, including the first notice of initial truancy required by this mandated program, apply only to pupils between the ages of six and eighteen.

Therefore, staff finds that the Controller's reduction of costs for truancy notices provided to students younger than six and older than eighteen, who are not subject to compulsory full-time education, is correct as a matter of law.

²⁴ Exhibit A, IRC 10-904133-I-10, page 20.

²⁵ Exhibit A, IRC 10-904133-I-10, pages 20-22.

²⁶ Exhibit A, IRC 10-904133-I-10, pages 22-25.

²⁷ Education Code section 48260 (as amended, Stats. 1994, ch. 1023; Stats. 1995, ch. 19).

²⁸ Education Code section 48200 (Stats. 1987, ch. 1452).

C. The Controller’s Reductions in Finding 2 Based on the Former Definition of Truant Are Inconsistent with the Education Code, and Are Incorrect as a Matter of Law.

The Controller identified 58 notifications within the sample issued for pupils who accumulated fewer than four absences.²⁹ Based on the analysis herein, staff finds that the Controller’s disallowance of notifications issued for pupils who accumulated three but not four or more absences is incorrect as a matter of law because it relies on the former definition of a truant.

As enacted in 1976, and as analyzed by the Board of Control in its November 29, 1984 decision, Education Code section 48260 stated that a pupil who is absent or tardy from school without valid excuse for *more than three days* in one school year is a truant.³⁰ Accordingly, the parameters and guidelines as originally adopted, and as amended July 22, 1993, included the then-current definition of a “truant” under Section I., Summary of Mandate:

A truancy occurs when a student is absent from school without valid excuse *more than three* (3) days or is tardy in excess of thirty (30) minutes on each of more than three (3) days in one school year. (Definition from Education Code Section 48260).³¹

Subsequent to the adoption and 1993 amendment of parameters and guidelines for this program, section 48260, defining truancy, was amended by Statutes 1994, chapter 1023 (SB 1728) and Statutes 1995, chapter 19 (SB 102) to lower the threshold for classifying a pupil as a truant, as follows:

Any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without valid excuse *three full days* in one school year or *tardy or absent* for more than any 30-minute period during the schoolday without a valid excuse *on three occasions* in one school year, *or any combination thereof*, is a truant and shall be reported to the attendance supervisor or to the superintendent of the school district.^{32,33}

Section 48260 is definitional and was never found to impose any mandated activities on school districts in the Board of Control’s decision, or in the adoption of parameters and guidelines. Accordingly, the section 48260 definition of truancy was not included as a reimbursable activity under the “Reimbursable Costs” section of the parameters and guidelines, but rather in the Summary of Mandate section, as noted above. Moreover, the unit cost for sending notices was

²⁹ Exhibit A, IRC 10-904133-I-10, page 20.

³⁰ Education Code section 48260 (Stats. 1976, ch. 1010) [Emphasis added].

³¹ Exhibit X, Parameters and Guidelines, amended July 22, 1993.

³² Education Code section 48260 (as amended, Stats. 1995, ch. 19 (SB 102)) [Emphasis added].

³³ The 1994 statute also changed the content of the notice required by the test claim statute to require school districts to also notify the pupil’s parent or guardian that the pupil may be subject to prosecution; or may be subject to suspension or restriction of driving privileges; and that “it is recommended that the parent or guardian accompany the pupil to school...for one day.” (Ed. Code § 48260.5 (as amended, Stats. 1994, ch. 1023 (SB 1728)).)

not increased when the parameters and guidelines were eventually amended to reflect the changes made by the 1994 and 1995 statutes, on January 31, 2008, pursuant to legislative direction enacted in Statutes 2007, chapter 69.³⁴

The Controller’s auditors in this case relied on the outdated definition of truancy included in the “Summary of Mandate” section of the 1993 parameters and guidelines (*i.e., more than three* absences or instances of tardiness). The Controller correctly asserts that “[t]he parameters and guidelines as adopted on July 22, 1993, are the applicable audit criteria for the purposes of this audit.”³⁵ And here, the parameters and guidelines, which “helpfully” included the text of a definition (which was *not* the subject of the mandate finding) in the Summary of Mandate, rather than citing to the code section where the definition could be found, were understandably a source of confusion for the auditors.

However, staff finds that because the amendment to section 48260 affected only the definition of truancy, and not the mandated program, neither a new test claim nor parameters and guidelines amendment was necessary for the districts to continue to be reimbursed for complying with the approved mandate imposed by section 48260.5: “upon a pupil's initial classification as a truant, the school district shall notify the pupil's parent or guardian...”

Based on the foregoing, staff finds that to the extent the Controller disallowed costs for notifications issued to pupils who accumulated three but not four absences or instances of tardiness, those reductions are incorrect as a matter of law. All costs reduced on this basis should be reinstated to the claimant.

D. The Controller’s Reductions in Finding 2 for Notifications Claimed for Pupils with Fewer Than Three Absences or Tardy Occurrences Are Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The Controller stated that a small portion of the notifications claimed were issued for students who did not accumulate even *three* absences or instances of tardiness.³⁶ In those cases, the pupils at issue did not meet the definition of a truant under the Education Code, and the claimant’s issuance of a notification was not mandated by the state.

As discussed above, Education Code section 48260, during the fiscal years here at issue, defined a “truant” as “any pupil subject to compulsory full-time education or to compulsory continuation

³⁴ Statutes 2007, chapter 69 (AB 1698) states:

Notwithstanding any other provision of law, by January 31, 2008, the Commission on State Mandates shall amend the parameters and guidelines regarding the notification of truancy, test claim number SB-90-4133, and modify the definition of a truant and the required elements to be included in the initial truancy notifications to conform reimbursable activities to Chapter 1023 of the Statutes of 1994 and Chapter 19 of the Statutes of 1995...Changes made by the commission to the parameters and guidelines shall be deemed effective on July 1, 2006.

³⁵ Exhibit C, Controller’s Comments on the IRC, page 11.

³⁶ Exhibit A, IRC 10-904133-I-10, page 67.

education who is absent from school without valid excuse *three full days* in one school year or tardy or absent for more than any 30-minute period during the schoolday without a valid excuse *on three occasions* in one school year, or any combination thereof....”³⁷

The mandated program as approved by the Board of Control, and as articulated in the parameters and guidelines, is to issue a notification of truancy to a pupil’s parent or guardian *upon the pupil’s initial classification as a truant*. If a pupil cannot be classified as a truant, as defined in section 48260, a notification is not required, and any notification sent to that pupil’s parent or guardian, whether or not intentional, is not reimbursable.

Based on the foregoing, staff finds that reductions based on pupils who did not accumulate three absences or instances of tardiness during the school year are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

E. Reductions in Finding 2 Based on a Single Instance of Insufficient Documentation Within the Controller’s Sample Are Entirely Lacking in Evidentiary Support.

The claimant identifies in its IRC a single instance within the sample of notifications analyzed which the Controller found was not supported by documentation.³⁸ No particular basis for the reduction is specified in the audit report or the IRC narrative and it is unclear whether the lack or insufficiency of documentation pertains to the number of absences that that pupil accumulated, or the pupil’s age, or whether the notification itself was issued as reported. Because the Commission is unable to make findings on this single instance of “insufficient documentation,” because of a lack of evidence in the record, this disallowance must be remanded to the Controller and reinstated absent an adequate explanation of the reduction supported by some evidence in the record. Moreover, this single instance of insufficient documentation was extrapolated to determine a reduction applicable to the whole population. Absent some findings or evidence that this documentation issue is of a type likely to be uniformly repeated within the population, the Controller’s decision to extrapolate an error rate from this single instance of insufficient documentation is entirely lacking in evidentiary support.

F. The Controller’s Reductions Based on Statistical Sampling and Extrapolation of Correct Reductions Are Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

In its audit of 2003-2004, 2004-2005, and 2005-2006 reimbursement claims, the Controller examined a random sample of initial truancy notices distributed by the claimant for each year to determine the proportion of notifications that were unallowable for the Controller’s asserted legal reasons and then extrapolated the results out to all of the notices for which reimbursement was claimed. The claimant and the Controller fundamentally disagree on whether statistical sampling is an appropriate methodology to estimate a reduction of costs claimed for mandate reimbursement.

³⁷ Education Code section 48260 (as amended, Stats. 1995, ch. 19 (SB 102)) [emphasis added].

³⁸ Exhibit A, IRC 10-904133-I-10, pages 20-21.

Based on the analysis herein, staff finds that the reductions in this case, determined based on the sampling method used and lack of any evidence to the contrary, are not arbitrary, capricious, or entirely lacking in evidentiary support.

1. There is no evidence to support claimant’s argument that the statistical sampling and extrapolation method constitutes an underground regulation.

The claimant challenges the statistical sampling and extrapolation methodology used by the Controller as an underground regulation not adopted pursuant to the APA, and argues that any findings and cost reductions extrapolated from the sample reviewed by the Controller should therefore be void. Government Code section 11340.5 provides, no state agency shall enforce or attempt to enforce a rule or criterion which is a regulation, as defined in section 11342.600, unless it has been adopted pursuant to the APA.³⁹ Therefore, if the Controller’s challenged audit methods constitute a regulation not adopted pursuant to the APA, the Commission cannot uphold the reductions. Interpreting section 11342.600, the California Supreme Court in *Tidewater Marine Western v. Bradshaw* found that a regulation has two principal characteristics:

First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a *certain class of cases* will be decided. Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.”⁴⁰

The necessary inquiry, then, is whether the challenged audit policy or practice is applied “generally,” and used to decide a class of cases; and whether the rule “implement[s], interpret[s], or make[s] specific” the law administered by the Controller.

Here, there is not substantial evidence in the record that the audit methodology as applied in this case rises to the level of a rule of general application, and no clear “class of cases” to which it applies has been defined. In *Tidewater*, the Court held that a “rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided.”⁴¹ And in *Clovis Unified*, the court in discussing the contemporaneous source document rule (CSDR) explained that in the context of the Controller’s audits of mandate reimbursement claims:

As to the first criterion—whether the rule is intended to apply generally—substantial evidence supports the trial court's finding that the CSDR was “applie[d] generally to the auditing of reimbursement claims ...; the Controller's auditors ha[d] no discretion to judge on a case[-]by[-]case basis whether to apply the rule.”⁴²

³⁹ Government Code section 11340.5 (Stats. 2000, ch. 1060).

⁴⁰ *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571 (emphasis added) [Citing *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630; Gov. Code § 11342(g)].

⁴¹ *Tidewater*, *supra*, 14 Cal.4th 557, 571.

⁴² *Clovis Unified School District v. Chiang*, 188 Cal.App.4th 794, 803.

Here, the sampling and extrapolation method is not published in the claiming instructions for this mandate; nor is it alleged that auditors were *required* to utilize such methods. Therefore, based on the case law discussed above, and the evidence in the record, the Commission finds that the Controller's sampling and extrapolation method, as applied in this case, is not a regulation within the meaning of the APA.

2. The Controller's audit conclusions must be upheld absent evidence that the Controller's reductions are arbitrary, capricious, or entirely lacking in evidentiary support.

