COMMISSION ON STATE MANDATES
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June 1, 2004

Mr. David Scribner
Executive Director
School Mandates Group
3 113 Catalina Island Road
West Sacramento, CA 95691

And Affected State Agencies and Interested Parties (see attached mailing list)

RE: Adopted Statement of Decision
The Stull Act, 98-TC-25
Education Code Sections 44660 – 44665 (formerly Ed. Code §§13485- 13490)
Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4
Denair Unified School District, Claimant

Dear Mr. Scribner:

The Commission on State Mandates adopted the attached Statement of Decision on May 27, 2004. State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office. Following is a description of the responsibilities of all parties and the Commission during the parameters and guidelines phase.

- **Claimant's Submission of Proposed Parameters and Guidelines.** Pursuant to Government Code section 17557 and California Code of Regulations, title 2, sections 1183.1 et seq., the claimant is responsible for submitting proposed parameters and guidelines by **June 28, 2004**. See Government Code section 17557 and California Code of Regulations, title 2, sections 1183.1 et seq. for guidance in preparing and filing a timely submission.
- **Review of Proposed Parameters and Guidelines.** Within ten days of receipt of completed proposed parameters and guidelines, the Cornmission will send copies to the Department of Finance, Office of the State Controller, affected state agencies, and interested parties who are on the enclosed mailing list. All recipients will be given an opportunity to provide written comments or recommendations to the Commission within 15 days of service. The claimant and other interested parties may submit written rebuttals. (See Cal. Code Regs., tit. 2, § 1183.11.)

- **Adoption of Parameters and Guidelines.** After review of the proposed parameters and guidelines and all comments, Commission staff will recommend the adoption of the claimant's proposed parameters and guidelines or adoption of an amended, modified, or supplemented version of the claimant's original submission. (See Cal. Code Regs., tit. 2, § 1183.12.)

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enclosure: Adopted Statement of Decision

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 44660-44665 (Former Ed. Code, §§ 13485-13490); Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4; Filed on July 7, 1999; By Denair Unified School District, Claimant.	No. 98-TC-25 *The Stull Act* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on May 27, 2004)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi 6-1-2004

PAULA HIGASHI, Executive Director Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Education Code Sections 44660-44665 (Former Ed. Code, §§13485-13490); Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4; Filed on July 7, 1999; By Denair Unified School District, Claimant.	No. 98-TC-25 *The Stull Act* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on May 27, 2004)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing on May 27, 2004. David E. Scribner appeared for the claimant, Denair Unified School District. Barbara Taylor appeared for 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 at the hearing by a vote of 4 to 0.

BACKGROUND

This test claim addresses the Stull Act. The Stull Act was originally enacted in 1971 to' establish a uniform system of evaluation and assessment of the performance of "'certificated personnel" within each school district. (Former Ed. Code, §§ 13485-13490.)[1] The Stull Act required the governing board of each school district to develop and adopt specific guidelines to evaluate and assess certificated personnel[2], and to avail itself of the advice of certificated instructional personnel before developing and adopting the guidelines.[3] The evaluation and assessment of the certificated personnel was required to be reduced to writing and a copy transmitted to the employee no later than sixty days before the end of the school year.[4] The employee then had the right to initiate a written response to the evaluation, which became a permanent part of the

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Statutes 197 1, chapter 36 1.

[2] Former Education Code section 13487.

[3] Former Education Code section 13486.

[4] Former Education Code section 13488.

employee's personnel file.[5] The school district was also required to hold a meeting with the employee to discuss the evaluation.[6]

Former Education Code section 13489 required that the evaluation and assessment be continuous. For probationary employees, the evaluation had to occur once each school year. For permanent employees, the evaluation was required every other year. Former section 13489 also required that the evaluation include recommendations, if necessary, for areas of improvement in the performance of the employee. If the employee was not performing his or her duties in a satisfactory manner according to the standards, the "employing authority"[7] was required to notify the employee in writing, describe the unsatisfactory performance, and confer with the employee making specific recommendations as to areas of improvement and endeavor to assist in the improvement.

In 1976, the Legislature renumbered the provisions of the Stull Act. The Stull Act can now be found in Education Code sections 44660-44665 .[8]

The test claim legislation, enacted between 1975 and 1999, amended the Stull Act. The claimant alleges that the amendments constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the Califomia Constitution.'

In addition, the claimant, a school district, alleges that compliance with the Stull Act is new as to county offices of education and, thus, counties are entitled to reimbursement for all activities under the Stull Act, [10]

However, no county office of education has appeared in this action as a claimant, nor filed a declaration alleging mandated costs exceeding $1000, as expressly required by Government Code section 17564 and section 1183 of the Commission's regulations,

Therefore, the test claim has not been perfected as to county offices of education. The findings in this analysis, therefore, are limited to school districts.

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[5] *Ibid.*

[6] *Ibid.*

[7] Former Education Code section 13490 defined "employing authority" as "the superintendent of the school district in which the employee is employed, or his designee, or in the case of a district which has no superintendent, a school principal or other person designated by the governing board."

[8] Statutes 1976, chapter 1010.

[9] In 1999, the Legislature added Education Code section 44661 .5 to the Stull Act. (Stats. 1999, ch. 279.) Education Code section 44661.5 authorizes a school district to include objective standards from the National Board for Professional Teaching Standards or any objective standards from the California Standards for the Teaching Profession when developing evaluation and assessment guidelines, The claimant did not include Education Code section 4466 1.5 in this test claim.

[10] Exhibit A (Test Claim, pages 7-9) to Item 9 of the May 27, 2004 Commission Hearing.

Claimant's Position

The claimant contends that the test claim legislation constitutes a reimbursable state-mandated program for the following "new" activities:

- Rewrite standards for employee assessment to reflect expected student "achievement" (as opposed to the prior requirement of expected student "progress") and to expand the standards to reflect expected student achievement at each "grade level." (Stats. 1975, ch. 1216.)
- Develop job responsibilities for certificated non-instructional personnel, including but not limited to, supervisory and administrative personnel. (Stats. 1975, ch. 1216.)
- Assess and evaluate non-instructional personnel. (Stats. 1975, ch. 1216; Stats. 1995, ch. 392.)
- Receive and review responses from certificated non-instructional personnel regarding the employee's evaluation. (Stats. 1986, ch. 393.)
- Conduct a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment. (Stats. 1986, ch. 393.)
- Conduct additional evaluations of certificated employees who receive an unsatisfactory evaluation. (Stats. 1983; ch. 498.)
- Review the results of a certificated instructional employee's participation in the Peer Assistance and Review Program for Teachers as part of the assessment and evaluation. (Stats. 1999, ch. 4.)
- Assess and evaluate the performance of certificated instructional personnel as it relates to the instructional techniques and strategies used and the employee's adherence to curricular objectives. (Stats. 1983, ch. 498.)
- Assess and evaluate certificated instructional personnel as it relates to the progress of pupils towards the state adopted academic content standards, if applicable, as measured by state adopted criterion referenced assessments. (Stats. 1999, ch. 4.)
- Assess and evaluate certificated personnel employed by county superintendents of education. (Stats. 1975, ch. 1216.)"

Department of Finance's Position

The Department of Finance filed comments on March 6, 2001, contending that most of the activities requested by the claimant do not constitute reimbursable state-mandated activities. The Department of Finance states, however, that the following activities "may" be reimbursable:

- Assess and evaluate the performance of certificated instructional personnel as it relates to the progress of students toward the attainment of state academic standards, as measured by state-adopted assessments.

[11] Exhibit A (Test Claim) to Item 9 of the May 27, 2004 Commission Hearing.

- Modification of assessment and evaluation methods to determine whether instructional staff is adhering to the curricular objectives and instructional techniques and strategies associated with the updated state academic standards.
- Assess and evaluate permanent certificated staff that has received an unsatisfactory evaluation at least once each year, until the employee receives a satisfactory evaluation, or is separated from the school district.
- Implementation of the Stull Act by county offices of education.[12]

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[13] recognizes the state constitutional restrictions on the powers of local government to tax and spend.'" "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."[15] 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.'" 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.[17]

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[12] Exhibit B to Item 9 of the May 27, 2004 Commission Hearing.

[13] Article XIII B, section 6 provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[14] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 735.

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

[16] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174. In *Department of Finance v. Commission on State Mandates, supra*, 30 Cal.4th at page 742, the court agreed that "activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds - even if the local entity is obligated to incur costs as a result of its discretionary decision to participate in a particular program or practice." The court left open the question of whether non-legal compulsion could result in a reimbursable state mandate, such as in a case where failure to participate in a program results in severe penalties or "draconian" consequences. *(Id.*, at p. 754.)

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

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 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.[18] 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.[19] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[20]

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.[21] In malting 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."[22]

Issue 1: Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

Certain statutes in the test claim legislation do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6.

In order for a statute to be subject to article XIII B, section 6 of the California Constitution, the statutory language must require local agencies or school districts to perform an activity or task. If the statutory language does not mandate local agencies or school districts to perform a task, then compliance with the test claim statute is within the discretion of the local entity and a reimbursable state-mandated program does not exist.

Here, there are two test claim statutes, Education Code section 44664, subdivision (b) (as amended by Stats. 1983, ch, 498 and Stats. 1999, ch. 4) and Education Code section 44662, subdivision (d) (as amended by Stats. 1999, ch. 4) that do not require school districts to perform activities and, thus, are not subject to article XIII B, section 6 of the California Constitution.

