BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	Case No.: 01-TC-22
Education Code Sections 44650-44654, 52050-52055.51, 52056-52057, 52058 Statutes 1999-2000x1, Chapter 3; Statutes 1999, Chapter 52; Statutes 2000, Chapters 71, 190 and 695; Statutes 2001, Chapters 159, 745, 749, and 887 California Code of Regulations, Title 5, Sections 1031-1039 Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002) Filed on June 28, 2002, by San Juan Unified School District, Claimant	*Academic Performance Index* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7. *(Adopted on July 31, 2009)*

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on July 31, 2009. Art Palkowitz appeared on behalf of the San Juan Unified School District. Donna Ferebee appeared on behalf of the Department of Finance.

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

The Commission adopted the staff analysis to approve the test claim at the hearing by a vote of 6-0.

Summary of Findings

The test claim consists of programs of the Public Schools Accountability Act and the Certificated Staff Performance Incentive Act, and related regulations. The Public Schools Accountability Act contains the following programs: (1) the Academic Performance Index (API), a method of measuring pupil performance, (2) the Governor's High Achieving/Improving Schools Program, an incentive program that rewards high-performing schools, and (3) the Intermediate

Intervention/Underperforming Schools Program (II/USP), an intervention and sanctions program to assist low-performing schools.[1] The Certificated Staff Performance Incentive Act, in addition to the Governor's Performance Award and the Schoolsite Employees Performance Bonus program reward certificated staff for making improvements in the academic progress of their pupils.

For reasons specified in the analysis, the Commission finds, effective June 25, 1999, that Education Code section 52056, subdivision (c), imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for a school district governing board to discuss the results of its annual ranking at the next regularly scheduled meeting following the annual publication of the API and Superintendent of Public Instruction (SPI) school rankings (Ed. Code § 52056, subd. (c), Stats. 1999-2000 1st Ex. Sess., ch. 3, eff. Jun. 25, 1999, Stats. 2000, ch. 695).

The Commission also finds, however, that districts' discussing the results of the annual API and SPI rankings (in § 52056, subd. (c)) is not a reimbursable mandate for schools with fewer than 100 valid test scores, or schools in the alternative accountability system that are under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, alternative schools, including continuation high schools and opportunity schools and independent study schools. (Ed. Code, § 52052, subd. (f)(1), Stats. 2001, ch. 887 & Cal. Code Regs., tit. 5, § 1032, subd. (b).)

The Commission also finds that section 52053, subdivisions (d) and (j), do not constitute a reimbursable state mandate because no schools or school districts have participated in the II/USP pursuant to these provisions.

The Commission also finds that all other test claim statutes and regulations do not constitute a reimbursable state-mandated program because they are either voluntary or are downstream of a voluntary activity.

BACKGROUND

This test claim alleges activities based on the Public Schools Accountability Act,[2] the Certificated Staff Performance Incentive Act,[3] and related statutes[4] and regulations.[5]

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[1] Education Code section 52051 et seq..

[2] Statutes 1999-2000x1 chapter 3; Education Code section 52050 et seq.. The Public Schools Accountability Act was effective June 25, 1999, because statutes enacted in a special session of the Legislature are not effective until the 91st day after the adjournment of the session at which they are passed. (Cal. Const. art. IV, § 8 (c)(1)).

[3] Statutes 1999, chapter 52; Education Code section 44650 et seq.

[4] Statutes 2000, chapter 71; section 40, uncodified.

[5] California Code of Regulations, title 5, sections 1031-1039. The regulations implement the Governor's Performance Award Program of the Public Schools Accountability Act, as well as the Certificated Staff Performance Incentive Act.

The Public Schools Accountability Act consists of the following programs: (1) the Academic Performance Index (API), a method of measuring pupil performance; (2) the Governor's High Achieving/Improving Schools Program, an incentive program that rewards high-performing schools; and (3) the Intermediate Intervention/ Underperforming Schools Program (II/USP), an intervention and sanctions program to assist low-performing schools. [6]

One of the legislative findings of the Public Schools Accountability Act states: "The statewide accountability system must include rewards that recognize high achieving schools as well as interventions and, ultimately, sanctions for schools that are continuously low performing."[7]

The Certificated Staff Performance Incentive Act, in addition to the Governor's Performance Award and the Schoolsite Employees Performance Bonus program that the claimant also pled, reward certificated staff for making improvements in the academic progress of pupils.

Test Claim Statutes

Academic Performance Index (Ed. Code, §§ 52050 – 52052.5): The purpose of the Academic Performance Index (API) is to "measure the performance of schools, especially the academic performance of pupils, and to demonstrate comparable improvement in academic achievement by all numerically significant ethnic and socioeconomically disadvantaged subgroups within schools."[8] A California Department of Education's (CDE) publication describes the API as follows:

> A school's API is a number that ranges from 200 to 1000 and is calculated from the results for each school's students on statewide tests. The state has set 800 as the API target for all schools to meet. Schools that fall short of 800 are required to meet annual growth targets until that goal is achieved. API targets vary for each school.[9]

The API is calculated annually for each school using a variety of indicators that are reported to CDE, including but not limited to the results of the STAR tests,[10] and the High School Exit Exam.[11] Attendance rates for pupils in elementary schools, middle schools, and secondary

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[6] Education Code section 52051.

[7] Education Code section 52050.5, subdivision (i). All references herein are to the Education Code unless otherwise indicated.

[8] Education Code section 52052, subdivision (a)(1).

[9] California Department of Education "Parent and Guardian Guide to California's 2008-09 Accountability Progress Reporting System." April 2009. See <http://www.cde.ca.gov/ta/ac/ap/documents/parentguide09.pdf> as of May 4, 2009.

[10] The Standardized Testing and Reporting Program, or STAR, consists of four testing programs: the (1) California Standards Tests; (2) The California Achievement Tests, Sixth Edition Survey (a national norm referenced achievement test, formerly the Stanford 9); (3) Spanish Assessment of Basic Education, Second Edition; and (4) the California Alternative Performance Assessment for pupils with significant cognitive disabilities that prevent them from taking the other tests.

[11] Education Code section 52052, subdivision (b).

schools, and the graduation rates for pupils in secondary schools is also used.[12] Pupil data is disaggregated by special education status, English language learners, socioeconomic status, gender and ethnic group.[13]

The Superintendent of Public Instruction (SPI) is required to develop, and the State Board of Education (SBE) to adopt, expected annual percentage growth targets for all schools based on their API baseline score measured from the previous year. The minimum growth target is 5 percent of the difference between the school's actual API score and the statewide API performance target, or one API point, whichever is greater. Schools at or above the statewide API performance target need only maintain their API score above the statewide API performance target. To meet its growth target, a school must demonstrate that all ethnic and socioeconomically disadvantaged subgroups, as defined, are making comparable improvement.[14]

The API is used to measure the progress of schools selected for participation in the II/USP (pursuant to § 52053), and rank all public schools in the state for the purpose of the High Achieving/Improving Schools Program pursuant to section 52056.[15]

Originally, the SPI was to create an alternative accountability system for schools with less than 100 pupils, but those schools now receive an API with an asterisk to indicate less statistical certainty than an API based on 100 or more test scores.[16] These small schools are eligible to participate in the Governor's Performance Awards Program and in the II/USP,[17] both of which are discussed below. The SPI is required to develop an alternative accountability system for schools under the jurisdiction of a county board of education, or county superintendent of schools, community day schools, nonpublic, nonsectarian schools, and alternative schools serving high-risk pupils, including continuation high schools and opportunity schools.[18] Section 52052.5 requires the SPI to establish an advisory committee to advise the SPI and SBE on "all appropriate matters relative to the creation of the Academic Performance Index and the implementation of the Immediate Intervention/Underperforming School Program and the High Achieving/Improving Schools Program."[19]

The API is also used to meet federal "Adequate Yearly Progress" requirements under the No Child Left Behind Act of 2001 (NCLB). NCLB requires, as a condition of funding, all states to develop and implement a single, statewide accountability system that will ensure all public schools make Adequate Yearly Progress toward the federal goal that all pupils perform at the

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[12] Education Code section 52052, subdivision (a)(4). Attendance information for certificated school personnel was deleted from the API by Statutes 2004, chapter 915 (SB 722).

[13] Education Code section 52052, subdivision (a)(4)(B).

[14] Education Code section 52052, subdivision (c) (Stats. 2001, ch. 887).

[15] Education Code section 52052, subdivision (e).

[16] Education Code section 52052, subdivision (f)(1).

[17] Education Code section 52052.2.

[18] Education Code section 52052, subdivision (h).

[19] Education Code section 52052.5.

proficient or above level in English-language arts and mathematics by 2014. Under Adequate Yearly Progress requirements, schools and local educational agencies[20] are required to meet criteria in four areas: participation rate, percent proficient, API as an additional indicator, and graduation rate (if applicable).[21]

Intermediate Intervention/Underperforming Schools Program (Ed. Code, §§ 52053 – 52055.51 & 52056.5 & 52058): The purpose of the II/USP is to provide schools in decile ranks 1-5 (with scores in the lower 50% on STAR tests) an opportunity to apply for funding to improve pupil achievement in exchange for greater accountability.[22] The SPI, with approval from the SBE, invites schools that scored below the 50th percentile on both the spring 1998 and spring 1999 STAR tests to participate in the program. "A school invited to participate may take any action not otherwise prohibited under state or federal law and that would not require reimbursement by the Commission on State Mandates to improve pupil performance."[23] The program is limited to 430 schools, no more than 301 elementary schools, 78 middle schools, and 52 high schools.[24]

The test claim statutes provide three ways that schools may be selected to participate in the II/USP without applying to CDE. Subdivision (d) of section 52053 requires the SPI to randomly select eligible schools to participate if fewer than the number of schools in any grade level category apply to the program. Similarly, subdivision (j) states that if fewer schools apply for participation than can be funded, the SPI with the approval of the SBE shall randomly select the balance of schools from schools eligible to participate that did not apply. Also, section 52056.5 authorizes the SPI to make a school subject to the II/USP if the school fails to meet annual state growth targets established pursuant to Section 52052.

Schools districts with schools in the II/USP must choose between contracting with an external evaluator or contracting with an entity that has proven and successful expertise specific to challenges in low-performing schools.[25] The external evaluator or entity has a long list of specified duties, including developing an action plan with the school and consulting employee organizations. Schools that participate receive state grants, some of which may be from federal funds (Pub. Law 105-78).[26] The grants require a school district match.[27]

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[20] Local educational agencies (LEAs) are school districts and county offices of education.

[21] California Department of Education, "2007 Growth Academic Performance Index Report, Information Guide" August 2007, See <http://www.cde.ca.gov/ta/ac/ap/documents /infoguide07g.pdf> as of May 4, 2009.

[22] California State Board of Education Policy, May 2004. See < http://www.cde.ca.gov/re/lr/wr/ documents/policy4iiusp.doc> as of April 27, 2009.

[23] Education Code section 52053, subdivision (a).

[24] Education Code section 52053, subdivision (b).

[25] Education Code section 52054, subdivision (a) (Stats. 2001, ch. 749).

[26] Education Code section 52053, subdivision (f).

[27] Education Code section 52054.5.