The claimant argues that there is no statutory or regulatory authority for the Controller to reduce claimed costs based on extrapolation from a statistical sample. The Controller counters that the law does not prohibit the audit methods used by the Controller. The Controller relies on Government Code section 12410, which requires the Controller to audit all claims against the state and "may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment."⁴³ The Controller also relies on Government Code section 17561, which permits the Controller to reduce any claim that is determined to be excessive or unreasonable: "The SCO conducted appropriate statistical samples that identified a *reasonable* estimate of the non-reimbursable initial truancy notifications, thus properly reducing the claims for the *unreasonable* claimed costs."⁴⁴

The Controller correctly states that there is no express prohibition in law or regulation of statistical sampling and extrapolation methods being used in an audit. Accordingly, the Controller cites to "Government Auditing Standards, as issued by the Comptroller General of the United States," to argue that it properly conducted the audit. "These audit standards," the Controller asserts, "specify that auditors may use professional judgment in 'selecting the methodology, determining the type and amount of evidence to be gathered, and choosing the tests and procedures for their work.'"⁴⁵ While the standards cited do not provide *expressly* for statistical sampling and extrapolation to be applied to mandate reimbursement, they do provide for statistical methods to be used to establish the sufficiency, or validity of evidence.⁴⁶ The Controller also cites the "Handbook of Sampling for Auditing and Accounting," by Herbert Arkin, for the proposition that a sampling methodology to determine the frequency of errors in the population (i.e., notifications that were not reimbursable for an asserted legal reason) is a widely used approach to auditing.⁴⁷

In accordance with the Controller's audit authority and duties under the Government Code, it is not the Commission's purview to direct the Controller to employ a specific audit method, including when the audit pertains to the application of a unit cost, as here. The Commission's

⁴³ Government Code section 12410 (Stats. 1968, ch. 449).

⁴⁴ Exhibit C, Controller's Comments, page 20 [emphasis in original].

⁴⁵ Exhibit C, Controller's Comments, page 17.

⁴⁶ Exhibit X, Excerpt from Government Auditing Standards, 2003, page 13.

⁴⁷ Exhibit B, Controller's Comments, page 19.

consideration is limited to whether the Controller's audit decisions are arbitrary, capricious, or entirely lacking in evidentiary support.⁴⁸

On that basis, and giving due consideration to the discretion of the Controller to audit the fiscal affairs of the state,⁴⁹ staff finds that the Controller's auditing methods (to the extent that they do not impose an underground regulation) must be upheld absent evidence that the resulting audit reductions are arbitrary, capricious, or entirely lacking in evidentiary support.

3. There is no evidence in the record that the Controller's findings using the sampling and extrapolation methodology are not representative of all notices claimed during the audit period or that the findings are arbitrary, capricious, or entirely lacking in evidentiary support.

In addition to challenging the legal sufficiency of the Controller's sampling and extrapolation methodology, the claimant also challenges the qualitative and quantitative reliability and fairness of using statistical sampling and extrapolation to evaluate reimbursement. The claimant states that the risk of extrapolating findings from a sample is that the conclusions obtained from the sample may not be representative of the universe. The claimant further contends that the sampling technique used by the Controller is also quantitatively non-representative because less than two percent of the total number of notices were audited, the stated precision rate was plus or minus eight percent even though the sample size (ranging from 147 to 148) is essentially identical for all three fiscal years, and the audited number of notices claimed for fiscal year 2004-2005 (19,101) is twenty-two percent larger than the number of notices claimed for fiscal year 2005-2006 (15,645). The claimant concludes by stating that "[t]he expected error rate is stated to be 50%, which means the total amount adjusted of \$98,866 [for the three fiscal years in which notifications were disallowed] is really just a number exactly between \$49,433 (50%) and \$148,299 (150%)" and that "[t]he midrange of an interval cannot be used as a finding of absolute actual cost."⁵⁰

The Controller states that "the fact that a particular student's initial truancy notification might more likely be identified as non-reimbursable is irrelevant to the composition of the audit sample itself. It has no bearing on evaluating whether the sample selection is representative of the population."⁵¹ The Controller further argues that the absolute size of the sample, not the relative size, is more important under "basic statistical sampling principles." The Controller explains that an "expected error rate" in this context is an assumption used to determine the appropriate sample size, rather than a measure of the ultimate accuracy of the result.

Moreover, there is no evidence in the record that the results are biased or unrepresentative "because a kindergarten pupil is more likely to be under-age and a special education pupil is more likely to be over-age," as asserted by claimant. There is no dispute that the samples were randomly obtained and reviewed by the Controller. According to the *Handbook of Sampling for*

⁴⁸ *American Bd. of Cosmetic Surgery, Inc, supra*, 162 Cal.App.4th 534, 547-548.

⁴⁹ Government Code section 12410 (Stats. 1968, ch. 449).

⁵⁰ Exhibit A, IRC 10-904133-I-10, page 19.

⁵¹ Exhibit C, Controller's Comments, page 18.

Auditing and Accounting (Arkin), all notices randomly sampled have an equal opportunity for inclusion in the sample and, thus, the result is statistically objective and unbiased.⁵² Moreover, absent evidence to the contrary, the Commission and the Controller must presume that the schools within the claimant's district complied with the mandate in the same way.

Based on the analysis above, the Commission finds that the Controller's reduction of costs, based on the statistical sampling method as applied in this case, is not arbitrary, capricious, or entirely lacking in evidentiary support.

Conclusion

Staff recommends that the Commission partially approve this IRC. Staff finds that the following reductions are correct as a matter of law and are not arbitrary, capricious, or entirely lacking in evidentiary support:

- Reductions in Finding 1 based on the ground that the claimant provided no documentation to support the number of notifications distributed.
- Reductions in Finding 2 based on notifications issued for pupils under age six or over age eighteen.
- Reductions in Finding 2 for notifications issued for pupils who accumulated *fewer than three* unexcused absences or instances of tardiness.
- The Controller's sampling and extrapolation methodology to calculate the reductions is not arbitrary, capricious, or entirely lacking in evidentiary support, to the extent that the underlying reasons for reduction are valid.

The following reductions, including any extrapolation of these reductions to costs claimed by the district, however, are incorrect as a matter of law, and are arbitrary, capricious, or entirely lacking in evidentiary support:

- Reductions in Finding 2 based on notifications issued for pupils who accumulated *three but not four* unexcused absences or instances of tardiness.
- Reductions based on one notification in Finding 2 for which the Controller found an unspecified lack of sufficient documentation.

Staff Recommendation

Staff recommends that the Commission adopt the proposed decision to partially approve the IRC, and, pursuant to Government Code section 17551(d) and section 1185.9 of the Commission's regulations, to request that the Controller recalculate its reductions and reinstate costs consistently with this analysis. Staff further recommends that the Commission authorize staff to make any technical, non-substantive changes following the hearing.

⁵² Herbert Arkin, *Handbook of Sampling for Auditing and Accounting*, Third Edition, Prentice Hall, New Jersey, 1984, page 9.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM
ON:

Education Code Section and 48260.5

Statutes 1983, Chapter 498

Fiscal Years 2003-2004, 2004-2005, 2005-
2006, and 2006-2007

Riverside Unified School District, Claimant

Case No.: 10-904133-I-10 and
13-904133-I-12

Notification of Truancy

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

(Adopted December 3, 2015)

DECISION

The Commission on State Mandates (Commission) heard and decided this consolidated incorrect reduction claim (IRC) during a regularly scheduled hearing on December 3, 2015. [Witness list will be included in the adopted decision.]

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

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

Summary of the Findings

This IRC addresses reductions made by the State Controller's Office (Controller) to reimbursement claims filed by Riverside Unified School District (claimant) for fiscal years 2003-2004 through 2006-2007, for the *Notification of Truancy* program.

Pursuant to Government Code section 17551(d), the Commission partially approves this IRC. The Commission finds that the following reductions are correct as a matter of law and are not arbitrary, capricious, or entirely lacking in evidentiary support:

- Reductions in Finding 1 based on the ground that the claimant provided no documentation to support the number of notifications distributed.
- Reductions in Finding 2 based on notifications issued for pupils under age six or over age eighteen.
- Reductions in Finding 2 for notifications issued for pupils who accumulated *fewer than three* unexcused absences or instances of tardiness.

- The Controller’s sampling and extrapolation methodology to calculate the reductions is not arbitrary, capricious, or entirely lacking in evidentiary support, to the extent that the underlying reasons for reduction are valid.

The following reductions, including any extrapolation of these reductions to costs claimed by the district, however, are incorrect as a matter of law, and are arbitrary, capricious, or entirely lacking in evidentiary support:

- Reductions in Finding 2 based on notifications issued for pupils who accumulated *three but not four* unexcused absences or instances of tardiness.
- Reductions based on one notification in Finding 2 for which the Controller found a lack of sufficient documentation.

Pursuant to Government Code section 1185.9 of the Commission’s regulations, the Commission requests costs incorrectly reduced be reinstated by the Controller in accordance with this decision.

COMMISSION FINDINGS

I. Chronology

- 02/05/2010 Controller issued the final audit report.⁵³
- 11/01/2010 The claimant filed IRC 10-904133-I-10.⁵⁴
- 08/24/2012 The Controller issued a revised final audit report.⁵⁵
- 11/13/2015 Claimant filed a revised IRC, 13-904133-I-12.⁵⁶
- 10/03/2014 The Controller filed comments on the IRCs.⁵⁷
- 09/21/2015 Commission staff issued the draft proposed decision.⁵⁸

II. Background

The Notification of Truancy Program

Under California’s compulsory education laws, children between the ages of six and 18 are required to attend school full-time, with a limited number of specified exceptions.⁵⁹ Once a pupil is designated a truant, as defined, state law requires schools, districts, counties, and the

⁵³ Exhibit A, IRC 10-904133-I-10, page 59.

⁵⁴ Exhibit A, IRC 10-904133-I-10, page 1.

⁵⁵ Exhibit B, IRC 13-904133-I-12, page 14.

⁵⁶ Exhibit B, IRC 13-904133-I-12, page 1.

⁵⁷ Exhibit C, Controller’s Comments.

⁵⁸ Exhibit D, Draft Proposed Decision.

⁵⁹ Education Code section 48200.

courts to take progressive intervention measures to ensure that parents and pupils receive services to assist them in complying with the compulsory attendance laws.

The first intervention is required by Education Code section 48260.5, as added by the test claim statute.⁶⁰ As originally enacted, section 48260.5 specified:

- (a) Upon a pupil's initial classification as a truant, the school district shall notify the pupil's parent or guardian, by first-class mail or other reasonable means, of the following:
 - (1) That the pupil is truant.
 - (2) That the parent or guardian is obligated to compel the attendance of the pupil at school.
 - (3) That parents or guardians who fail to meet this obligation may be guilty of an infraction and subject to prosecution pursuant to Article 6 (commencing with Section 48290) of Chapter 2 of Part 27.
- (b) The district also shall inform parents or guardians of the following:
 - (1) Alternative educational programs available in the district.
 - (2) The right to meet with appropriate school personnel to discuss solutions to the pupil's truancy.