Education Code section 44664, subdivision (b), as amended by Statutes 1983, chapter 498. In 1983, the Legislature amended Education Code section 44664 by adding subdivision (b). Subdivision (b) authorizes a school district to require a certificated employee that receives an

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[18] *County of Los Angeles v. State of California (1987) 43* Cal.3d *46, 56; Lucia Mar, supra, 44* Cal.3d 830, 835.

[19] *Lucia Mar, supra*, 44 Cal.3d 830, 835,

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

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

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

unsatisfactory evaluation to participate in a program to improve the employee's performance. Education Code section 44664, subdivision (b), stated the following:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction ***may*** include the requirement that the certificated employee shall, as detennined by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. (Emphasis added.)

The plain language of the statute authorizes, but does not mandate, a school district to require its certificated employees to participate in a program designed to improve performance if the employee receives an unsatisfactory evaluation. Thus, the Commission finds that Education Code section 44664, subdivision (b), as amended by Statutes 1983, chapter 498, does not mandate school districts to perfonn an activity and, thus, it is not subject to article XIII B, section 6 of the California Constitution.

Education Code section 44662, subdivision (d), and Education Code section 44664, subdivision (b), as amended by Statutes 1999, chapter 4. In 1999, the Legislature amended Education Code section 44664, subdivision (b), by adding the following underlined sentence:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. If district participates in the Peer Assistance and Review Program for Teachers established pursuant to Article 4.5 (commencing with Section 44500), any certificated employee who receives an unsatisfactory rating on an evaluation performed pursuant to this section shall participate in the Peer Assistance and Review Program for Teachers.

The 1999 test claim legislation also amended Education Code section 44662 by adding subdivision (d), which states:

> Results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with Section 44500) shall be made available as part of the evaluation conducted pursuant to this section.

The claimant requests reimbursement to "receive and review, for purposes of a certificated employee's assessment and evaluation, if applicable, the results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with section 44500.)"[23]

[23] Exhibit A (Test Claim, page 7) to Item 9 of the May 27, 2004 Commission Hearing.

The Department of Finance contends that reviewing the results of the Peer Assistance and Review Program, as part of the Stull Act evaluation of the employee's performance, is not a reimbursable state-mandated activity because participation in the Peer Assistance and Review Program is voluntary.[24]

In response to the Department of Finance, the claimant states the following:

> The legislative intent behind the amendments to the Stull Act was to ensure that school districts adopt objective, uniform evaluation and assessment guidelines that effectively assess certificated employee performance. To meet this desired goal, school districts that participate in the Peer Assistance and Review Program must include an employee's results of participation in the employee's evaluation. If this information was not considered by the district, inconsistent, incomplete, and inaccurate evaluations and assessments would occur – a result contrary to the Legislature's stated intent. Therefore, the claimant contends that the activities associated with the receipt and review of an employee's participation in the Peer Assistance and Review Program impose reimbursable state-mandated activities upon school districts.[25]

For the reasons described below, the Commission finds that the receipt and review of the results of an employee's participation in the Peer Assistance and Review Program is not a state-mandated activity and, therefore, the 1999 amendments to Education Code sections 44662 and 44664 are not subject to article XIII B, section 6 of the California Constitution.

In *Department of Finance v. Commission on State Mandates*[26], the Supreme **Court** reviewed test claim legislation that required school site councils to post a notice and an agenda of their meetings. The court detennined that school districts were not legally compelled to establish eight of the nine school site councils and, thus, school districts were not mandated by the state to comply with the notice and agenda requirements for these school site councils.[27] The court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[28] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders." [29]

The court also reviewed and affirmed the holding of the *City of Merced* case.[30, 31] The court stated the following:

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[24] Exhibit B to Item 9 of the May 27, 2004 Commission Hearing.

[25] Exhibit C (Claimant Rebuttal, page 7) to Item 9 of the May 27, 2004 Commission Hearing.

[26] *Department of Finance, supra*, *20* Cal.4th 727.

[27] Id. at page 73 1.

[28] *Id.* at page 737,

[29] *Ibid.*

[30] *Id.* at page 743.

[31] *City of Merced v. State of California (1984)* 153 Cal.App.3d 777.

> In City *of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, 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 requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[32]

Thus, the Supreme **Court** held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary* or *compelled.* [Emphasis added.][33]

The Supreme Court left undecided whether a reimbursable state mandate "might be found in circumstances short of legal compulsion-for example, if the state were to impose a substantial penalty (independent of the program funds at issue) upon any local entity that declined to participate in a given program."[34]

The decision of the California Supreme Court in *Department* of *Finance* is relevant and its reasoning applies in this case. The Supreme Court explained that ""the proper focus under a legal compulsion inquiry is upon the nature of the claimants' participation in the underlying programs themselves. "[35] Thus, based on the Supreme Court's decision, the Commission is required to determine if the underlying program (in this case, participation in the Peer Assistance and Review Program) is a voluntary decision at the local level or is legally compelled by the state.

The Peer Assistance and Review Program and the amendment to the Stull Act to reflect the Peer Assistance and Review Program were sponsored by Governor Davis and were enacted by the Legislature during the 1999 special legislative session on education. As expressly provided in the legislation, the intent of the Legislature, in part, was to coordinate the Peer Assistance and Review Program with the evaluations of certificated employees under the Stull Act. Section 1 of the 1999 test claim legislation states the following:

> It is the intent of the Legislature to establish a teacher peer assistance and review system as a critical feedback mechanism that allows exemplary teachers to assist

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[32] *Ibid.*

[33] *Id.* at page 73 1.

[34] *Ibid.*

[35] *Id.* at page 743.

> veteran teachers in need of development in subject matter knowledge or teaching strategies, or both.
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> It is further the intent of the Legislature that a school district that operates a program pursuant to Article 4.5 (commencing with Section 44500) of Chapter 3 of Part 25 of the Education Code coordinate its employment policies and procedures for that program with its activities for professional staff development, the Beginning Teacher Support and Assessment Program, and the biennial evaluations of certificated employees required pursuant to Section 44664 [of the Stull Act].

The plain language of Education Code section 44500, subdivision (a), authorizes, but does nbt require, school districts to participate in the Peer Assistance and Review Program. That section states in pertinent part that "[t]he governing board of a school district and the exclusive representative of the certificated employees in the school district *may* develop, and implement a program authorized by this article that meets local conditions and conforms with the principles set forth in subdivision (b)." (Emphasis added.) If a school district implements the program, the program must assist a teacher to improve his or her teaching skills and knowledge, and provide that the final evaluation of a teacher's participation in the program be made available for placement in the personnel file of the teacher receiving assistance. (Ed. Code, § 44500, subd. (b).) Furthermore, school districts that participate in the Peer Assistance and Review Program receive state funding pursuant to Education Code sections 44505 and 44506.

Therefore, the Commission finds that school districts are not legally compelled to participate in the Peer Assistance and Review Program and, thus, not legally compelled to receive and review the results of the program as part of the Stull Act evaluation.

The Commission further finds that school districts are not practically compelled to participate in the Peer Assistance and Review Program and review the results as part of the Stull Act evaluation. In *Department* of *Fincznce,* the California Supreme Court, when considering the practical compulsion argument raised by the school districts, reviewed its earlier decision in *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.[36] The *City of Sacramento* case involved test claim legislation that extended mandatory coverage under the state's unemployment insurance law to include state and local governments and nonprofit corporations. The state legislation was enacted to conform to a 1976 amendment to the Federal Unemployment Tax Act, which required for the first time that a "certified" state plan include unemployment coverage of employees of public agencies. States that did not comply with the federal amendment faced a loss of a federal tax credit and an administrative subsidy?' The local agencies, knowing that federally mandated costs are not eligible for state subvention, argued against a federal mandate. The local agencies contended that article XIII B, section 9 requires clear legal compulsion not present in the Federal Unemployment Tax Act.[38] The state, on the other hand, contended that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic "discretion" to refuse. **Thus,** the state

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[36] *Department of Finance, supra*, 30 Cal.4th at pages 749-751.

[37] *City of Sacramento, supra*, 50 Cal.3d at pages 57-58.

[38] *Id.* at page 71.

contended that the test claim statute merely implemented a federal mandate and that article XIII B, section 6 does not require strict legal compulsion to apply.[39]

The Supreme Court in *City of Sacramento* concluded that although local agencies were not strictly compelled to comply with the test claim legislation, the legislation constituted a federal mandate. The Supreme Court concluded that because the financial consequences to the state and its residents for failing to participate in the federal plan were so onerous and punitive, and the consequences amounted to "certain and severe federal penalties" including "double taxation" and other "draconian" measures, the state was mandated by federal law to participate in the plan.[40]

The Supreme Court applied the same analysis in the *Department of Finance* case and found that the practical compulsion finding for a state mandate requires a showing of "certain and severe penalties" such as "double taxation" and other "draconian" consequences, The **Court** stated the following:

> Even assuming, for purposes of analysis only, that our construction of the term ""federal mandate" in *City of Sacramento* [citation omitted], applies equally in the context of article XIII B, section 6, for reasons set below we conclude that, contrary to the situation we described in that case, claimants here have not faced "certain and severe . . . penalties" such as "double . . . taxation" and other ""draconian" consequences . . .[41]

Although there are statutory consequences for not participating in the Peer Assistance and Review Program, the Commission finds, as explained below, that the consequences do not constitute the type of draconian penalties described in the *Department of Finance* case.

