July 14, 2017

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

Mr. Justyn Howard
Department of Finance
915 L Street
Sacramento, CA 95814

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

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**
Certificated School Employees: Parental Leave, 16-TC-01
Education Code Section 44977.5;
Statutes 2015, Chapter 400 (AB 375)
Fresno Unified School District, Claimant

Dear Mr. Palkowitz and Mr. Howard:

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 **August 4, 2017**. 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.[1]

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 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.

[1] 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.

Hearing

This matter is set for hearing on **Friday, September 22, 2017** at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The Proposed Decision will be issued on or about September 8, 2017. 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

Hearing Date: September 22, 2017
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ITEM __

TEST CLAIM

DRAFT PROPOSED DECISION

Education Code Section 44977.5

Statutes 2015, Chapter 400 (AB 375)

Certificated School Employees: Parental Leave

16-TC-01

Fresno Unified School District, Claimant

EXECUTIVE SUMMARY

Overview

The test claim statute, Statutes 2015, chapter 400, added section 44977.5 to the Education Code, effective January 1, 2016, to require school districts to provide differential pay, after the exhaustion of sick leave and accumulated sick leave, to certificated K-12 school district employees who qualify under the California Family Rights Act (CFRA) for maternity and paternity leave (parental leave), which may be taken for up to 12 school weeks, due to the birth of the employee's child or the placement of a child with the employee as a result of adoption or foster care. Differential pay is calculated as the difference between the employee's salary and the salary paid to a substitute employee, or if no substitute was employed, the amount that would have been subtracted if one had been employed. The Test Claim alleges reimbursable costs for the amount of differential pay provided to certificated school district employees, and one-time costs for developing and implementing internal policies, training, procedures, and forms relating to the administration of the program.

Staff recommends that the Commission on State Mandates (Commission) deny this Test Claim. Although the test claim statute applies uniquely to local school districts and provides a new benefit to certificated employees, the differential pay does not increase the level of service provided to the public and thus, does not constitute a new program or higher level of service, and does not impose increased costs mandated by the state. Moreover, the test claim statute does not mandate a new program or higher level of service to develop and implement internal policies and procedures, training, and forms, or the activities to calculate and pay the differential pay. Therefore, the test claim statute does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Procedural History

The test claim statute (Stats. 2015, ch. 400) was chaptered on October 1, 2015, and became effective January 1, 2016. Fresno Unified School District (claimant) filed the Test Claim on

December 21, 2016.[1] The Department of Finance (Finance) filed comments on the Test Claim on February 14, 2017.[2] The claimant filed rebuttal comments on March 15, 2017.[3] Commission staff issued the Draft Proposed Decision on July 14, 2017.[4]

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission must strictly construe XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[5]

Claims

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

Subject	Description	Staff Recommendation
Does the test claim statute impose a reimbursable state-mandated program for the differential pay provided to the certificated employee on parental leave?	The test claim statute requires school districts to provide differential pay, after the exhaustion of sick leave and accumulated sick leave, to certificated K-12 school district employees who qualify under the California Family Rights Act (CFRA) for maternity and paternity leave (parental leave),	*Deny* – Although the test claim statute applies uniquely to school districts and provides a new benefit to certificated employees, the requirement to provide differential pay does not constitute a new program or higher level of service and does not result in increased costs mandated by the state. Courts have consistently held that increases in the cost of

[1] Exhibit A, Test Claim.

[2] Exhibit B, Department of Finance Comments on the Test Claim.

[3] Exhibit C, Claimant's Rebuttal Comments.

[4] Exhibit D, Draft Proposed Decision.

[5] *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.

	which may be taken for up to 12 school weeks due to the birth of the employee's child or the placement of a child with the employee as a result of adoption or foster care. Differential pay is calculated as the difference between the employee's salary and the salary paid to a substitute employee, or if no substitute was employed, the amount that would have been subtracted if one had been employed.	providing employee compensation or benefits are not subject to reimbursement as state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6.[6] Rather, a new program or higher level of service exists only when the test claim statute requires an increase in the actual level of governmental service provided to the public.[7] The governmental service provided by school districts is public education. The test claim statute requires differential pay -- an employee benefit, but does not increase the level of education services to the public. Moreover, the test claim statute does not result in increased costs mandated by the state. The amount spent by the school district on the differential pay and the pay to the substitute teacher equals the amount the school district budgeted and would have paid the certificated employee if the certificated employee had not taken parental leave. Although the test claim statute may result in a loss of costs savings, article XIII B, section 6 does not require reimbursement for a loss of cost savings.

[6] *County of Los Angeles v. State of California (County of Los Angeles I)* (1987) 43 Cal.3d 46. *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478. *City of Sacramento v. State of California* (1990) 50 Cal.3d 51. *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[7] *San Diego Unified School Dist. V. Commission on State Mandates* (2004) 33 Cal.4th. 859, 878.

Does the test claim statute impose a reimbursable state-mandated program for administrative activities to implement the requirement to pay the differential pay?	The claimant alleges reimbursable costs for the one-time activities of developing and implementing internal policies, training, procedures, and forms relating to the administration of the program.	*Deny* – The administrative activities to develop and implement internal policies, procedures, and training, and to adopt forms, are not mandated by the plain language of the test claim statute. Although a school district may find that administrative activities are necessary to comply with the requirement to provide differential pay, a state-mandated activity must be "ordered" or "commanded" by the state.[8] Additionally, the administrative activities of calculating and paying the differential salary to the employee under the test claim statute are incidental to, and part and parcel of, providing the employee benefit. These activities do not result in an increased level of educational services provided to the public and therefore, do not constitute a new program or higher level of service.

Staff Analysis

A. Although the Test Claim Statute Applies Uniquely to Local School Districts and Provides a New Benefit to Certificated Employees, the Requirement to Provide Differential Pay Does Not Constitute a New Program or Higher Level of Service, and Does Not Impose Increased Costs Mandated by the State.

1. Differential Pay for Parental Leave Does Not Impose a New Program or Higher Level of Service Because Differential Pay Is an Employee Benefit, and Does Not Increase the Level of Governmental Service Provided to the Public.

Although the test claim statute applies uniquely to school districts, the law requires a showing that the state has imposed a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. A new program or higher level of service exists only when the test claim legislation requires an increase in the *actual level of service provided to*

[8] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

the public.[9] The courts have consistently held that increases in the cost of providing employee benefits do not increase the actual level of providing a service to the public.[10] Thus, courts have denied reimbursement in cases involving the costs of providing unemployment insurance,[11] workers compensation,[12] pensions,[13] and death benefits.[14]

By contrast, courts have found a reimbursable new program or higher level of service when the state required local agencies to provide protective clothing and safety equipment to firefighters "because the increased safety equipment apparently was designed to result in more effective fire protection . . . ."[15] In addition, courts have found a reimbursable new program or higher level of service when the state mandated school districts to take specific steps to measure and address racial segregation in public schools.[16] And the California Supreme Court has held that requirements to immediately suspend and recommend expulsion for pupils who possess a firearm at school were intended to provide a new program or higher level of service to the public in the form of "safer schools for the vast majority of students."[17]

In this case, the claimant argues that the test claim statute provides a service to the public, citing the legislative history of the test claim statute that extols the benefits of parental leave to families and society.[18] However, the governmental service provided by school districts is public education;[19] a service which has not been increased by the test claim statute. In fact, the Legislature placed the test claim statute, section 44977.5, in the part of the Education Code that

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[9] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[10] *County of Los Angeles* (1987) 110 Cal.App.4th 1176, 1194; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 875-878, where the court discusses the two lines of cases as "those measures designed to increase the level of governmental services to the public," which results in a new program or higher level of service, and those measures "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased," which does not, citing *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537-538; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172, 173.

