



May 22, 2018

Mr. Christian Keiner  
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555 Capitol Mall, Suite 645  
Sacramento, CA 95814

Ms. Jill Kanemasu  
Division of Accounting and Reporting  
State Controller's Office  
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**  
*The Stull Act*, 14-9825-I-02  
Education Code Sections 44660-44665;  
Statutes 1983, Chapter 498; Statutes 1999, Chapter 4  
Fiscal Years: 2005-2006, 2006-2007, 2007-2008, and 2008-2009  
Carlsbad Unified School District, Claimant

Dear Mr. Keiner and Ms. Kanemasu:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

### **Written Comments**

Written comments may be filed on the Draft Proposed Decision by **June 12, 2018**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.<sup>1</sup>

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. Refer to [http://www.csm.ca.gov/dropbox\\_procedures.php](http://www.csm.ca.gov/dropbox_procedures.php) on the Commission's website for electronic filing instructions. (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.

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<sup>1</sup> 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.

Mr. Keiner and Ms. Kanemasu

May 21, 2018

Page 2

**Hearing**

This matter is set for hearing on **Friday, July 27, 2018**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The Proposed Decision will be issued on or about July 13, 2018. 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,



Heather Halsey  
Executive Director

**ITEM \_\_**  
**INCORRECT REDUCTION CLAIM**  
**DRAFT PROPOSED DECISION**

Education Code Sections 44660-44665  
Statutes 1983, Chapter 498, Statutes 1999, Chapter 4

*The Stull Act*

Fiscal Years 2005-2006, 2006-2007, 2007-2008, and 2008-2009

14-9825-I-02

Carlsbad Unified School District, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Incorrect Reduction Claim (IRC) addresses reductions made by the State Controller’s Office (Controller) to reimbursement claims filed by the Carlsbad Unified School District (claimant) for costs incurred during fiscal years 2005-2006 through 2008-2009 under the *Stull Act* program.

The Stull Act was originally enacted in 1971 to establish a uniform system of evaluation and assessment of the performance of “certificated personnel” within each school district. (Former Ed. Code, §§ 13485-13490.) The test claim statutes amended the Act, imposing a narrow higher level of service on school districts to (1) evaluate certificated instructional personnel on three additional criteria that were not previously included in the required evaluation and assessment,<sup>1</sup> and to evaluate and assess certificated instructional and non-instructional personnel in years in which the employee would not otherwise have been evaluated, if the employee’s last regularly-scheduled evaluation and assessment resulted in an unsatisfactory evaluation.<sup>2</sup> These amendments constitute a very narrow approved program, with a number of limitations and caveats, as stated in the Parameters and Guidelines.<sup>3</sup> The following issues are in dispute:

- Reductions based on the items that the claimant included in its time study, nineteen of which the Controller determined were beyond the scope of the mandate; and

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<sup>1</sup> See Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>2</sup> Exhibit A, IRC, page 32 [Parameters and Guidelines, p. 5].

<sup>3</sup> See Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

- Reductions based on 46 evaluations of certificated employees that were disallowed by the Controller for being outside the scope of the mandate. The claimant disputes the disallowed evaluations of non-instructional employees and preschool teachers.<sup>4</sup>

The Parameters and Guidelines for this program require that reimbursement be based on actual costs supported by contemporaneous source documents created at or near the same time the actual cost was incurred. The Controller initially rejected all of claimant's documentation supporting the reimbursement claims because the documentation was "based on average time increments supported with time records that were not completed contemporaneously."<sup>5</sup> The claimant then conducted a time study "as a substitute for records of actual time spent" on the mandate.<sup>6</sup> The Controller has partially accepted the claimant's time study. There is no indication in the record that claimant disputes the Controller's initial rejection of the documentation; the dispute in this IRC is focused on the development and application of the time study.<sup>7</sup>

### **Procedural History**

On September 25, 2005 the Commission on State Mandates (Commission) adopted the Parameters and Guidelines for this program. On December 28, 2006, the claimant filed its fiscal year 2005-2006 reimbursement claim.<sup>8</sup> On January 25, 2008, the claimant filed its fiscal year 2006-2007 reimbursement claim.<sup>9</sup> On February 13, 2009, the claimant filed its fiscal year 2007-2008 reimbursement claim.<sup>10</sup> On January 29, 2010, the claimant filed its fiscal year 2008-2009 reimbursement claim.<sup>11</sup> On June 24, 2010, the Controller issued a letter informing the claimant of the commencement of an audit.<sup>12</sup> On May 5, 2012, the Controller issued the Draft Audit Report.<sup>13</sup> On May 9, 2012, the claimant responded to the Draft Audit Report.<sup>14</sup> On

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<sup>4</sup> The total disputed reduction over three fiscal years is \$274,101. (See Exhibit A, IRC, page 2).

<sup>5</sup> Exhibit A, IRC, page 65 [Controller's Final Audit Report, p. 6].

<sup>6</sup> Exhibit A, IRC, page 65 [Controller's Final Audit Report, p. 6].

<sup>7</sup> Exhibit A, IRC, page 11 ["In response to the Controller's exclusion at the beginning of the audit of all of the original claim documentation, the District with the agreement of the auditor prepared a time study based on the FY 2010-2011 certificated staff evaluation cycle."].

<sup>8</sup> Exhibit A, IRC, page 338 [Claim Documentation for Fiscal Year 2005-2006].

<sup>9</sup> Exhibit A, IRC, page 270 [Claim Documentation for Fiscal Year 2006-2007].

<sup>10</sup> Exhibit A, IRC, page 184 [Claim Documentation for Fiscal Year 2007-2008].

<sup>11</sup> Exhibit A, IRC, page 85 [Claim Documentation for Fiscal Year 2008-2009].

<sup>12</sup> Exhibit B, Controller's Late Comments on the IRC, page 62 [Audit Entrance Conference Letter].

<sup>13</sup> Exhibit A, IRC, page 62 [Final Audit Report, p. 3].

<sup>14</sup> Exhibit A, IRC, page 62 [Final Audit Report, p. 3].

June 15, 2012, the Controller issued the Final Audit Report.<sup>15</sup> On June 9, 2015, the claimant filed this IRC.<sup>16</sup> On October 2, 2015, the Controller filed late written comments on the IRC.<sup>17</sup> Commission staff issued the Draft Proposed Decision on the IRC on May 22, 2018.<sup>18</sup>

### **Commission Responsibilities**

Government Code section 17561(d) 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.<sup>19</sup> 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."<sup>20</sup>

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.<sup>21</sup>

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<sup>15</sup> Exhibit A, IRC, page 57 [Final Audit Report Cover Letter].

<sup>16</sup> Exhibit A, IRC, page 1.

<sup>17</sup> Exhibit B, Controller's Late Comments on the IRC.

<sup>18</sup> Exhibit C, Draft Proposed Decision.

<sup>19</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>20</sup> *County of Sonoma v. Commission on State Mandates* (2000), 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>21</sup> *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.

The Commission must also review the Controller’s audit in light of the fact that the initial burden of providing evidence for a claim of reimbursement lies with the claimant.<sup>22</sup> In addition, sections 1185.1(f)(3) and 1185.2(d) and (e) 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.<sup>23</sup>

**Claims**

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

Issue	Description	Staff Recommendation
Was the IRC timely filed?	Former Section 1185.1 of the Commission’s regulations required IRCs to be filed no later than three years after the Controller’s final audit report, or other notice of adjustment.	<i>The IRC was timely filed.</i> The Controller’s Final Audit Report was issued June 15, 2012, and the IRC was filed June 9, 2015, less than three years from the date of the Controller’s Final Audit Report.
Were the Controller’s reductions based on the denial of activities stated in claimant’s time study that the Controller found were beyond the scope of the mandate correct as matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support?	The Controller rejected the claimant’s original claim documentation for fiscal years 2005-2006 through 2008-2009, finding that the claim was based on average time increments and was not supported by contemporaneous source documents and the Parameters and Guidelines require actual cost claiming supported by contemporaneous source documents. The claimant then performed a time study, with the Controller’s approval, in the 2010-2011 fiscal year, which was applied to the audit period. The Controller reduced the total time result of the time study, finding that several activities within the time study were beyond the scope of the mandate – including training, planning and preparation activities, evaluation conference activities, and STAR	<i>The reductions are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.</i> Planning and preparation activities, and evaluation conferences, are not part of the approved higher level of service provided for in the Test Claim Decision and the Parameters and Guidelines. The 19 disallowed activities are stated in too-general terms, and the claimant makes no effort to establish the relationship to the

<sup>22</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>23</sup> 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.

	test evaluation activities – which the Controller found were <i>not</i> reimbursable activities under the Parameters and Guidelines.	mandate, as required by the Parameters and Guidelines.
Was the Controller’s disallowance of 46 of 660 completed evaluations for non-instructional employees and preschool teachers correct as a matter of law?	<p>The Controller reduced the number of completed evaluations to which the time study would apply, based on 46 completed evaluations that it found were beyond the scope of the mandate. There were five reasons for disallowance articulated, but only two were disputed:</p> <ul style="list-style-type: none"> <li>• Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists are not certificated instructional employees;</li> <li>• Preschool teachers do not perform the requirements of an educational program mandated by state or federal law.</li> </ul>	<i>The reductions are correct as a matter of law.</i> Non-instructional certificated employees such as administrators, counselors, and librarians, are only required to be evaluated and assessed under the approved mandated program when the employee received an unsatisfactory evaluation in the employee’s last regularly-scheduled evaluation. Those facts are not supported in the record. Preschool teachers do not perform the requirements of educational programs mandated under state or federal law, except in the case of special education pupils, and there is no evidence in the record that the preschool teachers at issue here were performing those requirements.