On November 29, 1984, the Board of Control determined that Education Code section 48260.5, as added by Statutes 1983, chapter 498, imposed a reimbursable state-mandated program to develop notification forms and provide written notice to the parents or guardians of the truancy. The decision was summarized as follows:

The Board determined that the statute imposes costs by requiring school districts to develop a notification form, and provide written notice to the parents or guardians of students identified as truants of this fact. It requires that notification contain other specified information and, also, to advise the parent or guardian of their right to meet with school personnel regarding the truant pupil. The Board found these requirements to be new and not previously required of the claimant.⁶¹

The original parameters and guidelines were adopted on August 27, 1987, and authorized reimbursement for the one-time activities of planning implementation, revising school district policies and procedures, and designing and printing the notification forms. Reimbursement was also authorized for ongoing activities to identify pupils to receive the initial notification and prepare and distribute the notification by first class mail or other reasonable means.

The Commission amended the parameters and guidelines on July 22, 1993, effective for reimbursement claims filed beginning in fiscal year 1992-1993, to add a unit cost of \$10.21, adjusted annually by the Implicit Price Deflator, for each initial notification of truancy

⁶⁰ Education Code section 48260.5, Statutes 1983, chapter 498.

⁶¹ Exhibit X, Brief Written Statement for Adopted Mandate issued by the Board of Control on the *Notification of Truancy* test claim (SB 90-4133).

distributed in lieu of requiring the claimant to provide documentation of actual costs to the Controller. The parameters and guidelines further provide that “school districts incurring unique costs within the scope of the reimbursable mandated activities may submit a request to amend the parameters and guidelines to the Commission for the unique costs to be approved for reimbursement.”⁶² These are the parameters and guidelines applicable to this claim.⁶³

The Legislature enacted Statutes 2007, chapter 69, effective January 1, 2008, which was sponsored by the Controller’s Office to require the Commission to amend the parameters and guidelines, effective July 1, 2006, to modify the definition of a truant and the required elements to be included in the initial truancy notifications in accordance with Statutes 1994, chapter 1023, and Statutes 1995, chapter 19.⁶⁴ These statutes required school districts to add the following information to the truancy notification: that the pupil may be subject to prosecution under Section 48264, that the pupil may be subject to suspension, restriction, or delay of the pupil’s driving privilege pursuant to Section 13202.7 of the Vehicle Code, and that it is recommended that the parent or guardian accompany the pupil to school and attend classes with the pupil for one day. The definition of truant was also changed from a pupil absent for “more than three days” to a pupil absent for “three days.” In 2008, the Commission amended the parameters and guidelines, for costs incurred beginning July 1, 2006, as directed by the Legislature.

The Controller’s Audit and Summary of the Issues

The February 5, 2010 audit report determined that \$659,793 in claimed costs was allowable and \$326,088 was unallowable.⁶⁵

In Finding 1, the Controller found 57 truancy notifications issued in fiscal years 2003-2004 and 2004-2005 that were not supported by attendance records, resulting in a reduction of \$799.⁶⁶

In Finding 2, the Controller projected, based on statistical sampling and extrapolation methods, that 6,853 unallowable truancy notifications were issued during the audit period, resulting in a reduction of \$104,103.⁶⁷ The Controller found that the unallowable notifications were not reimbursable either because pupils were under 6 or over 18, and thus not subject to compulsory education under state law and not by definition a truant; or, because pupils did not accumulate the required number of absences to be classified a truant under the mandated program.⁶⁸ The Controller also found that one notice was not supported by sufficient documentation showing that the pupil had the required number of absences to be classified as a truant.⁶⁹ The Controller

⁶² Exhibit X, Parameters and Guidelines, amended July 22, 1993.

⁶³ The parameters and guidelines as amended in 2008 are not applicable to this IRC.

⁶⁴ Exhibit X, Controller’s Letter dated July 17, 2007 on AB 1698.

⁶⁵ Exhibit A, IRC 10-904133-I-10, page 51.

⁶⁶ Exhibit A, IRC 10-904133-I-10, page 66.

⁶⁷ Exhibit A, IRC 10-904133-I-10, page 68.

⁶⁸ Exhibit A, IRC 10-904133-I-10, page 67.

⁶⁹ Exhibit A, IRC 10-904133-I-10, page 20.

calculated the dollar amount reduced by sampling approximately 300 initial truancy notifications for each audit year, out of approximately 15,600 to 19,100 claimed, and determining the rate at which the district issued initial truancy notifications for pupils who did not accumulate four or more absences during the school year, or issued notifications for pupils under age six or over age 18. The Controller found error rates, based on its sampling, of 24.32 to 27.03 percent for elementary schools, and 1.35 to 2.04 percent for middle and high schools.⁷⁰ Those error rates were applied to the whole number of notifications claimed for the respective grade levels for each fiscal year, in order to project a total number of unallowable notifications for each fiscal year. In addition, the Controller found that the claimant's attendance records supported 454 more initial truancy notifications than were claimed for two elementary schools within the district for fiscal year 2005-2006.⁷¹ The Controller applied the 25.85 percent error rate calculated for fiscal year 2005-2006 for elementary schools, and found that 337 of 454 unclaimed notifications were allowable, resulting in a net increase of \$5,237.⁷² All this resulted in a net reduction of \$98,866 for the audit period.⁷³

Other reductions were made in Finding 3, for fiscal year 2006-2007 only, which the claimant disputed. In the revised audit, the Controller pro-rated reimbursement for previously disallowed truancy notifications and the claimant states in its second IRC that the pro-rated reduction "is satisfactory to the District," and withdraws the dispute with respect to Finding 3.⁷⁴ This decision, therefore, does not address the issues raised in Finding 3.

III. Positions of the Parties

Riverside Unified School District

The claimant argues, with respect to the 57 notifications disallowed in Finding 1 because they were not supported by attendance records, that "[t]he audit report does not indicate in what factual or legal manner the District documentation was insufficient, so it is not possible to determine if the adjustment is inappropriate."⁷⁵ The claimant argues that it has complied with the parameters and guidelines for claiming the number of initial notifications of truancy, and the audit does not articulate "why the source documentation was deficient."⁷⁶ The claimant points out that the parameters and guidelines "do not specify the form of supporting documentation required..." and "do not require claimants to maintain a copy of each notification."⁷⁷

⁷⁰ Exhibit A, IRC 10-904133-I-10, page 68.

⁷¹ Exhibit A, IRC 10-904133-I-10, page 67.

⁷² Exhibit A, IRC 10-904133-I-10, page 68.

⁷³ Exhibit A, IRC 10-904133-I-10, pages 67-69.

⁷⁴ Exhibit B, IRC 13-904133-I-12, page 9.

⁷⁵ Exhibit A, IRC 10-904133-I-10, page 10.

⁷⁶ Exhibit A, IRC 10-904133-I-10, page 11.

⁷⁷ Exhibit A, IRC 10-904133-I-10, page 11. See also, Exhibit A, pages 47-48.

With respect to the 454 understated notifications for Harrison and Hawthorne Elementary Schools, the claimant argues that those notifications “should be included in Finding 1 to increase the number of claimable notifications before the extrapolation of the statistical sampling findings, similar to how the FY 2003-04 and FY 2004-05 reductions have been treated.”⁷⁸

The audit disallowed 122 of the 886 notifications evaluated for fiscal years 2003-2004 through 2005-2006, based on insufficient documentation (1 notification); pupils under- or over-age and not subject to compulsory education (63); and pupils with fewer than 4 absences (58).⁷⁹ With respect to the one notification disallowed on documentation grounds, the claimant refers to the above discussion of documentation standards required by the parameters and guidelines.⁸⁰ Regarding the 63 notifications disallowed because pupils were under- or over-age and not subject to compulsory education, the claimant argues that even though the Education Code does not compel children under 6 or over 18 to attend school, persons under 6 are statutorily entitled to attend kindergarten, and special education students are statutorily entitled to services from age 3 to 22, and the notification of truancy “is a product of the attendance accounting process and promotes compliance of the compulsory education law and every pupil’s duty to attend school regularly...”⁸¹ Finally, with respect to the 57 notifications in the audit sample disallowed because the pupils accumulated fewer than four absences, the claimant acknowledges that the “original parameters and guidelines were based on this definition of a truant, that is, a pupil with more than three unexcused absences or tardy for more than three periods.”⁸² However, the claimant notes that Education Code section 48260 was amended to require only *three* absences or instances of tardiness prior to the fiscal years subject to this audit, and that therefore the claimant “properly complied with state law when it issued truancy notifications after three absences, rather than waiting for a fourth absence as required by the parameters and guidelines.”⁸³

With respect to the reduction for non-reimbursable truancy notifications in Finding 2, the claimant first notes that “this finding is based on a statistical sample of 886 truancy notifications actually examined from a universe of 52,722 notices for the three fiscal years.” The claimant argues that whether the Controller can adjust mandate reimbursement based on statistical sampling “is a threshold issue in that if the methodology used is rejected, as it should be, the extrapolation is void and the audit findings can only pertain to documentation actually reviewed, that is, the 886 notifications examined for the criteria of whether there were a sufficient number of absences or tardies to justify the initial notification of truancy and the age of the student.”⁸⁴ Accordingly, the claimant argues that there is no legal basis or justification to apply statistical

⁷⁸ Exhibit A, IRC 10-904133-I-10, page 12.

⁷⁹ Exhibit A, IRC 10-904133-I-10, page 20.

⁸⁰ Exhibit A, IRC 10-904133-I-10, pages 20-21.

⁸¹ Exhibit A, IRC 10-904133-I-10, pages 21-25.

⁸² Exhibit A, IRC 10-904133-I-10, page 26.

⁸³ Exhibit A, IRC 10-904133-I-10, pages 26-28.

⁸⁴ Exhibit A, IRC 10-904133-I-10, page 13.

sampling to mandate reimbursement claims, and no published audit manual or program which allows this method. The claimant argues that adjusting claimed costs using extrapolation and sampling “is utilizing a standard of general application without the benefit of compliance with the Administrative Procedure Act...” and is therefore an underground regulation.⁸⁵

Moreover, the claimant argues that statistical sampling is misused and inappropriate because of the risk that extrapolated findings “may not be representative of the universe,” and because a sampling and extrapolation methodology cannot ascertain actual costs: “It ascertains probable costs within an interval.”⁸⁶ The claimant thus concludes that because the statistical sampling and extrapolation methodology “fails for legal, qualitative, and quantitative reasons, the remaining audit findings are limited to the 886 notices actually investigated.”⁸⁷

State Controller’s Office

Answering the claimant’s argument regarding Finding 1 that the audit does not explain what documentation of truancy notifications was “insufficient,” the Controller states:

We disagree; the findings clearly identifies [*sic*] the facts. The district claimed 17,943 and 19,134 initial truancy notifications distributed for FY 2003-04 and FY 2004-05, respectively. However, the district provided records that documented only 17,919 and 19,101 initial truancy notifications distributed for FY 2003-04 and FY 2004-05, respectively. Therefore, the district overstated the number of initial truancy notifications that its records support.⁸⁸

The Controller argues that the parameters and guidelines do require supporting documentation, stating: “Each claim...must be timely filed and provide documentation in support of the reimbursement claimed...” The Controller reasons that the claimant “provided documentation that supported fewer initial truancy notifications than the number claimed,” and therefore the reduction was correct.⁸⁹ Additionally, the Controller disputes the claimant’s position that attendance records are not required to support the notifications for which reimbursement is claimed; the Controller argues that supporting documentation is necessary, and “must show that the claimed costs are reimbursable in accordance with the parameters and guidelines.”⁹⁰ With respect to the single disallowance within the sample on the grounds of insufficient documentation, the Controller states, “[b]ecause the district provided attendance record documentation for 885 of the 886 sampled students, we believe that the district is well-versed on the documentation criterion.”⁹¹

⁸⁵ Exhibit A, IRC 10-904133-I-10, pages 13-16.