If a school has not met its growth targets each year and has failed to show significant growth 24 months after receipt of funding, it is deemed a state-monitored school (formerly a low-performing school). The SPI may take one or more actions with regard to a state-monitored school, including reorganizing or closing it.[28]

High Achieving/Improving Schools Program (Ed. Code, § 52056, except subdivision (b)): This program provides monetary and non-monetary rewards, pursuant to a Governor's Performance Award Program, to schools that meet or exceed performance targets or demonstrate high achievement.[29] The SPI, with approval of the SBE, ranks all public schools based on the API in decile categories. The SPI also reports the target annual growth rates of schools and the actual growth rates attained. Schools are also ranked by API compared with schools that have similar characteristics. The SPI publishes these rankings annually on the Internet.[30]

According to section 52056, subdivision (b), "schools shall report their ranking, including a description of the components of the API, in their annual school accountability report card pursuant to Section 33126 and 35256." This provision was severed from this test claim in August 2007 and was renamed *School Accountability Report Cards IV*. Subdivision (c) of section 52056 states that the school district governing board "shall discuss the results of the annual ranking" at a regularly scheduled meeting.

Governor's Performance Award Program (Ed. Code, § 52057; Cal. Code Regs., tit. 5, §§ 1031–1033, 1036, 1038-1039): This program is under article 4, the High Achieving/Improving Schools Program, of chapter 6.1, the Public School Accountability Act. To be eligible for the Governor's Performance Awards, schools must "meet or exceed API performance growth targets … and demonstrate comparable improvement in academic achievement by all numerically significant ethnic and socioeconomically disadvantaged subgroups within schools."[31] All schools, including those in the II/USP may participate in the Governor's Performance Award Program. The monetary awards, made available on either a per-pupil or per-school basis, may not exceed $150 per pupil who receive a score on the STAR tests, and are subject to budget act appropriation.[32] The SPI, with approval of the SBE, may also establish nonmonetary awards for schools, as specified.[33] Schools that are eligible for performance awards may request that the SBE waive all code sections or any part of code sections, or any regulations controlling specified education programs, for categorical programs, with some specified exceptions.[34]

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[28] Education Code section 52055.5, subdivision (b)(3). The statute states that the SPI "shall do one or more of the following with respect to a state-monitored school."

[29] Education Code section 52057, subdivision (a).

[30] Education Code section 52056, subdivision (a).

[31] Education Code section 52057, subdivision (a).

[32] Education Code section 52057, subdivision (b).

[33] Education Code section 52057, subdivision (c).

[34] Education Code section 52057, subdivisions (d) & (e).

Title 5 of the California Code of Regulations provide the regulatory intent (§ 1031) and describe general eligibility criteria (§ 1032) and award funding criteria (§ 1033) for the Governor's Performance Award. It also states the waiver deadline (§ 1036), and exemption from school district, county, or school indirect charges or other administrative charges (§ 1038), and that use of funds is decided by the school site governance team/school site council (§ 1039).[35]

Schoolsite Employees Performance Bonus Program (Stats. 2000, ch. 71; Cal.Code Regs., tit. 5, §§ 1031–1033, 1036- 1038): This uncodified program was established in Statutes 2000, chapter 71, section 40, with an appropriation of $350 million to the State School Fund for allocation on a one-time basis by the SPI to school districts, county offices of education and charter schools. It requires school districts, county offices of education and charter schools, "as a condition of receiving funds pursuant to this section" upon request from the SPI, to certify the number of full-time equivalent employees at each schoolsite under their jurisdiction that are eligible for awards under the Governor's Performance Award Program. Schools use 50% of the award for one-time bonuses to employees, and the other 50% for any one-time purpose.

The title 5 regulations adopted for the Governor's Performance Award program also applied to the Schoolsite Employees Performance Bonus program until the regulations, as applied to the Schoolsite Employees Performance Bonus, were repealed in January 2002.[36]

Certificated Staff Performance Incentive Act (Ed. Code, §§ 44650 et seq.; Cal. Code Regs., tit. 5, §§ 1031-1032 & 1034 -1038): The purpose of this program is to make one-time performance awards to teachers and other certificated staff in underachieving schools, where the academic performance of pupils significantly improves beyond the minimum percentage growth target established by the SPI based on the school's API. "Any school district or charter school that maintains classes in kindergarten or in any of grades 1 to 12, inclusive, may apply for funding"[37] if it meets the following conditions: (1) the school's aggregate score on the API must be below the 50th percentile relative to other public schools in the state in the prior year; and (2) the school must meet any other SBE criteria.[38] Maximum awards may not exceed $25,000 per full-time equivalent certificated staff person.[39]

The SBE criteria are in the title 5 regulations, which states intent to implement the Certificated Staff Performance Incentive Act (§ 1031). The regulations also specify the general (§ 1032) and specific (§ 1034) eligibility criteria for the awards, describe funding distribution (§ 1035) and the waiver deadline (§ 1036), and specify that the awards are not considered compensation when

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[35] Register 00, No. 52 (Dec. 28, 2000). California Code of Regulations, title 5, section 1039, Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[36] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[37] Education Code section 44651, subdivision (a).

[38] Education Code section 44651, subdivision (b).

[39] Education Code section 44650, subdivision (b).

calculating retirement benefits (§ 1037). The regulations also state that this program is not subject to school district, county, or school indirect charges or other administrative charges (§1038).[40]

Prior Law

The Focus Schools Program was enacted in 1992 (Stats. 1992, ch. 1335) but, according to the bill analysis for the Public Schools Accountability Act, was never implemented because it was never funded.[41] Under the program, the SPI was to designate the schools with the lowest performing pupils, which were to develop a school action plan to improve pupil achievement and were entitled to expert assistance and additional resources to implement the plan. The SPI was to appoint an outside management consultant to assist and, in some circumstances, intervene in the management of schools that fail to improve performance.[42] The Focus Schools program became inoperative, by its own terms, on July 1, 1998, about a year before the Public Schools Accountability Act was enacted.

Claimant Position

Claimant seeks reimbursement based on article XIII B, section 6 of the California Constitution, for the following activities, as stated in its declaration submitted with the test claim:

A. Establish, periodically update and maintain data gathering proceedings to collect and report data as may be required by the SPI for computation of the API (Ed. Code, § 52052) "This includes, but is not limited to:"

   1. Notifying CDE when circumstances may exist which would invalidate a school's API (Cal. Code Regs., tit.5, § 1032, subd. (d)).

   2. Upon receipt of a report of STAR testing and demographic data from the CDE, notify the department and the test publisher within 30 days by way of e-mail or writing that there are errors in the STAR testing or demographic data (Cal. Code Regs., tit. 5, § 1032, subd. (j)).

   3. Submit all data corrections to the test publisher in writing or e-mail on or before a deadline specified by the test publisher (Cal. Code Regs., tit. 5, § 1032, subd. (j)).

   4. To the extent current rates are not available to the CDE, to respond to any requests from the CDE for attendance rates for pupils and certificated school personnel for elementary, middle and secondary schools (§ 52052, subd. (a)).

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[40] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[41] The 1992 statute's stated legislative intent was that funding be provided for the program in future Budget Acts, and that the SPI was only required to implement the provisions in fiscal years in which sufficient funds were appropriated (Sen. Bill No. 171, Stats. 1992, ch. 1335, § 3).

[42] Assembly Committee on Education, Analysis of Senate Bill No. 1 (1999-2000 1st Ex. Sess.) as amended March 4, 1999, page 7.

5. To the extent current rates are not available to the CDE, to respond to any requests from the CDE for graduation rates for pupils in secondary schools (§ 52052, subd. (a)).
6. To provide the SPI, when required, with data pertaining to high school graduation and attendance rates (§ 52052, subd. (a)).

B. For schools that are required (under §§ 52053, subd. (j) & 52056.5) to participate in the Immediate Intervention/Underperforming School Program and to the extent funding is unavailable or insufficient:

1. To contract with an external evaluator and appoint a broad-based schoolsite and community team (§ 52054, subd. (a)).
2. To assist the external evaluator and schoolsite and community team, as requested or required, in the preparation of an action plan (§ 52054, subds. (b)-(i)).
3. To contribute matching funds to any implementation grant provided (§ 52054.5).
4. For those which fail to meet their annual short-term growth targets within 12 months following receipt of funding, to hold a public hearing and to consult with the external evaluator and the schoolsite and community team in choosing interventions in order to continue to implement the action plan (§ 52055).
5. For schools that may be deemed low-performing schools under § 52055.5, when required by the SPI, to enter into a contract with a school assistance and intervention team (contracting schools) (§ 52055.51).
6. For contracting schools to provide support and assistance to the team at the targeted schoolsites (§ 52055.51).
7. For contracting schools to adopt the team's recommendations at a regularly scheduled meeting of the governing board and to submit the recommendations to the SPI and SBE (§ 52055.51).
8. For contracting schools, no less than three times during the year, to present the team with data regarding progress toward the goals established by the team, and to present the data to the governing board, the SPI, and SBE (§ 52055.51).
9. By November 30 after the first full year of implementation, and every November 30 thereafter, to submit an evaluation to the SPI of the impact, costs, and benefits of the program, and a report on whether the schools have, or have not, met their program growth targets (§ 52058, subd. (a)).

C. For school districts and charter schools (not county offices of education) to establish, periodically update and maintain employee payroll records to receive, administer and distribute award monies to staff, as part of the one-time Certificated Staff Performance Incentive Act (§ 44653).

D. Before January 8, 2002, for each school district and charter school (not county offices of education) to complete an application on behalf of its eligible schools to participate in the Certificated Staff Performance Incentive Act which shall include: (1) the number of eligible schools, (2) certification that the data used in the API calculations is accurate, and (3) a list of

certificated staff positions on a full-time equivalent basis at each eligible school. After January 8, 2002, the application shall certify: (a) that the data used in the API calculations from the schools is accurate, and (b) to report the number of certificated positions on an FTE basis at each of the eligible schools (§ 44651, Cal. Code Regs., tit. 5, § 1034).

E. When an award is received, school districts and charter schools to negotiate with the exclusive representative of the bargaining unit of the teachers and other certificated staff to determine how the funds are to be distributed (§ 44653).

F. In case there is no agreement on disbursement, for school districts and charter schools to calculate and distribute the award amounts as a percentage of base salaries that is determined by a specified formula (§ 44653).

G. When requested by the SPI, to certify the number of FTE employees for the period requested in the creation of the one-time API Schoolsite Employees Performance Bonus, (Stats. 2000, ch. 71, § 40).

H. For school districts, charter schools, and county offices of education, to establish and periodically update and maintain employee payroll records to receive, administer and distribute award moneys to staff as part of the API Schoolsite Employees Performance Bonus (Stats. 2000, ch. 71, § 40).

I. Upon receipt of an award from the Governor's Performance Award Program and schoolsite portion of the API Schoolsite Employees Performance Bonus, to consult with the existing school site governance team/school site council to decide the use of the award and have a distribution plan ratified by the governing board (Stats. 2000, ch. 71; Cal. Code Regs., tit. 5, § 1039).

J. The administrative costs to calculate individual salary awards, to determine and locate recipients, and to deliver those salary awards (§ 44654, Cal. Code Regs., tit.5, § 1038).