**Staff Analysis**

**A. The Claimant Timely Filed this IRC Within Three Years From the Date It First Received From the Controller Written Notice of the Adjustment as Required by Former Section 1185.1 of the Commission’s Regulations.**

To be complete, an IRC filing must be timely filed “no later than three years following the date of the Office of State Controller’s final audit report, letter, remittance advice, or other written notice of adjustment to a reimbursement claim.”<sup>24</sup>

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<sup>24</sup> Former California Code of Regulations, title 2, sections 1185.1(c), 1185.2(a) (Register 2014, No. 21).

Here, the Final Audit Report is dated June 15, 2012.<sup>25</sup> The IRC was filed with the Commission on June 9, 2015.<sup>26</sup> Less than three years having elapsed between the issuance of the Final Audit Report and the filing of the IRC, this IRC was filed within the period prescribed in Code of Regulations, title 2, section 1185.1, as that section provided at the time.

Based on the foregoing, staff finds the IRC was timely filed.

**B. The Controller’s Reductions, Based on the Denial of Activities Included in the Claimant’s Time Study that the Controller Found Were Beyond the Scope of the Mandate, Are Correct as Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Parameters and Guidelines for this program, adopted September 27, 2005, during the 2005-2006 fiscal year which is the same fiscal year as the first year’s reimbursement claim in this matter, require that reimbursement be based on *actual costs* supported by contemporaneous source documents created at or near the same time the actual cost was incurred, and that the evidence must show the validity of costs claimed and their relationship to the mandate.<sup>27</sup> Claimant was on notice of these requirements, yet chose to ignore them in filing its reimbursement claims.

The claimant’s reimbursement claim documentation was comprised of forms and schedules containing time estimates made by administrators, which were then compiled to produce average times for the approved reimbursable activities, and translated into costs, based on staff hours estimated to have been spent on the mandate.<sup>28</sup> The Controller rejected the claimant’s initial claimed costs, finding that the claimant did not comply with the contemporaneous source document rule, and did not claim actual costs, as required by the Parameters and Guidelines.<sup>29</sup> There is no assertion or evidence in the record rebutting that finding. Government Code section 17564 requires that reimbursement claims filed be filed in the manner prescribed in the parameters and guidelines. The claimant failed to comply with the Parameters and Guidelines, and therefore the Controller could have reduced the entire claim to zero. Any such reduction would have been correct as a matter of law.

Instead, the Controller permitted the claimant to conduct a time study “as a substitute for records of actual time spent on teacher evaluations.”<sup>30</sup> The results of that time study were then applied to the audit period, and the issue before the Commission in this IRC is whether the Controller’s

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<sup>25</sup> Exhibit A, IRC, pages 4; 57.

<sup>26</sup> Exhibit A, IRC, page 1.

<sup>27</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>28</sup> Exhibit A, IRC, pages 85-366. See, e.g., Exhibit A, IRC, pages 101; 104-122; 124-125; 141.

<sup>29</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6]. See Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 802-803 [Discussing non-enforceability of the Controller’s Contemporaneous Source Document Rule when imposed only by Controller’s Claiming Instructions, prior to valid incorporation within Parameters and Guidelines, a regulatory document].

<sup>30</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

adjustments to and application of the time study is arbitrary, capricious, or entirely lacking in evidentiary support.

The claimant's time study identified 22 discrete activities involved in the teacher evaluation process, and sought to isolate the time spent on each item, in order to determine average times and a productive hourly rate.<sup>31</sup> Those activities included training, meetings, observation, report writing, conferences between evaluators and teachers, and other activities relating to planning, preparation, and organizing notes, for a total (average) of 10 hours, 38 minutes per evaluation.<sup>32</sup>

The Controller disallowed 19 of the 22 discrete activities of the time study, based on the following findings:

- (1) The activities related to planning, preparation, and organizing notes are not reimbursable under the mandate.
- (2) Training-related activities were included in the time study but also claimed as a direct cost item in each fiscal year. "We determined allowable time spent on training from the district's original claims."
- (3) Conferences between the evaluators and teachers also are not reimbursable because they were required before the enactment of the test claim legislation.<sup>33</sup>

And, according to the claimant's narrative, the Controller also denied one activity related to evaluation and assessment of teachers with respect to their pupils' STAR testing results, and progress toward state standards.<sup>34</sup> The Controller found that each completed evaluation takes an average of 5 hours and 8 minutes, based on the three allowed activities from the claimant's time study.<sup>35</sup>

Claimant does not dispute the disallowance of training activities from the time study, which constitutes \$889 of the total \$274,101 reduced.<sup>36</sup> However, the claimant disputes the disallowance of activities related to evaluation conferences, preparation and planning activities, and reviewing STAR test results.<sup>37</sup>

As noted, the approved mandate is a very narrow higher level of service, and reimbursement is not required for evaluation and assessment activities conducted under prior law. Further, the Parameters and Guidelines expressly limit reimbursement to the new components (or criteria) of evaluation and assessment required by the test claim statutes, and to additional assessments conducted in a year in which they would not otherwise be required following an unsatisfactory

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<sup>31</sup> See Exhibit A, IRC, page 11.

<sup>32</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>33</sup> Exhibit A, IRC, page 66 [Final Audit Report, p. 7].

<sup>34</sup> Exhibit A, IRC, page 16.

<sup>35</sup> Exhibit A, IRC, page 67 [Final Audit Report, p. 8].

<sup>36</sup> Exhibit A, IRC, pages 15-16; pages 65-65 [Final Audit Report, pages 5-6].

<sup>37</sup> Exhibit A, IRC, pages 13-16.

evaluation.<sup>38</sup> And, the Parameters and Guidelines expressly require the claimant to identify the state or federal law that mandates the educational program being performed by the employee being evaluated.<sup>39</sup>

Nowhere in time study documentation, the response to the Draft Audit Report, or the IRC narrative itself, does the claimant attempt to tie the 19 disallowed time study activities to the approved activities in the narrow higher level of service approved by the Commission in the Test Claim Decision. As explained in the Test Claim Decision, prior law already required evaluation of certificated employees.<sup>40</sup> Therefore, the claimant's time study elements, which are stated in general terms, are not limited to the portion of the activity approved as a higher level of service in the Test Claim Decision and Parameters and Guidelines. Only that portion of the certificated instructional employee evaluation which relates to (1) instructional techniques; (2) adherence to curricular objectives; or (3) for STAR-subject teachers, the progress of pupils toward state-adopted standards, is reimbursable under the Parameters and Guidelines.<sup>41</sup>

Furthermore, the activity proposed for claimant's time study related to STAR testing goes beyond the scope of the reimbursable activity. The Parameters and Guidelines provide reimbursement to evaluate and assess the performance of teachers of STAR test subjects<sup>42</sup> "as it reasonably relates to the progress of pupils towards the state adopted academic content standards..." The Parameters and Guidelines also clarify that reimbursement for this activity is limited to "reviewing the results" of the STAR test, "as it reasonably relates to the performance of those certificated employees that teach [STAR subjects]," and "including in the written evaluation of those certificated employees the assessment of the employee's performance" based on their pupils' STAR test results.<sup>43</sup> However, the activity stated in the claimant's proposed time study pertaining to STAR testing is "Discussing the STAR results with teachers and assessing how to improve instructional abilities."<sup>44</sup> The Test Claim Decision made clear that the activities surrounding the evaluation conferences were required by prior law, and therefore limited reimbursement very specifically. "Reviewing the results" and "including in the written evaluation" an assessment based on STAR test results is not the same as "Discussing the STAR results with teachers..."<sup>45</sup>

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<sup>38</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>39</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>40</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 18-25.

<sup>41</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>42</sup> Grades 2 through 11, teaching Reading, Writing, Mathematics, History/Social Science, and Science.

<sup>43</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>44</sup> Exhibit A, IRC, page 13.

<sup>45</sup> Exhibit A, IRC, pages 13; 31 [Parameters and Guidelines, p. 4].

And, to the extent certain elements of the claimant’s time study are “rational, relevant, reasonable and necessary part[s] of implementing the mandated activities,”<sup>46</sup> the claimant had an opportunity to include those activities within the Parameters and Guidelines as “reasonably necessary activities” pursuant to Government Code section 17557(a) and Code of Regulations, title 2, section 1183.7(d). If the claimant seeks reimbursement for the various elements of its time study as “reasonably necessary” elements of the reimbursable mandate, those activities must be stated within the Parameters and Guidelines, either when the Parameters and Guidelines were first adopted, or as an amendment request.<sup>47</sup> To the extent the activities claimed exceed the scope of the mandate as stated in the Parameters and Guidelines, the argument that such items are “reasonably necessary” cannot now be employed as an end-run around the Parameters and Guidelines.

Finally, it is the claimant’s burden to establish actual costs, using “source documents that show the validity of such costs, when they were incurred, and *their relationship to the reimbursable activities.*”<sup>48</sup> The claimant frames these issues in terms of the Controller’s failure to state a reason for the reduction, and ignores its duty to establish the relationship to the reimbursable activities.<sup>49</sup> The Controller’s concession permitting the use of a time study does not alter the scope of the mandate, or otherwise relieve the claimant of the burden to show that its claimed costs are eligible for reimbursement pursuant to the Test Claim Decision and Parameters and Guidelines.

Accordingly, staff finds that the Controller’s reduction of costs based on claimant’s time study is not incorrect as a matter of law, or arbitrary, capricious, or entirely lacking in evidentiary support.