Pursuant to Education Code section 44504, subdivision (b), school districts that do not participate in the Peer Assistance and Review Program are not eligible to receive state funding for specified programs. Education Code section 44504, subdivision (b), states the following:

> A school district that does not elect to participate in the program authorized under this article by July 1, 2001, is not eligible for any apportionment, allocation, or other funding from an appropriation for the program authorized pursuant to this article or for any apportionments, allocations, or other funding from funding for local assistance appropriated pursuant to the Budget Act Item 6 11 O-23 l-0001, funding appropriated for the Administrator Training and Evaluation Program set forth in Article 3 (commencing with Section 4468 1) of Chapter 3.1 of Part 25, from an appropriation for the Instructional Time and Staff Development Reform Program as set forth in Article 7.5 (commencing with Section 44579) of Chapter 3, or from an appropriation for school development plans as set forth in Article 1 (commencing with Section 44670.1) of Chapter 3.1 and the Superintendent of Public Instruction shall not apportion, allocate, or otherwise provide any funds to the district pursuant to those programs.

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[39] *Ibid.*

[40] *Id.* at pages 73-76.

[41] *Department of Finance, supra*, 30 Cal.4th at page 75 1.

The funding appropriated under the programs specified in Education Code section 44504, subdivision (b), are not state-mandated programs. Most are categorical programs undertaken at the discretion of the school district in order to receive grant funds. For example, the funding appropriated pursuant to the Budget Act Item 611 O-23 l-0001 is local assistance funding to school districts "for the purpose of the Proposition 98 educational programs specified in subdivision (b) of Section 12.40 of this act." (Stats. 1999, ch. 50, State Budget Act.) The education programs specified in subdivision (b) of Section 12.40 of the 1999 State Budget Act include the Tenth Grade Counseling Program, the Reader Service for Blind Teacher Program, and the Home to School Transportation Program. (A full list of the educational programs identified in section 12.40 of the 1999 State Budget Act is provided in the footnote below.)"[42]

The same is true for the other programs identified in Education Code section 44504, subdivision (b), all of which are voluntary: i.e., the Administrator Training and Evaluation Program, the Instructional Time and Staff Development Reform Program, and the School Development Plans Program.

Accordingly, the Commission finds that the 1999 amendment to Education Code sections 44662, subdivision (d), and 44664, subdivision (b), does not impose a mandate on school districts to receive and review the results of the Peer Assistance and Review Program as part of the Stull Act

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[42] Section 12.40 of the 1999 State Budget Act identifies the following programs: Item 6 1 10-108-000 1 – Tenth Grade Counseling (Ed. Code, § 4843 1.7); Item 6 1 10-11 0-000 1 – Reader Service for Blind Teachers (Ed. Code, §§ 45371, 44925); Item 6110-l 1 l-0001 – Home to School Transportation and Small District Transportation (Ed. Code, § 41850, 42290); Item 6 1 10-116-0001 – School Improvement Program (Ed. Code, § 52000 et seq.); Item 6110-l 18-0001 – State Vocational Education (in lieu of funds otherwise appropriated pursuant to Business and Professions Code section 19632); Item 611 O-l 19-0001 – Educational Services for Foster Youth (Ed. Code, § 42920 et seq.); Item 6 1 10-120-000 1 – Pupil Dropout Prevention Programs (Ed. Code, §§ 52890, 52900, 54720, 58550); Item 6110-122-0001 – Specialized Secondary Programs (Ed. Code, § 58800 et seq.); Item 6110-124-0001 – Gifted and Talented Pupil Program (Ed. Code, § 52200 et seq.); Item 6 11 O-l 26-0001 – Miller-Unruh Basic Reading Act of 1965 (Ed. Code, § 54100 et seq.); Item 6 11 O-127-0001 Opportunity Classes and Programs (Ed. Code, § 48643 et seq.); Item 6 11 O-128-0001 – Economic Impact Aid (Ed. Code, §§ 54020, 5403 1, 54033, 54040); Item 6 1 10-13 l-0001 – American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); Item 6 110-146-0001 – Demonstration Programs in Intensive Instruction (Ed. Code, § 5 8600 et seq.); Item 61 10-15 l-0001 – California Indian Education Centers (Ed. Code, § 33380); Item 6110-163-0001 – The Early Intervention for School Success Program (Ed. Code, § 54685 et seq.); Item 6 110-l 67-0001 – Agricultural Vocational Education Incentive Program (Ed. Code, § 52460 et seq.); Item 611 O-l 80-0001 grant money pursuant to the federal Technology Literacy Challenge Grant Program; Item 6 11 0-18 l-0001 – Educational Technology Programs (Ed. Code, § 5 1870 et seq.); Item 6110-l 93-0001 – Administrator Training and Evaluation Program, School Development Plans and Resource Consortia, Bilingual Teacher Training Program; Item 6 1 10-197-000 1 – Instructional Support-Improving School Effectiveness – Intersegmental Programs; Item 611 O-203-000 1 – Child Nutrition Programs (Ed. Code, §§ 41311, 49536, 49501, 49550, 49552, 49559); Item 6110-204-0001 – 7th and 8th Grad Math Academies; and Item 6110-209-0001 – Teacher Dismissal Apportionments (Ed. Code, § 44944).

evaluation and, thus, these sections are not subject to article XIII B, section 6 of the California Constitution,

The remaining requirements imposed by the test claim legislation constitute a state-mandated program only for those certificated employees that perform the duties mandated by state and federal law.

The remaining test claim legislation requires school districts, in their evaluation of certificated personnel, to perfonn the following activities:

- assess and evaluate the performance of non-instructional certificated personnel (former Ed. Code, §§ 13485, 13487, as amended by Stats. 1975, ch. 1216; Ed. Code, § 44663, as amended by Stats. 1986, ch. 393);
- establish standards of expected student achievement at each grade level in each area of study to be included in a district's evaluation and assessment guidelines (former Ed. Code, § 13487, as repealed and reenacted by Stats. 1975, ch, 1216);
- evaluate and assess the performance of instructional certificated employees as it reasonably relates to the instructional techniques and strategies used by certificated employees, the certificated employee's adherence to curricular objectives, and the progress of pupils towards the state adopted academic content standards (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498 and Stats. 1999, ch. 4); and
- assess and evaluate certificated personnel that receive an unsatisfactory evaluation once each year until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

Pursuant to the Supreme Court's decision in the *Department of Finance* case, the Commission finds that the evaluation and assessment activities required by the test claim legislation constitute state-mandated activities only for those certificated employees that perform the duties mandated by state or federal law. The activities associated with evaluating and assessing certificated personnel employed in local, discretionary educational programs do not constitute state-mandated activities and, thus, are not subject to article XIII B, section 6 of the California Constitution.

In *Department of Finance*, *supra*, the Court found, on page 73 1 of the decision, that:

> [*W*]*e reject claimants' assertion that they have been legally compelled to incur* notice and agenda *costs,* and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related program in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary* or *compelled.* [Emphasis added.]

In the present case, the California Constitution gives the Legislature plenary authority over education by requiring the Legislature to encourage by all suitable means the promotion of education and to provide for a system of common schools.[43] A system of common schools

[43] California Constitution, article IX, sections 1, 5; *Hayes* v. *Commission on State Mandates* (1992) 11 Cal. App.4th 1564, 1579, fn. 5.

means one system, which prescribes the courses of study and educational progression from grade to grade. [44] Schools are required to meet the minimum standards and guidelines regarding course instruction and educational progression established by the Legislature.[45]

Given this background, the Legislature has historically mandated specified educational programs that school districts are required to follow. For example, Education Code section 48200 provides that each person between the ages of six and 18 years is subject to compulsory full-time education. School districts are required to adopt a course of study for grades 1 to 6 that shall include English, Mathematics, Social Sciences, Science, Visual and Performing Arts, Health, and Physical Education.[46] School districts are required to offer the following courses for grades 7 to 12: English, Social Sciences, Foreign Language, Physical Education, Science, Mathematics, Visual and Performing Arts, Career Technical Education; and Driver Education.[47] Education Code section 5 1225.3 describes the state-mandated courses of instruction required for high school graduation. In addition, in the appropriate elementary and secondary grade levels, the required course of study shall include instruction in personal and public safety and accident prevention (Ed. Code, § 5 1202), instruction about the nature and effects of alcohol, narcotics, and restricted dangerous drugs (Ed. Code, § 5 1203), and, in grades 7 and 8, instruction on parenting skills and education (Ed. Code, 51220.5). Finally, Education Code section 44805 states that "every teacher in the public schools shall enforce the course of study . . . prescribed for schools."

In addition, federal law requires school districts to provide a free and appropriate education to all handicapped children.[48]

Thus, school districts are required to employ certificated personnel to fulfill the requirements of the state and federal mandated educational programs. Accordingly, pursuant to the *Department* of *Finance* case, school districts are mandated by the state to perform the test claim requirements to evaluate and assess the certificated personnel performing the mandated functions.

Moreover, the Commission finds that the test claim requirements to evaluate and assess the certificated personnel performing mandated functions constitutes a program subject to article XIII B, section 6 of the California Constitution. The California Supreme **Court,** in the case of *County of Los Angeles v. State of California*[49], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a

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[44] *Wilson v. State Board of Education* (1999) 75 Cal.App.4th 1123, 1135-l 136. In *Wilson,* the court determined that charter schools fall within the system of common schools because their educational programs are required to meet the same state standards, including minimum duration of instruction applicable to all public schools, measurement of student progress by the same assessments required of all public school students, and students are taught by teachers meeting the same minimum requirements as all other public school teachers. (*Id.* at p. 1138.)