K. Compensation-driven benefit costs (employer's share of Medicare, unemployment insurance, worker's compensation) incurred as a result of individual salary awards made pursuant to the Governor's High Achieving Schools' Program, the Certificated Staff Performance Inventive Act, or the API Schoolsite Employees Performance Bonus Program (§ 44654, Cal. Code Regs., tit. 5, § 1038).

Claimant filed comments in November 2002, rebutting those of the Department of Finance and CDE and arguing that their comments should be stricken from the record because they do not comply with section 1183.02, subdivision (d) of the Commission's regulations. This regulation requires that assertions or representations of fact be supported by documentary evidence submitted with the state agency's response, and authenticated by declarations under penalty of perjury.[43] Claimant also made substantive comments that are discussed in the analysis below.

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[43] The existence of a reimbursable state mandate is a question of law. (*County of San Diego v. State of California (County of San Diego)* (1997) 15 Cal.4th 68, 89.) State agency or other comments are not relied on by the Commission, which reaches conclusions based on independent analysis of the test claim statutes and relevant facts supported in the record, and weighs the evidence accordingly.

Claimant also filed comments on the draft staff analysis in November 2007 on section 1032, subdivision (d) of the title 5 regulations and on the II/USP, both of which are discussed below.

Claimant filed additional comments on the revised draft staff analysis in June 2009, asserting that practical compulsion exists to participate in the II/USP, the High Achieving/Improving Schools Program, and the Governor's Performance Award Program. Claimant also argues that denying a test claim on the basis of not incurring reimbursable costs is improper and lacks legal authority.

State Agency Positions

Department of Education: In comments dated August 7, 2002, the CDE discusses each program separately, arguing that none of them is reimbursable. As to the API, CDE states in part:

> The API is calculated from indicators currently reported to the CDE as part of the Standardized Testing and Reporting Program (STAR). Part III, Section 1.A of the Test Claim alleges reimbursable costs for activities which already receive funding under Title 5, California Code of Regulations, Division 1, Chapter 2 Pupils, Subchapter 3.75 Standardized Testing and Reporting Program. The Budget provides $65 million for STAR administration, continued development, scoring, error correction, and apportionment.

CDE alleges that the other programs are not reimbursable because they are voluntary and are already funded.

For the High Achieving Schools Program or Governor's Performance Awards, CDE states it is not a mandated program. Eligible schools that meet or exceed API growth targets and testing participation rates are notified that they will receive the award, but districts have the option of turning down these funds (although CDE admits that this option was not explicitly stated to school districts). The funding for this program is to be decided by existing School Site Councils, and "any additional costs not covered by awards due to decisions made by School Site Councils are due to discretionary actions.

In comments submitted in September 2007 responding to a question from Commission staff, CDE reiterates that the II/USP is a voluntary program, and that the statutes authorizing or requiring the SPI to select schools for participation in the II/USP have not been used.

Department of Finance: Finance, in its October 2002 comments, also argues that the test claim is not reimbursable. Finance asserts that the activities are discretionary because they stem from voluntary programs, and that they are already funded.

In comments submitted in November 2007 on the draft staff analysis, Finance disagrees with both activities that staff found reimbursable. As to the school board discussion of the API annual rankings (§ 52056, subd. (c)), Finance asserts that it is not reimbursable due to Government Code section 17556, subdivision (f), which prohibits finding a reimbursable mandate if "the statute … imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election." Finance argues that the governing board discussion of the annual rankings is within the scope of Proposition 59, that provides that the people have the right to access to information concerning

the conduct of the people's business and that the meetings of public bodies are open to public scrutiny.

Proposition 59 was discussed by the Third District Court of Appeal in *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, and is discussed below.

Interested Party Comments

San Diego Unified School District (SDUSD) filed comments on the draft staff analysis in November 2007, arguing that California Code of Regulations, title 5, section 1032, subdivision (d), constitutes a state-mandated program to notify CDE of errors in the API, as discussed below.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[44] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[45] "Its purpose 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."[46] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[47]

In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[48]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a

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[44] Article XIII B, section 6, subdivision (a), (as amended in Nov. 2004) provides:

> (a) 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 that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975.

[45] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[46] *County of San Diego, supra,* 15 Cal.4th 68, 81.

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

[48] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[49] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[50] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[51]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[52]

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.[53] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[54]

Issue 1: Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?

A. Do the test claim statutes and regulations impose state-mandated activities on school districts within the meaning of article XIII B, section 6?

Academic Performance Index (Ed. Code, §§ 52050 – 52052.5): As indicated above, the purpose of the API is to measure the performance of schools and to demonstrate comparable improvement in academic achievement.

Section 52020 names chapter 6.1 as the "Public Schools Accountability Act of 1999," and section 52050.5 contains legislative findings and declarations. Section 52051 states that the Public School Accountability program is established and consists of the API, the II/USP and the Governor's High Achieving/Improving Schools Program. Section 52051.5 states that all references to schools in chapter 6.1 shall include charter schools. Section 52052 describes the API's purpose, indicators, pupil subgroups, included test scores, growth targets, performance

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[49] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[50] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[51] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

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

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

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

target, uses, and alternative accountability systems. Section 52052.3 indicates which pupil test scores are included in the API.[55] Section 52052.5 requires the SPI to form an advisory committee to advise the SPI and SBE on matters related to the API, the II/USP and the Governor's High Achieving/Improving Schools Program.

Claimant alleges establishing, periodically updating and maintaining data gathering procedures to collect and report data as may be required by the SPI for computation of the API, as follows:

- To the extent current rates are not available to the CDE, to respond to any requests from the CDE for attendance rates for pupils and certificated school personnel for elementary, middle and secondary schools (§ 52052, subd. (a));
- To provide the SPI, when required, with data pertaining to high school … attendance rates (§ 52052, subd. (a)).

CDE and Finance commented, in August and October 2002, that the API is calculated from indicators currently reported to the CDE as part of the STAR Program. CDE's August 2002 comments stated that the test claim alleges activities that already receive funding under the STAR program, including error correction, and that test claim 97-TC-23 "will provide reimbursement for reimbursable costs not covered by the STAR apportionment."[56]

<u>Reporting attendance and graduation rates (Ed. Code, §§ 52050 – 52052.5):</u> Section 52052, subdivision (a)(3), as of Statutes 2001, chapter 887 (the last amendment claimant pled)[57] states that the API "shall consist of a variety of indicators *currently reported to the* State Department of Education, including, but not limited to … attendance rates for pupils and certificated school personnel for elementary schools, middle schools, and secondary schools, and the graduation rates for pupils in secondary schools."[58] [Emphasis added.] Thus, although the statute states that the API shall consist of indicators currently reported to CDE, subdivisions (a)(3)(B) and (C) of section 52052 (Stats. 2001, ch. 887) state:

> (B) Before including high school graduation rates and attendance rates in the index, the Superintendent of Public Instruction shall determine the extent to which the data is currently reported to the state and the accuracy of the data.

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[55] Section 52052.3 was repealed by Statutes 2002, chapter 1035, which is not included in this test claim so the Commission makes no findings on it.

[56] The Commission's 2005 reconsideration of the decision in test claim 97-TC-23 (04-RL-9723-01), found that activities that related to the national norm referenced test (CAT/6) are reimbursable, and are subject to offsets for state STAR funding and federal Title VI funding. But Statutes 2008, chapter 757, effective September 30, 2008, deleted the CAT/6 mandate in Education Code section 60640, subdivision (b), thus ending the state-mandated program for administration of the CAT/6 tests in grades 3 and 7.

[57] Section 52052 has been further amended by Statutes 2002, chapter 1035, Statutes 2004, chapter 914, Statutes 2004, chapter 915, Statutes 2005, chapter 639, Statutes 2006, chapter 538, Statutes 2006, chapter 743, Statutes 2007, chapter 130, Statutes 2008, chapter 710, and Statutes 2008, chapter 757. The Commission makes no findings on these later amendments.

[58] Attendance rates for certificated school personnel was removed by Statutes 2004, chapter 915.

> (C) If the Superintendent of Public Instruction determines that accurate data for these indicators is not available, the Superintendent of Public Instruction shall report to the Governor and the Legislature by September 1, 1999, and recommend necessary action to implement an accurate reporting system.[59]

In its *Analysis of the 2001-02 Budget Bill*, the Office of the Legislative Analyst stated: "The SDE [State Dept. of Education] has not included graduation rates, student attendance nor teacher attendance in the API because it is currently not able to collect accurate school-level data on these outcome measures."[60] And the CDE's current description of the API does not indicate that pupil or teacher attendance or graduation rates are included in it.[61] Moreover, there is no evidence in the record that CDE has ever required schools to report attendance information or graduation rates, or that they are currently incorporated into the API.

The Commission finds that section 52052 does not expressly require schools to report attendance data for pupils or certificated personnel,[62] or graduation rates to CDE for the API, so doing so does not impose a state mandate within the meaning of article XIII B, section 6.

The Commission also finds that the remaining sections, 52020 (title of act), 52050.5 (legislative findings and declarations), 52051 (programs within the act), 52051.5 (charter schools included), 52052.5 (advisory committee) and former section 52052.3 (test scores in API), do not require any activities of school districts, so they do not impose state-mandated activities within the meaning of article XIII B, section 6.

Discuss the API ranking: Subdivision (c) of section 52056 requires the governing board of each school district, after the annual publication of the API and SPI school rankings, to "discuss the results of the annual ranking at the next regularly scheduled meeting." (As of Stats. 2000, ch. 695.) Because this statute uses the word "shall,"[63] the Commission finds that section 52056, subdivision (c), is a mandate on a school district governing board to discuss its API annual

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[59] Education Code section 52052, subdivision (a) (Stats. 1999-2000x1, ch. 3). The second sentence was removed by Statutes 2001, chapter 745, effective October 12, 2001, but the first sentence remains in subdivision (a)(4)(C), with a nonsubstantive amendment made by Statutes 2008, chapter 757.

[60] Office of the Legislative Analyst, "Analysis of the 2001-02 Budget Bill." See <http://www.lao.ca.gov/analysis_2001/education/ed_10_sch_acct_anl01.htm> as of May 4, 2009.

[61] California Department of Education, "Parent and Guardian Guide to California's 2008-09 Accountability Progress Reporting System." April 2009. See <http://www.cde.ca.gov/ta/ac/ap/documents/parentguide09.pdf> as of May 4, 2009.

[62] Attendance information for certificated school personnel was deleted from section 52052 by Statutes 2004, chapter 915 (Sen. Bill No. 722) upon which the Commission makes no finding because it was not pled.

[63] Education Code section 75: "'Shall' is mandatory and 'may' is permissive."

ranking at the next regularly scheduled meeting following the annual API publication by the SPI.[64]

Intermediate Intervention/Underperforming Schools Program (Ed. Code, §§ 52053-52055.51 & 52056.5 & 52058): As indicated above, the SPI with approval from the SBE, invites schools that scored below the 50th percentile on the Spring 1998 and Spring 1999 administrations of the STAR tests to participate in the II/USP, the purpose of which is to provide those schools with the opportunity to apply for funding to improve pupil achievement in exchange for greater accountability.