[11] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[12] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[13] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

[14] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[15] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877, citing *Carmel Valley Fire Protection Dist. V. State of California* (1987) 190 Cal.App.3d 521, 537-538.

[16] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172, 173; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[17] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878.

[18] Exhibit C, Claimant's Rebuttal Comments, pages 2, 4.

[19] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

relates to "Employees"[20] and *not* in the part that relates to "Instruction and Services" for pupils.[21] Additionally, the differential pay is a benefit provided solely to certificated employees on parental leave who are *not* providing educational services. As recognized by the California Supreme Court, employee benefits might generate a higher quality of local employees and, "in a general and indirect sense," provide the public with a higher level of service.[22] But the purpose of article XIII B, section 6 of the California Constitution is to require reimbursement to local government for the costs of carrying out functions peculiar to government, not for compensating local government employees. "A higher cost to local government for compensating its employees is not the same as a higher cost of providing services to the public."[23]

Therefore, staff finds that the differential pay required by the test claim statute does not impose a new program or higher level of service because providing differential pay to certificated employees does not increase the level of governmental service provided to the public.

2. The Differential Pay Required by the Test Claim Statute Does Not Impose Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution.

The claimant alleges that the test claim statute results in increased costs mandated by the state, including costs of $17,972.86 during 2016 to comply with the test claim statute.[24]

Staff finds that the differential pay required by the test claim statute does not result in actual increased costs mandated by the state within the meaning of article XIII B, section 6.

After a certificated employee's sick leave and accumulated sick leave have been exhausted, differential pay is calculated as the difference between the certificated employee's salary and the salary paid to a substitute teacher. Substitute teachers are generally paid by the day.[25] Thus, if a certificated teacher earns $200 per day, and a substitute teacher is paid $75 per day, the differential pay to the absent teacher is $125 per day for the period of time during the 12-week authorized absence, after exhausting sick leave and accumulated sick leave. Therefore, the amount spent by the district on the differential pay and the amount paid to the substitute teacher equals the amount the school district budgeted and would have paid the certificated employee if the certificated employee had not gone on parental leave. The district is not incurring any increased costs for the differential pay.

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[20] Chapter 3 "Certificated Employees," of Part 25 "Employees," of Division 3 "Local Administration."

[21] Division 4 of the Education Code (Parts 26-38) "Instruction and Services," beginning with section 46000.

[22] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, where the Supreme Court reviewed the *City of Richmond* decision.

[23] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[24] Exhibit A, Test Claim, pages 11-12.

[25] Education Code section 45030.

As recognized in the legislative history of the test claim statute, a school district may have a loss of cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute teacher would be paid during the parental leave period.[26] There was no requirement to pay the certificated employee during parental leave. The courts, however, have held that article XIII B, section 6 is not designed to provide reimbursement for a loss of cost savings, but requires a showing of "*increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit."[27]

Accordingly, the differential pay required by the test claim statute does not impose increased costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution.

B. The Test Claim Statute Does Not Mandate a New Program or Higher Level of Service to Develop and Implement Internal Policies and Procedures, Training, and Forms for Administration of the Program; or the Administrative Activities to Calculate and Pay the Differential Salary.

Staff finds that the administrative activities to develop and implement internal policies, procedures, and training, and to adopt forms, are not mandated by the plain language of the test claim statute. Although a school district may find that administrative activities are necessary to comply with the requirement to provide differential pay to the employee, a state-mandated activity must be "ordered" or "commanded" by the state.[28]

Moreover, the administrative activities of calculating and paying the differential salary to the employee under the test claim statute are incidental to, and part and parcel of, providing the employee benefit. These activities do not result in an increased level of educational services provided to the public and therefore, do not constitute a new program or higher level of service. As clarified by the Supreme Court in the 2004 *San Diego Unified School District* case, incidental aspects of law that are designed to implement a statute, like the administrative activities in this case, are not eligible for reimbursement under article XIII B, section 6.[29]

Accordingly, staff finds that the test claim statute does not mandate a new program or higher level of service to develop and implement internal policies, training, procedures, and forms relating to the administration of the program, or the administrative activities to calculate and pay the differential salary.

Conclusion

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[26] Exhibit X, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 2; Exhibit X, Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

[27] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[28] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

[29] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889, where the court concluded that incidental requirements designed to implement existing federal law are not eligible for reimbursement.

Staff finds that the test claim statute, Statutes 2015, chapter 400, does not impose a reimbursable state-mandated program on school districts.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny the Test Claim. 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 TEST CLAIM ON: Education Code section 44977.5 Statutes 2015, Chapter 400 (AB 375) Filed on June 2, 2016 By Fresno Unified School District, Claimant	Case No.: 16-TC-01 *Certificated School Employees: Parental Leave* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 22, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2017. [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 sections 17500 et seq., and related case law.

The Commission [adopted, rejected, modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote count will be in the adopted Decision], as follows:

Member	**Vote**
Lee Adams, County Supervisor	
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller, Vice Chairperson	
Mark Hariri, Representative of the State Treasurer	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	

Summary of the Findings

The test claim statute, Statutes 2015, chapter 400, added section 44977.5 to the Education Code, effective January 1, 2016, to require school districts to provide differential pay, after the exhaustion of sick leave and accumulated sick leave, to certificated K-12 school district

employees who qualify under the California Family Rights Act (CFRA) for parental leave, which may be taken for up to 12 school weeks, due to the birth of the employee's child or the placement of a child with the employee as a result of adoption or foster care. Differential pay is calculated as the difference between the employee's salary and the salary paid to a substitute employee, or if no substitute was employed, the amount that would have been subtracted if one had been employed. The Test Claim alleges reimbursable costs for the amount of differential pay provided to certificated school district employees, and one-time costs for developing and implementing internal policies, training, procedures, and forms relating to the administration of the program.