⁸⁶ Exhibit A, IRC 10-904133-I-10, page 19.

⁸⁷ Exhibit A, IRC 10-904133-I-10, page 20.

⁸⁸ Exhibit C, Controller’s Comments, page 10.

⁸⁹ Exhibit C, Controller’s Comments, page 11.

⁹⁰ Exhibit C, Controller’s Comments, page 12.

⁹¹ Exhibit C, Controller’s Comments, page 21.

With respect to the claimant’s argument that the 454 unclaimed notifications should be included in the total number of claimed notifications before extrapolating the rate of disallowance, the Controller argues that the audit adjustment would be the same “whether the report accounts for the 454 unclaimed initial truancy notifications in Finding 2 alone or Findings 1 and 2 together.” The Controller states that either calculation results in a net understatement of \$5,237.⁹²

Regarding disallowances based on under- or over-age students not subject to compulsory education, the Controller argues that the claimant “confuses students’ statutory requirement to attend school between ages 6 and 18 with students’ entitlement to attend outside of that age range.” The Controller holds that absences occurring before a pupil’s 6th birthday or after a pupil’s 18th birthday “are irrelevant when determining whether a student is a truant.”⁹³

And, with respect to disallowances based on an insufficient number of absences or instances of tardiness, the Controller maintains that the parameters and guidelines control whether initial notifications are reimbursable, notwithstanding the amendments to the Education Code (which were eventually incorporated into the parameters and guidelines). The Controller recognizes the distinction, saying:

We agree that Education Code section 48260.5 requires the district to issue an initial truancy notification upon a student’s third unexcused absence or tardiness occurrence. We disagree that the parameters and guidelines require the district to “wait” for a fourth absence before issuing the notification...The district confuses the difference between its statutory responsibility versus mandate-related reimbursable costs identified by the parameters and guidelines.⁹⁴

With respect to the claimant’s challenge to the Controller’s sampling and extrapolation methodology used in Finding 2, the Controller argues that the Government Code and the Government Auditing Standards do not prohibit sampling,⁹⁵ and that the Controller “properly used estimation sampling to establish the frequency of occurrence of non-reimbursable initial truancy notifications.”⁹⁶ With respect to the quantitative challenge as to the accuracy of sampling, the Controller argues that it applied a 95 percent confidence interval,⁹⁷ and that the absolute size of a sample, rather than its relative size, is sufficient to ensure accuracy.⁹⁸ The Controller also asserts that the claimant misconstrues the meaning of confidence intervals and expected error rates.⁹⁹ While the district argues that the adjustment amount “is really just a

⁹² Exhibit C, Controller’s Comments, page 13.

⁹³ Exhibit C, Controller’s Comments, page 22.

⁹⁴ Exhibit C, Controller’s Comments, page 23.

⁹⁵ Exhibit C, Controller’s Comments, pages 14-17.

⁹⁶ Exhibit C, Controller’s Comments, page 17.

⁹⁷ Exhibit C, Controller’s Comments, page 13.

⁹⁸ Exhibit C, Controller’s Comments, page 20.

⁹⁹ The Controller explains that an “expected error rate” in this context is an assumption used to determine the appropriate sample size, rather than a measure of the ultimate accuracy of the

number exactly between \$49,433 (50%) and \$148,299 (50%)...” the Controller states that the range is in fact “\$63,807 to \$133,922.” And, the Controller states, “[w]hile a statistical sample evaluation identifies a range for the population’s true error rate, the point estimate provides the best, and thus *reasonable*, single estimate of the population’s true error rate.”¹⁰⁰

IV. Discussion

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

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

The Commission must review questions of law, including interpretation of the parameters and guidelines, *de novo*, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.¹⁰¹

result. In addition, the desired accuracy of the result, which might be called a “margin of error,” may be determined by the Controller before calculating the sample size. Therefore, the “margin of error” of the Controller’s resulting percentage is a known value. The Controller provides the following formula:

$$n = \frac{p(1-p)}{\left(\frac{SE}{t}\right)^2 + \left(\frac{p(1-p)}{N}\right)}$$

n = sample size

p = percent of occurrence in population (expected error rate)

SE = desired sample precision

t = confidence level factor

N = population size

The formula above, when applied with a 50 percent expected error rate and a desired eight percent margin of error, shows that an appropriate sample size is between 147 and 148 pupils for populations ranging from 7,562 notifications (elementary and special education pupils for fiscal year 2005-2006) to 9,706 notifications (middle and high school pupils for fiscal year 2004-2005). (Exhibit C, Controller’s Comments, page 20.)

¹⁰⁰ Exhibit C, Controller’s Comments, page 20 [emphasis in original]. See also, Exhibit A, IRC 10-904133-I-10, page 19 [The claimant mischaracterizes the phrase “expected error rate.”]

¹⁰¹ *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

The Commission must also interpret the Government Code and implementing regulations in accordance with the broader constitutional and statutory scheme. In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁰²

With regard to the Controller’s audit decisions, the Commission must determine whether they were arbitrary, capricious, or entirely lacking in evidentiary support. This standard is similar to the standard used by the courts when reviewing an alleged abuse of discretion of a state agency.¹⁰³ Under this standard, the courts have found that:

When reviewing the exercise of discretion, “[t]he scope of review is limited, out of deference to the agency’s authority and presumed expertise: ‘The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]’”...“In general...the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support...” [Citations.] When making that inquiry, the “ ‘ ‘court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.’ ”¹⁰⁴

The Commission must review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with claimant.¹⁰⁵ In addition, section 1185.1(f)(3) and 1185.2(c) of the Commission’s regulations requires that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Commission’s ultimate findings of fact must be supported by substantial evidence in the record.¹⁰⁶

A. The Controller’s Reductions in Finding 1 on the Basis of Insufficient Documentation Are Correct as a Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

The Controller reduced costs claimed for fiscal years 2003-2004 and 2004-2005 totaling \$799, based on its determination in Finding 1 of the audit report that “attendance records did not support the number of initial truancy notifications claimed.” The Controller found that the

¹⁰² *County of Sonoma, supra*, 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

¹⁰³ *Johnston v. Sonoma County Agricultural Preservation and Open Space District* (2002) 100 Cal.App.4th 973, 983-984. See also *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th 534, 547.

¹⁰⁴ *American Bd. of Cosmetic Surgery, Inc., supra*, 162 Cal.App.4th 534, 547-548.

¹⁰⁵ *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

¹⁰⁶ Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record.

“overstated number of truancy notifications totaled 57.”¹⁰⁷ The Controller further asserts that “the program’s parameters and guidelines require the district to provide documentation that supports the total number of initial notifications of truancy distributed.”¹⁰⁸ The claimant argues that the audit report “does not describe the nature of the perceived documentation deficiency...” and “[t]he parameters and guidelines do not specify the form of supporting documentation required.” Indeed, the claimant argues that the parameters and guidelines “do not require claimants to maintain a copy of each notification...” and “do not require attendance records to support the number of notifications distributed.”¹⁰⁹ The claimant reasons that “[t]he truantries were recorded and the notices were distributed, therefore, actual costs were incurred, and the Controller does not state that the work was not performed.”¹¹⁰

The documentation requirements in the parameters and guidelines for this mandated program do not specifically require attendance records to support the costs claimed. However, the parameters and guidelines do require claimants to provide supporting documentation to indicate the number of truancy notifications distributed. As amended July 22, 1993, the parameters and guidelines state that claimants are to be reimbursed for: “Identifying the truant pupils to receive the notification, preparing and distributing by mail or other method the forms to parents/guardians, and associated recordkeeping.” In addition, the parameters and guidelines provide that when claiming under the uniform cost allowance (\$10.21 per notification, adjusted each year by the Implicit Price Deflator), claimants must “[r]eport the *number of initial notifications of truancy distributed* during the year.” And under “Supporting Data,” the parameters and guidelines state: “For auditing purposes, documents must be kept on file for a period of 3 years from the date of final payment by the State Controller, unless otherwise specified by statute...” Claimants requesting reimbursement under the “uniform allowance” are required to retain: “Documentation which *indicates the total number* of initial notifications of truancy distributed.”¹¹¹ In addition, all claimants are required to “provide *documentation in support of the reimbursement claimed* for this mandated program.” The parameters and guidelines do not specify the type of supporting documentation required.

The Controller interprets the parameters and guidelines to require a claimant to retain attendance records that demonstrate that each and every one of the initial truancy notifications distributed was distributed upon the pupil’s initial classification as a truant, and not before. It is not clear that attendance records are the only documentation that would suffice under the parameters and guidelines, but there is no evidence in the record that any documentation at all was provided for the 57 notifications in issue.

Based on the foregoing, the Commission finds that the Controller’s reduction in Finding 1 of the costs to issue a total of 57 initial truancy notifications for fiscal years 2003-2004 and 2004-2005,

¹⁰⁷ Exhibit A, IRC 10-904133-I-10, page 66.

¹⁰⁸ Exhibit A, IRC 10-904133-I-10, page 66.

¹⁰⁹ Exhibit A, IRC 10-904133-I-10, pages 10-11.

¹¹⁰ Exhibit A, IRC 10-904133-I-10, page 12.

¹¹¹ Exhibit A, IRC 10-904133-I-10, pages 45-48.

based on a lack of any documentation, is correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

B. The Controller’s Reductions in Finding 2 on the Basis of Notifications Issued for Pupils Who Were Not Subject to Compulsory Education Requirements of the Education Code Are Correct as a Matter of Law.

The Controller found, in Finding 2 of the audit report, 63 notifications within the audit sample that were issued to pupils under age six or over age eighteen who were not subject to the compulsory education requirements of the Education Code or the *Notification of Truancy* mandate. The claimant asserts that notifications of truancy issued for students under age six or over age eighteen should be reimbursable because the Education Code provides that those students are statutorily entitled to attend school.¹¹² The claimant further contends that school districts are required by Education Code section 46000 to record, keep attendance, and report absences of all pupils in accordance with California State Board of Education regulations. These regulations provide that records of attendance of every pupil shall be kept for apportionment of state funds and to ensure general compliance with the compulsory education law.¹¹³

The Commission finds that providing truancy notices to pupils under the age of six and over the age of eighteen, who by definition are not subject to the compulsory education law, goes beyond the scope of the mandate and is not eligible for reimbursement. Therefore these reductions are correct as a matter of law.

The claimant is correct that at the time these reimbursement claims were filed, school districts were required by state law to admit a child to kindergarten if the child would have his or her fifth birthday on or before December 2 of that school year.¹¹⁴ School districts are also required by state and federal law to provide special education services to “individuals with exceptional needs” through age 21 if required by a pupil’s individualized education plan (IEP).¹¹⁵ And schools are required by state law to record the attendance of every pupil enrolled in school for apportionment of state funds and “to ensure the *general* compliance with the compulsory education law, and performance by a pupil of his duty to attend school regularly as provided in [California Code of Regulations, title 5] section 300.”¹¹⁶

However, the truancy laws apply *only* to those pupils who are subject to compulsory full-time education. Education Code section 48260(a), as it read during the period at issue in this IRC, defines a truant as:

¹¹² Exhibit A, IRC 10-904133-I-10, pages 20-22.