**C. The Controller’s Disallowance of Completed Evaluations that Are Beyond the Scope of the Mandate Is Correct as a Matter of Law.**

The Controller found that evaluations for the following employees were beyond the scope of the mandate and disallowed costs for such evaluations:

- Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists who are not certificated instructional employees; and
- Preschool teachers who do not perform the requirements of the program that is mandated by state or federal law.<sup>50</sup>

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<sup>46</sup> Exhibit A, IRC, page 15.

<sup>47</sup> See Code of Regulations, title 2, section 1183.17.

<sup>48</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>49</sup> See, e.g., Exhibit A, IRC, page 15 [Discussing “Preparation Activities,” the claimant states that the Controller “has stated no basis to exclude it from the scope of the evaluation process.”]; Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>50</sup> Exhibit A, IRC, pages 73-74 [Final Audit Report, pp. 14-15].

The claimant argues that non-instructional certificated employees and preschool teachers are not excluded by the Parameters and Guidelines.<sup>51</sup>

The claimant is wrong. Part IV.A.1. of the Parameters and Guidelines limits reimbursement to “certificated *instructional* employees,” and to the *two new components* of the evaluation, both of which relate to the provision of *classroom instruction*: “instructional techniques and strategies used by the employee and the employee’s adherence to curricular objectives.”<sup>52</sup> In addition, Part IV.A.1. requires the claimant to identify the state or federal law mandating the educational program being performed by the certificated instructional personnel.<sup>53</sup> Therefore, this section provides reimbursement for evaluation and assessment of *instructional* employees only, and only those performing the requirements of educational programs mandated by state or federal law, which the claimant must allege. The Controller reasonably concludes that “instructional” employees excludes administrators, librarians, counselors, psychologists, and others.<sup>54</sup> Furthermore, Education Code section 48200 et seq. provides for compulsory education for pupils aged 6 to 18, but does not apply to preschool-aged children, and the claimant has not alleged or asserted any other state or federal law mandating preschool instruction.<sup>55</sup> Therefore, section IV.A.1. does not provide reimbursement for the evaluation and assessment of either non-instructional administrative personnel, or preschool teachers.

Part IV.A.2. requires reimbursement only for evaluations of “certificated instructional employees that teach...” STAR test subjects in grades 2 to 11.<sup>56</sup> This provision also excludes non-instructional administrative and support personnel, and excludes preschool teachers, based on nothing more than its plain language.

Part IV.B.1. provides for reimbursement for evaluation and assessment of certificated instructional *and* non-instructional employees, but only those whose last regularly-scheduled evaluation resulted in an unsatisfactory evaluation (i.e., off-year evaluations for permanent certificated employees, and more often than once every five years for permanent “tenured” certificated employees). Part IV.B.1. also includes the same caveat as above, that the claimant must identify the state or federal law mandating the educational program being performed; and, the general requirement that the claimant establish the relationship to the reimbursable activities

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<sup>51</sup> Exhibit A, IRC, pages 18-19.

<sup>52</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>53</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>54</sup> Exhibit A, IRC, pages 73-74 [Final Audit Report, pp. 14-15].

<sup>55</sup> The claimant stated in comments on the draft audit that federal law requires preschool instruction for special education pupils when part of a pupil’s Individualized Education Plan, but did not cite any applicable law. However, the Controller stated in the Final Audit Report that the claimant did not provide any legal citation or other source to support its assertions that preschool teachers are not excluded, and “[i]n addition, the district has not provided any documentation to support that preschool teachers previously excluded from reimbursement, if any, performed any activities related to special education pupils.” (Exhibit A, IRC, pages 71-74 [Controller’s Final Audit Report, pp. 12-15].)

<sup>56</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

also requires that the claimant show that an employee evaluated outside the mandated schedule did indeed receive an unsatisfactory evaluation. Preschool teachers are therefore excluded, as discussed above, and there has been no specific argument, and there is no indication in the record whether any non-instructional personnel were evaluated under Part IV.B.1., and therefore there is no indication or evidence in the record that the Controller's reduction is incorrect.

Based on the foregoing, staff finds that the Controller's disallowance of 46 completed evaluations that were beyond the scope of the mandate is correct as a matter of law.

### **Conclusion**

Based on the foregoing, staff finds that the IRC was timely filed. Staff further finds that the Controller's reduction of costs claimed based on the claimant's failure to comply with the Parameters and Guidelines is correct as a matter of law, and adjustments to the time study were not arbitrary, capricious, or entirely lacking in evidentiary support. Staff further finds that disallowance of 46 of 660 completed evaluations is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

### **Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to deny the IRC. Staff further recommends that the Commission authorize staff to make any technical, non-substantive changes following the hearing.

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

IN RE INCORRECT REDUCTION CLAIM  
 ON:

Education Code Sections 44662 and 44664  
 Statutes 1983, Chapter 498 and Statutes 1999,  
 Chapter 4  
 Fiscal Years 2005-2006, 2006-2007, 2007-  
 2008, and 2008-2009  
 Filed on June 9, 2015  
 Carlsbad Unified School District, Claimant

Case No.: 14-9825-I-02

*The Stull Act*

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

*(Adopted July 27, 2018)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Incorrect Reduction Claim (IRC) during a regularly scheduled hearing on July 27, 2018. [Witness list will be included in the adopted Decision.]

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

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the IRC at the hearing by a vote of [vote count will be included in the adopted Decision] as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	

## **Summary of the Findings**

This analysis addresses reductions made by the State Controller's Office (Controller) to reimbursement claims filed by the Carlsbad Unified School District (claimant) for costs incurred during fiscal years 2005-2006 through 2008-2009 (audit period) for the *Stull Act* program. The claimant disputes reductions totaling \$274,101 for the audit period.

The Commission denies this IRC, finding that reductions related to the claimant's time study, and disallowances of completed employee evaluations in all four fiscal years were correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

Specifically, the Controller reduced costs based on denial of 19 of 22 discrete activities identified in the claimant's time study, relating to training, meetings, observation, report writing, conferences between evaluators and teachers, and other activities relating to planning, preparation, and organizing notes, and STAR testing. These activities are beyond the very narrow scope of the approved higher level of service, and the claimant has presented no argument or evidence establishing the relationship to the mandated activities included in the Parameters and Guidelines. The reduction based on the 19 denied activities is therefore correct as a matter of law, and not arbitrary, capricious, or entirely lacking in evidentiary support.

In addition, the Controller reduced reimbursement based on disallowed completed evaluations for non-instructional certificated employees, such as administrators, counselors, and librarians, among others; and preschool teachers. Preschool teachers do not perform the requirements of educational programs mandated by state or federal law, and therefore evaluations of preschool teachers are not reimbursable. Similarly, evaluations of non-instructional certificated personnel are reimbursable under Part IV.B. of the Parameters and Guidelines only if such employees' last regularly-scheduled evaluation resulted in an unsatisfactory evaluation; those facts are not supported in the record. The reduction based on disallowed completed evaluations is therefore correct as a matter of law.

## **COMMISSION FINDINGS**

### **I. Chronology**

- 12/28/2006     The claimant filed its 2005-2006 reimbursement claim.<sup>57</sup>
- 01/25/2008     The claimant filed its 2006-2007 reimbursement claim.<sup>58</sup>
- 02/13/2009     The claimant filed its 2007-2008 reimbursement claim.<sup>59</sup>
- 01/29/2010     The claimant filed its 2008-2009 reimbursement claim.<sup>60</sup>

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<sup>57</sup> Exhibit A, IRC, page 338 [Claim Documentation for Fiscal Year 2005-2006].

<sup>58</sup> Exhibit A, IRC, page 270 [Claim Documentation for Fiscal Year 2006-2007].

<sup>59</sup> Exhibit A, IRC, page 184 [Claim Documentation for Fiscal Year 2007-2008].

<sup>60</sup> Exhibit A, IRC, page 85 [Claim Documentation for Fiscal Year 2008-2009].

- 06/24/2010 The Controller issued a letter informing the claimant of the initiation of the audit.<sup>61</sup>
- 05/02/2012 The Controller issued the Draft Audit Report.<sup>62</sup>
- 05/09/2012 The claimant responded to the Draft Audit Report
- 06/15/2012 The Controller issued its Final Audit Report.<sup>63</sup>
- 07/13/2012 The Controller issued “results of review” letters.<sup>64</sup>
- 06/09/2015 The claimant filed the IRC.<sup>65</sup>
- 10/02/2015 The Controller filed late comments on the IRC.<sup>66</sup>
- 05/22/2018 Commission staff issued the Draft Proposed Decision.<sup>67</sup>

## **II. Background**

The Stull Act was originally enacted in 1971 to establish a uniform system of evaluation and assessment of the performance of “certificated personnel” within each school district. (Former Ed. Code, §§ 13485-13490.) As originally enacted, the Stull Act required the governing board of each school district to develop and adopt specific guidelines to evaluate and assess certificated personnel, and to avail itself of the advice of certificated instructional personnel before developing and adopting the guidelines.<sup>68</sup> The evaluation and assessment of the certificated personnel was required to be reduced to writing and a copy transmitted to the employee no later than sixty days before the end of the school year.<sup>69</sup> The employee then had the right to initiate a written response to the evaluation, which became a permanent part of the employee’s personnel file.<sup>70</sup> The school district was also required to hold a meeting with the employee to discuss the evaluation.<sup>71</sup>

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<sup>61</sup> Exhibit B, Controller’s Late Comments on the IRC, page 62 [Audit Entrance Conference Letter].

<sup>62</sup> Exhibit A, IRC, page 62 [Final Audit Report, p. 3].

<sup>63</sup> Exhibit A, IRC, page 57 [Final Audit Report Cover Letter].