Section 52053 establishes the program and how schools are selected. Section 52053.5 describes qualifications for external evaluators, and 52054 concerns school contracts with and duties of external evaluators, including developing an action plan with specified contents. Section 52054.3 provides the option to use an existing plan instead of developing an action plan, and section 52054.5 details the grants available for the II/USP, including a local school district

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[64] Although the Commission makes no finding on it because it was not pled by claimant, section 52056, subdivision (c) was amended, and a new (d) was added by Statutes 2003, chapter 45, as follows:

> (c) The governing board is strongly encouraged to include in the discussion an examination by school, grade, and subgroup enumerated by and in accordance with subclause (II) of clause (v) of subparagraph (C) of paragraph (2) of subsection (b) of Section 6311 of Title 20 of the United States Code, of scores on the tests administered pursuant to the Standardized Testing and Reporting (STAR) Program set forth in Article 4 (commencing with Section 60640) of Chapter 5 of Part 33.
>
> (d) If the average STAR test score of the school is below the 50th percentile, or if the test scores of more than 25 percent of the pupils of a school are below the 50th percentile, the school district governing board may do both of the following:
>
> (1) Conduct an assessment of the reasons for the performance results of the school, by grade.
>
> (2) Adopt an improved performance plan that includes methods determined by the district to have been used by schools with similar pupil populations elsewhere in the district or state and significantly higher pupil scores. If it is deemed not feasible to adopt those methods, the plan shall explain why an alternate approach is preferable. If a school district governing board adopts an improved performance plan, it shall reevaluate the plan at each future annual meeting described by subdivision (c), until STAR test scores reach a level above those specified in this subdivision.

The federal law cited in subdivision (c) above is the definition of "adequate yearly progress" that "(v) includes separate measurable annual objectives for continuous and substantial improvement for each of the following … (II) The achievement of (aa) economically disadvantaged students; (bb) students from major racial and ethnic groups; (cc) students with disabilities; and (dd) students with limited English proficiency;"

matching requirement. Section 52055 requires schools that have not met their growth targets[65] within 12 months after receiving funding to hold public hearings and, after consulting specified groups, choose from a range of interventions. Section 52055.5 states the fate of schools that, 24 months after receiving funding, have not met their growth targets. If the school is making substantial progress, it may participate in the program for an additional year. If the school is not making substantial progress, it is deemed a state-monitored school (formerly a low-performing school) and the SPI must assume the legal rights, duties and powers of the governing board and reassign the principal. The SPI must also take other action, to include such options as reorganizing or closing the school. Section 52055.51 authorizes the SPI to require the school to contract with a school assistance and intervention team instead of taking action as a result of the school's state-monitored school status in section 52055.5, subdivision (b). Section 52056.5 authorizes the SPI to make schools that fail to meet annual state growth targets subject to the II/USP. Section 52058 requires school districts with schools participating in the II/USP to submit evaluation reports, as specified.

Claimant pleads the following activities under the II/USP, "to the extent funding is unavailable or insufficient."

> (1) Contracting with an external evaluator and appointing a broad-based schoolsite and community team (§ 52054, subd. (a));
>
> (2) Assisting the external evaluator and schoolsite and community team in preparing the plan (§ 52054, subs. (b)-(i));
>
> (3) Contributing matching funds to any implementation grant provided (§ 52054.5);
>
> (4) Holding a public hearing and consulting with external evaluator and schoolsite and community team in choosing interventions if school fails to meet its annual short-term growth target within 12 months (§ 52055);
>
> (5) Contracting with a school assistance and intervention team if the school is deemed a low-performing school, as required by the SPI (§ 52055.51), and for contracting schools to do the following:
>
> a. Provide support and assistance to the team at targeted schoolsites (§ 52055.51);
>
> b. Adopt the team's recommendations at a regularly scheduled meeting of the governing board and to submit the recommendations to the SPI and SBE (§ 52055.51); and
>
> c. No less than three times during the year, present the team with data regarding progress toward the goals established by the team, and to present the data to the governing board, the SPI and SBE (§ 52055.51).
>
> (6) By November 30 after the first full year of implementation, and every November 30 thereafter, to submit an evaluation to the SPI of the impact, costs, and benefits of the program and report on whether schools have met their program growth targets (§ 52058, subd. (a)).

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[65] Growth targets are selected by the SPI based on the previous year's API (Ed. Code, § 52052, subds. (c) & (d)).

CDE, in its August 2002 comments, states that the II/USP is not mandated, but is discretionary, so all the activities associated with the election by the district to be in the program are not mandated. Finance also states that the program is voluntary in its October 2002 comments.

The first statute establishing the program states: "the Superintendent of Public Instruction, with the approval of the State Board of Education, *shall invite* schools that scored below the 50th percentile on the achievement tests … to participate in the … Program."[66] [Emphasis added.] The program is limited to 430 schools, no more than 301 elementary schools, 78 middle schools, and 52 high schools.[67] Nothing in the statute requires schools to accept the invitation from CDE. Therefore, based on the plain language of section 52053, subdivision (a) (which describes eligibility for the II/USP), it does not legally compel the school or the school district to participate in the program.

In the *Kern High School Dist.* case,[68] the California Supreme Court stated, "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."[69] Applying the reasoning of *Kern,* the downstream activities pled by claimant for participating in the II/USP are not state mandates because program participation is voluntary. Since participation is at the discretion of the school district, the Commission finds there is no legal compulsion to implement it.

Claimant, in comments submitted in November 2002, states that the California Supreme Court, in *City of Sacramento v. State of California* has held that:

> [T]he determination of whether a program is truly voluntary depends upon (1) the nature and purpose of the program, (2) whether the program's design evidences an intent to coerce, (3) the penalties assessed for non-participation, (4) the legal and other practical consequences of non participation.[70]

According to claimant, "the concept of state mandate is sufficiently broad to include situations where the local school district has no reasonable alternative to the state scheme or no true choice but to participate in it." Claimant argues it would be fiscally irresponsible to turn down the state funds, since district employees and their "exclusive representatives" (unions) know about the program. Claimant reiterates this in its June 2009 comments on the draft staff analysis.

The Commission disagrees. Although the Supreme Court in *Kern* stated that state mandates could be found in cases of practical compulsion on the local entity, it described this as the statute imposing "certain and severe penalties such as double taxation or other draconian

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[66] Education Code section 52053, subdivision (a).

[67] *Ibid.*

[68] *Kern High School Dist., supra,* 30 Cal.4th 727.

[69] *Id.* at page 743. Emphasis in original.

[70] Keith B. Petersen, claimant comments submitted November 5, 2002. Citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76.

consequences"[71] for not participating in the programs. The court also described practical compulsion as "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[72]

Here, the only *certain* consequence of a school district not participating in the II/USP is losing the program funds at issue. There is nothing in the record to show that the school districts are practically compelled to participate in the II/USP program.[73] There are no certain and severe penalties, or draconian consequences in the statute or the record for nonparticipation. Nor is there a "substantial penalty independent of the program funds at issue" for not complying with the II/USP statute.[74]

In its June 2009 comments on the draft staff analysis, claimant states as follows:

> [T]he potential consequence of not participating in the [II/USP] … program is that a state-monitored school will be established and the SPI must assume the legal rights, duties and powers of the governing board and reassign the principal. The SPI must also take other action, to include such options as reorganizing or closing the school.

The Commission disagrees. First, the term "state-monitored school" applies to a school already in the II/USP that has not met its growth targets each year and has failed to show significant growth, as determined by the state board, after 24 months after receipt of funding under the IIUSP (§ 52055.5, subd. (b)). The Commission finds no evidence of "state-monitored schools" existing outside of this definition in the II/USP. Second, the claimant's consequences were proposed to *potentially* apply to an underperforming school, so they are not *certain* consequences as required for a finding of practical compulsion. And third, even if the consequence were to apply to an underperforming school, they would not be for non-participation in the II/USP. Rather, the consequences would be for lack of performance, which in turn, may make a school eligible for the II/USP. In short, there is no practical compulsion to participate in the II/USP.

Therefore, in the absence of both legal and practical compulsion to participate, the Commission finds that a school's voluntary participation in the II/USP (Ed. Code, §§ 52053 (except subds. (d) & (j)) 52053.5-52055.51 & 52056.5 & 52058) is not a state-mandated program within the meaning of article XIII B, section 6. This means the various downstream activities are not mandated, including contracting with an external evaluator or entity with proven expertise specific to challenges in low-performing schools, for schools that participate in the II/USP on their own application.

Claimant's November 2002 comments state that the test claim alleges the "detailed list of mandated duties for those schools who are required, pursuant to Education Code Sections 52053

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[71] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[72] *Id.* at p. 731.

[73] Cf. *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th, 1355, 1366.

[74] *Kern High School Dist., supra,* 30 Cal.4th 727, 731.

(j) and/or 52056.5, to participate in the Immediate Intervention/Underperforming School Program."

Section 52056.5 authorizes the SPI to make a school subject to the II/USP if the school fails to meet annual state growth targets established pursuant to section 52052. On its face, this section does not require a school district activity.[75] Therefore, the Commission finds that section 52056.5 is not a state mandate within the meaning of article XIII B, section 6.

Two provisions, however, authorize the SPI to select a school to participate in the II/USP without the school applying. Section 52053, subdivision (d), requires the SPI to randomly select schools to participate if fewer than the eligible number of schools in any grade level category apply to the program. Similarly, if fewer schools apply than can be funded, the SPI is required to randomly select schools to participate (§ 52053, subd. (j)).

Section 52053, subdivisions (i) and (l), indicate that schools selected to participate in the II/USP receive planning grants of $50,000:

> (i) The total number of schools selected for participation in the program shall be no more than the number that can be funded through the total appropriation for the planning grants referenced in subdivision (l) below. [¶]…[¶]
>
> (l) A school selected to participate on or before October 15, 2000, and each year thereafter, shall be awarded a planning grant from funds appropriated pursuant to Section 2 of Chapter 3 of the Statutes of 1999, First Extraordinary Session, of fifty thousand dollars ($50,000).

In a September 12, 2007 reply to a request for information from Commission staff, CDE commented: "schools have participated in II/USP strictly on a voluntary basis. None of the participating schools were selected by the State Superintendent of Public Instruction as prescribed in Education Code sections 52053 (d) and (j), and 52056.5."

Subdivision (m) of section 52053 states that "schools selected for participation in the program shall be notified by the [SPI] … no later than October 15 of each year." There is no evidence in the record (such as a letter or executive order from the SPI) of any notification to a school that has been selected involuntarily to participate in the II/USP.

Because subdivisions (d) and (j) do not on their face impose a mandate on school districts, and no executive order has been issued pursuant to them, the Commission finds that section 52053, subdivisions (d) and (j), does not impose a state mandate within the meaning of article XIII B, section 6.

Claimant, in its November 2007 comments on the draft staff analysis, asserts that the alleged fact that no districts participated involuntarily in the II/USP does not prevent finding reimbursable costs mandated by the state. According to claimant "that no districts may claim these costs on their annual reimbursement claims does not relieve the Commission on the duty to determine

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[75] The Commission makes no finding on the mandate implication of the SPI issuing an executive order (as defined in Gov. Code, § 17516) under the authority of section 52056.5 of the Education Code.

whether the costs are reimbursable." Claimant states that the Commission should find reimbursable, potentially claimable activities for the II/USP.

In its June 2009 comments on the revised draft staff analysis, claimant asserts that a reimbursable mandate may exist despite the claimant not claiming any reimbursable costs in the fiscal year, and that denying the test claim on the basis of not incurring reimbursable costs is improper and lacks any legal authority.