Although the test claim statute applies uniquely to local school districts and provides a new benefit to certificated employees, the law requires a showing that the state has imposed a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. A new program or higher level of service exists only when the test claim statute requires an increase in the *actual level of service provided to the public.*[30] The courts have consistently held that increases in the cost of providing employee benefits do not increase the actual level of providing a service to the public.[31]

In this case, the requirement to provide differential pay does not increase the level of governmental service provided to the public. The governmental service provided by school districts is public education.[32] Based on the plain language of the test claim statute and the Legislature's placement of the test claim statute in the chapter relating to "Employees,"[33] the Commission finds that differential pay is a benefit provided solely to certificated employees on parental leave, who are *not* engaged in providing educational services to the public.

In addition, the requirement to provide differential pay does not impose increased costs mandated by the state. After a certificated employee's sick leave and accumulated sick leave have been exhausted, differential pay is calculated as the difference between the certificated employee's salary and the salary paid to a substitute teacher. Substitute teachers are generally paid by the day.[34] Thus, if a certificated teacher earns $200 per day, and a substitute teacher is paid $75 per day, the differential pay to the absent teacher is $125 per day for the period of time during the 12-week authorized absence, after exhausting sick leave and accumulated sick leave. Therefore, the amount spent by the district on the differential pay and the amount paid to the substitute teacher equals the amount the school district budgeted and would have paid the

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[30] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[31] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 875-878, where the court discusses the two lines of cases as "those measures designed to increase the level of governmental services to the public," which results in a new program or higher level of service, and those measures "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased," which does not.

[32] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

[33] Chapter 3 "Certificated Employees," of Part 25 "Employees," of Division 3 "Local Administration."

[34] Education Code section 45030.

certificated employee if the certificated employee had not gone on parental leave. The district is not incurring any increased costs for the differential pay. A school district may have a loss of cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute teacher would be paid during the parental leave period. There was no requirement to pay the certificated employee during parental leave. The courts, however, have held that article XIII B, section 6 of the California Constitution is not designed to provide reimbursement for a loss of cost savings, but requires a showing of "*increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit."[35]

Moreover, the administrative activities to develop and implement internal policies, procedures, and training, and to adopt forms, are not mandated by the plain language of the test claim statute. Although a school district may find that administrative activities are necessary to comply with the requirement to provide differential pay to the employee, a state-mandated activity must be "ordered" or "commanded" by the state.[36] In addition, the administrative activities of calculating and paying the differential pay to the employee under the test claim statute are incidental to, and part and parcel of, providing the employee benefit. These activities do not provide an increased level of educational service to the public and therefore, do not constitute a new program or higher level of service.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

10/01/2015	The test claim statute, Statutes 2015, Chapter 400, was chaptered.
01/01/2016	The test claim statute became effective.
12/21/2016	The Fresno Unified School District (claimant) filed the Test Claim with Commission.[37]
02/14/2017	The Department of Finance (Finance) filed comments on the Test Claim.[38]
03/15/2017	The claimant filed rebuttal comments.[39]
07/14/2017	Commission staff issued the Draft Proposed Decision.[40]

II. Background

This Test Claim addresses Statutes 2015, chapter 400, which requires school districts to provide differential pay to K-12 certificated employees for purposes of maternity and paternity leave

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[35] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[36] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

[37] Exhibit A, Test Claim.

[38] Exhibit B, Department of Finance Comments on the Test Claim.

[39] Exhibit C, Claimant's Rebuttal Comments.

[40] Exhibit D, Draft Proposed Decision.

(parental leave) during the 12-week protected leave period under the California Family Rights Act (CFRA) after the employee's sick leave and accumulated sick leave has been exhausted. Differential pay is the difference between the employee's salary and the salary paid to a substitute employee, or that would have been paid to a substitute employee if one had been hired.

Preexisting law provides certificated employees with various types of paid and unpaid leave programs that may be used for disability related to pregnancy and childbirth, and unpaid maternity and paternity leave to care for a new or adopted baby or foster child.

A. Disability and Parental Leave for Female Certificated Employees Under Preexisting Law

1. Pregnancy Disability Leave

Education Code section 44965 requires school districts and county offices of education to give leave to certificated employees (i.e., teachers) who are absent due to pregnancy, miscarriage, childbirth, and childbirth recovery. This leave is considered temporary disability leave and employees are entitled to all the same rights as other persons with temporary disabilities. The length of the leave of absence is to be determined by the employee and the employee's physician, and school district employment policies are to be applied to disability due to pregnancy and childbirth on the same terms and conditions applied to other temporary disability.

Under Government Code section 12945, employees are entitled to four months of unpaid pregnancy disability leave if they are disabled due to pregnancy, childbirth, or related medical conditions, to include lactation. The employee is guaranteed the right to return to her job at the end of the leave. Employers must continue the employee's health and welfare benefits for up to four months of pregnancy disability leave on the same terms as if the employee were working.

Unless the school district participates in the State Disability Insurance Program (SDI),[41] the employee must use available sick leave to be paid during disability due to pregnancy. Sick leave accrues at 10 days per year for full-time employees, and proportionately less for part-time employees.[42] Unused sick leave accumulates from year to year with no cap and can be transferred (provided the employee worked for a district for at least a year), if the employee subsequently accepts a certified position with another school district.[43] School districts are authorized to adopt rules and regulations regarding proof of illness or injury.[44]

2. Differential Pay Leave for Extended Illness or Injury (Including Pregnancy, Childbirth, Miscarriage, or Childbirth Recovery)

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[41] Exhibit X, California Teachers Association Website. The California Teachers Association notes that most school districts do not participate in the SDI program. See: http://ctainvest.org/home/insurance-estate-planning/disability-long-term/pregnancy-and-parental-leave-rights.aspx (accessed on May 23, 2017).

[42] Education Code section 44978.

[43] Education Code section 44979.

[44] Education Code section 44978.

If the certificated employee has exhausted her available sick leave and remains on temporary leave due to pregnancy, miscarriage, childbirth, and childbirth recovery, there were two ways, under preexisting law, that school districts could pay her for up to five months of the absence.[45]

Under the first method, the employee is paid the difference between her salary and the sum that is actually paid a substitute employee employed to fill the position during her absence. If no substitute is employed, the certificated employee is paid this "differential pay" amount as though the substitute had been employed. The district must make every reasonable effort to secure the services of a substitute employee.[46] An employee may not be provided more than one five-month period per illness or accident.[47] If a school year ends before the five-month period is exhausted, the employee may take the balance of the leave in a subsequent school year.[48] The differential pay statute was amended in 1998 so that the employee's sick leave, including accumulated sick leave, and the five-month leave period run consecutively, not concurrently.[49] The 1998 amendment was the subject of the Commission's *Differential Pay and Reemployment*, 99-TC-02, Statement of Decision, discussed below.