<sup>64</sup> Exhibit A, IRC, page 4.

<sup>65</sup> Exhibit A, IRC, page 1.

<sup>66</sup> Exhibit B, Controller’s Late Comments on the IRC.

<sup>67</sup> Exhibit C, Draft Proposed Decision.

<sup>68</sup> Former Education Code sections 13486-13487.

<sup>69</sup> Former Education Code section 13488.

<sup>70</sup> Former Education Code section 13488.

<sup>71</sup> Former Education Code section 13488.

Prior law also required that the evaluation and assessment be continuous.<sup>72</sup> For probationary employees, the evaluation had to occur once each school year. For permanent employees, the evaluation was required every other year. Former section 13489 also required that the evaluation include recommendations, if necessary, for areas of improvement in the performance of the employee. If the employee was not performing his or her duties in a satisfactory manner according to the standards, the “employing authority” was required to notify the employee in writing, describe the unsatisfactory performance, and confer with the employee making specific recommendations as to areas of improvement and endeavor to assist in the improvement. Reimbursement for these prior requirements was denied by the Commission.<sup>73</sup>

The test claim statutes amended the Stull Act in 1983 and 1999 to expand the scope of evaluation and assessment of certificated personnel. The test claim statutes added additional criteria that must be included in those evaluations: the employee’s instructional techniques and strategies, and adherence to curricular objectives; and the performance of instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 (i.e., the STAR test subjects) as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests.<sup>74</sup> And, in the case the employee receives an unsatisfactory result, the test claim statutes require an additional evaluation “in the years in which the permanent certificated employee would not have otherwise been evaluated.”<sup>75</sup>

Since prior law already required evaluation and assessment of certificated personnel, the Commission partially approved the Test Claim on May 27, 2004, for those activities that represent the *limited* new program or higher level of service mandated by the state by the test claim statutes. The Test Claim Decision also found that the mandate was limited to certificated personnel performing the requirements of educational programs mandated by state or federal law; in other words, if the personnel being evaluated are performing the duties of voluntary school programs, the evaluation of those personnel would not be mandated by the state.<sup>76</sup>

The Parameters and Guidelines were adopted September 27, 2005. As relevant to this IRC, the Parameters and Guidelines identify the following reimbursable activities and limitations:

A. Certificated Instructional Employees

1. Evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498.).

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<sup>72</sup> Former Education Code section 13489.

<sup>73</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 2; 17-18.

<sup>74</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 29-33.

<sup>75</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 33-34.

<sup>76</sup> See Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 5-12.

Reimbursement for this activity is limited to:

- a. reviewing the employee's instructional techniques and strategies and adherence to curricular objectives, and
- b. including in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:
  - o once each year for probationary certificated employees;
  - o every other year for permanent certificated employees; and
  - o beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

*Note: For purposes of claiming reimbursement, eligible claimants must identify the state or federal law mandating the educational program being performed by the certificated instructional employees.*

2. Evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed. Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4.).

Reimbursement for this activity is limited to:

- a. reviewing the results of the Standardized Testing and Reporting test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and
- b. including in the written evaluation of those certificated employees the assessment of the employee's performance based on the Standardized Testing and Reporting results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:
  - o once each year for probationary certificated employees;
  - o every other year for permanent certificated employees; and
  - o beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

## B. Certificated (Instructional and Non-Instructional) Employees

1. Evaluate and assess permanent certificated, instructional and non-instructional, employees that perform the requirements of educational programs mandated by state or federal law and receive an *unsatisfactory evaluation* in the years in which the permanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year). The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

This additional evaluation and assessment of the permanent certificated employee requires the school district to perform the following activities:

- a. evaluating and assessing the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subs. (b) and (c));
- b. reducing the evaluation and assessment to writing (Ed. Code, § 44663, subd. (a)). The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- c. transmitting a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
- d. attaching any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- e. conducting a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

*Note: For purposes of claiming reimbursement, eligible claimants must identify the state or federal law mandating the educational program being performed by the certificated, instructional and non-instructional, employees.*<sup>77</sup>

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<sup>77</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 3-5].

Additionally, the Parameters and Guidelines require that actual costs claimed “must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities.”<sup>78</sup>

### **Controller’s Audit and Summary of the Issues**

The Controller’s Final Audit Report states that “[i]nitially, all costs claimed [for employee salaries and benefits] by the district were unallowable because they were based on average time increments supported with time records that were not completed contemporaneously.”<sup>79</sup> In other words, the claimant did not provide adequate source documentation, and utilized average times to calculate the reimbursement requested. The Controller initially disallowed the entire claim. The claimant’s representatives then conducted a time study in fiscal year 2010-2011, as a substitute for records of actual time spent on evaluations, to determine the costs for the audit period (fiscal years 2005-2006 through 2008-2009).<sup>80</sup> The Controller accepted and applied that time study to the audit period, but as explained below determined that the scope of the time study included unallowable activities and costs.

There is no indication in the record that claimant disputes the Controller’s initial rejection of the claimant’s source documentation; the dispute in this IRC is focused on the development and application of the claimant’s time study.<sup>81</sup>

The claimant’s time study documented the time to perform 22 “activities of the teacher evaluation process,” and determined that it takes evaluators approximately 10 hours and 38 minutes, on average, to complete each required evaluation.<sup>82</sup> Of those 22 “activities” included in the time study, the Controller disallowed 19, as follows:

1. Preparing before training or planning meetings/conferences;
2. Training or planning meetings/conferences;
3. Preparing/organizing notes from training or planning meetings/conferences;
4. Preparing before meeting with teachers;
5. Conducting actual conference with teachers;
6. Preparing or organizing notes from meetings with teachers;
7. Preparing before “Pre-Observation” conferences with teachers;

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<sup>78</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>79</sup> Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6].

<sup>80</sup> Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6].

<sup>81</sup> Exhibit A, IRC, page 11 [“In response to the Controller’s exclusion at the beginning of the audit of all of the original claim documentation, the District with the agreement of the auditor prepared a time study based on the FY 2010-2011 certificated staff evaluation cycle.”].

<sup>82</sup> Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6]. See also, Exhibit A, IRC, page 11 [“The time study identified 22 discrete activities established as a result of staff interviews.”].

8. Conducting “Pre-Observation” conferences with teachers;
9. Preparing/organizing notes form “Pre-Observation” conferences with teachers;
10. Preparing before classroom observations of teachers;
11. Preparing/organizing notes from classroom observations, finalizing Collect Data forms;
12. Reporting observations, preparing the Standards for Excellence in Teaching observation checklists;
13. Preparing before “Post-Observation” conferences with teachers;
14. Conducting “Post-Observation” conferences with teachers;
15. Preparing notes from “Post-Observation” conferences and preparing Reflecting Conference worksheets;
16. Preparing before Final Evaluation conferences with teachers;
17. Conducting Final Evaluation conferences with teachers;
18. Preparing/organizing notes from Final Evaluation conferences with teachers; and
19. Discussing the STAR results with teachers and assessing how to improve instructional abilities.<sup>83</sup>

The Controller determined that activities related to planning, preparation, and organizing notes are not reimbursable because they are not required activities under the Parameters and Guidelines; that claimant duplicated costs by including training in the time study, which was identified as a separate reimbursable activity in the Parameters and Guidelines on a one-time basis for each employee performing the mandate; and that conferences between teachers and evaluators are not reimbursable because they were required under prior law.<sup>84</sup>

Accordingly, the Controller allowed three elements, or “activities” of the time study:

- Conducting “informal” classroom observations;
- Conducting “formal” classroom observations; and
- Writing Final Evaluation Reports and/or preparing Teacher Evaluation Report.<sup>85</sup>

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<sup>83</sup> Exhibit A, IRC, pages 65-66 [Controller’s Final Audit Report, pp. 6-7].

<sup>84</sup> Exhibit A, IRC, page 66 [Controller’s Final Audit Report, p. 7].

<sup>85</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

Based on these three activities, the Controller found that it takes approximately 5 hours and 8 minutes to complete each required teacher evaluation under the mandated program.<sup>86</sup>

In addition to limiting the elements of the time study, the Controller disallowed costs for 46 of 660 completed evaluations, which the Controller determined were claimed in excess of the scope of the mandate. The evaluations which the Controller found to be non-reimbursable were for:

- Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists who are not certificated *instructional* employees;
- Preschool teachers who do not perform the requirements of the program that is mandated by state or federal law;
- Duplicate teacher evaluations claimed multiple times in one school year;
- Permanent biannual teacher evaluations claimed every year rather than every other year; and
- Permanent five-year teacher evaluations claimed multiple times in a five-year period rather than once every five years.<sup>87</sup>

The claimant responded to these findings in the Draft Audit Report, concurring with the findings on duplicate evaluations and evaluations conducted in years that they were not mandated, but asserting that the remaining reductions for administrative or library personnel, who were also certificated employees, and for preschool teachers, were not supported in the audit report or by any law or rule cited by the Controller.<sup>88</sup> In addition, the claimant conceded that training activities and costs were duplicated in the time study, and agreed that because the Parameters and Guidelines permitted training only once for each employee, the Controller's adjustment is reasonable.<sup>89</sup>

Accordingly, based on the claimant's response to the audit report and its IRC filing, the following issues are in dispute:

- Reductions based on the 19 disallowed activities in the claimant's time study; and
- Disallowed completed evaluations based on the type of certificated employee (i.e., Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists, which are not certificated *instructional* employees; and preschool teachers, which the Controller found were not

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<sup>86</sup> Exhibit A, IRC, page 67 [Controller's Final Audit Report, p. 8].