[45] *Burton v. Pasadena City Board of Education* (1977) 71 Cal.App.3d 52, 58.

[46] Education Code section 5 12 10.

[47] Education Code section 5 1220.

[48] *Hayes, supra,* 11 Cal.App.4th at page 1592.

[49] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

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. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[50]

Legislative intent of the test claim legislation is provided in Education Code section 44660 as follows:

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines, which may, at the discretion of the governing board, be uniform throughout the district, or for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.[51]

The Commission finds that objectively evaluating the performance of certificated personnel performing mandated functions within a school district carries out the governmental function of providing a service to the public. Public education is a governmental function within the meaning of article XIII B, section 6. The California Supreme Court in *Lucia Mar* stated that "the contributions called for [in the test claim legislation] are used to fund a 'program' . . . for the education of handicapped children is clearly a governmental function providing a service to the public. "[52] Additionally, the court in the *Long Bench Unified School District* case held that "although numerous private schools exist, education in our society is considered to be a peculiarly governmental function. "[53] In addition, the test claim legislation imposes unique requirements on school districts.

However, the activities associated with evaluating and assessing certificated personnel employed in local, discretionary educational programs do not constitute state-mandated activities and, thus, are not subject to article XIII B, section 6 of the California Constitution. Pursuant to existing law, school districts are encouraged to develop their own local programs that best fit the needs and interests of the pupils. Unless the Legislature expressly imposes statutory requirements on school districts, school districts have discretionary control with their educational programs?[54]

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[50] *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d at page 537.

[51] As originally enacted, former Education Code section 13485 stated the legislative intent as follows: "It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the performance of certifkated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines."

[52] *Lucia Mar, supra*, 44 Cal.3d at page 835.

[53] *Long Bench Unified School District, supra, 225* Cal.App.3d at page 172.

[54] California Constitution, article IX, section 14; Education Code sections 35 160, 35 160.1, 51002.

For example, the Supreme Court in the *Department of Finance* case found that eight of the nine educational programs were voluntary and not mandated by the state. These include the Following programs: School Improvement Program (Ed. Code, § 52010 et seq.); American Indian Early Childhood Education Program (Ed. Code, § 52060 et seq.); School-Based. Coordinated Categorical Program (Ed. Code, § 52850 et seq.); Compensatory Education Programs (Ed. Code, § 54420 et seq.); Migrant Education Program (Ed. Code, § 54440 et seq.); Motivation and Maintenance Program (Ed. Code, § 54720 et seq.); Parental Involvement Program (Ed. Code, § 11500 et seq.); and Federal Indian Education Program (25 U.S.C, § 2604).[55]

The Commission finds that school districts are free to discontinue their participation in these underlying voluntary programs and free to discontinue employing certificated personnel funded by these programs, Accordingly, the test claim requirements to evaluate and assess certificated personnel funded or employed in local discretionary programs are not mandated by the state and not subject to article XIII B, section 6 of the California Constitution?

Since the parties did not file comments in response to the request for additional briefing on this issue, the determination of the certificated employees performing mandated functions for which schools districts are eligible to receive reimbursement will be addressed during the parameters and guidelines phase.

Issue 2: **Does the test claim legislation impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution?**

The California Supreme Court and the courts of appeal have held that article XIII B, section 6 was not intended to entitle local agencies and school districts for all costs resulting from legislative enactments, but only those costs mandated by a new program or higher level of service imposed on them by the state. [57] Generally, to determine if.the program is new or imposes a higher level of service, the analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation?

As indicated above, the Stull Act was enacted in 1971. The test claim legislation, enacted from 1975 to 1999, amended the Stull Act. The issue is whether the amendments constitute a new program or higher level of service within the meaning of article XIII B, section 6 of the Californi a Constitution.

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[55] *Department of Finance, supra*, 30 Cal.4th at page 745.

[56] The court did not conclude whether school districts were legally compelled to participate in the Bilingual-Bicultural Education program (Ed. Code, § 52160 et seq.) since the case was denied on other grounds. *(Department of Finance, supra*, 30 Cal.4th at p. 746-747.)

[57] *Lucia Mar Unified School Dist., supra, 44* Cal.3d at page 834; *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 18 16.

[58] *Lucia Mar Unified School Dist., supra*, 44 Cal.3d at page 835.

Develop job responsibilities for certificated non-instructional personnel, and assess and evaluate the perfomance of certificated non-instructional personnel (Former Ed. Code, §§ 13485, 13487, as amended by Stats, 1975, ch. 1216; Ed. Code, § 44663, as amended by Stats. 1986, ch. 393).

The claimant is requesting reimbursement for the following activities relating to certificated non-instructional employees:

- Establish and define job responsibilities for certificated non-instructional personnel, including, but not limited to, supervisory and administrative personnel.
- Evaluate and assess the perfomance of certificated non-instructional personnel as it reasonably relates to the fulfillment of the established job responsibilities.
- Prepare and draft a written evaluation of the certificated non-instructional employee. The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a certificated non-instructional employee written responses regarding the evaluation.
- Prepare and hold a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment.[59]

As originally enacted in 1971, the Stull Act stated in former Education Code section 13485 the following:

> It is the intent of the Legislature to establish a uniform system of evaluation and assessment of the perfomance of certificated personnel within each school district of the state. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines.

Fomer Education Code section 13486 stated the following:

> In the development and adoption of these guidelines and procedures, the governing board shall avail itself of the advice of the certificated instructional personnel in the district's organization of certificated personnel.

Former Education Code section 13487 required school districts to develop and adopt specific evaluation and assessment guidelines for certificated personnel. Fomer section 13487 stated the following:

> The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:
>
> (a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.
>
> (b) Assessment of certificated personnel as it relates to the established standards.
>
> (c) Assessment of other duties normally required to be performed by certificated employees as an adjunct to their regular assignments.

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[59] Exhibit A (Test Claim, page 6) to Item 9 of the May 27, 2004 Commission Hearing.

(d) The establishment of procedures and techniques for ascertaining that the certificated employee is maintaining proper control and is preserving a suitable learning environment.

Former Education Code section 13488 required that the evaluation and assessment be reduced to writing, that an opportunity to respond be given to the certificated employee, and that a meeting be held between the certificated employee and the evaluator to discuss the evaluation. Former section 13488 stated the following:

> Evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee not later than 60 days before the end of each school year in which the evaluation takes place. The certificated employee shall have the right to initiate a written reaction or response to the evaluation. Such response shall become a permanent attachment to the employee's personnel file. Before the end of the school year, a meeting shall be held between the certificated personnel and the evaluator to discuss the evaluation.

And, former Education Code section 13489 required that the evaluation and assessment be performed on a continuing basis, and that the evaluation include necessary recommendations as to areas of improvement. Former Education Code section 13489, as enacted in 1971, stated the following:

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and at least every other year for personnel with permanent status. The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe such unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance.

In addition, section 42 of the 1971 statute provided a specific exemption for certificated employees of community colleges if a related bill was enacted. Section 42 stated the following:

> Article 5 (commencing with Section 13401) and Article 5.5 (commencing with Section 13485) of Chapter 2 of Division 10 of the Education Code shall not apply to certificated employees in community colleges if Senate Bill No. 696 or Assembly Bill No. 3032 is enacted at the 197 1 Regular Session of the Legislature,

According to the history, Senate Bill 696 was enacted as Statutes 1971, chapter 1654. Thus, certificated employees of community colleges were not required to comply with the Stull Act.

In 1972, former Education Code section 13485 was amended to specifically exclude from the requirements of the Stull Act certificated personnel employed on an hourly basis in adult education classes.[60]

In 1973, fonner Education Code section 13489 was amended to exclude hourly and temporary certificated employees and substitute teachers, at the discretion of the governing board, from the requirement to evaluate and assess on a continuing basis."

Thus, under prior law, school districts were required to perform the following activities as they related to "certificated personnel:"

- Develop and adopt specific evaluation and assessment guidelines for the performance of "certificated personnel."
- Evaluate and assess "certificated personnel" as it relates to the established standards.
- Prepare and draft a written evaluation of the "certificated employee." The evaluation shall include recommendations, if necessary, as to areas of improvement.
- Receive and review from a "certificated employee" written responses regarding the evaluation.
- Prepare and hold a meeting between the "certificated employee" and the evaluator to discuss the evaluation and assessment.

The test claim legislation, in 1975 (Stats. 1975, ch. 1216), amended the Stull Act by adding language relating to certificated "non-instructional" employees. As amended, former Education Code section 13485 stated in relevant part the following (with the amended language underlined) :

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state . . . .

Former Education Code section 13487 was also repealed and reenacted by Statutes 1975, chapter 12 16, as follows (amendments relevant to this issue are underlined):

> (a) The governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study.
>
> (b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

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[60] Statutes 1972, chapter 535.

[61] Statutes 1972, chapter 1973.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of **such** noninstructional employees as it reasonably relates to the fulfillment of those responsibilities. . . .