The Commission disagrees. The plain language of section 52053, subdivisions (d) and (j), impose requirements on the SPI. According to the record, the SPI has not selected any schools to participate. If a school were involuntarily selected to participate in the II/USP, it could submit a test claim on the SPI's notification of its selection (in § 52053, subd. (m)). Given that there is no evidence in the record of any such state-mandated selection by the SPI, the Commission finds that section 52053, subdivisions (d) and (j), do not constitute a state mandate.

In sum, the Commission finds that the II/USP is not a state-mandated program within the meaning of article XIII B, section 6.

High Achieving/Improving Schools Program (Ed. Code, § 52056, except subdivision (b)): This program provides monetary and non-monetary rewards, including the Governor's Performance Award Program (discussed separately below), to schools that meet or exceed performance targets or demonstrate high achievement. Claimant pled this section as it was amended by Statutes 2000, chapter 695.

Subdivision (a) of section 52056 describes the program and requires the SPI to rank all public schools based on the API in decile categories by grade level of instruction, and rank them by value of the API when compared to schools with similar characteristics. The SPI must also report the target annual growth rate of schools and the actual growth rates attained, and must publish the rankings on the Internet.

Because subdivision (a) does not require a school or school district activity, the Commission finds it is not a state mandate within the meaning of article XIII B, section 6.

In its June 2009 comments on the revised draft staff analysis, claimant states that "[T]he potential consequence of not participating in the … program is that a state-monitored school will be established and the SPI must assume the legal rights, duties and powers of the governing board and reassign the principal … [and] such options as reorganizing or closing the school.

The Commission disagrees. No potential consequences for non-participation in the High Achieving/Improving Schools Program are identified in the statute or the regulations, and there is no evidence in the record of consequences that would constitute practical compulsion,[76] so there is no practical compulsion to participate. Therefore, the Commission finds that this program is not a state mandate.

Governor's Performance Award Program (Ed. Code, § 52057; Cal. Code Regs., tit. 5, §§ 1031-1033, 1036, 1038-1039): This program provides monetary and nonmonetary awards to schools that meet or exceed API performance growth targets, as described above.

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[76] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1369-1370.

Section 52057 establishes the program eligibility, awards, waiver of certain provisions, and expenditure of funds. Section 1031 of the title 5 regulations states the regulatory intent is to implement the Governor's Performance Award Program and the Certificated Staff Performance Incentive Act. As to the remaining title 5 regulations, section 1032 details the general eligibility criteria for these awards. Section 1033 outlines the award funding criteria and states in part, "Schools that meet the eligibility requirements in 2000-2001 for the Governor's Performance Award Program (GPA) shall receive a per pupil award amount for each of their eligible pupils." Section 1033 also describes eligible pupils, and how the amount allocated for the award is determined. Section 1036 states the deadline for requesting waivers of the regulations, and section 1038 states that the award is not subject to indirect or other administrative charges. Section 1039 of the regulations states that the use of funds at the school site for the program shall be decided by the existing school site governance team/school site council and then ratified by the governing board of each local educational agency.[77]

There is nothing in Education Code section 52057 or the applicable title 5 regulations that states that schools or school districts are required to participate in the Governor's Performance Award Program, so there is no legal compulsion to do so. And neither the statute nor the record indicates practical compulsion, defined as: "certain and severe penalties such as double taxation or other draconian consequences"[78] for not participating in the program, or "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[79]

In its June 2009 comments on the draft staff analysis, claimant states that "[T]he potential consequence of not participating in the … program is that a state-monitored school will be established and the SPI must assume the legal rights, duties and powers of the governing board and reassign the principal … [and] such options as reorganizing or closing the school.

The Commission disagrees. No potential consequences for non-participation in the Governor's Performance Award Program are identified in the statute or the regulations, and there is no evidence in the record of consequences that would constitute practical compulsion,[80] so there is no practical compulsion to participate.

Therefore, the Commission finds that section 52057 is not a state mandate within the meaning of article XIII B, section 6. The Commission also finds that California Code of Regulations, title 5,

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[77] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[78] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[79] *Id.* at p. 731.

[80] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1369-1370.

sections 1031, 1033, 1036, and 1038[81] do not constitute a state mandate on schools or school districts for purposes of the Governor's Performance Award Program.[82]

Deciding on use of Governor's Performance Award Program funds: Section 1039 of the title 5 regulations state:

> Use of funds at the school site for the Governor's Performance Award Program shall be decided by the existing school site governance team/school site council representing major stakeholders and then ratified by the governing board of each local education agency.[83]

Although this provision appears to be mandatory based on the plain meaning of "shall be decided by the existing school site governance team …. and then ratified by the governing board," it is not because these activities are conditional on participation in the Governor's Performance Award Program, which is voluntary.

As the Supreme Court stated in *Kern,* "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a reimbursable mandate."

Because deciding the use of funds, and ratifying this decision, is a downstream activity that results from *voluntary* participation in the Governor's Performance Award Program, the Commission finds that section 1039[84] of the title 5 regulations is not a state mandate within the meaning of article XIII B, section 6.

This conclusion is also supported by the rules of statutory construction. In interpreting these regulations, "[t]he same rules of construction apply in the interpretation or [sic] regulations as apply in the interpretation of statutes."[85] And the Commission, like a court, keeps in mind the following principles of statutory construction:

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[81] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[82] The regulations also apply to the API and the Certificated Staff Performance Incentive Act. The finding here is limited to the regulations as they apply to the Governor's Performance Award program.

[83] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[84] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[85] *Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd.* (1991) 1 Cal.App.4th 639, 647.

> A statute must be construed 'in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts.' [Citation omitted .]" A court may consider the overall scheme in which an ambiguous statute is included in order to ascertain its intended meaning. [Citation omitted.] The organization of the division, chapters, and articles is an aid to understanding its purpose. [Citation ommited.] [division, chapter, article, and section headings may properly be considered in determining intent and are entitled to considerable weight].[86]

Considered in context, section 1039 is under article 1.7 of title 5 of the California Code of Regulations. The express purpose of article 1.7, as stated in section 1031, subdivision (b), is to "implement the programs established by two statutes relating to the API.: (1) The Governor's Performance Award Program of the Public Schools Accountability Act of 1999… (2) the Certificated Staff Performance Incentive Act …. "

As indicated above, the Governor's Performance Award Program is not a state-mandated program, and as indicated below, the Certificated Staff Performance Incentive Act, is also not a state-mandated program. Thus, deciding the use of funds at the school site for purposes of the voluntary Governor's Performance Award Program is not a state mandate. Rather, like the requirements placed on school districts in the *Kern* case, it is a "procedural condition imposed on program participation."[87] As such, it is not reimbursable because participation in the underlying award and incentive programs is voluntary.

In addition, the section heading to section 1032 is "General Eligibility Criteria for Award Programs Related to API Growth," which indicates that the regulation contains award program criteria rather than requirements that are independent of those award programs: The Governor's Performance Award Program and the Certificated Staff Performance Incentive Act (§ 1031, subd. (b)).

So again, the Commission finds that section 1039[88] of the title 5 regulations is not a state mandate within the meaning of article XIII B, section 6.

Notifying CDE regarding invalidation of school's API (Cal.Code Regs. tit.5, § 1032, subd. (d)): Subdivision (d) of section 1032 in the title 5 regulations[89] describes conditions under which the API is invalid, including if the school district notifies CDE of any of the following: (d)(1), there were adult testing irregularities at the school affecting five percent or more of pupils tested; or (d)(2), that the API is not representative of the pupil population at the school; or (d)(3), that the school has experienced a significant demographic change in pupil population between the base

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[86] *Medical Bd. of California v. Superior Court* (2003) 111 Cal.App.4th 163, 175.

[87] *Kern High School Dist., supra,* 30 Cal.4th 727, 753.

[88] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[89] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

year and growth year, and that the API between years is not comparable.[90] Subdivisions (d)(6) and (e) state as follows:

> (6) If after reviewing the information, the department determines that further investigation is warranted, the department may conduct an investigation to determine if the integrity of the API has been jeopardized. The department may invalidate or withhold the school's API until such time that the department has satisfied itself that the integrity of the API has not been jeopardized.[91]
>
> (e) If a school's API is considered invalid pursuant to subdivisions (d)(1) [district notifies CDE of adult testing irregularities at the school affecting 5% or more of the pupils tested], (d)(2) [district notifies CDE that the API is not representative of the pupil population at the school], (d)(4) [school's proportion of parental waivers compared to its STAR test enrollment is equal to or greater than 15% for the 2000 STAR, or 10 % for subsequent STARs, with exceptions], or (d)(5) [In any content area of the California Standards Tests, the school's proportion of the number of test- takers in that content area compared with the total numbers of test-takers is less than 85 percent], *the school is ineligible for participation in any of the award programs for the current and subsequent year.* If a school does not receive an API pursuant to subdivision (d)(3) [the district notifies CDE that the school has experienced a significant demographic change in pupil population between the base year and growth year, and the API between years is not comparable], *the school is ineligible for participation in any of the award programs* for the current year only.[92] [Emphasis added.]

Claimant pleads the following activity: (1) Notifying CDE when circumstances may exist which would invalidate a school's API (Cal Code Regs., tit.5, § 1032, subd. (d)).

Finance, in October 2002, comments that this regulation does not require districts to provide information to the SPI, but states that a school's API shall be considered invalid under certain circumstances.

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[90] Other information that can also invalidate a school's API (but is silent on whether the district notifies CDE of the information) include: in subdivision (d)(4), the schools proportion of parental waivers compared to its STAR enrollment, is equal to or greater than 15 percent for the 2000 STAR, or greater than 10 percent for the 2001 and each subsequent STAR, with exceptions. Also, (in subd. (d)(5)) the STAR can be invalidated if the school's proportion of the number of test-takers in any content area of the California Standard's Test compared with the total number of test-takers is less than 85 percent. And (subd. (d)(6)) if information is made available or obtained by CDE that would lead a reasonable person to conclude that one or more of the preceding circumstances occurred, the API shall be considered invalid.

[91] This was originally in subdivisions (d)(4) and (e) of section 1032. Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[92] This language was amended into subdivision (e) by Register 02, No. 2 (Jan. 8, 2002).

Claimant disagrees, stating in November 2002 that it cannot be the intent of the law for local districts to fail to disclose data deficiencies when they exist regarding testing irregularities, the API not being representative of the pupil population, or a school experiencing a significant demographic change in pupil population. Regarding the STAR apportionments, claimant argues they are for the costs of the STAR testing process, but costs alleged in this claim relate to additional post-test duties required to ensure the accuracy of the API.

In comments on the draft staff analysis submitted in November 2007, claimant states that Education Code section 52052 and section 1032, subdivision (d) of the title 5 regulations require school districts to report the API information and to "satisfy" a CDE investigation. Claimant also distinguishes this case from the *Kern* case, and that if the district potentially removes itself from participation in the awards programs, it would not be complying with section 1032, subdivision (d), to establish eligibility for cash awards.