<sup>87</sup> Exhibit A, IRC, page 67 [Controller's Final Audit Report, p. 8].

<sup>88</sup> Exhibit A, IRC, pages 70-71 [Controller's Final Audit Report, pp. 11-12].

<sup>89</sup> Exhibit A, IRC, page 70 [Controller's Final Audit Report, p. 11].

performing the requirements of state- or federally-mandated educational programs).<sup>90</sup>

### **III. Positions of the Parties**

#### **A. Carlsbad Unified School District**

##### **1. Time Study**

The claimant groups the 19 disallowed activities from the time study into four categories: evaluation conferences; preparation activities; training activities; and STAR testing results.<sup>91</sup> The claimant acknowledges that the audit report allows reimbursement for training costs elsewhere in the findings, and therefore the claimant “does not dispute removal of the training time from the time study.”<sup>92</sup> With respect to evaluation conferences, the claimant cites the Controller’s finding that evaluation conferences are not new to the test claim statute, and argues that “[t]he Controller has confused the subject matter of the old and new mandated with the method of implementation.”<sup>93</sup> The claimant notes that the Commission’s Test Claim Decision found that the test claim statute added two new factors or criteria for evaluation of certificated instructional employees: “the instructional techniques and strategies used by the employee, and the employee’s adherence to curricular objectives.”<sup>94</sup> The claimant argues that “the fact that districts used evaluation conferences to implement the previous mandated activities does not exclude reimbursement to use the same method to implement the new activities.”<sup>95</sup>

With respect to “preparation activities,” the claimant argues that preparation time was stated as a separate element in the time study only to promote accuracy: “preparation time could have been logically merged with the activity relevant to the preparation.”<sup>96</sup> The claimant notes that the Parameters and Guidelines “enumerates the subject matter of the evaluation process and not the entire process to implement the mandate.”<sup>97</sup> The claimant further notes, “[e]ven the Controller characterizes the parameters and guidelines as an ‘outline.’”<sup>98</sup> The claimant therefore concludes that preparation relating to evaluation conferences “is a rational, relevant, reasonable and

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<sup>90</sup> The total disputed reduction over four fiscal years is \$258,812 in salaries and benefits, and \$15,289 in related indirect costs. (Exhibit A, IRC, page 65 [Controller’s Final Audit Report, p. 6].)

<sup>91</sup> Exhibit A, IRC, pages 13-16.

<sup>92</sup> Exhibit A, IRC, page 16.

<sup>93</sup> Exhibit A, IRC, page 13.

<sup>94</sup> Exhibit A, IRC, page 14.

<sup>95</sup> Exhibit A, IRC, page 14.

<sup>96</sup> Exhibit A, IRC, page 15.

<sup>97</sup> Exhibit A, IRC, page 15.

<sup>98</sup> Exhibit A, IRC, page 15.

necessary part of implementing the mandated activities in the usual course of business and the Controller has stated no basis to exclude it from the scope of the evaluation process.”<sup>99</sup>

And with respect to STAR testing results, the claimant argues that the audit disallows time to review STAR test results “as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11...” despite such review being found reimbursable in the Commission’s Test Claim Decision.<sup>100</sup>

Accordingly, the claimant alleges that the Controller incorrectly denied costs for activities properly included within the time study, and, incorrectly reduced the average time resulting from the study.

## 2. Excluded Evaluations

The claimant’s time study assigned a value (in staff time) to each evaluation, for purposes of tracking costs and claiming reimbursement. The Controller, however, disallowed costs for 46 of 660 completed evaluations claimed, based on findings that those evaluations were beyond the scope of the mandate. Evaluations claimed beyond the scope of the mandate include those that were conducted at a time they were not required, including duplicate evaluations within a single school year and evaluations conducted more than once every five years for permanent five-year-tenured teachers, or more than every other year for permanent non-tenured teachers.<sup>101</sup> The remaining disallowances were for certificated employees who were not required to be evaluated under the mandate (specifically, administrative and other non-instructional personnel, and preschool instructors).<sup>102</sup> While the claimant concurs with the Controller’s findings relating to evaluations conducted in a year they were not required, the claimant also notes in its IRC that the Controller has not identified the number of evaluations excluded based on each of these grounds.<sup>103</sup> With respect to excluded employees, such as “principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists,”<sup>104</sup> the claimant argues that the Test Claim Decision and Parameters and Guidelines do not limit reimbursement to employees providing classroom instruction. Rather, the claimant argues that the Test Claim Decision includes all certificated personnel “involved in the education process...”<sup>105</sup>

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<sup>99</sup> Exhibit A, IRC, page 15.

<sup>100</sup> Exhibit A, IRC, page 16 [citing the Test Claim Decision, *The Stull Act*, 98-TC-25].

<sup>101</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

<sup>102</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

<sup>103</sup> Exhibit A, IRC, pages 19-20.

<sup>104</sup> Exhibit A, IRC, page 67 [Controller’s Final Audit Report, p. 8].

<sup>105</sup> Exhibit A, IRC, page 17 [citing the Test Claim Decision, *The Stull Act*, 98-TC-25, pages 18-20 (“Certificated employees are those employees directly involved in the educational process and include both instructional and non-instructional employees such as teachers, administrators, supervisors, and principals.”)].

With respect to the exclusion of completed evaluations for preschool teachers, the claimant argues that the Commission identified a number of voluntary educational programs for which reimbursement for this mandate was not required, and preschool instruction was not among them.<sup>106</sup> Accordingly, the claimant asserts that “[t]here is no stated basis to exclude certificated preschool instructors.”<sup>107</sup>

### **B. State Controller’s Office**

The Controller explains that “[i]nitially, all costs claimed by the district were unallowable because they were based on average time increments supported with time records that were not completed contemporaneously.”<sup>108</sup> The claimant conducted a time study in fiscal year 2010-2011, “as a substitute for records of actual time spent on teacher evaluations.”<sup>109</sup> The Controller accepted and applied that time study to the audit period, but determined that the scope of the time study included unallowable activities and costs:

The time study documented the time it took district evaluators to perform 22 separate activities of the teacher evaluation process. The time study results reported time for training, planning, preparation, meetings, observation, report writing and other activities within the evaluation process. We determined that 19 activities reported in the time study were unallowable.<sup>110</sup>

The claimant disputed those 19 disallowed activities, and grouped them into four categories: evaluation conferences; preparation activities; training activities; and STAR testing results.<sup>111</sup> Responding to the claimant’s categories, the Controller asserts that “evaluation conferences” as described by the claimant are not reimbursable for two reasons: first, section IV.B.1. of the Parameters and Guidelines only provides reimbursement for evaluation conferences every other year, unless a previous evaluation results in an unsatisfactory evaluation. The Controller states that no unsatisfactory evaluations were reported.<sup>112</sup> And second, the Controller maintains that section IV.A.1. and IV.A.2. do not provide reimbursement for evaluation conferences, and the Commission’s Statement of Decision expressly found that conferences were not reimbursable “because they were required before the enactment of the test claim legislation.”<sup>113</sup> The

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<sup>106</sup> Exhibit A, IRC, pages 18-19 [citing Parameters and Guidelines, p. 3; Test Claim Decision, p. 11, Fn 42].

<sup>107</sup> Exhibit A, IRC, page 19.

<sup>108</sup> Exhibit B, Controller’s Late Comments on the IRC, page 10.

<sup>109</sup> Exhibit B, Controller’s Late Comments on the IRC, page 10.

<sup>110</sup> Exhibit B, Controller’s Late Comments on the IRC, page 10.

<sup>111</sup> Exhibit A, IRC, pages 13-16.

<sup>112</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>113</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

Controller notes that the test claim statutes added “two new evaluation factors,” but the evaluation itself was required under prior law.<sup>114</sup>

With respect to “preparation activities,” the Controller argues that reimbursement is limited to those activities outlined in the Parameters and Guidelines, which do not list any preparation activities as reimbursable.<sup>115</sup> To the extent the claimant asserts that preparation activities are “reasonable and necessary,” the Controller suggests that “[t]he district may file an amendment with the Commission on State Mandates to amend the existing parameters and guidelines.”<sup>116</sup>

And with respect to “STAR testing results,” the Controller asserts that the claimant “did not claim any activity that is reimbursable.”<sup>117</sup> The Controller notes that “[r]eimbursement for the activity IV.A.2 is limited to ‘review of the results of the STAR test...and to include in the written evaluation...the assessment of the employee’s performance based on STAR results...’”<sup>118</sup> The claimant instead claimed reimbursement for “discussing the STAR results with teachers and how to improve instructional abilities.”<sup>119</sup> The Controller asserts that “these two activities are not interchangeable,” and “[w]e believe conference activities are not reimbursable, as they are not listed as allowable activities in the respective section of the program’s parameters and guidelines.”<sup>120</sup>

Finally, with respect to the number of completed evaluations claimed, and the number disallowed, the Controller notes that the claimant disagrees with the disallowed evaluations for “non-instructional certificated personnel,” including administrators, counselors, librarians, and others; and disallowed evaluations for preschool teachers.<sup>121</sup> The Controller maintains that the claimant is reading the Commission’s Test Claim Decision out of context, and therefore misinterpreting the Parameters and Guidelines with respect to employees for whom evaluations are reimbursable.<sup>122</sup> Addressing preschool teachers specifically, the Controller argues that the claimant failed to identify any specific state or federal law making preschool instruction mandatory, and therefore evaluations of preschool teachers are beyond the scope of this mandate.<sup>123</sup>

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<sup>114</sup> Exhibit B, Controller’s Late Comments on the IRC, page 14.