Under the second method, any school district may adopt and maintain in effect a rule that provides 50 percent or more of the employee's regular salary during the absence; for up to five months.[50]

3. Unpaid Parental Leave

Both federal (Federal Family and Medical Leave Act, or FMLA)[51] and state law (CFRA)[52] authorize up to 12 weeks of unpaid leave to employees who have worked for an employer for at least 12 months prior to starting the leave, and have actually worked (not counting paid or unpaid time off) 1,250 hours in the past 12 months. Employees may take up to 12 workweeks of unpaid leave in a 12-month period for various family and medical reasons, including for "the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or the serious health condition of a child of the employee."[53] CFRA only applies to school districts or private employers who employ 50

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[45] Education Code section 44978 states in pertinent part: "Any employee shall have the right to utilize sick leave provided for in this section [sick leave] and the benefit provided by Section 44977 [differential pay] for absences necessitated by pregnancy, miscarriage, childbirth, and recovery therefrom."

[46] Education Code section 44977(a).

[47] Education Code section 44977(b)(2).

[48] Education Code section 44977(b)(2).

[49] Education Code section 44977(b)(1).

[50] Education Code section 44983.

[51] 29 United States Code section 2611, et seq.

[52] Government Code sections 12945.2 and 19702.3.

[53] Government Code section 12945.2(c)(3)(A).

employees within 75 miles of the worksite where that employee is employed.[54] Upon granting the leave request, employers must provide the employee a guarantee of employment in the same or a comparable position when the leave period ends.[55]

If the employee is on pregnancy disability leave, she may take her 12 weeks of unpaid parental leave under CFRA after her physician clears her to return to work. If she is not on pregnancy disability leave, she may take her 12 weeks of unpaid parental leave upon the birth or placement of her child or at any time during the subsequent year.[56]

To receive pay during CFRA leave, the employee must use accrued vacation or other accrued leave. For leave in connection with a birth, adoption, or foster care of a child, sick leave may only be used if mutually agreed to by the employer and the employee.[57]

Although most school districts do not participate in the SDI program, employees of those that do may receive paid pregnancy disability benefits of roughly half of their current salary. For a pregnancy without complications, the benefit period is generally from four weeks before the due date to six weeks after the delivery. If the pregnancy prevents the employee from working before or after that period, she may receive benefits for a longer period of time if her doctor verifies the need for additional leave.[58]

B. Parental Leave for Male Certificated Employees Under Preexisting Law

The FMLA and CFRA also provide male certificated employees with 12-weeks of *unpaid* parental leave under the same terms as female employees as described above, which can be taken upon the birth or placement of the child, or at any time during the subsequent year.

Male certificated employees may also be able use their paid sick leave for a leave of absence due to "personal necessity." This leave may last up to seven days unless more time is specified in the district's bargaining agreement. School districts adopt rules and regulations regarding the manner and proof of personal necessity.[59]

C. The Test Claim Statute (Stats. 2015, ch. 400; Ed. Code, § 44977.5) – Differential Pay for Certificated Employees on Parental Leave

The test claim statute added section 44977.5 to the Education Code, effective January 1, 2016, to provide differential pay to certificated K-12 school district employees who qualify for CFRA and

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[54] Government Code section 12945.2(b).

[55] Government Code section 12945.2(a).

[56] Exhibit X, California Teachers Association Website: http://ctainvest.org/home/insurance-estate-planning/disability-long-term/pregnancy-and-parental-leave-rights.aspx (accessed on May 23, 2017).

[57] Government Code section 12945.2(e).

[58] Exhibit X, California Teachers Association Website: http://ctainvest.org/home/insurance-estate-planning/disability-long-term/pregnancy-and-parental-leave-rights.aspx (accessed on May 23, 2017).

[59] Education Code section 44981.

who take maternity or paternity leave for up to 12 school weeks due to childbirth or adoption or foster care placement, as follows:[60]

(a) During each school year, when a person employed in a position requiring certification qualifications has exhausted all available sick leave, including all accumulated sick leave, and continues to be absent from his or her duties on account of maternity or paternity leave pursuant to Section 12945.2 of the Government Code [the CFRA] for a period of up to 12 school weeks, whether or not the absence arises out of or in the course of the employment of the employee, the amount deducted from the salary due him or her for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed. The school district shall make every reasonable effort to secure the services of a substitute employee.

(b) For purposes of subdivision (a):

(1) The 12-week period shall be reduced by any period of sick leave, including accumulated sick leave, taken during a period of maternity or paternity leave pursuant Section 12945.2 of the Government Code.

(2) An employee shall not be provided more than one 12-week period per maternity or paternity leave. However, if a school year terminates before the 12-week period is exhausted, the employee may take the balance of the 12-week period in the subsequent school year.

(3) An employee on maternity or paternity leave pursuant to Section 12945.2 of the Government Code shall not be denied access to differential pay while on that leave.

(c) This section shall be applicable whether or not the absence from duty is by reason of a leave of absence granted by the governing board of the employing school district.

[60] Education Code section 44977.5 was amended by Statutes 2016, chapter 883, effective January 1, 2017, to expand the population of employees entitled to this benefit, amending subdivision (d) to state: "Notwithstanding subdivision (a) of Section 12945.2 of the Government Code [the CFRA], a person employed in a position requiring certification qualifications is *not* required to have 1,250 hours of service with the employer during the previous 12-month period in order to take parental leave pursuant to this section." (Emphasis added.) Before this amendment, differential pay was provided only to those certificated employees who, under the CFRA, worked 1,250 hours in the past 12 months. The 2016 statute also expanded differential pay for K-14 classified school employees and community college faculty on parental leave for the 12 weeks of unpaid leave. The Commission has not received a test claim filing on Statutes 2016, chapter 883 and thus, makes no determination on that statute.

(d) To the extent that this section conflicts with a provision of a collective bargaining agreement entered into by a public school employer and an exclusive bargaining representative before January 1, 2016, pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code, this section shall not apply until expiration or renewal of that collective bargaining agreement.

(e) For purposes of this section, "maternity or paternity leave" means leave for reason of the birth of a child of the employee, or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee.

Under the test claim statute, the certificated employee is required to exhaust existing sick leave and accumulated sick leave benefits first, before he or she is eligible for differential pay during the 12-week parental leave period. Differential pay is calculated as the difference between the employee's salary and the salary paid to a substitute employee. As the statute states, differential pay is "the amount deducted from the salary due [the certificated employee] for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence or, if no substitute employee was employed, the amount that would have been paid to the substitute had he or she been employed." For example, if a teacher earns $200 per day, and a substitute teacher is paid $75 per day, the differential pay to the absent teacher is $125 per day for the period of time during the 12-week authorized absence, after exhausting sick leave and accumulated sick leave.[61] Therefore, when the differential pay starts after sick leave is exhausted, the differential pay to the certificated employee on leave and the pay given to a substitute teacher equals the amount the school district budgeted for the certificated employee and would have paid the certificated employee if the certificated employee had not gone out on parental leave. As recognized in the May 26, 2015 analysis of the bill by the Assembly Appropriations Committee, the statute may result in a loss of cost savings to the district as a result of not paying the employee on leave:

> Employer costs based on the differential pay program should not exceed what is normally paid to a school employee who would otherwise be working; however, this bill may place additional cost pressures on school district budgets to the extent they no longer experience cost savings as a result of not paying employees during a leave of absence due to maternity or paternity leave.[62]

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[61] See Exhibit X, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 3, which uses the following example: if the certificated employee is normally paid $50,000 and the substitute pay is $35,000, then the certificated employee would be paid the difference of $15,000 during maternity or paternity leave, after exhausting all accrued sick leave. Substitute teachers are generally paid by the day and do not receive an annual salary. (Ed. Code, § 45030.)