San Diego Unified School District (SDUSD) filed comments on the draft staff analysis in November 2007, arguing that California Code of Regulations, title 5, section 1032, subdivision (d), constitutes a state-mandated program to notify CDE of errors in the API. This is because the draft staff analysis found a state mandate in section 52056, subdivision (c)'s requirement for the district governing board to discuss the results of the annual ranking following the annual publication of the API and SPI school rankings. SDUSD argues that the intent is to have the governing board make decisions and use the information to ultimately improve pupil performance. SDUSD asserts the existence of compulsion to notify the governing board of validation errors in the API, so the board shall discuss why the API annual ranking may be inaccurate. Also, SDUSD notes that section 52056, subdivision (b), states: "All schools shall report their ranking, including a description of the components of the API in their school accountability report card pursuant to Sections 33126 and 35256." And section 33126, subdivision (a), states the "school accountability report card shall provide data by which a parent can make meaningful comparisons between public schools that will enable him or her to make informed decisions on which school to enroll his or her children." According to SDUSD, the intent is to have the API and its component information used by parents to make decisions about school choice, and that there is a compulsion to provide parents with meaningful data, including a correct API.

The issue is whether section 1032, subdivision (d), of the title 5 regulations imposes a state-mandated activity within the meaning of article XIII B, section 6.

Although the regulation states that the API "shall be considered invalid" if the school district reports the information in subdivisions (d)(1) through (d)(3), it does not expressly require the school district to report it. Therefore, the Commission finds that school districts are not legally compelled under section 1032 to report this information.

The next issue is whether there is practical compulsion by the state to certify the information in subdivisions (d)(1) through (d)(3) of section 1032 of the title 5 regulations, when doing so would invalidate the school's API. The Commission finds that there is not.

Section 1032 states in subdivision (d)(6) that CDE "may investigate" information "to determine if the integrity of the API has been jeopardized" and authorizes CDE to "invalidate or withhold the school's API until such time that the department has satisfied itself that the integrity of the API has not been jeopardized." According to subdivision (e), the consequence of having an

invalid API is that "the school is ineligible for participation in any of the award programs for the current and subsequent year" except in the case of the school experiencing a significant demographic change in pupil population between the base and growth years, in which case, the school is ineligible for participation in any of the award programs for the current year only.

For a school district that certifies the information in subdivisions (d)(1) through (d)(3) of section 1032, its API "shall be considered invalid" which in turn, renders it ineligible for the Governor's Performance Award Program or the Certificated Staff Performance Incentive Act, according to subdivision (e).

In the *Kern High School District* case, the California Supreme Court considered school district's voluntary participation in the School Improvement Program, which the court called "substantial" because it provided $394 million statewide in fiscal year 1998-1999.[93] In finding that claimants were not practically compelled to participate in that and the other programs at issue, the court stated:

> In essence, claimants assert that their participation in the education-related programs here at issue is so beneficial that, as a practical matter, they feel they must participate in the programs, accept program funds, and-by virtue of …[the test claim statutes]- incur expenses necessary to comply with the procedural conditions imposed on program participation. Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstance that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render the local entity's decision whether to continue its participation in the modified program any less voluntary.[94]

As discussed below, the Governor's Performance Award Program and the Certificated Staff Performance Incentive Act are voluntary programs. The activities in section 1032, subdivision (d), of the title 5 regulations are performed only if the district chooses to participate in the Governor's Performance Award Program and the Certificated Staff Performance Incentive Act, the programs implemented by the regulations (§ 1031, subd. (b)). Therefore, the regulatory activities of notifying CDE of testing irregularities or other factors that would invalidate a school's API, like the activities at issue in the *Kern* case, do not constitute practical compulsion. Rather, "claimants have found the benefits of various funded programs 'too good to refuse'- even though as a condition of program participation, they have been forced to incur some

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[93] *Kern High School Dist., supra,* 30 Cal.4th 727, 732.

[94] *Kern High School Dist., supra,* 30 Cal.4th 727, 753.

costs."[95] Moreover, there is nothing in the record to show that the school districts are practically compelled to participate in the programs.[96]

Additionally, the section 1032 regulation is under article 1.7 of title 5 of the California Code of Regulations, the express purpose of which, as stated in section 1031, subdivision (b), is to "implement the programs established by two statutes relating to the API.: (1) The Governor's Performance Award Program of the Public Schools Accountability Act of 1999… (2) the Certificated Staff Performance Incentive Act …. " The regulation is a downstream requirement imposed on participants in these optional programs. As such, applying the reasoning in the *Kern School Dist.* case, the Commission finds that this regulation does not impose a state mandate.

SDUSD asserts that the interest in accurate information and informed parental choice of schools compels the school to comply with section 1032, subdivision (d). Although those may be worthwhile goals, they do not create practical compulsion for purposes of finding a state mandate. The Supreme Court in *Kern* described practical compulsion as the statute imposing "certain and severe penalties such as double taxation or other draconian consequences"[97] for not participating in the programs, and described practical compulsion as "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[98] As discussed above, the activity at issue (notifying CDE of circumstances that may invalidate a school's API) does not meet this standard.

Therefore, in the absence of legal or practical compulsion to notify the CDE when circumstances may exist that would invalidate a school's API, the Commission finds that subdivision (d) of section 1032 of the title 5 regulations[99] does not impose a state mandate within the meaning of article XIII B, section 6.

<u>Notify CDE and publisher of errors in STAR testing and demographic data:</u> Subdivision (j) of section 1032 in the title 5 regulations states:

> The local educational agency [school district or county office of education] *must* notify the department and the test publisher via e-mail or in writing whether there are errors in the STAR testing or demographic data. The local education agency's notification *must* be received by the department and the test publisher within thirty (30) calendar days of the initial date of publication of the STAR testing and demographic data on the department's web-site. The local education agency *must* submit all data corrections to the publisher in writing or e-mail. The test publisher shall specify a deadline for submittal of the data corrections that is no

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[95] *Kern High School Dist., supra,* 30 Cal.4th 727, 731.

[96] Cf. *Department of Finance v. Commission on State Mandates, supra,* 170 Cal.App.4th, 1355, 1366.

[97] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[98] *Id.* at p. 731.

[99] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

less than forty-five (45) calendar days after the date of publication of the STAR testing and demographic data.[100] [Emphasis added.]

Claimant pleads the following activities in the test claim:

> (1) Upon receipt of a report of STAR testing and demographic data from the CDE, notify the department and the test publisher within 30 days by way of e-mail or writing that there are errors in the STAR testing or demographic data (Cal Code Regs., tit. 5, § 1032, subd. (j)); and
>
> (2) Submit all data corrections to the test publisher in writing or e-mail on or before a deadline specified by the test publisher (*Ibid*).

Finance, in its October 2002 comments, states that the section does not specifically require districts to provide any information. Also, CDE states that school districts already receive funding under the STAR program for administration and error correction. Finance alleges that currently it is the test publisher's responsibility to incur costs associated with correcting a publishing error in regards to the STAR program. According to Finance, if the district provides inaccurate data despite receiving funds to ensure the quality of the STAR data, the district should be held responsible for the fiscal implications at the local level.

In its November 2007 comments on the draft staff analysis, Finance asserts that the annual Budget Act provides apportionment funding per test to each district to ensure quality data collection and reporting. According to Finance, if a district provides erroneous data, it is responsible to correct it because the district receives apportionment payments for correction and thus does not incur mandated costs.

Turning to the issue of whether the section 1032, subdivision (j), of the title 5 regulations imposes a state mandate, the regulation states that the local educational agency "must" notify the department and publisher of errors in the STAR testing and demographic data, and "must" submit data corrections to the publisher. The word "must" in the regulation is as mandatory as the word "shall."[101] For the reasons discussed below, however, the Commission finds that these activities are not mandated by the state.

In interpreting this regulation, "[t]he same rules of construction apply in the interpretation or [sic] regulations as apply in the interpretation of statutes."[102] And the Commission, like a court, keeps in mind the following principles of statutory construction:

> A statute must be construed 'in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts.' [Citation omitted .]" A

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[100] This language was formerly in subdivision (i), Register 01, No. 46 (Nov. 15, 2001). It was moved to subdivision (j) by Register 02, No. 2 (Jan. 8, 2002).

[101] Education Code section 75: "'Shall' is mandatory and 'may' is permissive." See *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group* (2005) 129 Cal.App.4th 508, 519.

[102] *Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd., supra,* 1 Cal.App.4th 639, 647.

> court may consider the overall scheme in which an ambiguous statute is included in order to ascertain its intended meaning. [Citation omitted.] The organization of the division, chapters, and articles is an aid to understanding its purpose. [Citation ommited.] [division, chapter, article, and section headings may properly be considered in determining intent and are entitled to considerable weight].[103]

Section 1032, put in context, is under article 1.7 of title 5 of the California Code of Regulations. The express purpose of article 1.7, as stated in section 1031, subdivision (b), is to "implement the programs established by two statutes relating to the API.: (1) The Governor's Performance Award Program of the Public Schools Accountability Act of 1999… (2) the Certificated Staff Performance Incentive Act …. "

As discussed above, the Governor's Performance Award Program is not a state-mandated program, and as discussed below, the Certificated Staff Performance Incentive Act, is also not a state-mandated program. Thus, notifying CDE and the publisher of errors in the STAR testing or demographic data is not required. Rather, like the requirements placed on school districts in the *Kern* case, it is a "procedural condition imposed on program participation."[104] As such, it is not reimbursable because participation in the underlying award and incentive programs is voluntary.

This conclusion is also supported by the heading to section 1032, which is "General Eligibility Criteria for Award Programs Related to API Growth." This heading indicates that the regulation contains award program criteria rather than requirements that are independent of those award programs: The Governor's Performance Award Program and the Certificated Staff Performance Incentive Act (§ 1031, subd. (b)).

Therefore, the Commission finds that subdivision (j) of section 1032 of title 5 of the California Code of Regulations[105] does not impose a state mandate on school districts to notify the test publisher and CDE of errors in the STAR testing or demographic data.

The other subdivisions in section 1032 (subds. (a), (i) & (k)) do not require a school district activity, so the Commission finds that they also do not impose a state mandate within the meaning of article XIII B, section 6.

Schoolsite Employees Performance Bonus (Stats. 2000, ch. 71, § 40, former Cal.Code Regs., tit. 5, §§ 1031–1033, 1036- 1038; former Cal. Code Regs., tit. 5, § 1033, subd. (b)): This uncodified statute requires school districts, county offices of education and charter schools, "as a condition of receiving funds" upon request from the SPI, to certify the number of full-time equivalent employees at each schoolsite under their jurisdiction that are eligible for awards under the Governor's Performance Award Program. Schools are to use 50% of the award for one-time bonuses to employees, and the other 50% for any one-time purpose.

The title 5 regulations adopted for the Governor's Performance Award program also applied to the Schoolsite Employees Performance Bonus program until the regulations, as applied to the Schoolsite Employees Performance Bonus, were repealed in January 2002.[106]

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[103] *Medical Bd. of California v. Superior Court, supra,*111 Cal.App.4th 163, 175.

[104] *Kern High School Dist., supra,* 30 Cal.4th 727, 753.