The 1975 test claim legislation did not amend the requirements in former Education Code sections 13488 or 13489 to prepare written evaluations of certificated employees, receive responses to those evaluations, and conduct a meeting with the certificated employee to discuss the evaluation,

Additionally, in 1986, the test claim legislation (Stats. 1986, ch. 393) amended Education Code section 44663 (which derived from former Ed. Code, § 13488) by adding subdivision (b) to provide that the evaluation and assessment of certificated non-instructional employees shall be reduced to writing before June 30 of the year that the evaluation is made, that an opportunity to respond be given to the certificated non-instructional employee, and that a meeting be held between the certificated non-instructional employee and the evaluator to discuss the evaluation before July 30. Education Code section 44663, subdivision (b), as added by the test claim legislation, states the following:

> In the case of a certificated noninstructional employee, who is employed on a 12-month basis, the evaluation and assessment made pursuant to this article shall be reduced to writing and a copy thereof shall be transmitted to the certificated employee no later than June 30 of the year in which the evaluation and assessment is made. A certificated noninstructional employee, who is employed on a 12-month basis shall have the right to initiate a written reaction or response to the evaluation. This response shall become a permanent attachment to the employee's personnel file. Before July 30 of the year in which the evaluation and assessment take place, a meeting shall be held between the certificated employee and the evaluator to discuss the evaluation and assessment.

The claimant contends that the Stull Act, as originally enacted in 1971, required the assessment and evaluation of teachers, or certificated instructional employees, only. The claimant argues that when the Stull Act was amended in 1975 and 1986, it added the requirement for schools districts to develop job responsibilities to assess and evaluate the performance of non-instructional personnel. The claimant contends that under the rules of statutory construction, an amendment indicates the legislative intent to change the law, The claimant contends that this amendment imposed additional activities on school districts to develop job responsibilities and evaluate certificated non-instructional employees, which constitute a higher level of service."

The Department of Finance argues that school districts have always had the requirement to assess and evaluate non-instructional personnel because the original legislation enacted in 197 1 refers to all certificated personnel. The Department of Finance contends that the subsequent

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[62] Exhibit C to Item 9 of the May 27, 2004 Commission Hearing.

amendments that specifically list certificated non-instructional personnel, were clarifying edits and not new requirements.[63]

The Stull Act was an existing program when the test claim legislation was enacted. Thus, the issue is whether the 1975 and 1986 amendments to the Stull Act mandated an increased, or higher level of service to develop job responsibilities and to evaluate and assess certificated non-instructional employees. In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies.[64]

In 1990, the Second District **Court** of Appeal decided the *Long Beach Unified School District* case, which challenged a test claim filed with the Board of Control on executive orders issued by the Department of Education to alleviate racial and ethnic segregation in schools.[65] The court determined that the executive orders did not constitute a "new program" since schools had an existing constitutional obligation to alleviate racial segregation? However, the court found that the executive orders constituted a "higher level of service" because the requirements imposed by the state went beyond constitutional and case law requirements. The court stated in relevant part the following:

> The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. [Citation omitted.] A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because the requirements go beyond constitutional and case law requirements. . . .While these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are *required acts. These requirements constitute a higher level of service.* We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "Only those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."[67, 68]

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[63] Exhibit B to Item 9 of the May 27, 2004 Commission Hearing.

[64] *County of Los Angeles, supra,* 43 Cal.3d at page 56.

[65] *Long Beach Unified School District, supra,* 225 Cal.App.4th 155.

[66] *Id.* at page *173.*

[67] *Ibid.,* emphasis added.

[68] *See* also, *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193-l 194, where the Second District Court of Appeal followed the earlier rulings and held that in the case of an existing program, reimbursement is required only when the state is divesting itself of its responsibility to provide fiscal support for a program, or is forcing a new program on a locality for which it is ill-equipped to allocate funding.

Thus, in order for the 1975 and 1986 amendments to the Stull Act, relating to certificated non-instructional personnel, to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.

For the reasons described below, the Commission finds that school districts have been required to develop job responsibilities for certificated non-instructional employees, evaluate and assess certificated non-instructional employees, draft written evaluations of certificated non-instructional employees, receive and review written responses to the evaluation from certificated non-instructional employees, and conduct meetings regarding the evaluation with certificated non-instructional ernployees under the Stull Act since 1971, before the enactment of the test claim legislation.

Claimant argues that the statutory amendments to the Stull Act, by themselves, reflect the legislative intent to change the law. However, the intent to change the law may not always be presumed by an amendment, as suggested by the claimant. The court has recognized that changes in statutory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made . . . changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.]"[69]

Thus, to determine whether the Stull Act, as originally enacted in 197 1, applied to all certificated employees of a school district, instructional and non-instructional employees alike, the Commission must apply the rules of statutory construction. Under the rules of statutory construction, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way. Moreover, the intent must be gathered with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.'"[70]

As indicated by the plain language of former Education Code sections 13485,13487, 13488, and 13489, school districts were required under prior law to develop evaluation and assessment guidelines for the evaluation of "certificated" employees, evaluate and assess "certificated" employees on a continuing basis, draft written evaluations of "certificated" employees, receive and review written response to the evaluation from "certificated" employees, and conduct meetings regarding the evaluation with "certificated" employees. The plain language of these statutes does not distinguish between instructional employees (teachers) and non-instructional employees (principals, administrators), or specifically exclude certificated non-instructional employees. When read in context with the whole system of law of which these statutes are a part, the requirements of the Stull Act originally applied to *all* certificated employees under prior law.

As enacted, the Stull Act was placed in Chapter 2 of Division 10 of the 1971 Education Code, a chapter addressing " Certificated Employees." Certificated employees are those employees

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[69] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[70] *People* v. *Thomas* (1992) 4 Cal.4th 206, 210.

directly involved in the educational process and include both instructional and non-instructional employees such as teachers, administrators, supervisors, and principals.[71] Certificated employees must be properly credentialed for the specific position they hold.[72] A "certificated person" was defined in former Education Code section 12908 as "a person who holds one or more documents such as a certificate, a credential, or a life diploma, which singly or in combination license the holder to engage in the school service designated in the document or documents." The definition of "certificated person" governs the construction of Division 10 of the former Education Code and is not limited to instructional employees.[73]

Thus, the plain language of former Education Code sections 13485,13487, 13488, and 13489 read within the context of Chapter 2 of Division 10 of the 1971 Education Code, a division that govems both instructional and non-instructional certificated employees, required school districts to develop evaluation and assessment guidelines and to evaluate both instructional and non-instructional certificated employees based on the guidelines on a continuing basis.

In addition, former Education Code section 13486, as enacted in 197 1, expressly required school districts to avail themselves "of the advice *of* the *certificated instructional personnel* in the district's organization of certificated personnel" when developing and adopting the evaluation guidelines. (Emphasis added.) Former Education Code sections 13485,13487, 13488, and 13489, enacted at the same time, did not limit the evaluation and assessment requirements to "certificated instructional personnel" only. Rather, "certificated employees" were required to be evaluated. Thus, had the Legislature intended to require school districts to evaluate and assess only teachers, as argued by claimant, they would have limited the requirements of former Education Code sections 13485,13487, 13488, 13489 to "certificated instructional personnel." Under the rules of statutory construction, the Commission is prohibited from altering the plain language of a statute, or writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[74]

Moreover, under prior law, the Legislature expressly excluded certain types of certificated employees from the requirements of the Stull Act, and never expressly excluded non-instructional employees. When the Stull Act was originally enacted in 1971, the Legislature excluded employees of community colleges from the requirements.[75] In 1972, the Legislature revisited the Stull Act and expressly excluded certificated personnel employed on an hourly basis in adult education classes.[76] In 1973, school districts were authorized to exclude hourly and temporary certificated employees, and substitute teachers fi-om the evaluation requirement.[77] Under the rules of statutory construction, where exceptions to a general rule are specified by

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[71] Former Education Code section 13 187 et seq. of the 197 1 Education Code.

[72] Former Education Code section 1325 1 et seq. of the 1971 Education Code.

[73] Former Education Code 12901 of the 1971 Education Code.

[74] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757; *In re Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

[75] Section 42 of Statutes 1971, chapter 361.

[76] Statutes 1972, chapter 535.

[77] Statutes 1973, chapter 220.

statute, other exceptions are not to be implied or presumed, absent a discernible and contrary legislative intent.[78] Thus, it cannot be implied from the plain language of the legislation that the Legislature intended to exclude certificated non-instructional employees from the requirements of the Stull Act.

The conclusion that the Stull Act applied to non-instructional employees under prior law is further supported by case law. In 1977, the First District Court of Appeal considered *Grant v. Adams*.[79] The *Grant* case involved a school district employee who was a certified teacher with credentials as an administrator who had been serving as a principal (a non-instructional employee) of an elementary school from 1973 through 1974. In May 1974, the employee was reassigned and demoted to a teaching position for the 1974-1975 school year.[80] The employee made the argument that the Stull Act, when coupled with other statutory provisions, created a property interest in his position as a principal and required that an evaluation be conducted before termination of an administrative assignment, The court disagreed with the employee's argument, holding that the Stull Act evaluation was not a precondition to reassignment or dismissal.[81] When analyzing the issue, the court made the following findings:

> In 1971, the Legislature passed the so-called "Stull Act," Education Code sections 13485-13490. Among other things the Stull Act required that all school districts establish evaluation procedures for certificated personnel. (Ed. Code, § 13485.) *The state board of education developed guidelines for evaluation of administrators and teachers pursuant to the Stull Act. Respondents (school district] adopted those guidelines without relevant change in June 1972.* The guidelines called for evaluation of personnel on permanent status at least once every two years. Appellant was given no evaluation pursuant to the guidelines. (Emphasis added.)[82]

In 1979, the California Supreme Court decided *Miller v. Chico Unified School District Board of Education,* a case with similar facts? In the *Miller* case, the employee was a principal of a junior high school from 1958 until 1976, when he was reassigned to a teaching position. In 1973, the school board adopted procedures to formally evaluate administrators pursuant to the Stull Act.[84] The employee received a Stull Act evaluation in 1973, 1974, and 1975.[85] In 1976, the school board requested the employee's cooperation in his fourth annual Stull evaluation report, but the employee refused on advice of counsel.[86] The employee sought reinstatement to

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[78] *People v. Galambos* (2002) 104 Cal.App.4th 1147.