[62] Exhibit X, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 2.

Similarly, the Senate Appropriations Committee states that school districts "will not realize the savings attributed to unpaid maternity and paternity protected leave that they currently experience. . . . [E]mployer costs based on the differential pay program should not exceed what is normally paid to a school employee who would otherwise be working."[63] The initial reason for enacting the bill, according to the author, is stated in the legislative history:

> According to the author, currently, certificated school employees can only take up to six or eight weeks of paid leave when they have a baby. Six or eight weeks is insufficient time for a new parent to care for and bon [sic] with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave.
>
> [¶] . . . [¶]
>
> The U.S. is the only industrialized nation that doesn't mandate that parents of newborns get paid leave.[64]

The later-drafted Senate Floor Analysis states additional reasons for the bill:

> According to the author's office, "Forcing teachers and other certificated employees to take entirely unpaid leave after only six or eight weeks of maternity leave, or none in the case of a new father, can lead to several issues for the employee, the school district, and society. Less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems. A lack of proper postpartum support in the form of reasonable parental leave tends to lead to a delay in childhood immunizations, a decrease in the duration and likelihood of breastfeeding, increased financial hardship, and a higher chance of postpartum depression." The author's office indicates that six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave.[65]

D. Commission Statement of Decision on *Differential Pay and Reemployment,* 99-TC-02

On July 31, 2003, the Commission adopted a decision partially approving the Test Claim, *Differential Pay and Reemployment*, 99-TC-02, which pled Statutes 1998, Chapter 30, amending Education Code section 44977 and adding Education Code 44978.1.

As originally enacted before 1975, Education Code section 44977 required that certificated employees who are absent from work on account of illness or accident (including pregnancy, miscarriage, childbirth, and childbirth recovery) to receive differential pay (i.e., the difference between the employee's salary and the sum the school district paid substitute employees who

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[63] Exhibit X, Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

[64] Exhibit X, Assembly Committee on Education, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 5.

[65] Exhibit X, Senate Rules Committee, Office of Senate Floor Analyses, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

filled in during the absence) for a period of up to five school months. This requirement was subject to alternative interpretations. Education Code section 44978, in addition to providing a minimum of ten days of annual sick leave for full-time certificated employees, states that "Section 44977 relating to compensation, shall not apply to the first 10 days of absence on account of illness or accident." Thus, differential pay in section 44977 was calculated by many school districts to run after the exhaustion of annual sick leave, and *concurrently* with any accumulated sick leave the teacher may have carried over from previous years. This interpretation was supported by case law in the First and Second District Courts of Appeal and several opinions of the Attorney General.[66]

The 1998 test claim statute, however, required the differential pay to start after the exhaustion of sick leave and accumulated sick leave as follows: "[t]he sick leave, including accumulated sick leave, and the five-month [differential pay] period shall run consecutively," and the claimant alleged that this change resulted in increased costs mandated by the state.

The Commission concluded that the change in the calculation of differential pay from concurrent to consecutive with accrued sick leave may result in an increased cost to school districts in some instances, but does not provide an increased level of service to the public. Therefore, the Commission found that the 1998 amendment to Education Code section 44977 did not impose a new program or higher level of service within the meaning of article XIII B, section 6 for the amount of differential pay to the employee.[67] However, the Commission approved reimbursement for the one-time administrative activity for changing the calculation of differential pay from running concurrently to consecutively with accumulated sick leave.[68]

The 1998 test claim statute also added Education Code section 44978.1, which states that certificated employees who remain unable to return to their original duties due to illness or injury after all sick leave and differential pay is exhausted shall, if not placed in another position, be placed on a reemployment list. The Commission concluded that Education Code section 44978.1 imposed a reimbursable state-mandated program for the following activities:

- When a certificated employee is not medically able to resume the duties of his or her position following the exhaustion of all sick leave and the five-month differential pay period described in Education Code section 44977 has been exhausted, place the employee, if not placed in another position, on a reemployment list for 24 months for probationary employees, or 39 months for permanent employees. (This activity includes

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[66] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 6 and 7 (citing *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243; *Lute v. Covina Valley Unified School Dist.* (1988) 202 Cal.App.3d 1181; 29 Ops.Atty.Gen. 62, 63 (1957); 30 Ops.Atty.Gen. 307, 309 (1957); 53 Ops.Atty.Gen. 111, 113 (1970).)

[67] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 8-9.

[68] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 7, 12.

the one-time activity of establishing a reemployment list for this purpose, and ongoing activities of maintaining the list.)

- When the employee is medically able, return the employee to a position for which he or she is credentialed and qualified. (This activity includes the administrative duties required to process the re-employment paperwork, but not reimbursement of salary and benefits for the employee once they return to work.)[69]

Costs incurred to comply with the *Differential Pay and Reemployment* program are currently reimbursed under the education mandates block grant.[70]

III. Positions of the Parties

A. Fresno Unified School District

The claimant maintains that the test claim statute imposes a reimbursable state-mandated program on school districts under article XIII B, section 6 of the California Constitution and Government Code section 17514. Claimant alleges reimbursable costs for differential pay for up to 12 school weeks to certificated school district employees who exhaust their sick leave. Claimant also alleges one-time costs for developing and implementing internal policies, training, and procedures and forms relating to the administration of the program. The claimant's declaration, filed under penalty of perjury, states that the test claim statute resulted in total actual costs to the claimant of $17,972.86 during 2016.[71] The claimant, however, does not identify which expenses were actually incurred, or the cost of each alleged activity to implement the test claim statute.

In rebuttal comments, the claimant distinguishes the *Differential Pay and Reemployment*, 99-TC-02, Test Claim Statement of Decision, citing to the legislative history of the test claim statute in the present case, to show that differential pay for certificated employees provides an enhanced service to the public. According to the claimant:

> The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's future mental, physical, social and emotional health in life impacted by the strength of the relationship with both of the child's parents. The test claim does not involve concurrent and consecutive sick leave that is limited to a change in calculating differential pay.[72]

The claimant further argues that the statute enhances the level of service provided to the public because, according to the legislative history:

1. Maternity leave is essential, not only for a mother's full recovery from childbirth, but also to facilitate a stronger mother-child bond.

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[69] Commission on State Mandates, Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 11-12.

[70] Government Code section 17581.6(e)(19).

[71] Exhibit A, Test Claim, pages 11-12.

[72] Exhibit C, Claimant's Rebuttal Comments, page 4.