<sup>115</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>116</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>117</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>118</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>119</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>120</sup> Exhibit B, Controller’s Late Comments on the IRC, page 15.

<sup>121</sup> Exhibit B, Controller’s Late Comments on the IRC, pages 18-19.

<sup>122</sup> Exhibit B, Controller’s Late Comments on the IRC, page 18.

<sup>123</sup> Exhibit B, Controller’s Late Comments on the IRC, page 19.

#### IV. Discussion

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

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

The Commission must review questions of law, including interpretation of the parameters and guidelines, de novo, without consideration of legal conclusions made by the Controller in the context of an audit. The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>124</sup> 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."<sup>125</sup>

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.<sup>126</sup> Under this standard, the courts have found that:

When reviewing the exercise of discretion, "[t]he scope of review is limited, out of deference to the agency's authority and presumed expertise: 'The court may not reweigh the evidence or substitute its judgment for that of the agency. [Citation.]'" ... "In general ... the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. . . ." [Citations.] When making that inquiry, the " "court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." [Citation.]' "<sup>127</sup>

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<sup>124</sup> *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

<sup>125</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>126</sup> *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (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.

<sup>127</sup> *American Bd. of Cosmetic Surgery, Inc. v. Medical Bd. of California* (2008) 162 Cal.App.4th, 534, 547-548.

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 the claimant.<sup>128</sup> In addition, section 1185.1(f)(3) and 1185.2(d) and (e) 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.<sup>129</sup>

**A. The Claimant Timely Filed this IRC Within Three Years From the Date It First Received From the Controller Written Notice of the Adjustment as Required by Former Section 1185.1 of the Commission's Regulations.**

Government Code section 17561 authorizes the Controller to audit the reimbursement claims and records of local government to verify the actual amount of the mandated costs, and to reduce any claim that the Controller determines is excessive or unreasonable. If the Controller reduces a claim on a state-mandated program, the Controller is required to notify the claimant in writing, specifying the claim components adjusted, the amounts adjusted, interest charges on claims adjusted to reduce the overall reimbursement to the claimant, and the reason for the adjustment.<sup>130</sup> The claimant may then file an IRC with the Commission "pursuant to regulations adopted by the Commission" contending that the Controller's reduction was incorrect and to request that the Controller reinstate the amounts reduced to the claimant.<sup>131</sup>

To be complete, an IRC filing must be timely filed "no later than three years following the date of the Office of State Controller's final audit report, letter, remittance advice, or other written notice of adjustment to a reimbursement claim."<sup>132</sup>

Here, the Final Audit Report is dated June 15, 2012.<sup>133</sup> The IRC was filed with the Commission on June 9, 2015.<sup>134</sup> Less than three years having elapsed between the issuance of the final audit report and the filing of the IRC, this IRC was filed within the period prescribed in former Code of Regulations, title 2, section 1185.1.

Based on the foregoing, the Commission finds the IRC was timely filed.

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<sup>128</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>129</sup> 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.

<sup>130</sup> Government Code section 17558.5(c).

<sup>131</sup> Government Code sections 17551(d), 17558.7; California Code of Regulations, title 2, sections 1185.1, 1185.9.

<sup>132</sup> Former California Code of Regulations, title 2, sections 1185.1(c), 1185.2(a) (Register 2014, No. 21).

<sup>133</sup> Exhibit A, IRC, pages 4; 57.

<sup>134</sup> Exhibit A, IRC, page 1.

**B. The Controller’s Reductions Based on the Denial of Activities Included in the Claimant’s Time Study that the Controller Found Were Beyond the Scope of the Mandate Are Correct as Matter of Law, and Not Arbitrary, Capricious, or Entirely Lacking in Evidentiary Support.**

The Parameters and Guidelines for this program, adopted September 27, 2005, require that reimbursement be based on *actual costs* supported by contemporaneous source documents created at or near the same time the actual cost was incurred, as follows:

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.<sup>135</sup>

The claimant’s original reimbursement claim documentation is comprised of forms and schedules containing administrator’s assertions of estimated staff time spent on the mandate, which were then compiled to produce average times to perform the mandated activities, and translated into costs.<sup>136</sup> The Controller rejected the claimant’s initial claimed costs for fiscal years 2005-2006 through 2008-2009 “because they were based on average time increments supported with time records that were not completed contemporaneously.”<sup>137</sup> This amounts to a finding that the claimant did not comply with the contemporaneous source document rule, and did not claim actual costs, as required by the Parameters and Guidelines.<sup>138</sup> There is no assertion or evidence in the record rebutting that finding. Pursuant to Government Code section 17564, reimbursement claims filed with the Controller shall be filed in the manner prescribed in the Parameters and Guidelines, and the Parameters and Guidelines, as a quasi-judicial decision of the Commission, are final and binding.<sup>139</sup> The claimant failed to comply with the Parameters and Guidelines, and therefore the Controller could have reduced the entire claim to zero. Any such reduction would have been correct as a matter of law.

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<sup>135</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>136</sup> Exhibit A, IRC, pages 85-366. See, e.g., Exhibit A, IRC, pages 101; 104-122; 124-125; 141.

<sup>137</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>138</sup> See Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 802-803 [Discussing non-enforceability of the Controller’s Contemporaneous Source Document Rule when imposed only by Controller’s Claiming Instructions, prior to valid incorporation within Parameters and Guidelines, a regulatory document].

<sup>139</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

Instead, the Controller permitted the claimant to conduct a time study based on fiscal year 2010-2011 activities, “as a substitute for records of actual time spent on teacher evaluations.”<sup>140</sup> The results of that time study were then applied to the earlier audit period, and the issue before the Commission in this IRC is whether the Controller’s adjustments to and application of the time study is arbitrary, capricious, or entirely lacking in evidentiary support.

The claimant’s time study identified 22 discrete activities involved in the teacher evaluation process, and identified the time spent on each item, in order to determine average times to perform the reimbursable activities.<sup>141</sup> Those items included time for training, planning, preparation, meetings, observation, report writing, and other activities, for a total (average) of 10 hours, 38 minutes per evaluation.<sup>142</sup>

The Controller disallowed 19 of the 22 discrete activities of the time study, based on the following findings:

- (1) The activities related to planning, preparation, and organizing notes are not reimbursable under the mandate.
- (2) Training-related activities were included in the time study, but were also claimed as a direct cost item in each fiscal year. “We determined allowable time spend on training from the district’s original claims.”
- (3) Conferences between the evaluators and teachers are not reimbursable because they were required before the enactment of the test claim legislation.<sup>143</sup>

And, according to the claimant’s narrative, the Controller also denied one activity related to evaluation and assessment of teachers with respect to their pupils’ STAR testing results, and progress toward state standards.<sup>144</sup>

The Controller found that each completed evaluation takes an average of 5 hours and 8 minutes, based on the three allowed activities from the claimant’s time study.<sup>145</sup>

The claimant disputes the disallowance of activities related to evaluation conferences, preparation and planning activities, and reviewing STAR test results.<sup>146</sup> Specifically, the claimant argues that evaluation conferences are “a method of implementing this mandate, and not just a subject matter activity.”<sup>147</sup> The claimant further asserts that preparation activities were not explicitly considered or denied by the Test Claim Decision, and “[p]reparation is a rational,

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<sup>140</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>141</sup> See Exhibit A, IRC, page 11.

<sup>142</sup> Exhibit A, IRC, page 65 [Final Audit Report, p. 6].

<sup>143</sup> Exhibit A, IRC, page 66 [Final Audit Report, p. 7].

<sup>144</sup> Exhibit A, IRC, page 16.

<sup>145</sup> Exhibit A, IRC, page 67 [Final Audit Report, p. 8].

<sup>146</sup> Exhibit A, IRC, pages 13-16.

<sup>147</sup> Exhibit A, IRC, page 13.

relevant, reasonable and necessary part of implementing the mandated activities in the usual course of business and the Controller has stated no basis to exclude it from the scope of the evaluation process.”<sup>148</sup> In addition, the claimant argues that the Test Claim Decision approved “the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees [that teach STAR test subjects], and to include in the written evaluation of those certificated employees the assessment of the employee’s performance based on the STAR results for the pupils they teach.”<sup>149</sup>

The Commission finds that the Controller’s denial of the 19 activities included in the claimant’s time study is correct as a matter of law, and not arbitrary, capricious, or without evidentiary support.

The Parameters and Guidelines limit reimbursement for evaluation and assessment of certificated employees as follows:

- Evaluate and assess the performance of certificated instructional employees *that perform the requirements of educational programs mandated by state or federal law* as it reasonably relates to the instructional techniques and strategies used by the employee; and the employee’s adherence to curricular objectives.

*Reimbursement for this activity is limited to:*

- *review* of the employee’s instructional techniques and strategies and adherence to curricular objectives, and
  - *include in the written evaluation* of the certificated instructional employees the assessment of these factors during the specified evaluation periods.
- Evaluate and assess the performance of certificated instructional employees that teach [STAR test subjects, reading, writing, mathematics, etc.] in grades 2 to 11 as it reasonably relates to the progress of pupils toward [STAR test statewide standards].

*Reimbursement for this activity is limited to:*

- *review* of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and
  - *include in the written evaluation* of those certificated employees the assessment of the employee’s performance based on the STAR results for the pupils they teach during the specified evaluation periods.
- Evaluate and assess permanent *certificated, instructional and non-instructional employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation* in the years in which the permanent certificated employee would not have otherwise been evaluated.

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<sup>148</sup> Exhibit A, IRC, pages 13-15.

<sup>149</sup> Exhibit A, IRC, page 16.