¹¹³ Exhibit A, IRC 10-904133-I-10, pages 22-25.

¹¹⁴ Education Code section 48000(a), as amended by Statutes 1991, chapter 381.

¹¹⁵ Title 20, United States Code, section 1401; Education Code section 56026.

¹¹⁶ Education Code section 46000; California Code of Regulations, title 5, section 400. Section 300 of the regulations state in relevant part that “every pupil shall attend school punctually and regularly.”

*Any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without valid excuse three full days in one school year or tardy or absent for more than any 30-minute period during the schoolday without a valid excuse on three occasions in one school year, or any combination thereof, is a truant and shall be reported to the attendance supervisor or to the superintendent of the school district.*¹¹⁷

“Compulsory full-time education” is defined in Education Code section 48200 as including “each person between the ages of six and eighteen years” as follows:

Each person *between the ages of 6 and 18 years* not exempted under the provisions of this chapter or Chapter 3 (commencing with Section 48400) is subject to compulsory full-time education. Each person subject to compulsory full-time education and each person subject to compulsory continuation education not exempted under the provisions of Chapter 3 (commencing with Section 48400) shall attend the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday [sic] by the governing board of the school district in which the residency of either the parent or legal guardian is located and each parent, guardian, or other person having control or charge of the pupil shall send the pupil to the public full-time day school or continuation school or classes and for the full time designated as the length of the schoolday [sic] by the governing board of the school district in which the residence of either the parent or the legal guardian is located.¹¹⁸

Education Code 48260(b) further states that “[n]otwithstanding subdivision (a) [which defines a truant as a pupil subject to compulsory full-time education], it is the intent of the Legislature that school districts shall not change the method of attendance accounting provided for in existing law.” Therefore, even though schools are required by state law to report the attendance of all enrolled pupils, the truancy laws, including the first notice of initial truancy required by this mandated program, apply only to pupils between the ages of six and eighteen.

Therefore, the Controller’s reduction of costs for truancy notices provided to students younger than six and older than eighteen, who are not subject to compulsory full-time education, is correct as a matter of law.

C. The Controller’s Reductions in Finding 2 Based on the Former Definition of Truant Are Inconsistent with the Education Code, and Are Incorrect as a Matter of Law.

In addition, Finding 2 of the audit report identifies 58 notifications within the sample issued for pupils who accumulated fewer than four absences.¹¹⁹ Based on the analysis herein, the Commission finds that the Controller’s disallowance of notifications issued for pupils who did

¹¹⁷ Education Code section 48260 (as amended, Stats. 1994, ch. 1023; Stats. 1995, ch. 19).

¹¹⁸ Education Code section 48200 (Stats. 1987, ch. 1452).

¹¹⁹ Exhibit A, IRC 10-904133-I-10, page 20.

not accumulate four or more absences is incorrect as a matter of law, because it relies on the former definition of a truant.

The parameters and guidelines provide for a uniform cost allowance “based on the number of initial notifications of truancy distributed pursuant to Education Code Section 48260.5, as added by Chapter 498, Statutes of 1983.”¹²⁰ As enacted in 1976, and as analyzed by the Board of Control in its November 29, 1984 decision, Education Code section 48260 stated that a pupil who is absent or tardy from school without valid excuse for *more than three days* in one school year is a truant, as follows:

Any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without valid excuse *more than three days* or tardy in excess of 30 minutes on each of *more than three days* in one school year is a truant and shall be reported to the attendance supervisor or to the superintendent of the school district.¹²¹

Accordingly, the parameters and guidelines as originally adopted, and as amended July 22, 1993, included the then-current definition of a “truant” under Section I., Summary of Mandate:

A truancy occurs when a student is absent from school without valid excuse *more than three (3) days* or is tardy in excess of thirty (30) minutes on each of more than three (3) days in one school year. (Definition from Education Code Section 48260).¹²²

Subsequent to the adoption and 1993 amendment of parameters and guidelines for this program, section 48260, defining truancy, was amended by Statutes 1994, chapter 1023 (SB 1728) and Statutes 1995, chapter 19 (SB 102) to lower the threshold for classifying a pupil as a truant, as follows:

Any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without valid excuse *three full days* in one school year or *tardy or absent* for more than any 30-minute period during the schoolday without a valid excuse *on three occasions* in one school year, *or any combination thereof*, is a truant and shall be reported to the attendance supervisor or to the superintendent of the school district.^{123,124}

¹²⁰ Exhibit X, Parameters and Guidelines, amended July 22, 1993.

¹²¹ Education Code section 48260 (Stats. 1976, ch. 1010) [Emphasis added].

¹²² Exhibit X, Parameters and Guidelines, amended July 22, 1993.

¹²³ Education Code section 48260 (as amended, Stats. 1995, ch. 19 (SB 102)) [Emphasis added].

¹²⁴ The 1994 statute also changed the content of the notice required by the test claim statute to require school districts to also notify the pupil’s parent or guardian that the pupil may be subject to prosecution; or may be subject to suspension or restriction of driving privileges; and that “it is recommended that the parent or guardian accompany the pupil to school...for one day.” (Ed. Code § 48260.5 (as amended, Stats. 1994, ch. 1023 (SB 1728)).)

No test claim or request to amend parameters and guidelines was ever submitted by a school district on the 1994 and 1995 statutes. However, section 48260 is definitional and was never found to impose any mandated activities on school districts in the Board of Control's decision, or in the adoption of parameters and guidelines. Accordingly, the section 48260 definition of truancy was not included as a reimbursable activity under the "Reimbursable Costs" section of the parameters and guidelines, but rather in the Summary of Mandate section, as noted above. Moreover, the 1994 and 1995 statutes do not require school districts to perform any new activities; the same activity of distributing initial truancy notifications is still required. In addition, the unit cost for reimbursing the mandated activities to send notices to parents or guardians was not increased when the parameters and guidelines were eventually amended to reflect the changes made by the 1994 and 1995 statutes, on January 31, 2008, pursuant to legislative direction enacted in Statutes 2007, chapter 69.¹²⁵

As explained, the 1994 and 1995 amendments to Education Code section 48260 created a discrepancy between what triggered the mandated activities under law and what the parameters and guidelines in effect during that period stated was the triggering event under the Summary of Mandate. The inconsistency was corrected by an amendment to the parameters and guidelines adopted January 31, 2008 (an amendment made retroactive to July 1, 2006), but for over a decade the requirements of the Education Code and the language included in the Summary of Mandate section of the parameters and guidelines were at odds. In 2007, the Legislature acted to correct the discrepancy at the request of the State Controller's Office, recognizing that: "The school districts must adhere to the state statute, nevertheless, the State Controller uses the commission's parameters and guidelines to conduct the audits." The discrepancy, the Legislature found, "forces the State Controller's Office to request school districts to return the reimbursements even though the districts have been following the law."¹²⁶ As a result, the Legislature directed the Commission to amend the parameters and guidelines, the committee analysis noting that "[t]he commission is no longer able to update the definition of truancy due to one-year statute of limitations on revisions following amending statute."¹²⁷

When an amendment to a code section or regulation imposes a new program or higher level of service that increases the costs of a local government, a test claim must be filed within one year of the effective date of the amendment or subsequent statute in order for the local government to

¹²⁵ Statutes 2007, chapter 69 (AB 1698) states:

Notwithstanding any other provision of law, by January 31, 2008, the Commission on State Mandates shall amend the parameters and guidelines regarding the notification of truancy, test claim number SB-90-4133, and modify the definition of a truant and the required elements to be included in the initial truancy notifications to conform reimbursable activities to Chapter 1023 of the Statutes of 1994 and Chapter 19 of the Statutes of 1995...Changes made by the commission to the parameters and guidelines shall be deemed effective on July 1, 2006.

¹²⁶ Exhibit X, Assembly Bill 1698 (2007), Education Committee Analysis.

¹²⁷ Exhibit X, Assembly Bill 1698 (2007), Education Committee Analysis.

exercise its right to reimbursement under the Constitution, as alluded to by the committee analysis comments on AB 1698. But here, the amendment to section 48260 did not impose a new activity, let alone a new program or higher level of service that increased costs and required the adoption of a higher uniform cost allowance; the amendment affected only the *definition* of truancy.

Education Code section 48260 does not impose a mandated activity; it merely defines the event that triggers the mandated activity. The plain language is expressly definitional, not mandatory.¹²⁸ Therefore, section 48260 was amended without altering the scope of the mandated activities, and reimbursement under the terms of the approved code section (48260.5) for sending a notice “upon a pupil’s initial classification as a truant,” does not require a new test claim finding, or even an amendment to the parameters and guidelines based on changes to section 48260. This interpretation is consistent with the Board of Control’s original test claim decision, which found that section 48260.5, and not section 48260, imposed the mandate. This reasoning is also consistent with the prior parameters and guidelines, in which the definition of truancy was not included as a reimbursable activity under the “Reimbursable Costs” section.

The Controller’s auditors in this case relied on the outdated definition of truancy included in the “Summary of Mandate” section of the 1993 parameters and guidelines (*i.e., more than three* absences or instances of tardiness). The Controller correctly asserts that “[t]he parameters and guidelines as adopted on July 22, 1993, are the applicable audit criteria for the purposes of this audit.”¹²⁹ And here, the parameters and guidelines, which “helpfully” included the text of a definition (which was *not* the subject of the mandate finding) in the Summary of Mandate, rather than citing to the code section where the definition could be found, were understandably a source of confusion for the auditors.

However, the Commission finds that because the amendment to section 48260 affected only the definition of truancy, and not the mandated program required to be performed by school districts, neither a new test claim nor parameters and guidelines amendment was necessary for the districts to continue to be reimbursed for complying with section 48260.5; that “upon a pupil’s initial classification as a truant, the school district shall notify the pupil’s parent or guardian...”

Therefore, the Controller’s reduction based on notices provided for pupils who accumulated three, but not four, unexcused instances of tardiness or absence is incorrect as a matter of law. All costs reduced on this basis should be reinstated to the claimant.

D. The Controller’s Reductions in Finding 2 for Notifications Claimed for Pupils with Fewer Than Three Absences or Tardy Occurrences Are Correct as a Matter of Law and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

¹²⁸ An amendment to the definition of truancy may have also necessitated altering the text or content of the notice, but section 48260 made no such express requirement.

¹²⁹ Exhibit C, Controller’s Comments, page 11.

The Controller stated in Finding 2 that a small portion of the notifications claimed were issued for students who did not accumulate even *three* absences or instances of tardiness.¹³⁰ In those cases, the pupils at issue did not meet the definition of a truant under the Education Code, and the claimant’s issuance of a notification was not mandated by the state.

The audit report determination relies on “unallowable initial truancy notifications for students who accumulated fewer than four unexcused absences or tardiness occurrences...” and states that “[s]ome of these students accumulated fewer than three unexcused absences or tardiness occurrences.” However, neither the IRC, nor the audit report, identifies the number of pupils who accumulated fewer than three unexcused absences or tardiness occurrences. For fiscal years 2003-2004 through 2005-2006, the audit report simply identifies 122 unallowable truancy notifications.