[79] *Grant v. Adams* (1977) 69 Cal.App.3d 127,

[80] *Id.* at page 130.

[81] *Id.* at pages 134-135.

[82] *Id.* at page 143, footnote 3.

[83] *Miller v. Chico Unified School District Board of Education* (1979) 24 Cal.3d 703.

[84] Id. at page 707.

[85] *Id.* at pages 708-710, 717.

[86] Id. at page 709.

his position as a principal on the ground that the school board failed to comply with the Stull Act.[87] The court denied the employee's request and made the following findings:

> The record indicates, however, that the school board substantially complied with the Stull Act's mandate that the board fix performance guidelines for its certificated personnel, evaluate plaintiff in light of such guidelines, inform plaintiff of the results of any evaluation, and suggest to plaintiff ways to improve his performance.
>
> The school board's guidelines provide for annual evaluations of supervisory personnel; accordingly, the board evaluated plaintiff in 1973, 1974, and 1975. Although plaintiff received generally satisfactory evaluations in 1973 and 1974, the board's evaluation report in 1974 contains suggestions for specific areas of improvement. . . .
>
> Plaintiffs final Stull Act evaluation in June 1975 plainly notified plaintiff "in writing" of any unsatisfactory conduct on his part, and in addition provided a forum for plaintiff's supervisors to make "specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance." [Former Ed. Code, § 13489.) . . . .
>
> The court is surely obligated to understand the purpose of . . . [the Stull Act] and to apply those sections to the relevant facts.[88]

Finally, the legislative history of the 1986 test claim legislation supports the conclusion that the specific language added to the Stull Act was not intended to impose new required acts on school districts. As stated above, the test claim legislation (Stats. 1986, ch. 393) amended Education Code section 44663 by adding subdivision (b) to provide that the evaluation and assessment of certificated non-instructional employees shall be reduced to writing before June 30 of the year that the evaluation is made, that an opportunity to respond be given to the certificated non-instructional employee, and that a meeting be held between the certificated non-instructional employee and the evaluator to discuss the evaluation before July 30. The legislative history of Statutes 1986, chapter 393 (Assem. Bill No. 3878) indicates that the purpose of the bill was to extend for 45 days the *current* requirement for the evaluation of certificated non-instructional employees.[89] The analysis of Assembly Bill 3878 by the Assembly Education Committee, dated

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[87] *Id.* at page 7 16.

[88] *Id.* at pages 717-718.

[89] Letter from San Diego Unified School District to the Honorable Teresa Hughes, Chairperson of the Assembly Education Committee, on Assembly Bill 3878, April 4, 1986; Assembly Education Committee, Republican Analysis on Assembly Bill 3 878, April 7, 1986; Department of Finance, Enrolled Bill Report on Assembly Bill 3878, April 21, 1986; Legislative Analyst, Analysis of Assembly Bill 3878, April 24, 1986; Assembly Education Committee, Republican Analysis on Assembly Bill 3878, April 26, 1986; Senate Committee on Education, Staff Analysis on Assembly Bill 3878, May 28, 1986; Legislative Analyst, Analysis of Assembly Bill 3878, June 18, 1986. (Exhibit I to Item 9 of the May 27, 2004 Commission Hearing.)

April 7, 1986, states the following:

> Current statute requires evaluations of noninstructional certificated employees on 12 month contracts to be conducted within 30 days before the last school day. This apparently is a problem for San Diego [Unified School District] because all evaluations are jammed in at the end of the school year. They feel it would make more sense to allow extra time to evaluate those on 12 month contracts and spread the process out over a longer period of time.[90]

The April 24, 1986 analysis of Assembly Bill 3878 by the Legislative Analyst states the following:

> Our review indicates that this bill does not mandate any new duties on school district governing boards, but simply extends the date by which evaluations of certain certificated employees must be completed.[91]

Based on the foregoing authorities, the Commission finds that school districts were required under prior law to perfonn the following activities:

- Develop and adopt specific evaluation and assessment guidelines for the performance of certificated non-instructional personnel.
- Evaluate and assess certificated non-instructional personnel as it relates to the established standards.
- Prepare and draft a written evaluation of the certificated non-instructional employee. The evaluation shall include recornrnendations, if necessary, as to areas of improvement.
- Receive and review from a certificated non-instructional employee written responses regarding the evaluation.
- Prepare and hold a meeting between the certificated non-instructional employee and the evaluator to discuss the evaluation and assessment.

The Commission further finds that the language added to former Education Code section 13487 by the 1975 test claim legislation to "establish and define job responsibilities" for certificated non-instructional personnel falls within the preexisting duty to develop and adopt objective evaluation and assessment guidelines for all certificated employees, does not mandate any new required acts, and, thus, does not constitute a new program or higher level of service."[92]

Accordingly, the Commission finds that the 1975 and 1986 amendments to former Education Code sections 13485 and 13487 and Education Code section 44663 as they relate to certificated non-instructional employees do not constitute a new program or higher level of service.[93]

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[90] *Id.* at page 301.

[91] *Id.* at page 306.

[92] *Long Beach Unified School District, supra*, 225 Cal.App.4th at page 173.

[93] It is noted that the analysis by the Legislative Analyst on Senate Bill 777, which was enacted as Statutes 1975, chapter 1216, concludes that "there would also be undetermined increased local costs due to the addition of.. . non-instructional certificated employees in evaluation and

Establish standards of expected pupil achievement at each grade level in each area of study [Former Ed. Code, § 13487, as repealed and reenacted by Stats. 1975, ch. 1216).

The claimant is requesting reimbursement to establish standards of expected pupil achievement at each grade level in each area of study.

Former Education Code section 13487, as originally enacted in 1971, required school districts to develop and adopt specific evaluation and assessment guidelines for certificated personnel. Former section 13487 stated in relevant part the following:

> The governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include but shall not necessarily be limited in content to the following elements:
>
> (a) The establishment of standards of expected student progress in each area of study and of techniques for the assessment of that progress.

The test claim legislation, in Statutes 1975, chapter 1216, repealed and reenacted former Education Code section 13487. As reenacted, the statute provided the following (amendments relevant to this issue are reflected with strikeout and underline):

> (a) The governing board of each school district shall establish standards of expected student ~~progress~~ achievement at each grade level in each area of study.

The claimant contends that the 1975 test claim legislation imposed a new program or higher level of service on school districts to rewrite standards for employee assessment to reflect expected student "achievement" (as opposed expected student "progress") and to expand the standards to reflect expected student achievement at each "grade level."[94] The claimant further states the following:

> Prior law only required that the standards of expected student achievement be established to show student progress. Under prior law, these standards may have tracked student progress over time. For example, a school district may have established reading standards for pupils upon graduating from eighth grade. Under the test claim legislation, school districts no longer have the ability to determine over what period standards of expected student achievement will be

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assessment requirements." (See, Exhibit I, pp. 292-294.) The courts have determined, however, that legislative findings are not relevant to the issue of whether a reimbursable state-mandated program exists:

> [T]he statutory scheme [in Government Code section 17500 et seq.] contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists . . . ." *(City* of *San Jose, supra,* 45 Cal.App.4th at pp. 1817-1818, quoting *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal. App .4th 805, 8 19, and *Kinlaw v. State of California, supra, 54* Cal. 3d at p. 333 .)

[94] Exhibit A (Test Claim, page 4) to Item 9 of the May 27, 2004 Commission Hearing,

established: The standards must be established by each grade level. The new standards outlined in the test claim legislation align more closely with the state's new content standards . . ."[95]

The Department of Finance contends that the 1975 amendment to former Education Code section 13487 does not constitute a new program or higher level of service. The Department states the following:

> Finance notes that in practice, school district standards required by Chapter 36 1/7 1 would have had to have been differentiated by grade in order to provide a measure of "expected student progress." Finance also notes that changing the term "expected student progress" to the term "expected student achievement" is a wording change that would not require additional work on the part of school districts. These changes did not require additional work on the part of school districts, and therefore, are not reimbursable.[96,97]

In order for the 1975 reenactment of former Education Code section 13487 to constitute a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts beyond those already required by law.[98] For the reasons below, the Commission finds that the 1975 reenactment of former Education Code section 13487 does not constitute a new program or higher level of service.

On its face, the activities imposed by the 1975 reenactment of former Education Code section 13487 do not appear different than the activities required by the original 197 1 version of former Education Code section 13487. Both versions require that standards for evaluation be established so that certificated personnel are evaluated based on student progress. As originally enacted in 197 1, "[t]he governing board of each school district shall develop and adopt specific evaluation and assessment guidelines which shall include . . . the establishment of standards of *expected student progress* in each area of study . . , [and the] . . . assessment of certificated personnel competence as it relates to the established standards." (Emphasis added.) As reenacted in 1975, "[t]he governing board of each school district shall establish standards of expected student achievement at each grade level in each area of study . . . and evaluate and assess certificated employee competency as it reasonably relates to , . . *the progress of students toward the established standards*." (Emphasis added.)