The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district. The following activities are reimbursable:

- evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel;
- the evaluation and assessment shall be reduced to writing. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance;
- transmit a copy of the written evaluation to the certificated employee;
- attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file; and
- conduct a meeting with the certificated employee to discuss the evaluation.<sup>150</sup>

This is a very narrow higher level of service, and reimbursement is not required for the full evaluation and assessment of those certificated employees who have received satisfactory evaluations. For those employees, reimbursement is limited to the review and the inclusion of the new criteria mandated by the test claim statutes in the written evaluation. Further, the Parameters and Guidelines require the claimant to identify the state or federal law that mandates the educational program being performed by the employee being evaluated.<sup>151</sup>

Nowhere in the time study documentation, the response to the Draft Audit Report, or the IRC narrative itself, does the claimant attempt to isolate the narrow higher level of service approved by the Commission in the Test Claim Decision, or to tie the 19 disallowed time study items to the approved activities. As explained in the Test Claim Decision, prior law already required evaluation of certificated employees.<sup>152</sup> The test claim statutes merely added additional criteria to be considered within those evaluations, and required a follow-up evaluation when a

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<sup>150</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>151</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>152</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 18-25.

certificated employee receives an unsatisfactory evaluation and annual evaluations thereafter until the employee receives a satisfactory evaluation or, is separated from the school district.<sup>153</sup> The time study activities proposed by the claimant make are not restricted to the time and costs of evaluations pertaining to only the new evaluation and assessment criteria,<sup>154</sup> nor are they limited to only those evaluations required for employees whose last regularly-scheduled evaluation resulted in an unsatisfactory rating.<sup>155</sup> The Parameters and Guidelines require documentation to establish the relationship between the activities and costs claimed and the reimbursable activities stated in the Parameters and Guidelines.<sup>156</sup> The claimant's time study activities (which generally include evaluation conferences, preparation and planning activities) are described too generally to establish that connection.<sup>157</sup>

Furthermore, the activity proposed for claimant's time study related to STAR testing goes beyond the scope of the reimbursable activity. The claimant argues that the Commission approved "the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees [teaching STAR test subjects] and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach..."<sup>158</sup> That description is substantially similar to and consistent with the Parameters and Guidelines, which indeed provide reimbursement to evaluate and assess the performance of teachers of STAR test subjects<sup>159</sup> "as it reasonably relates to the progress of pupils towards the state adopted academic content standards..." The Parameters and Guidelines also clarify that reimbursement for this activity is limited to "reviewing the results" of the STAR test and "including in the written evaluation...the assessment of the employee's performance based on the [STAR test] results for the pupils they teach."<sup>160</sup> However, the activity stated in the claimant's proposed time study pertaining to STAR testing is "*Discussing* the STAR results with teachers and assessing how to improve instructional abilities."<sup>161</sup> The activity as described in the claimant's time study implies interaction between the teacher and the evaluator that is not required by the plain language of the approved activity as stated in the Parameters and Guidelines. Both reviewing the results of the STAR test, and

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<sup>153</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>154</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5, Parts IV.A.1. & 2.].

<sup>155</sup> Exhibit A, IRC, page 32 [Parameters and Guidelines, p. 5, Part IV.B.1.].

<sup>156</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3]. Actual costs claimed "must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities."

<sup>157</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>158</sup> Exhibit A, IRC, page 16 [citing Test Claim Decision, *The Stull Act*, 98-TC-25, p. 31].

<sup>159</sup> Grades 2 through 11, teaching Reading, Writing, Mathematics, History/Social Science, and Science.

<sup>160</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>161</sup> Exhibit A, IRC, page 13.

including an assessment in the written evaluation can be done unilaterally by the evaluator, and do not require a discussion.

And, to the extent certain elements of the claimant's time study related to evaluation conferences, preparation, and planning activities seem "rational, relevant, reasonable and necessary part[s] of implementing the mandated activities,"<sup>162</sup> they are not identified as reimbursable activities in the Parameters and Guidelines. The claimant had an opportunity to include those activities within the Parameters and Guidelines as "reasonably necessary activities" pursuant to Government Code section 17557(a) and Code of Regulations, title 2, section 1183.7(d). Section 1183.7 describes the "Content of Parameters and Guidelines," and subdivision (d) defines "reasonably necessary activities" as those activities "necessary to comply with the statutes, regulations and other executive orders found to impose a state-mandated program." The section further states that "[w]hether an activity is reasonably necessary is a mixed question of law and fact," the assertion of which must be supported by documentary evidence submitted in accordance with section 1187.5.<sup>163</sup> In other words, if the claimant seeks reimbursement for the various elements of its time study as "reasonably necessary" elements of the reimbursable mandate, those activities have to be approved by the Commission based on substantial evidence in the record and included within the Parameters and Guidelines, either when the Parameters and Guidelines were first adopted, or as an amendment request.<sup>164</sup> To the extent the activities claimed exceed the scope of the mandate as stated in the Parameters and Guidelines, they are not eligible for reimbursement. The Parameters and Guidelines, as adopted, are binding on the parties.<sup>165</sup> The argument that such items are "reasonably necessary" cannot now be employed as an end-run around the Parameters and Guidelines.

Finally, it is the claimant's burden to establish actual costs, using "source documents that show the validity of such costs, when they were incurred, and *their relationship to the reimbursable activities.*"<sup>166</sup> The claimant argues that the Controller's reduction of costs is incorrect or arbitrary or capricious, and frames these issues in terms of the Controller's failure to state a reason for the reduction.<sup>167</sup> The claimant, however, ignores its duty to establish the relationship to the reimbursable activities. The Controller's concession permitting the use of a time study does not alter the scope of the mandate, which is a question of law, or otherwise relieve the claimant of the burden to show that its claimed costs are eligible for reimbursement pursuant to the Test Claim Decision and Parameters and Guidelines. Moreover, there is no evidence in the record that the Controller's reduction of costs based on the denial of these 19 activities is arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>162</sup> Exhibit A, IRC, page 15.

<sup>163</sup> California Code of Regulations, title 2, section 1183.7.

<sup>164</sup> See California Code of Regulations, title 2, section 1183.17.

<sup>165</sup> *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

<sup>166</sup> Exhibit A, IRC, page 30 [Parameters and Guidelines, p. 3].

<sup>167</sup> See, e.g., Exhibit A, IRC, page 15 [Discussing "Preparation Activities," the claimant states that the Controller "has stated no basis to exclude it from the scope of the evaluation process."].

Accordingly, the Commission finds that the Controller's reduction of costs based on the Controller's denial of 19 of the activities included in claimant's time study is correct as a matter of law, and is not arbitrary, capricious, or entirely lacking in evidentiary support.

**C. The Controller's Disallowance of Completed Evaluations that Are Beyond the Scope of the Mandate Is Correct as a Matter of Law.**

As noted above, the Parameters and Guidelines for *The Stull Act* program require reimbursement for the following:

- Evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to
  - the instructional techniques and strategies used by the employee; and
  - the employee's adherence to curricular objectives;
- Evaluate and assess the performance of certificated instructional employees that teach [STAR test subjects, reading, writing, mathematics, etc.] in grades 2 to 11 as it reasonably relates to the progress of pupils toward [STAR test statewide standards]; and
- Evaluate and assess permanent certificated, instructional, and non-instructional employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated. The additional evaluations shall last until the employee achieves a positive evaluation, or is separated from the school district.<sup>168</sup>

The Parameters and Guidelines further require the claimant to identify the state or federal law mandating the educational program being performed by the employee being evaluated and assessed.<sup>169</sup>

The Controller disallowed reimbursement for evaluations completed for employees that are not within the scope of the mandate. Specifically, as disputed here, the Controller disallowed reimbursement for evaluations of the following employees:

- Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists who are not certificated instructional employees; and

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<sup>168</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

<sup>169</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6]. Note that this caveat is not stated under section IV.A.2. of the Parameters and Guidelines, with respect to certificated instructional employees that teach STAR test subjects in grades 2 to 11 (presumably because simply claiming costs under this very specific activity makes clear which state and federal laws are implicated).

- Preschool teachers [because they] do not perform the requirements of the program that is mandated by state or federal law.<sup>170</sup>

The claimant argues that all certificated employees are “instructional personnel even if they are not ‘classroom teachers’” and that preschool teachers are not excluded by the Parameters and Guidelines.<sup>171</sup> Addressing preschool instructors specifically, claimant argues that “[t]he audit report excludes preschool teachers in general based on the Controller’s opinion that preschool teachers do not perform the requirements of an educational program mandated by state or federal law.”<sup>172</sup> The claimant further argues that the Commission identified voluntary programs for which reimbursement is not required in a footnote in the Test Claim Decision, “and preschool is not included in that enumeration.”<sup>173</sup> Accordingly, claimant asserts that “[t]here is no stated basis to exclude certificated preschool instructors.”<sup>174</sup>

With respect to other personnel, such as administrators, librarians, and others for whom evaluations and assessments were excluded from reimbursement, the claimant states that the audit report misstates the standard for judging which employees’ evaluations are reimbursable and which are not:

The intent of this component is to evaluate the elements of classroom instruction. Principals, vice principals, directors, coordinators, counselors, psychologists, librarians, and library media specialists do not provide classroom instruction and are considered “non-instructional” certificated personnel.<sup>175</sup>

The claimant concedes that “the portion of the mandate relating to the evaluation of compliance with the testing assessment standards (the STAR component) is limited to classroom teachers because the parameters and guidelines specifically state ‘employees that teach’ specified curriculum.”<sup>176</sup> However, the claimant maintains that all certificated employees are instructional personnel and that “[i]t has not been established as a matter of law that involvement in the educational process requires a ‘classroom.’”<sup>177</sup>

The claimant is wrong on both counts. The Test Claim Decision analyzed at length the distinction between instructional and non-instructional personnel, in an attempt to isolate the higher level of service imposed by the test claim statutes. The Commission found that prior law “required school districts to develop evaluation and assessment guidelines and to evaluate both instructional and non-instructional certificated employees based on the guidelines on a

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<sup>170</sup> Exhibit A, IRC, pages 73-74 [Final Audit Report, pp. 14-15].