2. A child's ability to succeed in school and in life is impacted by the strength of the relationship with the primary caretaker. This relationship affects a child's future mental, physical, social, and emotional health. Additionally, this relationship is founded on the nonverbal emotional communication between child and parent, known as the attachment bond, which occurs naturally as a baby's needs are cared for. A secure attachment bond ensures that a child will feel secure, understood, and safe; this results in eagerness to learn, healthy self-awareness, trust, and empathy.
3. Overall, paid family leave helps keep people in the workforce after they have children. When more workers are able to take leave, they are more likely to choose to remain in the labor market; and paid parental leave is associated with higher employment in economies around the world. (AB 375; Assembly Third Reading – May 4, 2015)
4. Forcing teachers and other certificated employees to take entirely unpaid leave after only six to eight weeks of maternity leave, or none in the case of a new father, can lead to several issues for the employee, the school district, and society. Less parental leave has been positively correlated with lower cognitive test scores and higher rates of behavioral problems. A lack of proper postpartum support in the form of reasonable parental leave tends to lead to a delay in childhood immunizations, a decrease in the duration and likelihood of breastfeeding, increased financial hardship, and a higher chance of postpartum depression.
5. The author's office indicates that six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take unpaid leave. (Senate Rules Committee, July 8, 2015).[73]

Claimant's rebuttal comments also distinguish *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478 and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; cases cited by the Department of Finance to argue that the test claim statute does not impose a new program or higher level of service. Claimant argues that unlike the statutes in those cases, this test claim statute imposes unique requirements on school districts and thus, constitutes a state-mandated new program or higher level of service.[74]

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[73] Exhibit C, Claimant's Rebuttal Comments, page 2.

[74] Exhibit C, Claimant's Rebuttal Comments, pages 3-4. The Claimant's Rebuttal Comments (Exhibit C, p. 3, fn. 1) also state: "Finance's comments failed to comply with Cal. Code Regs., tit. 2, §§1183.2 and 1187.5 and shall be excluded from the Commission's ultimate findings and the record." These regulations require all representations of fact, including written comments and supporting documentation to be signed at the end of the document by an authorized representative, with a declaration that they are true and complete to the best of the representative's personal knowledge or information or belief. Although the Finance's comments are not signed under penalty of perjury with the declaration, the issues presented in this Test Claim are pure questions of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.) Finance's comments relevant to test claim findings contain arguments interpreting the law and do not include representations of fact.

B. Department of Finance

The Department of Finance (Finance) concurs that recognizing one-time activities (such as for developing and implementing internal policies, training, procedures and forms relating to the administration of the program) as reimbursable activities would be consistent with the Commission's 2003 decision in *Differential Pay and Reemployment*, 99-TC-02. Finance anticipates that ongoing costs associated with the administrative activities for this program would "likely be less than the low tens of thousands of dollars annually."[75]

Finance also states that the cost of differential pay compensation to certificated employees on maternity or paternity leave is not a state-reimbursable cost for the same reasons stated in the Statement of Decision for the Test Claim, *Differential Pay and Reemployment*, 99-TC-02. Courts have found that a higher cost of employee compensation is not the same as a higher cost of providing a service to the public.[76]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[77] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[78]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[79]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or

[75] Exhibit B, Department of Finance Comments on the Test Claim, page 1.

[76] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

[77] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[78] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[79] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 874.

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[80]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[81]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[82]

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.[83] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[84] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[85]

A. Although the Test Claim Statute Applies Uniquely to Local School Districts and Provides a New Benefit to Certificated Employees, the Requirement to Provide Differential Pay Does Not Constitute a New Program or Higher Level of Service, and Does Not Impose Increased Costs Mandated by the State.

As stated in the background, Education Code section 44977.5, as amended by Statutes 2015, chapter 400, provides for differential pay for up to 12 weeks to a certificated school employee who is absent due to maternity or paternity leave. "Differential pay" is the difference between the employee's salary and the sum that is actually paid a substitute employee who fills the employee's position during his or her absence or, if no substitute is employed, the amount that would have been paid to a substitute had one been employed.

The Commission finds that the differential pay required by the test claim statute increases an employee benefit, but does not increase the level of governmental service provided to the public,

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[80] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56).

[81] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[82] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[83] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[84] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[85] *County of Sonoma v. Commission on State Mandates* 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

nor does it result in increased costs mandated by the state. Thus, the differential pay required by the test claim statute does not constitute a reimbursable state-mandated program.

1. Differential Pay for Parental Leave Does Not Impose a New Program or Higher Level of Service Because Differential Pay Is an Employee Benefit, and Does Not Increase the Level of Governmental Service Provided to the Public.

The courts have consistently held that increases in the cost of providing employee compensation or benefits are not subject to reimbursement as state-mandated new programs or higher levels of service within the meaning of article XIII B, section 6. Rather, a new program or higher level of service exists only when the test claim statute requires an increase in the *actual level of governmental service provided to the public*.[86]

In 1987, the California Supreme Court decided *County of Los Angeles v. State of California,*[87] and for the first time, defined a " new program or higher level of service" within the meaning of article XIII B, section 6. Counties were seeking reimbursement for legislation that required local agencies to provide the same level of workers' compensation benefits to their employees as private individuals or organizations had to provide. The Supreme Court recognized that workers' compensation is not a new program and was left to decide whether the legislation imposed a higher level of service on local agencies.[88] Although the court defined a "program" to include "laws which, to implement a state policy, impose unique requirements on local governments," the court emphasized that a new program or higher level of service requires "state mandated increases in the services provided by local agencies in existing programs."[89]

> Looking at the language of article XIII B, section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. *Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs."*[90]

The court continued:

> The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to

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[86] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877. See also pages 875-878, where the court discusses the two lines of cases as "those measures designed to increase the level of governmental services to the public," which results in a new program or higher level of service, and those measures "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased," which does not.

[87] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[88] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[89] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[90] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56. Emphasis added.

> those agencies the fiscal responsibility *for providing services which the state believed should be extended to the public*.[91]

Applying these principles, the court held that reimbursement for the increased costs of providing workers' compensation benefits to employees of local agencies was not required by the California Constitution. The court stated:

> Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers … In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program … Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[92]

Seventeen years later, the California Supreme Court summarized its holding in *County of Los Angeles* by stating that although "[t]he law increased the cost of employing public servants, … it did not in any tangible manner increase the level of service provided by those employees to the public."[93]

In 1998, the Third District Court of Appeal decided *City of Richmond v. Commission on State Mandates*,[94] involving legislation requiring local governments to provide death benefits to local safety officers under both the Public Employees Retirement System (PERS) and the workers' compensation system. This resulted in survivors of local safety members of PERS who were killed in the line of duty receiving both a death benefit under worker's compensation and a special death benefit under PERS, instead of the greater of the two as under prior law. The court held that the legislation did not constitute a new program or higher level of service even though the benefits might generate a higher quality of local safety officers and thereby, in a general and indirect sense, provide the public with a higher level of service by its employees.[95] The court in *City of Richmond* stated:

> Increasing the costs of providing services cannot be equated with requiring an increased level of service under [article XIII B,] section 6 … A higher cost to

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[91] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57. Emphasis added.