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[95] Exhibit C, page 2, to Item 9 of the May 27, 2004 Commission Hearing,

[96] Exhibit B, page 1, to Item 9 of the May 27, 2004 Commission Hearing.

[97] The Department of Finance's factual assertion is not supported by "documentary evidence , . , authenticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so," as required by the Commission's regulations. (Cal. Code Regs., tit. 2, § 1183 .02, subd. (c)(1).)

[98] *County* of *Los Angeles, supra*, 43 Cal.3d at page 56; *Long Bench Unified School Dist., supra*, 225 Cal.App.4th at page 173; and *County of Los Angeles, supra*, 110 Cal.App.4th at pages 1193-1194.

In addition, the legislative history of the test claim statute, Statutes 1975, chapter 1216 (Sen. Bill No. 777), does not reveal an intention by the Legislature to impose new required acts. Legislative history simply indicates that the language was "modified."[99]

Moreover, claimant's argument, that the test claim statute imposes a higher level of service because, under prior law, school districts "may" have only tracked student progress over time (for example, by establishing "reading standards for pupils upon graduating from eighth grade"), is not persuasive. Under the claimant's interpretation, the performance of a first grade teacher could be evaluated and assessed based on reading standards for eighth grade students; students that the teacher did *not* teach. The Stull Act, as originally enacted, required the school district to evaluate and assess the performance of all certificated employees based on the progress of their pupils. In addition, the claimant's factual assertion is not supported by "documentary evidence ... authen ticated by declarations under penalty of perjury signed by persons who are authorized and competent to do so, " as required by the Commission's regulations. [100]

Finally, assuming for the sake of argument only, that school districts were required to establish new standards of expected student achievement due to the 1975 test claim statute, that activity would have occurred outside the reimbursement period for this claim. The reimbursement period for this test claim, if approved by the Commission, begins July 1, 1998. The test claim statute was enacted in 1975, 23 years earlier than the reimbursement period. There is no requirement in the test claim statute that establishing the standards is an ongoing activity.

Therefore, based on the evidence in the record, the Commission finds that former Education Code section 13487 as reenacted by Statutes 1975, chapter 12 16, does not impose a new program or higher level of service on school districts.

Evaluate and assess the performance of certificated instructional employees (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498 and Stats. 1999, ch. 4).

The claimant requests reimbursement to evaluate and assess the performance of certificated instructional employees as it reasonably relates to the following:

- the instructional techniques and strategies used by the certificated employee (Stats. 1983, ch. 498);
- the certificated employee's adherence to curricular objectives (Stats 1983, ch. 498); and
- the progress of pupils towards the state adopted academic content standards as measured by state adopted criterion referenced assessments (Stats. 1999, ch. 4).[101]

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[99] Senate Committee on Education, Staff Analysis on Senate Bill 777, as amended on May 7, 1975; Assembly Education Committee, Analysis of Senate Bill 777, as amended on August 12, 1975; Ways and Means Staff Analysis on Senate Bill 777, as amended on August 19, 1975; Legislative Analyst, Analysis of Senate Bill 777, as amended on August 19, 1975, dated August 22, 1975; Assembly Third Reading of Senate Bill 777, as amended on August 19, 1975, (Exhibit I to Item 9 of the May 27, 2004 Commission Hearing.)

[100] Cal. Code Regs., tit. 2, § 1183.02, subd. (c)(1).

[101] Exhibit A (Test Claim, page 6) to Item 9 of the May 27, 2004 Commission Hearing.

The Department of Finance agrees that these activities constitute reimbursable state-mandated activities under article XIII B, section 6.[102]

For the reasons described below, the Commission finds that evaluating and assessing the performance of certificated instructional employees that perfonn the requirements of educational programs mandated by state or federal law based on these factors constitutes a new program or higher level of service.

The instructional techniques and strategies used by the employee, and the employee's adherence to curricular objectives. In 1983, the test claim legislation amended Education Code section 44662, subdivision (b), to require the school district to evaluate and assess certificated employee competency as it reasonably relates to "'the instructional techniques and strategies used by the employee," and "the employee's adherence to curricular objectives." (Stats. 1983, ch. 498.)

Before the 1983 test claim legislation was enacted, the Stull Act required school districts to establish an objective and unifonn system of evaluation and assessment of the performance of certificated personnel.[103] When developing these guidelines, school districts were required to receive advice from certificated instructional personnel. The court interpreted this provision to require districts to meet and confer, and engage in collective bargaining, with representatives of certificated employee organizations before adopting the evaluation guidelines.[104] **Thus,** certificated instructional employees were evaluated based on the guidelines developed through collective bargaining, and on the following criteria required by the state:

- the progress of students toward the established standards of expected student achievement at each grade level in each area of study; and
- the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities. [105]

Under prior law, the evaluation had to be reduced to writing and a copy of the evaluation given to the employee. An evaluation meeting had to be held between the certificated employee and the evaluator to discuss the evaluation and assessment. [106]

The 1983 test claim statute still requires school districts to reduce the evaluation to writing, to transmit a copy to the employee, and to conduct a meeting with the employee to discuss the evaluation and assessment.[107] These activities are not new. However, the 1983 test claim statute amended the evaluation requirements by adding two new evaluation factors: the instructional

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[102] Exhibit B to Item 9 of the May 27, 2004 Commission Hearing.

[103] Former Education Code sections 13485 and 13487.

[104] *Certificated Employees Council of the Monterey Peninsula Unified School District v. Monterey Peninsula Unified School District* (1974) 42 Cal.App.3d 328, 334.

[105] Former Education Code section 13487, subdivision (b), as amended by Statutes 1975, chapter 1216.

[106] Former Education Code sections 13485-l 3490, as originally enacted by Statutes 197 1, chapter 361.

[107] Education Code sections 44662, 44663, 44664.

techniques and strategies used by the employee, and the employee's adherence to curricular objectives. Thus, school districts are now required by the state to evaluate and assess the competency of certificated instructional employees as it reasonably relates to:

- the progress of students toward the established standards of expected student achievement at each grade level in each area of study;
- the instructional techniques and strategies used by the employee;
- the employee's adherence to curricular objectives; and
- the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities.

School districts may have been evaluating teachers on their instructional techniques and adherence to curricular objectives before the enactment of the test claim statute based on the evaluation guidelines developed through the collective bargaining process, But, the state did not previously require the evaluation in these two areas. Government Code section 17565 states that "if a . . . school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the . . . school district for those costs after the operative date of the mandate."

Accordingly, the Commission finds that Education Code section 44662, subdivision (b), as amended by Statutes 1983, chapter 498, imposes a new required act and, thus, a new program or higher level of service on school districts to evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives.

Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

- once each year for probationary certificated employees;
- every other year for permanent certificated employees; and
- beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801)[108], and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree. [109]

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[108] Section 7801 of title 20 of the United States Code defines "highly qualified" as a teacher that has obtained full state certification as a teacher or passed the state teacher licensing examination, and holds a license to teach, and the teacher has not had certification requirements waived on an emergency, temporary, or provisional basis.

[109] Education Code section 44664, subdivision (a)(3), as amended by Statutes 2003, chapter 566.

State adopted academic content standards as measured by state adopted assessment tests. In 1999, the test claim legislation (Stats. 1999, ch. 4) amended Education Code 44662, subdivision (b)(l), by adding the following underlined language:

> The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to:
>
> The progress of pupils toward the standards established pursuant to subdivision (a) [standards of expected pupil achievement at each grade level in each area of study] and, if applicable, the state adopted academic content standards as measured by state adopted criterion referenced assessments.

Before the 1999 test claim legislation, school districts were required to evaluate and assess certificated employees based on the progress of pupils. The progress of pupils was measured by standards, adopted by *local school districts,* of expected student achievement at each grade level in each area of study. The evaluation had to be reduced to writing and a copy of the evaluation given to the employee. An evaluation meeting had to be held between the certificated employee and the evaluator to discuss the evaluation and assessment. [110]

The 1999 test claim legislation still requires school districts to evaluate and assess certificated employees based on the progress of pupils. It also still requires school districts to reduce the evaluation to writing, to transmit a copy to the employee, and to conduct a meeting with the employee to discuss the evaluation and assessment. [111] These activities are not new.

However, the test claim legislation, beginning January 1, 2000[112], imposes a new requirement on school districts to evaluate the performance of certificated employees as it reasonably relates to the progress of pupils based not only on standards adopted by local school districts, but also on the academic content standards adopted by the *state,* as measured by the state adopted assessment tests.

The state academic content standards and the assessment tests that measure the academic progress of students were created in 1995 with the enactment of the California Assessment of Academic Achievement Act.[113] The act required the State Board of Education to develop and adopt a set of statewide academically rigorous content standards in the core curriculum areas of reading, writing, mathematics, history/social science, and science to serve as the basis for assessing the academic achievement of individual pupils and of schools.[114] In addition, the Act established the Standardized Testing and Reporting Program (otherwise known as the STAR Program)[115], which requires each school district to annually administer to all pupils in grades 2 to 11 a nationally normed achievement test of basic skills, and an achievement test based on the

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[110] Former Education Code sections 1348513490, as originally enacted by Statutes 1971, chapter 3 6 1.

[111] Education Code sections 44662, 44663, 44664.

[112] Statutes 1999, chapter 4 became operative and effective on January 1, 2000.

[113] Education Code section 60600 et seq.

[114] Education Code section 60605, subdivision (a).

[115] Education Code section 60640, subdivision (a).

state's academic content standards.[116] The Commission determined that the administration of the STAR test to pupils constitutes a partial reimbursable state-mandated program (CSM 97-TC-23).