<sup>171</sup> Exhibit A, IRC, pages 18-19 and 71.

<sup>172</sup> Exhibit A, IRC, page 18.

<sup>173</sup> Exhibit A, IRC, page 19.

<sup>174</sup> Exhibit A, IRC, page 19.

<sup>175</sup> Exhibit A, IRC, page 17 [quoting Controller’s Final Audit Report, p. 15 (Exhibit A, IRC, p. 74)].

<sup>176</sup> Exhibit A, IRC, page 71 [Controller’s Final Audit Report, p. 12].

<sup>177</sup> Exhibit A, IRC, page 18 and 71.

continuing basis.”<sup>178</sup> The Commission also found case law to support the conclusion that the Stull Act, prior to the test claim statutes, applied to both instructional and non-instructional certificated personnel.<sup>179</sup> In analyzing the test claim statutes the Commission found, and the Department of Finance and the test claimant agreed, that the new categories of “instructional techniques and strategies,” and “the employee’s adherence to curricular objectives,” represented new criteria for the evaluation and assessment of certificated *instructional* personnel equating the term “instructional” with “teachers.”<sup>180</sup>

Accordingly, Part IV.A.1. of the Parameters and Guidelines limits reimbursement for the higher level of service imposed by the test claim statutes to “certificated *instructional* employees,” and to the *two new components* of the evaluation, both of which relate to the provision of *instruction*: “instructional techniques and strategies used by the employee and the employee’s adherence to curricular objectives.”<sup>181</sup> In addition, as noted, Part IV.A.1. *requires the claimant* to identify the state or federal law mandating the educational program being performed by the certificated instructional personnel.<sup>182</sup> Therefore, this section provides reimbursement for evaluation and assessment of *instructional* employees only, and only those performing the requirements of educational programs mandated by state or federal law. Although administrators, librarians, counselors, and psychologists are positions requiring certification, they generally do not provide instruction to students.<sup>183</sup> The claimant argues that these employees are *not excluded* by the

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<sup>178</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, page 22.

<sup>179</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 22-23.

<sup>180</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, pages 28-30; 21 [The plain language of these statutes does not distinguish between instructional employees (teachers) and non-instructional employees (principals, administrators), or specifically exclude certificated non-instructional employees.].

<sup>181</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>182</sup> Exhibit A, IRC, page 31 [Parameters and Guidelines, p. 4].

<sup>183</sup> Education Code section 44065, which governs teaching and services credential requirements. See also, California Code of Regulations, title 5, section 80049.1, which authorizes a school psychologist with a services credential to “provide services that enhance academic performance; design strategies and programs to address problems of adjustment; consult with other educators and parents on issues of social development, behavioral and academic difficulties; conduct psycho-educational assessments for purposes of identifying special needs; provide psychological counseling for individuals, groups and families; and coordinate intervention strategies for management of individual and school-wide crises.”

California Code of Regulations, title 5, section 80049.1 also authorizes a school counselor with a services credential to “develop, plan, implement and evaluate a school counseling and guidance program that includes academic, career, personal and social development; advocate for the higher academic achievement and social development of all students; provide school-wide prevention and intervention strategies and counseling services; provide consultation, training and staff development to teachers and parents regarding students’ needs; and supervise a district-approved advisory program as described in Education Code Section 49600.”

Parameters and Guidelines, but neither do they necessarily fall within the higher level of service that the Commission determined to be reimbursable, absent some evidence that they are indeed performing the requirements of educational programs mandated by state or federal law; a requirement that the Parameters and Guidelines expressly requires the claimant to establish and for which the claimant has submitted no evidence. Thus, the Controller correctly concludes that “instructional” employees excludes administrators, librarians, counselors, and psychologists, and others, absent additional evidence.<sup>184</sup>

With regard to preschool instruction, the claimant mistakenly relies on a footnote in the Test Claim Decision, which listed examples of voluntary educational programs funded by the Budget Act, to suggest that preschool instruction, which was not among the programs listed, must therefore be mandatory.<sup>185</sup> The list in the Test Claim Decision was not intended to represent an exhaustive cataloging of voluntary (or non-mandatory) educational programs, as the claimant suggests.<sup>186</sup> Rather, the Parameters and Guidelines expressly require the claimant to specifically identify the educational programs mandated by state or federal law being performed by the certificated instructional employee in order to get reimbursed for the evaluation, which the claimant has not done. In addition, Education Code section 48200 et seq., provides for compulsory education for pupils aged 6 to 18, but does not as a matter of law apply to preschool-aged children. The claimant argues that federal special education law requires preschool instruction for pupils when part of a pupil’s Individualized Education Plan.<sup>187</sup> However, the claimant has not provided any evidence that preschool teachers evaluated and claimed provided

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California Code of Regulations, title 5, section 80053, authorizes the librarian with a services credential to “instruct students in accessing, evaluating, using and integrating information and resources in the library program; to plan and coordinate school library programs with the instructional programs of a school district through collaboration with teachers; to select materials for school and district libraries; to develop programs for and deliver staff development for school library services; to coordinate or supervise library programs at the school, district or county level; to plan and conduct a course of instruction for those pupils who assist in the operation of school libraries; to supervise classified personnel assigned school library duties; and to develop procedures for and management of the school and district libraries.”

California Code of Regulations, title 5, section 80054.5, authorizes the school administrator with a services credential to develop, coordinate, and assess instructional programs; supervise and evaluate certificated and classified personnel; discipline students; manage fiscal services; develop, coordinate, and supervise student support services.

And, Code of Regulations, title 5, section 16043 states that persons employed by a school district as librarians may supplement classroom instruction, or conduct “a planned course of instruction for those pupils who assist in the operation of school libraries.”

<sup>184</sup> Exhibit A, IRC, pages 73-74 [Final Audit Report, pp. 14-15].

<sup>185</sup> Exhibit A, IRC, pages 18-19.

<sup>186</sup> Exhibit X, Test Claim Decision, *The Stull Act*, 98-TC-25, page 12, Fn 42.

<sup>187</sup> Exhibit A, IRC, pages 71-74 [Controller’s Final Audit Report, pp. 12-15].

instruction in educational programs mandated by federal law, as required by the Parameters and Guidelines.

In addition, Part IV.A.2. requires reimbursement only for evaluations of “certificated instructional employees that teach...” STAR test subjects in grades 2 to 11.<sup>188</sup> This provision also excludes non-instructional administrative and support personnel, and excludes preschool teachers, based on nothing more than its plain language.

Part IV.B.1. does provide for reimbursement for evaluation and assessment of certificated instructional *and* non-instructional employees, but only those whose last regularly-scheduled evaluation resulted in an unsatisfactory evaluation (i.e., off-year evaluations for permanent certificated employees, and more often than once every five years for permanent “tenured” certificated employees). Part IV.B.1. also includes the same caveat as above, that the claimant must identify the state or federal law mandating the educational program being performed. There has been no specific argument or evidence in the record to support a finding that any of the non-instructional personnel whose evaluations were disallowed were evaluated on the basis of having a previously unsatisfactory evaluation.

The claimant, with all of its arguments, attempts to shift the burden to the Controller to support its reductions, but it is the claimant’s burden to make out its claim.<sup>189</sup> In addition, sections 1185.1(f)(3), 1185.2(d) and (e) of the Commission’s regulations require that any assertions of fact by the parties to an IRC must be supported by documentary evidence. The Parameters and Guidelines specifically and expressly require the *claimant* to identify the state or federal law mandating the educational program being performed by the employee(s) evaluated, except in the case of STAR subject instructors in grades 2 to 11 (for whom the mandatory nature of the educational program is presumed).<sup>190</sup> The claimant has not complied with the Parameters and Guidelines.

Based on the foregoing, the Commission finds that the Controller’s disallowance of 46 completed evaluations that were beyond the scope of the mandate is correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

## **V. Conclusion**

Based on the foregoing, the Commission finds that the IRC was timely filed and denies this IRC. The Commission finds that the Controller’s reduction of costs based the denial of 19 activities included in the claimant’s time study and the disallowance of 46 completed evaluations that were beyond the scope of the mandate, are correct as a matter of law and not arbitrary, capricious, or entirely lacking in evidentiary support.

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<sup>188</sup> Exhibit A, IRC, pages 31-32 [Parameters and Guidelines, pp. 4-5].

<sup>189</sup> *Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1274-1275.

<sup>190</sup> Exhibit A, IRC, pages 31-33 [Parameters and Guidelines, pp. 4-6].

**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 May 22, 2018, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued May 22, 2018**

*The Stull Act*, 14-9825-I-02

Education Code Sections 44660-44665;

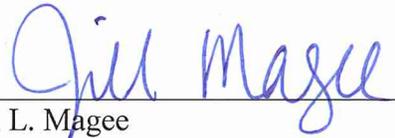
Statutes 1983, Chapter 498; Statutes 1999, Chapter 4

Fiscal Years: 2005-2006, 2006-2007, 2007-2008, and 2008-2009

Carlsbad 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 May 22, 2018 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

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# COMMISSION ON STATE MANDATES

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**Matter:** The Stull Act

**Claimant:** Carlsbad Unified School District

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