[105] Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

Claimant alleges the following activities as a result of this program:

> (1) When requested by the SPI, to certify the number of full-time equivalent employees for the period requested in the creation of the one-time API Schoolsite Employees Performance Bonus (Stats. 2000, ch. 71, § 40);
>
> (2) For school districts and county offices of education to establish, periodically update and maintain employee records to receive, administer and distribute award moneys to staff as part of the Bonus program *(Ibid)*;
>
> (3) Upon receipt of an award from the Governor's Performance Award Program and the Schoolsite Employees Performance Bonus Award, to consult with the existing school site governance team/school site council to decide the use of the awards and have the distribution plan ratified by the governing board. The Superintendent of Public Instruction shall then apportion an equal amount per full-time equivalent employee to the appropriate school district, county office of education, or charter school for allocation to the schoolsites that have met or exceeded their Academic Performance Index growth target *(Ibid)*.

CDE and Finance state that this program is voluntary and not a state mandate.

Claimant argues that the requirement to certify the number of full-time equivalent employees is mandatory upon the SPI's request. Claimant argues that school districts do not apply for this program, but that the statute requires the SPI to allocate the sums appropriated, so the program is not discretionary.

The test claim statute (Stats. 2000, ch. 71, § 40) states in part:

> (a)(2) *As a condition of receiving funds pursuant to this section*, school districts, county offices of education, and charter schools shall, upon request by the Superintendent of Public Instruction and by November 1, 2000, certify the number of full-time equivalent employees employed… ." [¶]…[¶]
>
> (a)(4) *As a condition of receiving funds pursuant to this section*, a schoolsite shall expend 50 percent of the funds to provide one-time bonuses, to its employees, to be divided equally among all schoolsite employees on a full-time equivalent basis. The other 50 percent may be used at the discretion of the schoolsite for any one-time purpose. [Emphasis added.]

The Schoolsite Employees Performance Bonus program is not mandated by the state. The school district requirements are only imposed "as a condition of receiving funds pursuant to this section." (Stats. 2000, ch. 71, § 40, subd. (a)(2) & (a)(4).) The statute does not state that schools are required to accept the funds, so there is no legal compulsion to participate in the program.

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[106] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

Moreover, there is no practical compulsion to participate in the Schoolsite Employees Performance Bonus program. There are no "certain and severe penalties"[107] for not participating in the program, nor is there "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[108] Performing activities required as a condition of receiving funds does not create a state-mandated program.[109]

Thus, the downstream activities (e.g., administering and distributing award funds and deciding on the use of funds) in this program are also not mandated, in accordance with the reasoning in the *Kern* case. Therefore, the Commission finds that Statutes 2000, chapter 71, section 40 (Schoolsite Employees Performance Bonus Program) is not a state mandate within the meaning of article XIII B, section 6.

Since the title 5 regulations (former Cal.Code Regs., tit. 5, §§ 1031–1033, 1036- 1038)[110] were intended to implement the Schoolsite Employees Performance Bonus Program (among others), the Commission also finds that they are not a state mandate because, as applied to this program, they are downstream of an optional program.

<u>Certification of FTE employees:</u> As originally adopted, section 1033, subdivision (b), of the title 5 regulations stated:

> To participate in the Academic Performance Index Schoolsite Employees Performance Bonus awards school districts, county offices of education, and charter schools shall certify the number of full-time equivalent (FTE) employees employed as of the second principal apportionment of the 1999-2000 school year at each school site under their jurisdiction that are eligible for awards in accordance with Education Code section 52057 (a).[111]

Although this provision appears to be mandatory based on the plain meaning of "shall certify the number of" FTEs, it is not. Rather, this activity is conditional on participation in the Academic Performance Index Schoolsite Employees Performance Bonus awards, which is voluntary.

Based on the Supreme Court's reasoning in *Kern* regarding voluntary participation, and because certification of FTEs is a downstream activity that results from *voluntary* participation in the Schoolsite Employees Performance Bonus awards, the Commission finds that former section 1033, subdivision (b), is not a state mandate within the meaning of article XIII B, section 6.

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[107] *Kern High School Dist., supra,* 30 Cal.4th 727, 751.

[108] *Id.* at p. 731.

[109] *Ibid.*

[110] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[111] This provision in subdivision (b) was adopted by Register 01, No. 5 (Jan. 30, 2001) and repealed by Register 02, No. 2 (Jan. 8, 2002)).

Certificated Staff Performance Incentive Act (Ed. Code, §§ 44650-44654; added by Stats. 1999, ch. 52; Cal. Code Regs., tit. 5, §§ 1031-1032 & 1034 -1038): As indicated above, this act establishes one-time performance awards for teachers and other certificated staff in underachieving schools, where the academic performance of pupils significantly improves beyond the minimum percentage growth target established by the SPI based on the school's API.

Section 44650 establishes the act and the maximum award at $25,000 per full-time equivalent (FTE) employee, subject to annual Budget Act appropriation. Section 44651 describes eligibility for funding. Section 44652 provides for allocation of funds by the SPI to school districts and charter schools. Section 44653 states that after receiving the allocation from the SPI, the governing board shall negotiate individual teacher and other certificated staff salary award amounts with the exclusive representative of the bargaining unit. Section 44654 details how funds are to be classified for purposes of the district's revenue limit, and for purposes of teacher retirement or benefits. Section 44650, subdivision (b), states that the SBE shall establish criteria for determining the eligibility of schools to receive the awards.

The criteria are in the title 5 regulations, which state their intent is to implement the Governor's Performance Award Program and the Certificated Staff Performance Incentive Act (§ 1031). The regulations also specify the general (§ 1032) and specific (§ 1034) eligibility criteria for the awards, describe funding distribution (§ 1035), specify the waiver deadline (§ 1036), and specify that the awards are not considered compensation when calculating retirement benefits (§ 1037), and that the Certificated Staff Performance Incentive program and the Governor's Performance Awards are not subject to the school district or school or indirect or other administrative charges (§1038).[112]

Claimant alleges the following activities associated with the Certificated Staff Performance Incentive Act:

> (1) Establishing, periodically updating and maintaining employee payroll records to receive, administer and distribute the awards as part of the One-time Certificated Staff Performance Incentive Act (§ 44653);
>
> (2) For each school district to complete an application on behalf of its eligible schools to participate in the program, to include (a) the number of eligible schools, (b) certification that the data used in the API calculations is accurate, and (c) a list of certificated staff positions on a full-time equivalent (FTE) basis at each of the eligible schools. After January 8, 2002, the application shall certify the data used in the API calculations is accurate, and report the number of certificated positions on an FTE basis at each of the eligible schools (§ 44651 & Cal.Code Regs., tit. 5, § 1034);
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> (3) When an award is received, for school districts to negotiate with the exclusive representative of the bargaining unit of the teachers and other certificated staff to determine the distribution of funds (§ 44653);

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[112] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

> (4) In the event the governing board and the exclusive representative of teachers and other certificated staff do not reach an agreement regarding the distribution of an award under the program, or if the teachers and other certificated staff are not represented by an exclusive bargaining representative, for districts to calculate and distribute the award amounts as a percentage of base salaries that is determined by formula (§ 44653);
>
> (5) Claimant also pleads the administrative costs to calculate individual salary awards, determine and locate recipients, and to deliver the awards and the cost of compensation-driven benefits incurred as a result of this program, as well as the Governor's High Achieving Schools Program and the API Schoolsite Employees Performance Bonus Program (§ 44654 & Cal.Code Regs., tit. 5, § 1038);

CDE and Finance allege in their comments that this program is not a state mandate because it is voluntary.

Claimant argues that districts have no reasonable alternative to participate, as detailed above. Claimant also disagrees with CDE that salary-driven costs can be recovered through the awards program.

According to the program's eligibility statute: "Any school district or charter school that maintains classes in kindergarten or any of grades 1 to 12, inclusive, *may apply* for funding under this article if it meets the condition of subdivision (b)." [Emphasis added.] Subdivision (b) requires the school's API to be below the 50th percentile relative to other public schools in the state in the prior year, and requires schools to meet other SPI-established criteria (§ 44651, subds. (a) & (b)). These criteria are in the regulations (Cal. Code Regs., tit. 5, §§ 1031-1032 & 1034 -1038).[113]

The Certificated Staff Performance Incentive Act and applicable regulations do not legally compel school districts to participate, since the plain language of section 44651 authorizes but does not require districts to apply for the program. Nor is there any practical compulsion to participate in this program, independent of the program funds at issue.[114] There are no "certain and severe penalties … or other draconian consequences"[115] for not participating in the program.

Therefore, the Commission finds that the Certificated Staff Performance Incentive Act (Ed. Code, §§ 44650-44654) is not a state mandate within the meaning of article XIII B, section 6. The Commission also finds California Code of Regulations, title 5, sections 1031 and 1034-

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[113] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[114] *Kern High School Dist., supra,* 30 Cal.4th 727, 731.

[115] *Id.* at 751.

1038[116] do not impose state mandates for purposes of the Certificated Staff Performance Incentive Act.[117]

Schools in the alternative accountability system that choose the API: Not all schools are required to participate in the API. Section 52052, subdivision (h), as amended by Statutes 2001, chapter 887, states:

> By July 1, 2000, the Superintendent of Public Instruction, with the approval of the State Board of Education, shall develop an alternative accountability system for schools with fewer than 100 test scores contributing to the schools' API scores, and for schools under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, and alternative schools serving high-risk pupils, including continuation highs schools and opportunity schools [formerly "independent study schools"].

The issue is whether schools with fewer than 100 valid test scores, or schools that are under the jurisdiction of the county board of education or a county superintendent of schools, community day schools, alternative schools (including continuation high schools, and opportunity schools or independent study schools) are mandated by the state to participate in the API. The Commission finds that they are not.

As added by Statutes 2001, chapter 887, subdivisions (f)(1), (f)(2) and (g) of section 52052 stated:

> (f)(1) A comprehensive high school, middle school, or elementary school with 11 to 99 valid test scores of pupils who were enrolled in a school within the same school district in the prior fiscal year shall receive an API score with an asterisk that indicates less statistical certainty than API scores based on 100 or more test scores.
>
> (f)(2)A school under the jurisdiction of a county board of education or a county superintendent of schools, a community day school, or an alternative school, including continuation high schools and opportunity schools, may receive an API score if the school has 11 more [sic] or more valid test scores **and the school chooses to receive an API score** for at least three years.[118] [Emphasis added.]

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[116] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[117] The regulations also apply to the API and Governor's Performance Award programs, so the finding here is limited to the regulations as they apply to the Certificated Staff Performance Incentive Act.

[118] Currently, subdivision (f)(2) states: "A school annually shall receive an API score, unless the Superintendent determines than an API determines than an API score would be an invalid measure of the performance of the school for one or more of the following reasons…" The Commission makes no finding on this current version.

> (g) Only schools with 100 or more test scores contributing to the API may be included in the API rankings.

Similarly, the title 5 regulations apply to "schools" defined as "all schools, including charter schools, that receive a ranking on the API including schools participating in the …[II/USP]." (Cal.Code Regs., tit. 5, § 1032, subd. (a).) Subdivision (b) of section 1032 further states:

> For the purposes of these award programs, the API shall be the measure of accountability for all schools, except those that fall under the alternative accountability system, once such a system is adopted by the [SBE] … as required by Education Code section 52052(g). The Superintendent of Public Instruction will develop an alternative accountability system for schools with fewer than 100 valid test scores, schools that fall under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, and alternative schools, including continuation high schools and independent study schools.
>
> Alternative schools **may elect to be part of the API accountability system** for the purposes of awards and interventions pursuant to the API.[119] If the school elects to be part of the API accountability system, the school shall remain in the system for at least three subsequent years.[120] [Emphasis added.]