[92] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58, footnote omitted.

[93] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 875.

[94] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[95] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, where the Supreme Court reviewed the *City of Richmond* decision.

> the local government for compensating its employees is not the same as a higher cost of providing services to the public.[96]

The court further clarified that "[a]lthough a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[97]

Two other published cases have reached the same conclusion regarding employee compensation or benefits. In *City of Anaheim*, the court found that a temporary increase in PERS benefits for retired employees, resulting in higher contribution rates for local government, did not constitute a new program or higher level of service to the public. [98] As the court said: "Similarly, City is faced with a higher cost of compensation to its employees. This is not the same as a higher cost of providing services to the public."[99] And in *City of Sacramento*, the California Supreme Court determined that the requirement to provide unemployment insurance to the city's employees was not a service to the public.[100]

In 2004, the California Supreme Court summarized the above line of cases in *San Diego Unified School Dist*., as those "in which the cost of employment was increased but the resulting governmental services themselves were not directly enhanced or increased."[101] The Supreme Court stated: "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[102, 103]

Based on these cases, a new program or higher level of service requires more than increased costs experienced uniquely by local government. A new program or higher level of service requires a showing that the state has mandated an increase in the actual level of governmental

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[96] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196.

[97] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[98] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

[99] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478, 1484.

[100] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[101] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th. 859, 878.

[102] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877. Emphasis in original.

[103] Similarly, in 2006, the Second District Court of Appeal issued an unpublished decision in *CSAC-Excess Insurance Authority v. Commission on State Mandates*, finding that legislation, which provided an evidentiary presumption of industrial causation in workers' compensation cases for cancer and lower back injury claims for local government employees (firefighters, peace officers, and publicly-employed lifeguards), did not provide a service to the public even though the legislation was addressed only to local government. (Exhibit X, *CSAC-Excess Insurance Authority v. Commission on State Mandates*, December 20, 2006, B188169; review denied by Supreme Court March 21, 2007, nonpublished opinion.)

service provided to the public.[104] For example, the courts have found a reimbursable new program or higher level of service when the state imposed a new requirement on local agencies to provide protective clothing and safety equipment to firefighters "because the increased safety equipment apparently was designed to result in more effective fire protection . . . ."[105] In addition, courts have found a reimbursable new program or higher level of service when the state mandated school districts to take specific steps to measure and address racial segregation in public schools. The court found this was a higher level of service to the extent the requirements exceeded federal law and case law requirements by mandating school districts to undertake defined actions that were merely advisory under prior law.[106] The California Supreme Court has held that requirements to immediately suspend and recommend expulsion for pupils who possess a firearm at school were intended to provide a new program or higher level of service to the public in the form of "safer schools for the vast majority of students."[107] The courts have also found a new program or higher level of service when the state shifted the cost of educating pupils at state schools for the severely handicapped to local school districts; a program that was previously administered and funded entirely by the state.[108]

In this case, the claimant argues that the test claim statute provides a service to the public, citing the legislative history of the test claim statute that extols the benefits of parental leave to families and society. According to the claimant: "The pending test claim in providing maternity and paternity leave, implements the state policy to benefit a child's future mental, physical, social and emotional health in life impacted by the strength of the relationship with both of the child's parents."[109]

However, the governmental service provided by school districts is public education,[110] which has not been increased by the test claim statute. In fact, the Legislature placed section 44977.5 in the part of the Education Code that relates to "Employees"[111] and *not* in the part that relates to

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[104] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1194.

[105] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877, citing *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537-538.

[106] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172, 173; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[107] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878.

[108] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836.

[109] Exhibit C, Claimant's Rebuttal Comments, pages 2, 4.

[110] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

[111] Chapter 3 "Certificated Employees," of Part 25 "Employees," of Division 3 "Local Administration."

"Instruction and Services" for pupils.[112] Based on the plain language and placement of the test claim statute in the Education Code, the Commission finds that differential pay is a benefit provided solely to certificated employees who are *not* engaged in providing educational services to the public. In this regard, the test claim statute resembles the statutes at issue in the cases where reimbursement was denied, which involved unemployment insurance,[113] workers compensation,[114] pension,[115] and death benefits.[116] In those cases, employment benefits were also provided to employees who are not engaged in their official duties. As recognized by the California Supreme Court, employee benefits might generate a higher quality of local employees and, "in a general and indirect sense," provide the public with a higher level of service.[117] But the purpose of article XIII B, section 6 is to require reimbursement to local government for the costs of carrying out functions peculiar to government, not for compensating local government employees. "A higher cost to local government for compensating its employees is not the same as a higher cost of providing services to the public."[118]

Therefore, the Commission finds that the differential pay required by the test claim statute does not impose a new program or higher level of service because providing differential pay to certificated employees does not increase the level of governmental service provided to the public.

2. The Differential Pay Required by the Test Claim Statute Does Not Impose Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution.

The claimant alleges that the test claim statute results in increased costs mandated by the state, and filed a declaration by the Executive Officer of Fiscal Services from Fresno Unified School District, who declares under penalty of perjury that the district incurred actual costs of $17,972.86 during 2016 to comply with the test claim statute.[119] The claimant, however, does not identify which expenses were actually incurred, or provide any evidence of the cost of each alleged activity to implement the test claim statute.

The purpose of article XIII B, section 6 is to prevent the state from forcing new programs or higher levels of service on local governments that require "increased actual expenditures" of

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[112] Division 4 of the Education Code (Parts 26-38) "Instruction and Services," beginning with section 46000.

[113] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[114] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[115] *City of Anaheim v. State of California* (1987) 189 Cal.App.3d 1478.

[116] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[117] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1195; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, where the Supreme Court reviewed the *City of Richmond* decision.

[118] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196, 1197.

[119] Exhibit A, Test Claim, pages 11-12.

their limited tax revenues that are counted against the local government's annual spending limit in accordance with articles XIII A and XIII B.[120] The Commission finds, as a matter of law, that the differential pay required by the test claim statute does not result in actual increased costs mandated by the state within the meaning of article XIII B, section 6.

As indicated in the Background, after a certificated employee's sick leave and accumulated sick leave have been exhausted, differential pay is calculated as the difference between the employee's salary and the salary paid to a substitute teacher. Substitute teachers are generally paid by the day.[121] Thus, if a certificated teacher earns $200 per day, and a substitute teacher is paid $75 per day, the differential pay to the absent teacher is $125 per day for the period of time during the 12-week authorized absence, after exhausting sick leave and accumulated sick leave. The amount spent by the district on the differential pay and the amount paid to the substitute teacher equals the amount the school district budgeted and would have paid the certificated employee if the certificated employee had not taken parental leave. Under the Education Code, school districts must adopt their annual budgets by July 1.[122] Between 50 to 60 percent of the money apportioned to the district from the state is required to be expended for salaries of certificated classroom teachers, and this amount is included in the budget.[123] Thus, the district is not incurring an increased cost for the differential pay. Rather, the district is simply paying part of the teacher's budgeted salary to the teacher, and part to the substitute teacher. Thus, the test claim statute does not require "increased actual expenditures" of a school district's limited tax revenues that are counted against the district's annual spending limit for the differential pay.