Although evaluating the performance of a certificated employee based on the progress of pupils is not new, the Commission finds that the requirement to evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted criterion referenced assessments is a new required act and, thus a higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

This higher level of service is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

- once each year for probationary certificated employees;
- every other year for permanent certificated employees; and
- beginning January 1, 2004, every five years for certificated employees with permanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.[117]

Assess and evaluate permanent certificated, instructional and non-instructional, employees that receive an unsatisfactory evaluation once each year until the employee achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats.' 1983, ch. 498).

The claimant is requesting reimbursement to conduct additional assessments and evaluations for permanent certificated employees that receive an unsatisfactory evaluation as follows:

> Conduct additional annual assessments and evaluations of pennanent certificated instructional and non-instructional employees who have received an unsatisfactory evaluation. The school district must conduct the annual assessment and evaluation of a permanent certificated employee until the employee achieves a positive evaluation or is separated from the school district. This mandated activity is limited to those annual assessments and evaluations that occur in years in which the employee would not have been required to be evaluated as per Section 44664 (i.e., permanent certificated employees shall be evaluated every other year). When conducting these additional evaluations the full cost of the

[116] Education Code section 60640, subdivision (b).

[117] Education Code section 44664, subdivision (a)(3), as amended by Statutes 2003, chapter 566.

evaluation is reimbursable (e.g., evaluation under all criterion, preparing written evaluation, review of comments, and holding a hearing with the teacher). [118]

The Department of Finance agrees that the 1983 amendment to Education Code section 44664 imposes a reimbursable state-mandated activity.

Before the enactment of the test claim legislation, former Education Code section 13489 (as last amended by Stats. 1973, ch. 220) required that an evaluation for permanent certificated employees occur every other year. Former Education Code section 13489 stated in relevant part the following:

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis, at least once each school year for probationary personnel, and *at least every other year for personnel with permanent status.* The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. In the event an employee is not performing his duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of such fact and describe **such** unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist him in such performance. (Emphasis added.)

In 1976, former Education Code section 13489 was renumbered to Education Code section 44664.[119] The test claim legislation (Stats. 1983, ch. 498) amended Education Code section 44664, by adding the following sentence: "When any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall *annually evaluate* the employee until the employee achieves a positive evaluation or is separated from the district." (Emphasis added.) [120]

The Commission finds that Education Code section 44664, as amended by Statutes 1983, chapter 498, imposes a new required act and, thus, a new program or higher level of service by requiring school districts to perform additional evaluations for permanent certificated employees that perform the requirements of educational programs mandated by state or federal law and receive an unsatisfactory evaluation.

This higher level of service is limited to those annual assessments and evaluations that occur in years in which the pennanent certificated employee would not have otherwise been evaluated pursuant to Education Code section 44664 (i.e., every other year) and lasts until the employee achieves a positive evaluation or is separated from the school district. This additional evaluation

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[118] Exhibit A (Test Claim) to Item 9 of the May 27, 2004 Commission Hearing.

[119] Statutes 1976, chapter 1010.

[120] Statutes 2003, chapter 566, amended Education Code section 44664 by changing the word "when" to "if." The language now states the following: "~~When~~ If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district."

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

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

Issue 3: Does Education Code Section 44662 (As Amended by Stats. 1999, ch. 4) and Education Code Section 44664 (As Amended by Stats. 1983, ch. 498) Impose Costs Mandated by the State Within the Meaning of Government Code Section 17514?

As indicated above, the Commission finds that the following activities constitute a new program or higher level of service:

- evaluate and assess the performance of certificated instructional employees that perform the requirements of educational programs mandated by state or federal law as it reasonably relates to the instructional techniques and strategies used by the employee and the employee's adherence to curricular objectives (Ed. Code, § 44662, subd. (b), as amended by Stats. 1983, ch. 498);
- evaluate and assess the performance of certificated instructional employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11 as it reasonably relates to the progress of pupils towards the state adopted academic content standards as measured by state adopted assessment tests (Ed, Code, § 44662, subd. (b), as amended by Stats. 1999, ch. 4); and
- assess and evaluate permanent certificated, instructional and non-instructional, employees that perfonn the requirements of educational programs mandated by state or federal law

and receive an unsatisfactory evaluation in the years in which the permanent certificated employee would not have otherwise been evaluated until the employee receives achieves a positive evaluation, or is separated from the school district (Ed. Code, § 44664, as amended by Stats. 1983, ch. 498).

The Commission must continue its inquiry to determine if these activities result in increased costs mandated by the state pursuant to Government Code section 175 14.

Government Code section 175 14 defines "costs mandated by the state" as any increased cost a local agency or school district is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant states that it has incurred significantly more than $200 to comply with the test claim statutes plead in this claim. [121, 122]

The Commission finds that there is nothing in the record to dispute the costs alleged by the claimant. The parties have not identified any sources of state or federal funds appropriated to school districts that can be applied to the activities identified above. Moreover, none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply to this claim.

Therefore, the Commission finds that Education Code section 44662 (as amended by Stats. 1999, ch. 4) and Education Code section 44664 (as amended by Stats. 1983, ch. 498), result in costs mandated by the state under Government Code section 17514.

CONCLUSION

The Commission concludes that Education Code section 44662, as amended by Statutes 1999, chapter 4, and Education Code section 44664, as amended by Statutes 1983, chapter 498, mandate a new program or higher level of service for school districts within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 175 14 for the following activities only:

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

  Reimbursement for this activity is limited to the review of the employee's instructional techniques and strategies and adherence to curricular objectives, and to include in the written evaluation of the certificated instructional employees the assessment of these factors during the following evaluation periods:

  - once each year for probationary certificated employees;
  - every other year for permanent certificated employees; and

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[121] Exhibit A to Item 9 of the May 27, 2004 Commission Hearing (Test Claim and Declaration of Larry S. Phelps, Superintendent of Denair Unified School District).

[122] After this test claim was filed, Government Code section 17564 was amended to require that all test claims and reimbursement claims submitted exceed $1000 in costs. (Stats. 2002, ch. 1124.)

- beginning January 1, 2004, every five years for certificated employees with pennanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

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

  Reimbursement for this activity is limited to the review of the results of the STAR test as it reasonably relates to the performance of those certificated employees that teach reading, writing, mathematics, history/social science, and science in grades 2 to 11, and to include in the written evaluation of those certificated employees the assessment of the employee's performance based on the STAR results for the pupils they teach during the evaluation periods specified in Education Code section 44664, and described below:

  - once each year for probationary certificated employees;
  - every other year for permanent certificated employees; and
  - beginning January 1, 2004, every five years for certificated employees with pennanent status who have been employed at least ten years with the school district, are highly qualified (as defined in 20 U.S.C. § 7801), and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree.

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

  - evaluate and assess the certificated employee performance as it reasonably relates to the following criteria: (1) the progress of pupils toward the standards established by the school district of expected pupil achievement at each grade level in each area of study, and, if applicable, the state adopted content standards as measured by state adopted criterion referenced assessments; (2) the instructional techniques and strategies used by the employee; (3) the employee's adherence to curricular objectives; (4) the establishment and maintenance of a suitable learning environment, within the scope of the employee's responsibilities; and, if applicable, (5) the fulfillment of other job responsibilities established by the school district for certificated non-instructional personnel (Ed. Code, § 44662, subds. (b) and (c));

- the evaluation and assessment shall be reduced to writing. (Ed. Code, § 44663, subd. (a).) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If the employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the school district shall notify the employee in writing of that fact and describe the unsatisfactory performance (Ed. Code, § 44664, subd. (b));
- transmit a copy of the written evaluation to the certificated employee (Ed. Code, § 44663, subd. (a));
- attach any written reaction or response to the evaluation by the certificated employee to the employee's personnel file (Ed. Code, § 44663, subd. (a)); and
- conduct a meeting with the certificated employee to discuss the evaluation (Ed. Code, § 44553, subd. (a)).

The Commission further finds that the activities listed above do not constitute reimbursable state-mandated programs with respect to certificated personnel employed in local, discretionary educational programs.

Finally, the Commission finds that all other statutes in the test claim not mentioned above are not reimbursable state-mandated programs within the meaning of article XIII B, section 6 and Govemment Code section 175 14.

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I arn over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 958 14.

June 1, 2004, I served the:

Adopted Statement of Decision
The Stull Act, 98-TC-25
Education Code Sections 44660 – 44665 (fornerly Ed. Code §§ 13485-13490)
Statutes 1975, Chapter 1216; Statutes 1983, Chapter 498; Statutes 1986, Chapter 393; Statutes 1995, Chapter 392; Statutes 1999, Chapter 4
Denair Unified School District, Claimant

by placing a true copy thereof in an envelope addressed to:

Mr. David Scribner
Executive Director
School Mandates Group
3 113 Catalina Island Road
West Sacramento, CA 95691

State Agencies and Interested Parties (See attached mailing list);

and by sealing and depositing said envelope in the United States mail at Sacramento, California, with postage thereon fully paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 1, 2004, at Sacramento, California.

Victoria Soriano

VICTORIA SORIANO

Commission on State Mandates

Original List Date: 7/7/1999
Last Updated: 3/12/2004
List Print Date: 06/01/2004
Claim Number: 98-TC-25
Issue: The Stull Act

Mailing Information: Notice of adopted SOD

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal, Code Regs., tit. 2, § 1181.2.)

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