According to the plain language of section 52052, subdivision (f), and the section 1032, subdivision (b) regulation, as quoted above, schools in the alternative accountability system participate in the API system voluntarily. The statute states that schools under the jurisdiction of a county board of education or county superintendent of schools, or a community day school or an alternative school may receive an API score "if the school has 11 or more valid test scores **and the school chooses to receive an API score** for at least three years."[121] And alternative schools, according to the regulation, may "elect" to be part of the API accountability system.[122]

As the Supreme Court stated: "if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirement related to that program does not constitute a

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[119] This provision originally read: "Once the alternative accountability system required by Education Code section 52052 (g) is adopted by the State Board of Education, alternative schools may elect to be part of the API accountability system for the purposes of awards and interventions pursuant to the API." (Register 00, No. 52 (Dec. 28, 2000).) Although in earlier versions of the regulation, this is choice is contingent on SBE's adoption of an alternative accountability system, the finding is based on the statute (former Ed. Code, § 52052, subd. (f)(2)) which is not contingent.

[120] Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002).

[121] Education Code section 52052, subdivision (f). Emphasis added.

[122] California Code of Regulations, title 5, section 1032, subdivision (b).

reimbursable mandate."[123] In this case, the test claim statutes and regulations expressly state that the API is voluntary as to the following types of schools: schools with fewer than 100 valid test scores, or schools that are under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, or alternative schools, including continuation high schools and opportunity schools and independent study schools. Therefore, based on the plain language of the statute and regulation, there is no legal compulsion for these schools to participate in the API program.

The Supreme Court, in *Kern*, also said that state mandates could be found in cases of practical compulsion, which it described as the statute imposing "certain and severe penalties such as double taxation or other draconian consequences"[124] for not participating in the programs. In another part of the *Kern* opinion, the court described practical compulsion as "a substantial penalty (independent of the program funds at issue) for not complying with the statute."[125]

There is, however, no practical compulsion to participate in the API. Section 52052.2 states that a school with an API score with an asterisk (11-99 valid test scores) may participate in the Governor's Performance Awards Program and the II/USP. But even for schools not eligible for award programs due to lacking an API, there is no evidence of practical compulsion.

Not having an API, or having an invalid API score, is not practical compulsion, even though it excludes the school from some award programs. As in *Kern*, there is no practical compulsion merely because "claimants have found the benefits of various funded programs 'too good to refuse' –even though, as a condition of program participation, they have been forced to incur some costs."[126] In short, there is no practical compulsion to participate in the API if the consequence of not participating is a school's ineligibility for the Governor's Performance Awards and the II/USP that the school finds "too good to refuse."

Because there is no legal or practical compulsion for these specified types of schools to have an API, the Commission finds that the following schools are not mandated by the state to participate in the API system: schools with fewer than 100 valid test scores, or schools that are under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, or alternative schools, including continuation high schools and opportunity schools and independent study schools. For purposes of an API-related activity that is as a state mandate, 'schools' does not include these types of schools.

B. Does Education Code section 52056, subdivision (c), constitute a program within the meaning of article XIII B, section 6?

Discussion is now limited to the following provision that imposes a state mandate on school districts:

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[123] *Kern High School Dist., supra,* 30 Cal.4th 727, 743. Emphasis in original.

[124] *Id.* at p. 751.

[125] *Id.* at p. 731.

[126] *Id.* at p. 731.

- Education Code section 52056, subdivision (c), for the governing board of each school district, after the annual publication of the API and SPI school rankings, to "discuss the results of the annual ranking at the next regularly scheduled meeting." (Stats. 2000, ch. 695.)

In order for this provision to be subject to article XIII B, section 6 of the California Constitution, it must constitute a "program." This means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[127] Only one of these findings is necessary to trigger article XIII B, section 6.[128]

The activity in the API statute is within the purview of public education accountability and improvement, programs that carry out a governmental function of providing a service to the public.[129] Moreover, the statute imposes a unique requirement on school districts. In sum, section 52056, subdivision (c), carries out the governmental function of providing accountability and improvement in public education, and is a law which, to implement state policy, imposes unique requirements on school districts and does not apply generally to all residents and entities in the state. Thus, the Commission finds that Education Code section 52056, subdivision (c), constitutes a program within the meaning of article XIII B, section 6.

Issue 2: Does Education Code section 52056, subdivision (c), impose a new program or higher level of service?

The next issue is whether subdivision (c) of section 52056, i.e., found above to be a state-mandated program, is a new program or higher level of service. To determine this, the test claim statute is compared to the legal requirements in effect immediately before enacting the test claim statute.[130]

Discuss the API (Ed. Code, § 52056, subd. (c)): This provision requires the governing board of each school district, after the annual publication of the API and SPI school rankings, to "discuss the results of the annual ranking at the next regularly scheduled meeting." (As of Stats. 2000, ch. 695.)

This activity is a new program or higher level of service, since prior law did not require this discussion. Nor could it have, given that the API did not exist prior to the test claim statute. Therefore, the Commission finds that the requirement for the school district governing board to discuss the API at its next meeting (Ed. Code, § 52056, subd. (c)) is a new program or higher level of service.

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[127] *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 56.

[128] *Carmel Valley Fire Protection Dist*. (1987) 190 Cal.App.3d 521, 537.

[129] "Education in our society is … a peculiarly governmental function." *Long Beach Unified School District v. State of California, supra,* 225 Cal.App.3d 155, 172.

[130] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

The school districts' discussion of the results of the annual API and SPI rankings is not state-mandated, however, for schools with fewer than 100 valid test scores, or schools in the alternative accountability system that are under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, or alternative schools, including continuation high schools and opportunity schools and independent study schools.

Issue 3: Does Education Code section 52056, subdivision (c), impose costs mandated by the state within the meaning of Government Code sections 17514 and 17556?

The final issue is whether Education Code section 52056, subdivision (c), imposes costs mandated by the state,[131] and whether any statutory exceptions listed in Government Code section 17556 apply to the claim. Government Code section 17514 defines "cost mandated by the state" as follows:

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.

In the test claim,[132] claimant declares that it will incur costs in excess of $200 during 2000-2002 to implement the claim statutes.[133]

Discuss the API (Ed. Code, § 52056, subd. (c)): This provision requires the governing board of each school district, after the annual publication of the API and SPI school rankings, to "discuss the results of the annual ranking at the next regularly scheduled meeting."

Finance, in its November 2007 comments on the draft staff analysis, argues that this discussion of the API by the governing board is already required by Proposition 59. As approved by the voters in November 2004, this ballot initiative added the following to the California Constitution:

> (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

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[131] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[132] Test Claim 01-TC-22, Exhibit 1, Declaration of Diana Halpenny, June 24, 2002.

[133] Government Code section 17564. The current requirement is $1000 in costs.

The ballot materials given to the electorate on Proposition 59 state that: "The measure does not directly require any specific information to be made available to the public. It does, however, create a constitutional right for the public to access government information."[134]

The yardstick by which we measure the application of Proposition 59 to subdivision (c) of section 52056 is Government Code section 17556, subdivision (f), which states that the Commission shall not find costs mandated by the state if, after a hearing, the Commission finds:

> (f) The statute or executive order imposes duties that are necessary to implement, reasonably within the scope of, or expressly included in, a ballot measure approved by the voters in a statewide or local election. This subdivision applies regardless of whether the statute or executive order was enacted or adopted before or after the date on which the ballot measure was approved by the voters.

In *California School Boards Association v. State of California*,[135] the court invalidated the "reasonably within the scope of" language in Government Code section 17556, subdivision (f). In fact, the court used Proposition 59 to illustrate why the "reasonably within the scope of" language is invalid:

> One example suffices to show that the "reasonably within the scope of" language is overly broad. … Any statute that has anything to do with open government is "reasonably within the scope of" Proposition 59. However, it is unlikely that the voters intended to grant carte blanche to the Legislature to impose unlimited, unreimbursable costs on local governments for all duties associated with open government.[136]

Therefore, the issue is whether section 52056's requirement to discuss the API ranking at the next regularly scheduled school board meeting is "necessary to implement or expressly included in" Proposition 59. The Commission finds that it is not.

A requirement to discuss API rankings at a school board meeting is not expressly included in Proposition 59, nor is there any evidence or argument in the record that discussing API rankings is necessary to implement Proposition 59. The requirement to discuss the API rankings at school board meeting was enacted by Statutes 1999-2000 (1st Ex. Sess.), chapter 3, before Proposition 59 was enacted in November 2004. There is no indication in the legislative history of the test claim statute (Ed. Code, § 52056, subd. (c), Stats. 1999-2000 1st Ex. Sess., ch. 3, eff Jun. 25, 1999, Stats. 2000, ch. 695) that it was intended to implement Proposition 59 or any other ballot initiative. Lacking any evidence to the contrary, the Commission finds that the provision

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[134] Ballot Pamphlet, Statewide General Election (Nov. 2, 2004) Proposition 59, analysis by the Legislative Analyst. See: < http://www.lao.ca.gov/ballot/2004/59_11_2004.htm> as of May 11, 2008. The courts frequently look to ballot materials to understand the terms of a measure enacted by the electorate. *Kern High School Dist., supra,*30 Cal.4th 727, 737.

[135] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183.

[136] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1215-1216.

regarding discussion of the API ranking in section 52056 is not "necessary to implement" Proposition 59 or any other ballot initiative.

Based on claimant's declaration accompanying the test claim, the Commission finds that Education Code section 52056, subdivision (c), imposes costs mandated by the state within the meaning of Government Code section 17514, and that no exceptions to reimbursement in Government Code section 17556 apply. (Ed. Code, § 52056, subd. (c), Stats. 1999-2000 1st Ex. Sess., ch. 3, eff Jun. 25, 1999, Stats. 2000, ch. 695.)

CONCLUSION

For the reasons discussed above, the Commission finds, effective June 25, 1999, that Education Code section 52056, subdivision (c), imposes a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for a school district governing board to discuss the results of its annual ranking at the next regularly scheduled meeting following the annual publication of the API and SPI school rankings (Ed. Code § 52056, subd. (c), Stats. 1999-2000 1st Ex. Sess., ch. 3, eff. Jun. 25, 1999, Stats. 2000, ch. 695).

The Commission also finds, however, that districts' discussing the results of the annual API and SPI rankings (in § 52056, subd. (c)) is not a reimbursable mandate for schools with fewer than 100 valid test scores, or schools in the alternative accountability system that are under the jurisdiction of a county board of education or a county superintendent of schools, community day schools, alternative schools, including continuation high schools and opportunity schools and independent study schools. (Ed. Code, § 52052, subd. (f)(1), Stats. 2001, ch. 887 & Cal. Code Regs., tit. 5, § 1032, subd. (b).)

The Commission also finds that participation in the II/USP pursuant to section 52053, subdivisions (d) and (j), do not constitute a reimbursable state mandate because no schools or school districts have participated in the II/USP pursuant to these provisions.

The Commission also finds that all other test claim statutes and regulations do not constitute a reimbursable state-mandated program because they are either voluntary or are downstream of a voluntary activity.