As recognized in the legislative history of the test claim statute, a school district may have a loss of cost savings as a result of the differential pay requirement because before the test claim statute, only the substitute teacher would be paid during the parental leave period.[124] There was no prior requirement to pay the certificated employee during parental leave. The courts, however, have held that article XIII B, section 6 is not designed to reimburse a loss of cost savings. In *County of Sonoma v. Commission on State Mandates*, the court concluded that reimbursement is not required for a loss of revenue; "it is the expenditure of tax revenues of local

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[120] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 736; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284; California Constitution, article XIII B, sections 1 and 8(a)-(c), (h).

[121] Education Code section 45030, which provides that "The governing board of any school district may employ such substitute employees of the district as it deems necessary and shall adopt and make public a salary schedule setting the daily or pay period rate or rates for substitute employees."

[122] Education Code section 42127(a)(2)(A).

[123] Education Code sections 41370, 41372(b); and California School Accounting Manual, which requires budgeting for certificated employees separately. See pages 210-215 of the Manual: http://www.cde.ca.gov/fg/ac/sa/documents/csam2016complete.pdf (accessed on May 31, 2017).

[124] Exhibit X, Assembly Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended May 4, 2015, page 2; Exhibit X, Senate Committee on Appropriations, Analysis of Assembly Bill No. 375 (2015-2016 Reg. Sess.) as amended July 8, 2015, page 4.

governments that is the appropriate focus of section 6."[125] In that case, several counties challenged a Commission decision denying a test claim on a statute that reduced property taxes previously allocated to local governments and simultaneously placed, in an amount equal to the amount reduced, into the Educational Revenue Augmentation Fund for distribution to school districts.[126] The court found that the counties' tax revenues were not expended. "No invoices were sent, no costs were collected, and no charges were made against the counties . . ."[127] As the court explained, reimbursement is only required when a test claim statute results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit:

> An examination of the intent of the voters and the language of Proposition 4 [the source of article XIII B, section 6] itself supports our conclusion that Proposition 4 was aimed at controlling and capping government spending, not curbing changes in revenue allocations [between counties and school districts]. Section 6 is an obvious compliment to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in *increased actual expenditures* of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with 'costs' incurred by local government as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas.[128]

Accordingly, the Commission finds that the differential pay required by the test claim statute does not impose increased costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution.

B. The Test Claim Statute Does Not Mandate a New Program or Higher Level of Service to Develop and Implement Internal Policies and Procedures, Training, and Forms for the Administration of the Program; or the Administrative Activities to Calculate and Pay the Differential Salary.

The claimant alleges that the test claim statute mandates a new program or higher level of service for administrative activities, such as developing and implementing internal policies, training, and adopting forms to administer differential pay for certificated employees on maternity and paternity leave.[129] Finance states that one-time reimbursement for these types of administrative activities would be consistent with the Statement of Decision for the *Differential Pay and*

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[125] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[126] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1269.

[127] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[128] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283-1284 (emphasis added).

[129] Exhibit A, Test Claim, pages 8-9.

Reemployment Program, 99-TC-02.[130] In that decision, the Commission approved reimbursement for the one-time administrative activity of changing the process for calculating the five-month differential pay period from running concurrently to consecutively with accumulated sick leave.[131]

The Commission finds that these activities are not mandated by the state, and do not impose a new program or higher level of service.

The administrative activities to develop and implement internal policies, procedures, and training, and to adopt forms, are not mandated by the plain language of the test claim statute. The test claim statutes states in pertinent part: "…the amount deducted from the salary due … [the certificated employee] for any of the additional 12 weeks in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence."[132] Although a school district may find that administrative activities are necessary to comply with the requirement to provide differential pay to the employee, a state-mandated activity must be "ordered" or "commanded" by the state.[133]

Moreover, the administrative activities of calculating and paying the differential salary to the employee under the test claim statute are incidental to, and part and parcel of, providing the employee benefit. These activities do not result in an increased level of educational services provided to the public and, thus, do not constitute a new program or higher level of service. "Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate."[134] As clarified by the Supreme Court in the 2004 *San Diego Unified School District* case, incidental aspects of law that are designed to implement a statute, like the administrative activities in this case, are not eligible for reimbursement under article XIII B, section 6.[135]

Although this finding may be viewed as a departure from the Commission's Test Claim Statement of Decision *Differential Pay and Reemployment*, 99-TC-02, Commission decisions are not precedential. Like any other administrative agency, the Commission is free to depart from its prior findings if its determination is supported by law and the evidence in the record, and is not

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[130] Exhibit B, Department of Finance Comments on the Test Claim, page 1.

[131] Statement of Decision, *Differential Pay and Reemployment*, 99-TC-02, July 31, 2003, pages 7, 12.

[132] Education Code, section 44977.5(a) (Stats. 2015, ch. 400). Note that this code section has since been amended by Statutes 2016, chapter 883, over which the Commission has no jurisdiction and makes no finding.

[133] *Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 174.

[134] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[135] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889, where the court concluded that incidental requirements designed to implement existing federal law are not eligible for reimbursement.

arbitrary in itself.[136] In addition, the Statement of Decision in *Differential Pay and Reemployment*, 99-TC-02, was adopted before the California Supreme Court clarified the law on this issue in the *San Diego Unified School District* case.[137]

Accordingly, the Commission finds that the test claim statute does not mandate a new program or higher level of service to develop and implement internal policies, training, procedures, and forms relating to the administration of the program, or the administrative activities to calculate and pay the differential salary.

V. Conclusion

For the reasons stated above, the Commission finds that Statutes 2015, chapter 400, does not impose a reimbursable state-mandated program on school districts. The Commission denies the Test Claim.

[136] *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 776-777; 72 Opinions of the California Attorney General 173, 178, footnote 2 (1989) ["We do not question the power of an administrative agency to reconsider a prior decision for the purpose of determining whether that decision should be overruled in a subsequent case. It is long settled that due process permits substantial deviation by administrative agencies from the principle of stare decisis."]

[137] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 889.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

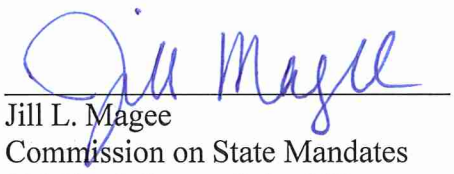
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On July 14, 2017, I served the:

Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Certificated School Employees: Parental Leave, 16-TC-01
Education Code Section 44977.5;
Statutes 2015, Chapter 400 (AB 375)
Fresno 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 July 14, 2017 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/22/17

Claim Number: 16-TC-01

Matter: Certificated School Employees: Parental Leave

Claimant: Fresno Unified School District

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