As discussed above, Education Code section 48260, during the fiscal years here at issue, defined a truant as “any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without valid excuse *three full days* in one school year or tardy or absent for more than any 30-minute period during the schoolday without a valid excuse *on three occasions* in one school year, or any combination thereof.”¹³¹

The Commission’s 1993 parameters and guidelines require a school district to issue a notification of truancy “upon a pupil’s initial classification as a truant...”¹³² If a pupil cannot be classified as a truant, as defined in section 48260, a notification is not required, and any notification sent to that pupil’s parent or guardian, whether or not intentional, is not reimbursable. Therefore, to the extent the Controller reduced the claims based on notifications issued for pupils who were not by definition truant (i.e., pupils that did not accumulate at least three absences or instances of tardiness, or any combination thereof), those reductions are correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.¹³³

Based on the foregoing, the Commission finds that reductions based on pupils who did not accumulate three absences or instances of tardiness during the school year are correct as a matter of law.

E. Reductions in Finding 2 Based on a Single Instance of Insufficient Documentation Within the Controller’s Sample Are Entirely Lacking in Evidentiary Support.

¹³⁰ Exhibit A, IRC 10-904133-I-10, page 67.

¹³¹ Education Code section 48260 (as amended, Stats. 1995, ch. 19 (SB 102)) [emphasis added].

¹³² See, e.g., Exhibit C, Controller’s Comments, page 9 [quoting the Commission’s 1993 parameters and guidelines]. See also, former Education Code section 48260.5 (Stats. 1983, ch. 498) [“Upon a pupil’s initial classification as a truant, the school district shall notify...”].

¹³³ As discussed below, the number of pupils who did not accumulate a given number of absences or instances of tardiness within the sample was extrapolated to a total dollar amount reduction, and the Controller will be required to adjust that reduction consistently with this finding.

The claimant identifies in its IRC a single instance within the sample of notifications analyzed which the Controller found was not supported by documentation.¹³⁴ It is unclear from the audit report or the IRC narrative whether the lack or insufficiency of documentation pertains to the number of absences that that pupil accumulated, or the pupil's age, or whether the notification itself was issued as reported. Because the Commission is unable to make findings on this single instance of "insufficient documentation" because of the lack of evidence in the record, this disallowance must be remanded to the Controller and reinstated absent an adequate explanation of the reduction supported by some evidence in the record.

Furthermore, as discussed below, each of the asserted legal grounds for disallowance identified within the Controller's sample of the total population of notifications issued is calculated as an error rate and extrapolated to the whole to estimate the number of notifications that suffer from the same flaw and determine a dollar amount reduction. Because neither the claimant nor the Controller has specifically identified the reason that this single instance within the sample of "insufficient documentation" was disallowed, it is impossible to determine, and the Commission cannot presume, whether the asserted error is likely to be uniformly repeated within the population. Therefore, unlike the extrapolation of error rates for notifications issued to pupils under or over-age, or notifications issued to pupils who did not accumulate the requisite number of absences, there is not sufficient evidence in the record to support adding this instance of "insufficient documentation" to the error rates calculated by the Controller.

Based on the foregoing, the Commission finds that reductions based on a non-specific finding of insufficient documentation within the Controller's sample of notifications issued are entirely lacking in evidentiary support.

F. The Controller's Reductions Based on Statistical Sampling and Extrapolation of Correct Reductions Are Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.

In its audit of 2003-2004, 2004-2005, and 2005-2006 reimbursement claims, the Controller examined a random sample of initial truancy notices distributed by the claimant for each year to determine the proportion of notifications that were unallowable for the Controller's asserted legal reasons. The Controller's sample for fiscal years 2003-2004, 2004-2005, and 2005-2006 totaled 886 notifications distributed by elementary and secondary schools, out of a total of 53,119 "supported" notifications.¹³⁵ The Controller selected its sample "based on a 95% confidence level, a precision rate of $\pm 8\%$, and an expected error rate of 50%."¹³⁶ The number of unallowable notifications within the sample for each fiscal year was then calculated as an error percentage, and extrapolated to the total number of notifications issued and identified by the

¹³⁴ Exhibit A, IRC 10-904133-I-10, pages 20-21.

¹³⁵ This figure excludes the "unsupported" notifications in Finding 1. The sample sizes for elementary schools and the sample sizes for secondary schools that were reviewed by the Controller each fiscal year ranged from 147 to 148. The sample sizes for elementary and secondary schools were separately calculated because elementary schools took daily attendance and secondary schools took period attendance. (Exhibit A, IRC, page 67 (final audit report).)

¹³⁶ Exhibit A, IRC 10-904133-I-10, page 67 (final audit report).

claimant in each fiscal year to approximate the total number of unallowable notifications (totaling 7,325 for three years). The number of unallowable notices was then multiplied by the unit cost for each fiscal year to calculate the total reduction for the three fiscal years at \$98,866.¹³⁷

Since the Controller has not actually reviewed all 53,119 “supported” notifications, the Controller’s methodology results in an estimate based on statistical probabilities of the amount of costs claimed beyond the scope of the mandate and that the Controller has determined to be excessive or unreasonable. The Controller states that the estimated reduction of costs has an “adjustment range” with a 95 percent confidence level for all three fiscal years between \$63,807 and \$133,922, and that the total reduction taken (\$98,866) for three years “provides the best, and thus *reasonable*, single estimate of the population’s true error rate.”¹³⁸ The Controller asserts that sampling and extrapolation is an audit tool commonly used to identify error rates; that there is no law or regulation prohibiting that method; and, that the claimant misstates and misunderstands the meaning of an expected error rate and confidence interval. The Controller argues that its method is reasonable, and “the Administrative Procedures Act [sic] is not applicable.”¹³⁹

Claimant asserts that the use of statistical sampling should be rejected, that the extrapolation of findings is void, and that the audit findings can only pertain to documentation actually reviewed; that is, the 886 notifications examined.¹⁴⁰ The claimant attacks the statistical reliability and accuracy of the Controller’s methodology, arguing that “[t]esting to detect the rate of error within tolerances is the purpose of sampling, but it is not a tool to assign an exact dollar amount to the amount of the error, which the Controller has inappropriately done so here.”¹⁴¹ The claimant further states that the risk of extrapolating findings from a sample is that the conclusions obtained from the sample may not be representative of the universe. In this respect, the claimant states the following:

For example, kindergarten students present in the sample are more likely to be excluded because of the under-age issue, which makes these samples nonrepresentative of the universe. Also, if any of the notices excluded for being under-age or over-age are for students who are special education students, these samples would also not be representative of the universe since the possibility of a special education student being under-age or over-age is greater than the entire student body. The audit report states that the District “provides no evidence showing that the audit sample included a disproportionate number of kindergarten or special education students compared to the truancy population.” This misses the point entirely. The District does not assert that the incidence of kindergarten

¹³⁷ This figure includes the \$5,237 adjusted for understated truancy notifications for two of the district’s elementary schools. (See Exhibit A, IRC, pages 68-69 (final audit report).)

¹³⁸ Exhibit C, Controller’s Comments, page 20.

¹³⁹ Exhibit C, Controller’s Comments, page 20.

¹⁴⁰ Exhibit A, IRC 10-904133-I-10, page 13.

¹⁴¹ Exhibit A, IRC 10-904133-I-10, page 17.

students or special education students is either proportionate or disproportionate, rather than a kindergarten pupil is more likely to be under-age and a special education pupil is more likely to be over-age than other students sampled, and thus not representative.¹⁴²

The claimant further contends that the sampling technique used by the Controller is also quantitatively non-representative because fewer than two percent of the total number of notices were audited, the stated precision rate was plus or minus eight percent even though the sample size (ranging from 147 to 148) is essentially identical for all three fiscal years, and that the audited number of notices claimed for fiscal year 2004-2005 (19,101) is twenty-two percent larger than the number of notices claimed for fiscal year 2005-2006 (15,645). The claimant concludes by stating that “[t]he expected error rate is stated to be 50%, which means the total amount adjusted of \$98,866 is really just a number exactly between \$49,433 (50%) and \$148,299 (150%)” and that “[t]he midrange of an interval cannot be used as a finding of absolute actual cost.”¹⁴³ Claimant further asserts that the Controller’s failure to adopt statistical sampling as a regulation renders its use void under the APA.¹⁴⁴

Based on the analysis herein, the Commission finds that the reductions in this case, determined based on the sampling method used and lack of any evidence to the contrary, are not arbitrary, capricious, or entirely lacking in evidentiary support.

1. There is no evidence to support claimant’s argument that the statistical sampling and extrapolation method used in the audit constitutes an underground regulation.

The claimant challenges the statistical sampling and extrapolation methodology used by the Controller as an underground regulation not adopted pursuant to the APA, and argues that any findings and cost reductions extrapolated from the sample reviewed by the Controller should therefore be void. The provisions of the APA on which the claimant relies include, primarily, Government Code sections 11340.5 and 11342.600. Section 11340.5 provides, in pertinent part:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless [the rule] has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.¹⁴⁵

Therefore, if the Controller’s challenged audit methods constitute a regulation not adopted pursuant to the APA, the Commission cannot uphold the reductions. Section 11342.600, in turn, defines a regulation to mean “...every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it,

¹⁴² Exhibit A, IRC 10-904133-10, pages 17-18.

¹⁴³ Exhibit A, IRC 10-904133-I-10, page 19.

¹⁴⁴ Exhibit A, IRC 10-904133-I-10, page 19.

¹⁴⁵ Government Code section 11340.5 (Stats. 2000, ch. 1060).

or to govern its procedure.”¹⁴⁶ Interpreting this section, the California Supreme Court in *Tidewater Marine Western v. Bradshaw* found that a regulation has two principal characteristics:

First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a *certain class of cases* will be decided. Second, the rule must “implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.”¹⁴⁷

The necessary inquiry, then, is whether the challenged audit policy or practice is applied “generally,” and used to decide a class of cases; and whether the rule “implement[s], interpret[s], or make[s] specific” the law administered by the Controller. Here, that presents a close question, which turns on the issue of general applicability: if it is the Controller’s policy that *all audits* of the *Notification of Truancy* program be conducted using the statistical sampling and extrapolation methods here challenged, then that would meet the standard of a rule applied “generally, rather than in a specific case.”¹⁴⁸ On the other hand, if statistical sampling and extrapolation is only one of an auditor’s tools, and is within the discretion of each auditor to use, then the APA does not bar the exercise of that discretion.¹⁴⁹

In *Clovis Unified*, the court held that the Controller’s contemporaneous source document rule (CSDR), which was contained solely in the Controller’s claiming instructions and not adopted in the regulatory parameters and guidelines, was applied *generally* to audits of all reimbursement claims for certain programs, in that individual auditors had no discretion to judge on a case-by-case basis whether to apply the rule.¹⁵⁰ As to the second criterion, the court found that the CSDR was more specific, and in some ways inconsistent with the parameters and guidelines for the subject mandated programs. Specifically, the court found that the CSDR defined “source documents” differently and more specifically than the parameters and guidelines, including relegating employee declarations to “corroborating documents, not source documents...,” and failing to recognize the appropriate use of a time study.¹⁵¹ The court therefore held, “[g]iven these substantive differences...we conclude that the CSDR implemented, interpreted, or made specific...” the parameters and guidelines and the Controller’s audit authority and was, therefore, an underground regulation.¹⁵²

¹⁴⁶ Government Code section 11342.600 (Stats. 2000, ch. 1060).

¹⁴⁷ *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571 (emphasis added) [Citing *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630; Gov. Code § 11342(g)].

¹⁴⁸ *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571.

¹⁴⁹ See *Taye v. Coye* (1994) 29 Cal.App.4th 1339, 1345 [Finding that an auditor’s decision was not an underground regulation where it was “designed to fit the particular conditions that were encountered upon arrival at the audit site.”].

¹⁵⁰ *Clovis Unified School District v. Chiang*, 188 Cal.App.4th 794, 803.

¹⁵¹ *Id.*, at pp. 803-805.

¹⁵² *Id.*, at p. 805.

In the Medi-Cal audit context, the courts held the Department of Health Services' statistical sampling and extrapolation methods to determine the amount of over- or under-payment in reimbursement to health care providers to be an underground regulation, absent compliance with the APA. In *Grier v. Kizer*¹⁵³ and *Union of American Physicians and Dentists v. Kizer*,¹⁵⁴ (*UAPD*) "the Department conducted audits of Medi-Cal providers by taking a small random sample [to determine the frequency and extent of over- or under-claiming for services provided], then extrapolating that error rate over the total amount received by the provider during the period covered by the audit."¹⁵⁵ The courts found the sampling and extrapolation methodology in that case invalid, solely because of the failure of the Department of Health Services to adopt its methodology in accordance with the APA. The court in *Grier, supra*, concurred with an OAL determination, made in a parallel administrative proceeding, that the challenged method constituted a regulation, and should have been duly adopted. The court observed that "the definition of a regulation is broad, as contrasted with the scope of the internal management exception, which is narrow."¹⁵⁶ And, the court rejected the Department's argument that sampling and extrapolation was the only legally tenable interpretation of its audit authority: "While sampling and extrapolation may be more feasible or cost-effective,...[a] line by line audit is an alternative tenable interpretation of the statutes."¹⁵⁷ The court also noted that the Department "acquiesced" in that determination and soon after adopted a regulation providing expressly for statistical sampling and extrapolation in the conduct of Medi-Cal audits.¹⁵⁸ Accordingly, the court in *Union of American Physicians and Dentists* assumed, without deciding, that having satisfied the APA, the statistical methodology could be validly applied to pending audits, or remanded audits.¹⁵⁹ Now, with respect to Medi-Cal audits, a statistical sampling methodology is provided for in *both* the Welfare and Institutions Code and in the Department's implementing regulations.¹⁶⁰

Here, the Controller argues that the auditor "conducted appropriate statistical samples that identified a *reasonable* estimate of the non-reimbursable initial truancy notifications, thus properly reducing the claims for the *unreasonable* claimed costs," and that therefore "the

¹⁵³ (1990) 219 Cal.App.3d 422.

¹⁵⁴ (1990) 223 Cal.App.3d 490.

¹⁵⁵ *Id.*, at p. 495.

¹⁵⁶ *Id.*, at p. 435.

¹⁵⁷ *Id.*, at pp. 438-439.

¹⁵⁸ *Ibid*

¹⁵⁹ *Union of American Physicians and Dentists, supra*, 223 Cal.App.3d 490, 504-505 [finding that the statistical audit methodology did not have retroactive effect because it did not alter the legal significance of past events (i.e., the amount of compensation to which a Medi-Cal provider was entitled)].

¹⁶⁰ See, e.g., Welfare and Institutions Code section 14170(b) (added, Stats. 1992, ch. 722 (SB 485); Code of Regulations, title 22, section 51458.2 (Register 1988, No. 17).

Administrative Procedures Act is not applicable.”¹⁶¹ But that argument essentially rests on the theory that the auditors acted appropriately, and therefore the APA could not have been violated. This conclusion does not follow. Looking no further than *Clovis Unified*, and especially in light of *Grier* and *UAPD*, it is clear that an audit practice may be reasonable and otherwise permissible, yet still constitute an illegal underground regulation.

However, the Commission does not have substantial evidence in the record that the audit methodology as applied in this case rises to the level of a rule of general application, and no clear “class of cases” to which it applied has been defined. In *Tidewater*, the Court held that a “rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided.”¹⁶² And in *Clovis Unified*, the court explained that in the context of the Controller’s audits of mandate reimbursement claims:

As to the first criterion—whether the rule is intended to apply generally—substantial evidence supports the trial court’s finding that the CSDR was “applie[d] generally to the auditing of reimbursement claims ...; the Controller’s auditors ha[d] no discretion to judge on a case[-]by[-]case basis whether to apply the rule.”¹⁶³

Here, the sampling and extrapolation method is not published in the claiming instructions for this mandate or any other guidance or policy document that as far as the Commission is aware; nor is it alleged that auditors were *required* to utilize such methods. Indeed, of the 42 completed audit reports for this mandated program currently available on the Controller’s website, some do not apply a statistical sampling and extrapolation methodology to calculate a reduction;¹⁶⁴ others apply a sampling and extrapolation method to determine whether the notifications issued complied with the eight required elements under section 48260.5;¹⁶⁵ and still others use sampling and extrapolation methods to determine the proportion of notifications issued that were supported by documentation, including attendance records, rather than the proportion unallowable based on absences, as here.¹⁶⁶

¹⁶¹ Exhibit C, Controller’s Comments, page 20.

¹⁶² *Tidewater*, *supra*, 14 Cal.4th 557, 571.

¹⁶³ *Clovis Unified School District v. Chiang*, 188 Cal.App.4th 794, 803.

¹⁶⁴ See, e.g., Audit of Sweetwater Union High School District, *Notification of Truancy*, fiscal years 2006-2007 through 2009-2010 [In this audit report the Controller reduced based on the claimant’s failure to comply with the notification requirements of section 48260.5, rather than performing a sampling and estimation audit to determine whether notifications were issued in compliance with section 48260.].

¹⁶⁵ See, e.g., Audit of Colton Joint Unified School District, *Notification of Truancy*, fiscal years 1999-2000 through 2001-2002, issued November 26, 2003.

¹⁶⁶ See, e.g., Audit of Bakersfield City School District, *Notification of Truancy*, fiscal years 2007-2008 through 2009-2010, issued October 25, 2012.

Therefore, based on the case law discussed above, and the evidence in the record, the Commission finds that the Controller’s sampling and extrapolation method, as applied in this case, is not a regulation within the meaning of the APA.

2. The Controller’s audit conclusions must be upheld absent evidence that the Controller’s reductions are arbitrary, capricious, or entirely lacking in evidentiary support.

The claimant argues that there is no statutory or regulatory authority for the Controller to reduce claimed costs based on extrapolation from a statistical sample. The Controller counters that the law does not prohibit the audit methods used by the Controller. The Controller relies on Government Code section 12410, which requires the Controller to audit all claims against the state and “may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment.”¹⁶⁷ The Controller also relies on Government Code section 17561, which permits the Controller to reduce any claim that is determined to be excessive or unreasonable: “The SCO conducted appropriate statistical samples that identified a *reasonable* estimate of the non-reimbursable initial truancy notifications, thus properly reducing the claims for the *unreasonable* claimed costs.”¹⁶⁸

Based on the analysis herein, the Commission finds that the Controller’s audit conclusions must be upheld absent evidence that the Controller’s reductions are arbitrary, capricious, or entirely lacking in evidentiary support.

The Controller correctly states that there is no express prohibition in law or regulation of statistical sampling and extrapolation methods being used in an audit. The Controller’s authority to audit is commonly described in the broadest terms: article XVI, section 7 states that “Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller’s duly drawn warrant.”¹⁶⁹ Government Code section 12410 provides that the Controller “shall superintend the fiscal concerns of the state...” and “shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment.”¹⁷⁰

With respect to mandate reimbursement, the Controller’s audit authority is more specifically articulated. Article XIII B, section 6 provides that “the State shall provide a subvention of funds to reimburse...local government for the costs of the program or increased level of service...” whenever the Legislature or a state agency mandates a new program or higher level of service.¹⁷¹ Government Code section 17561, accordingly, provides that the state “shall reimburse each local agency and school district for *all* ‘costs mandated by the state,’ as defined in Section 17514...”

¹⁶⁷ Government Code section 12410 (Stats. 1968, ch. 449).

¹⁶⁸ Exhibit C, Controller’s Comments, page 20 [emphasis in original].

¹⁶⁹ California Constitution, article XVI, section 7 (added November 5, 1974, by Proposition 8).

¹⁷⁰ Statutes 1968, chapter 449.

¹⁷¹ California Constitution, article XIII B, section 6 (Stats. 2004, ch. 133 (SCA 4; Proposition 1A, November 2, 2004)).

Section 17561 also provided, at the time the audit of the subject claims was conducted, in 2009 and 2010, the following:

In subsequent fiscal years each local agency or school district shall submit its claims as specified in Section 17560. The Controller shall pay these claims from funds appropriated therefor except as follows: (A) The Controller may audit any of the following: (i) Records of any local agency or school district to verify the actual amount of the mandated costs. (ii) The application of a reasonable reimbursement methodology. (iii) The application of a legislatively enacted reimbursement methodology under Section 17573. (B) The Controller may reduce any claim that the Controller determines is excessive or unreasonable. (C) The Controller shall adjust the payment to correct for any underpayments or overpayments that occurred in previous fiscal years.¹⁷²

The parameters and guidelines for the *Notification of Truancy* mandate predate the statutory authorization for a “reasonable reimbursement methodology,” as defined in sections 17518.5 and 17557; however, a unit cost, which was adopted for this program, is included within the definition of a “reasonable reimbursement methodology.”¹⁷³ Thus the Controller’s audit authority pursuant to section 17561 expressly authorizes an audit of a claim based on a unit cost reimbursement scheme. The statutes, however, do not address how the Controller is to audit and verify the costs mandated by the state.

Accordingly, the Controller cites to “Government Auditing Standards, as issued by the Comptroller General of the United States,” to argue that it properly conducted the audit. “These audit standards,” the Controller asserts, “specify that auditors may use professional judgment in ‘selecting the methodology, determining the type and amount of evidence to be gathered, and choosing the tests and procedures for their work.’”¹⁷⁴ While the standards cited do not provide for statistical sampling and extrapolation to be applied to mandate reimbursement, they do provide for statistical methods to be used to establish the sufficiency, or validity of evidence generally.¹⁷⁵ The Controller also cites the “Handbook of Sampling for Auditing and Accounting,” by Herbert Arkin, for the proposition that a sampling methodology to determine the frequency of errors in the population (i.e., notifications that were not reimbursable for an asserted legal reason) is a widely used approach to auditing.¹⁷⁶

In accordance with the Controller’s audit authority and duties under the Government Code, it is not the Commission’s purview to direct the Controller to employ a specific audit method, including when the audit pertains to the application of a unit cost, as here. The Commission’s consideration is limited to whether the Controller’s reduction of costs based on audit decisions is

¹⁷² Government Code section 17561 (Stats. 2009-2010, 3rd Ex. Sess., ch. 4.)

¹⁷³ Government Code section 17518.5 (added, Stats. 2004, ch. 890); Government Code section 17557 (as amended, Stats. 2004, ch. 890; Stats. 2007, ch. 329).

¹⁷⁴ Exhibit C, Controller’s Comments, page 17.

¹⁷⁵ Exhibit X, Excerpt from Government Auditing Standards, 2003, page 13.

¹⁷⁶ Exhibit B, Controller’s Comments, page 19.

arbitrary, capricious, or entirely lacking in evidentiary support.¹⁷⁷ Based on the standards and texts cited by the Controller, statistical methods are an appropriate and commonly-used tool in auditing. The claimant, too, concedes that “[a] statistically valid sample methodology is a recognized audit tool for some purposes.”¹⁷⁸

In fact, statistical sampling methods such as those employed here are used in a number of other contexts and have not been held, in themselves, to be arbitrary and capricious, or incorrect as a matter of law. As discussed above, when the Department of Health Services used statistical sampling and extrapolation to determine the amount of over- or under-payment in the context of Medi-Cal reimbursement to health care providers in *Grier v. Kizer*¹⁷⁹ and *Union of American Physicians and Dentists v. Kizer*¹⁸⁰ (*UAPD*), those methods were disapproved by the courts only on the ground that they constituted a regulation not adopted in accordance with the APA, rather than on the substantive question whether statistical sampling and extrapolation was a permissible methodology for auditing.¹⁸¹ Once the Department adopted a regulation in accordance with the APA – a reaction to the proceedings in *Grier* – the court in *UAPD* had no objection to the methodology on its merits.¹⁸² Thus, after *Grier*, the Department of Health Services has both regulatory and statutory authority for its sampling and extrapolation audit process.¹⁸³

In addition to the Medi-Cal reimbursement context, the courts have declined to reject the use of statistical sampling and extrapolation to calculate damages due to plaintiffs in a class action or other mass tort action.¹⁸⁴ And, in a case addressing audits of county welfare agencies, the court declined to consider whether the sampling and extrapolation procedures were legally proper, instead finding that counties were not required to be solely responsible for errors “which seem to be inherent in public welfare administration.”¹⁸⁵

On that basis, and giving due consideration to the discretion of the Controller to audit the fiscal affairs of the state,¹⁸⁶ the Commission finds that it must uphold the Controller’s auditing

¹⁷⁷ *American Bd. of Cosmetic Surgery, Inc., supra*, 162 Cal.App.4th 534, 547-548.

¹⁷⁸ Exhibit A, IRC 10-904133-I-10, page 16.

¹⁷⁹ (1990) 219 Cal.App.3d 422.

¹⁸⁰ (1990) 223 Cal.App.3d 490.

¹⁸¹ E.g., *Grier, supra*, 219 Cal.App.3d, 422, 439-440.

¹⁸² *Union of American Physicians and Dentists, supra*, 223 Cal.App.3d 490, 504-505 [finding that the statistical audit methodology did not have retroactive effect because it did not alter the legal significance of past events (i.e., the amount of compensation to which a Medi-Cal provider was entitled)].

¹⁸³ See, e.g., Welfare and Institutions Code section 14170(b) (added, Stats. 1992, ch. 722 (SB 485); Code of Regulations, title 22, section 51458.2 (Register 1988, No. 17).

¹⁸⁴ See, e.g., *Bell v. Farmers Insurance Exchange* (2004) 115 Cal.App.4th 715.

¹⁸⁵ *County of Marin v. Martin* (1974) 43 Cal.App.3d 1, 7.

¹⁸⁶ Government Code section 12410 (Stats. 1968, ch. 449).

decisions absent evidence that the audit reductions are arbitrary, capricious, or entirely lacking in evidentiary support.

3. There is no evidence in the record that the Controller's findings using the sampling and extrapolation methodology are not representative of all notices claimed during the audit period or that the findings are arbitrary, capricious, or entirely lacking in evidentiary support.

In addition to challenging the legal sufficiency of the Controller's sampling and extrapolation methodology, the claimant also challenges the qualitative and quantitative reliability and fairness of using statistical sampling and extrapolation to evaluate reimbursement. The claimant further states that the risk of extrapolating findings from a sample is that the conclusions obtained from the sample may not be representative of the universe. In this respect, the claimant asserts that a kindergarten pupil is more likely to be under-age and a special education pupil is more likely to be over-age, and, thus, the extrapolation from the samples would not be representative of the universe.¹⁸⁷ The claimant further contends that the sampling technique used by the Controller is also quantitatively non-representative because less than two percent of the total number of notices were audited, the stated precision rate was plus or minus eight percent even though the sample size (ranging from 147 to 148) is essentially identical for all three fiscal years, and that the audited number of notices claimed for fiscal year 2004-2005 (19,101) is twenty-two percent larger than the number of notices claimed for fiscal year 2005-2006 (15,645). The claimant concludes by stating that "[t]he expected error rate is stated to be 50%, which means the total amount adjusted of \$98,866 is really just a number exactly between \$49,433 (50%) and \$148,299 (150%)" and that "[t]he midrange of an interval cannot be used as a finding of absolute actual cost."¹⁸⁸

The Controller disagrees with the claimant's assertions that the sampling is non-representative of all notices claimed. The Controller states that "the fact that a particular student's initial truancy notification might more likely be identified as non-reimbursable is irrelevant to the composition of the audit sample itself. It has no bearing on evaluating whether the sample selection is representative of the population."¹⁸⁹ The Controller cites to Arkin's *Handbook of Sampling for Auditing and Accounting*, page 9:

Since the [statistical] sample is objective and unbiased, it is not subject to questions that might be raised relative to a judgment sample. Certainly a complaint that the auditor had looked only at the worst items and therefore biased the results would have not standing. This results from the fact that an important feature of this method of sampling is that all entries or documents have an equal opportunity for inclusion in the sample.¹⁹⁰

¹⁸⁷ Exhibit A, IRC 10-904133-I-10, pages 17-18.

¹⁸⁸ Exhibit A, IRC 10-904133-I-10, page 19.

¹⁸⁹ Exhibit C, Controller's Comments, page 18.

¹⁹⁰ Exhibit C, Controller's Comments, page 18 [Citing Herbert Arkin, *Handbook of Sampling for Auditing and Accounting*, Third Edition, Prentice Hall, New Jersey, 1984, page 9].

The Controller further states that the district apparently reached the conclusion that the sampling was quantitatively non-representative because the sample sizes were essentially consistent, while the applicable population size varied. The Controller argues that the absolute size of the sample, not the relative size, is more important under “basic statistical sampling principles.” The Controller explains that an “expected error rate” in this context is an assumption used to determine the appropriate sample size, rather than a measure of the ultimate accuracy of the result. In other words, when “the auditor has no idea whatsoever of what to expect as the maximum rate of occurrence or does not care to make an estimate...” an expected error rate of 50 percent as the beginning assumption will provide “the most conservative possible sample size estimate” in order to achieve the precision desired.¹⁹¹ In addition, the desired accuracy of the result, which might be called a “margin of error,” is determined by the auditor before calculating the sample size (shown below as “SE = desired sample precision”). Therefore, the “margin of error” of the Controller’s resulting percentage is a known value. The Controller relies on the following formula outlined in Arkin’s *Handbook of Sampling for Auditing and Accounting* to calculate the sample size:

$$n = \frac{p(1 - p)}{\left(\frac{SE}{t}\right)^2 + \left(\frac{p(1 - p)}{N}\right)}$$

n = sample size

p = percent of occurrence in population (expected error rate)

SE = desired sample precision

t = confidence level factor

N = population size¹⁹²

Thus, applying the formula above to the population of elementary and secondary notices in this case, with a 50 percent expected error rate (the “most conservative sample size estimate” when an error rate is not known) and a desired eight percent margin of error, as stated in the audit report, shows that an appropriate sample size for each level of elementary and secondary schools is between 147 and 148 notices for populations ranging from 7,562 to 9,706 notifications issued either by elementary or secondary schools during the audit period.¹⁹³

Moreover, there is no evidence in the record that the results are biased or unrepresentative “because a kindergarten pupil is more likely to be under-age and a special education pupil is more likely to be over-age,” as asserted by claimant. There is no dispute that the samples were randomly obtained and reviewed by the Controller. According to the *Handbook of Sampling for Auditing and Accounting* (Arkin), all notices randomly sampled have an equal opportunity for

¹⁹¹ Exhibit C, Controller’s Comments, page 20 [Citing Herbert Arkin, *Handbook of Sampling for Auditing and Accounting*, Third Edition, Prentice Hall, New Jersey, 1984, page 89].

¹⁹² *Ibid.*

¹⁹³ Exhibit C, Controller’s Comments, page 20.

inclusion in the sample and, thus, the result is statistically objective and unbiased.¹⁹⁴ Moreover, absent evidence, the Commission and the Controller must presume that the schools within the claimant's district complied with the mandate in the same way.

Based on the analysis above, the Commission finds that the Controller's reduction of costs, based on the statistical sampling method as applied in this case, is not arbitrary, capricious, or entirely lacking in evidentiary support.

V. Conclusion

Pursuant to Government Code section 17551(d), the Commission partially approves this IRC. The Commission finds that the following reductions are correct as a matter of law and are not arbitrary, capricious, or entirely lacking in evidentiary support:

- Reductions in Finding 1 based on the ground that the claimant provided no documentation to support the number of notifications distributed.
- Reductions in Finding 2 based on notifications issued for pupils under age six or over age eighteen.
- Reductions in Finding 2 for notifications issued for pupils who accumulated *fewer than three* unexcused absences or instances of tardiness.
- The Controller's sampling and extrapolation methodology to calculate the reductions is not arbitrary, capricious, or entirely lacking in evidentiary support, to the extent that the underlying reasons for reduction are valid.

The following reductions, however, including any extrapolation of these reductions to costs claimed by the district, are incorrect as a matter of law, or are entirely lacking in evidentiary support:

- Reductions in Finding 2 based on notifications issued for pupils who accumulated *three but not four* unexcused absences or instances of tardiness.
- Reductions based on one notification in Finding 2 for which the Controller found an unspecified lack of sufficient documentation.

The costs incorrectly reduced should be reinstated by the Controller in accordance with this decision.

¹⁹⁴ Herbert Arkin, *Handbook of Sampling for Auditing and Accounting*, Third Edition, Prentice Hall, New Jersey, 1984, page 9.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On September 21, 2015, I served the:

Draft Proposed Decision, Schedule for Comments, and Notice of Hearing

Notification of Truancy, 10-904133-I-10 and 13-904133-I-12

Education Code Section 48260.5

Statutes 1983, Chapter 498

Fiscal Years: 2003-2004, 2004-2005, 2005-2006, and 2006-2007

Riverside Unified School District, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 21, 2015 at Sacramento, California.



Jill E. Magee

Commission on State Mandates

980 Ninth Street, Suite 300

Sacramento, CA 95814

(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/10/15

Claim Number: 10-904133-I-10 and 13-904133-I-12

Matter: Notification of Truancy

Claimant: Riverside Unified School District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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